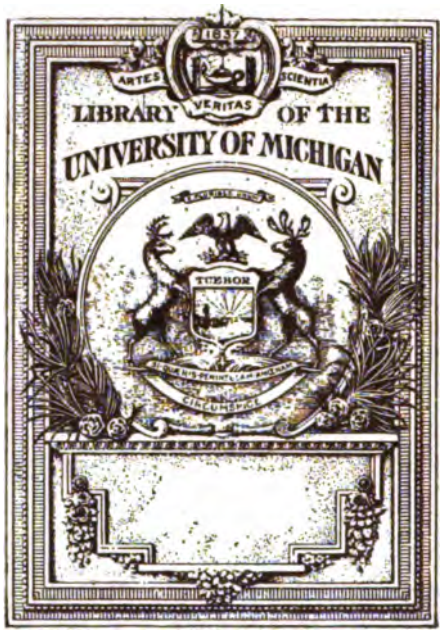

ARTES
VERITAS
SCIENTIA
LIBRARY OF THE
UNIVERSITY OF MICHIGAN
TUEBOR

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1919, IN

251, 252, 253 U. S.

BOOK 64

LAWYERS' EDITION.

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOTNOTES, AND PARALLEL REFERENCES,

BY

THE PUBLISHERS' EDITORIAL STAFF.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY,
ROCHESTER, NEW YORK.
1920.

Direct. (Cont.)
4-9-1923

E. R. ANDREWS PRINTING COMPANY, Rochester, N. Y.

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. EDWARD DOUGLASS WHITE.

ASSOCIATE JUSTICES,

HON. JOSEPH MCKENNA,
HON. OLIVER WENDELL HOLMES,
HON. WILLIAM R. DAY,
HON. WILLIS VAN DEVANTER,
HON. MAHLON PITNEY,
HON. JAMES CLARK MCREYNOLDS,
HON. LOUIS DEMBITZ BRANDEIS,
HON. JOHN HESSIN CLARKE.

ATTORNEY GENERAL,

HON. A. MITCHELL PALMER.

SOLICITOR GENERAL,

HON. ALEX C. KING

CLERK,

JAMES D. MAHER, ESQ.

REPORTER,

HON. ERNEST KNAEBEL.

MARSHAL,

FRANK K. GREEN, ESQ.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

October 30, 1916.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 61 L. ed., Appendix III. p. 1381.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1914, 1915.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I., Porto Rico.†	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice LOUIS D. BRANDEIS, Massachusetts.	President Wilson.	Second. Vermont, Conn., New York.	1916. (June 1.)	1916. (June 5.)
Associate Justice MAHLON PITNEY, New Jersey.	President Taft.	Third. New Jersey, Pa., Del.	1912. (Mar. 13.)	1912. (Mar. 18.)
Chief Justice EDWARD D. WHITE, Louisiana.	President Taft.	Fourth. Md., Va., N. C., W. Va., S. C.	1910. (Dec. 12.)	1910. (Dec. 19.)
Associate Justice JAMES C. McREYNOLDS, Tennessee.	President Wilson.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1914. (Aug. 29.)	1914. (Oct. 12.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Sixth. Ky., Tenn., Ohio, Mich.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice JOHN H. CLARKE Ohio.	President Wilson.	Seventh. Ind., Ill., Wis.	1916. (July 24.)	1916. (Oct. 9.)
Associate Justice WILLIS VAN DEVANTER, Wyoming.	President Taft.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., Oklahoma, New Mex.	1910. (Dec. 16.)	1911. (Jan. 3.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona, Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

* Territories assigned to circuits by order of the Supreme Court.

† Porto Rico added to first circuit by Act of Congress of January 28, 1915 (38 Stat. at L. 803, chap. 22).

GENERAL TABLE OF CASES REPORTED.

IN THIS BOOK

VOLUMES 251, 252, 253.

C.

D.

E.

F.

I.

J.

K.

L.

N.

M.

N.

O.

Q.

R.

M.

N.

T.

U.

Y.

Z.

CITATIONS.

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

B.

C.

E.

G.

I.

L.

M.

N.

O.

P.

S.

T.

U.

V.

W.

Z.

STATUTES, CONSTITUTIONS, PROCLAMATIONS, AND TREATIES CONSTRUED, ETC.

Colombia.

Judicial Code.

England.

Treaties.

Germany.

Civil Code.

Omaha Nation.

Panama.

Treaties.

Political Code.

Civil Code.

Laws.

Pottawatomie Nation.

Treaties.

Spain.

Treaties.

United States.

Constitution.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1919,

AND REPORTED HEREIN,

VOLUME 251,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 251 U.S.	Title.	Here in
1	United States v. Southern P. Co.	97
6-8	" "	100
8-11	" "	101
11-13	" "	102
13-15	" "	103
15	Stroud v. United States	103
16-17	" "	109
17-20	" "	110
20-22	" "	111
22	Pacific Gas & Electric Co. v. Police Ct.	112
23-24	" "	116
24-26	" "	117
27	Postal Teleg.-Cable Co. v. Warren-Godwin Lumber Co.	118
27-28	" "	119
28-31	" "	120
31-32	" "	120
32	Los Angeles v. Los Angeles Gas & E. Corp.	121
33-35	" "	125
35-38	" "	126
38-40	" "	127
40	" "	128
41	Ervien v. United States	128
45-46	" "	129
46-48	" "	130
48	Liverpool, B. & R. P. Steam Nav. Co. v. Brooklyn Eastern Dist. Terminal	130
51-52	" "	131
52-54	" "	132
54	Chicago, R. I. & P. R. Co. v. Cole	133
55-56	" "	134
56	" "	135
57	Bragg v. Weaver	135
58	" "	136
58-60	" "	137
60-62	" "	138
63-64	St. Louis, I. M. & S. R. Co. v. Williams	139
64-66	" "	140

Off. Rep. 251 U.S.	Title.	Here in
66-67	St. Louis, I. M. & S. R. Co. v. Williams	141
68	Corsicana Nat. Bank v. Johnson	141
70-72	" "	147
72-75	" "	148
75-77	" "	149
77-80	" "	150
80-82	" "	151
82-84	" "	152
84-87	" "	153
87-89	" "	154
89-91	" "	155
91-94	" "	156
94	" "	157
95	Wagner v. Covington	157
98-99	" "	165
99-101	" "	166
101-103	" "	167
103-104	" "	168
104	Gilligan v. Covington	168
104	Oklahoma R. Co. v. Severns Paving Co.	168
106	" "	170
106-107	" "	171
108	Evans v. National Bank	171
108-112	" "	175
112-113	" "	176
113-115	" "	177
115-118	" "	178
118-120	" "	179
121	Peters v. Veasey	180
121-122	" "	181
122-123	" "	182
123	New York, N. H. & H. R. Co. v. United States	182
126-127	" "	183
127	" "	184
128	United States v. Osage County	184
129	" "	185
129-132	" "	186
132-134	" "	187
134	Bone v. Marion County	188
135-137	" "	189

Off. Rep. 251 U.S.	Title.	Here in
137–139	Bone v. Marion County	190
139–141	" "	191
141–143	" "	192
143–145	" "	193
145	" "	194
146	Hamilton v. Kentucky Distilleries & Warehouse Co.	194
153–155	" "	198
155–157	" "	199
157–159	" "	200
159–161	" "	201
161–163	" "	202
163–167	" "	203
167–168	" "	204
168	" "	205
169	Sullivan v. Shreveport	205
170	" "	208
170–173	" "	209
173	Hardin-Wyandot Lighting Co. v. Upper Sandusky	210
174–175	" "	211
175–177	" "	212
177–179	" "	213
179	Godchaux v. Estopinal	213
180–181	" "	214
181	" "	215
182	Branson v. Bush	215
183–185	" "	218
185–187	" "	219
187–190	" "	220
190–192	" "	221
192	Winchester v. Winchester waterworks Co.	221
193	" "	222
193–195	" "	223
195–198	" "	224
198	" "	225
198–202	St. Louis, I. M. & S. R. Co. v. United States	225
202–204	" "	226
204–207	" "	227
207–209	" "	228
210	United States v. Standard Brewery	229
215–216	" "	233
216–218	" "	234
218–220	" "	235
220	" "	236
221–223	United States v. Poland	236
223–225	" "	237
225–228	" "	238
228	Producers Transp. Co. v. Railroad Commission	239
229–230	" "	241
230–232	" "	242
232	" "	243
233	Hays v. Seattle	243
234	" "	244
234–237	" "	245
237–239	" "	246
239	" "	247
239	Schall v. Camors	247
246–248	" "	251
248–250	" "	252
250–253	" "	253
253–255	" "	254
255	" "	255
256	Mergenthaler Linotype Co. v. Davis	255
257–258	" "	257
258–259	Mergenthaler Linotype Co. v. Davis	258
259	Southern P. Co. v. Industrial Acci. Commission	258
262–263	" "	260
264	Jacob Ruppert v. Caffey	260
278–280	" "	265
280–282	" "	266
282–284	" "	267
284	" "	268
284–285	" "	269
285	" "	270
285	" "	271
285–286	" "	272
286–293	" "	273
293–299	" "	274
299–301	" "	275
301–303	" "	276
303–306	" "	277
306–308	" "	278
308–310	" "	279
311	Duhne v. New Jersey	280
312–313	" "	280
313–314	" "	281
315	Western U. Teleg. Co. v. Boegli	281
315–316	" "	285
316–317	" "	286
317	Birge-Forbes Co. v. Heye	286
322–324	" "	289
324–325	" "	290
326	Northern P. R. Co. v. United States	290
328–330	" "	291
330–332	" "	292
332–335	" "	293
335–337	" "	294
337–339	" "	295
339–342	" "	296
342	" "	297
342	Maryland Casualty Co. v. United States	297
344–345	" "	300
345–348	" "	301
348–350	" "	302
350–352	" "	303
352–355	" "	304
355	Eastern Extension, A. & C. Teleg. Co. v. United States	305
356–359	" "	306
359–361	" "	307
361–364	" "	308
364–366	" "	309
366	Napa Valley Electric Co. v. Railroad Commission	310
367–368	" "	311
368–370	" "	312
370–373	" "	313
373	" "	314
373	Chipman v. Thomas B. Jeffery Co.	314
376–377	" "	315
377–380	" "	316
380–382	Stroud v. United States	317
382–384	Rex v. United States	318
384	" "	319
386	Silverthorne Lumber Co. v. United States	319
390–392	" "	321

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1919.

Vol. 251.

UNITED STATES, Appt.,
v.
SOUTHERN PACIFIC COMPANY et al.

(See S. C. Reporter's ed. 1–15.)

Evidence — sufficiency — railway land grant — fraudulent representations — oil lands.

1. An attempt to obtain a patent for lands within the indemnity limits of the Southern Pacific Railroad land grant of July 27, 1866, by representing that the lands were not mineral, when the railway company's officers believed the fact was otherwise, is shown by evidence that when the patent was sought and obtained the lands had no substantial value unless for oil mining; that the interest and anxiety displayed by the company's officers in securing the patent were wholly disproportionate to the value of the lands for any other purpose; that the lands lay within a recognized and productive oil region which the company's geologists had been systematically examining to determine in what lands oil was to be expected; and that upon the advice and recommendation of such geologists the company was treating and dealing with adjacent lands, of which it was the owner, as valuable for oil.

[For other cases, see Evidence, XII. f, in Digest Sup. Ct. 1908.]

Public lands — cancelation of patent — railway land grant — fraudulent representations — oil lands.

2. Lands within the indemnity limits of the Southern Pacific Railroad land grant of July 27, 1866, were known to the railway company to be valuable for oil when the patent therefor was sought and obtained, so as to justify cancelation of the patent at the suit of the government, where the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end.

[For other cases, see Public Lands, I. 1; I. c, 2, i, in Digest Sup. Ct. 1908.]

Public lands — railroad land grants — indemnity selections — mineral lands.

3. A report of a special agent of the General Land Office as to the nonmineral character of certain lands which were thereafter selected by the Southern Pacific Railway Company as within the indemnity limits of the land grant of July 27, 1866, did not relieve the railway company from showing before the Land Department that the lands selected were not mineral.

[For other cases, see Public Lands, I. c, 2, e; I. f, in Digest Sup. Ct. 1908.]

[No. 179.]

Argued March 5 and 6, 1919. Decided November 17, 1919.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed, with directions to dismiss the bill, a decree of the District Court for the Southern District of the Northern Division of California in favor of the United States in a suit to cancel a patent to public lands issued to a railway company upon certain indemnity selections. Reversed, and decree of District Court affirmed.

See same case below, 162 C. C. A. 19, 249 Fed. 785.

The facts are stated in the opinion.

Note.—On setting aside land patents for fraud—see note to Miller v. Kerr, 5 L. ed. U. S. 381.

On land grants to railroads, generally—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

Mr. J. Crawford Biggs, Special Assistant to the Attorney General, and Assistant Attorney General Kearful, argued the cause and filed a brief for appellant:

In a suit to annul a patent as fraudulently covering mineral lands, belief as to mineral character is established by proof that the known conditions at the time of the proceedings which resulted in the patent were plainly such as to engender the belief that the lands contained mineral deposits of such quality and in such quantity as would render their extraction profitable, and justify expenditures to that end; and this rule applies to oil lands.

Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, 58 L. ed. 936, 939, 34 Sup. Ct. Rep. 507; Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Cosmos Exploration Co. v. Gray Eagle Oil Co. 104 Fed. 20; Francœur v. Newhouse, 40 Fed. 618.

A suit brought by the United States to cancel a patent for fraud stands upon a different plane from the ordinary private suit to recover real estate.

Causey v. United States, 240 U. S. 399, 402, 60 L. ed. 711, 713, 36 Sup. Ct. Rep. 365; Utah Power & Light Co. v. United States, 243 U. S. 389, 409, 61 L. ed. 791, 818, 37 Sup. Ct. Rep. 387; United States v. Minor, 114 U. S. 233, 240, 29 L. ed. 110, 112, 5 Sup. Ct. Rep. 836.

A representation recklessly made without knowledge of its truth, but which is in reality false, is a fraudulent representation.

Smith v. Richards, 13 Pet. 26, 36, 10 L. ed. 42, 47; Cooper v. Schlesinger, 111 U. S. 148, 155, 28 L. ed. 382, 384, 4 Sup. Ct. Rep. 360; Lehigh Zinc & I. Co. v. Bamford, 150 U. S. 665, 673, 37 L. ed. 1215, 1217, 14 Sup. Ct. Rep. 219; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 185, 51 L. ed. 430, 435, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; Mullan v. United States, 118 U. S. 271, 277, 30 L. ed. 170, 172, 6 Sup. Ct. Rep. 1041.

The fraudulent manner in which the Southern Pacific acquired patent to the lands involved in the Tulare Oil Company contest is in keeping with its fraudulent conduct in securing patent for the lands now sued for.

Tulare Oil & Min. Co. v. Southern P. R. Co. 29 Land Dec. 269; Wood v. United States, 16 Pet. 342, 10 L. ed. 987; Mudsill Min. Co. v. Watrous, 9 C. C. A. 415, 22 U. S. App. 12, 61 Fed. 163, 18 Mor. Min. Rep. 1; Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413; Diamond Coal & Coke Co. v. United States, 233 U. S. 248, 58 L. ed. 943, 34 Sup. Ct. Rep. 507.

A man who has made a false representation in respect to a material matter must, in order to rely on the defense that the transaction was not entered into on the faith of the representation, be able to prove to a demonstration that it was not relied on.

Kerr, F. & Mistake, 3d ed. 75; Pollock, Torts, 292; Griffin v. Roanoke R. & Lumber Co. 140 N. C. 514, 6 L.R.A. (N.S.) 463, 53 S. E. 307; Pomeroy, Eq. Jur. 3d ed. § 895.

The representation need not be the sole inducement.

Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931; Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A. 448, 12 U. S. App. 347, 56 Fed. 139.

The proceedings resulting in the patent were ex parte, no issue was framed, no hearing was had, and the patent is not conclusive against the government, but it may cancel the patent by showing that it was obtained by means of false and fraudulent proofs.

Washington Securities Co. v. United States, 234 U. S. 76, 58 L. ed. 1220, 34 Sup. Ct. Rep. 725; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; J. J. McCaskill Co. v. United States, 216 U. S. 504, 509, 54 L. ed. 590, 594, 30 Sup. Ct. Rep. 386; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, 58 L. ed. 936, 939, 34 Sup. Ct. Rep. 507.

Mr. Charles R. Lowers argued the cause, and, with Messrs. William F. Herrin and Joseph P. Blair, filed a brief for appellees:

Opinion or surmise that oil might exist, at an unknown depth, from 4 to 10 miles from its nearest known occurrence, is not convincing proof that the conditions in 1904 were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable, and justify expenditures to that end.

Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, 58 L. ed. 936, 939, 34 Sup. Ct. Rep. 507.

It was the duty of the government to prove its case by that class of evidence which commands respect, and with that amount of it which produces conviction.

Maxwell Land-Grant Case, 121 U. S. 325, 379–381, 30 L. ed. 949–959, 7 Sup. Ct. Rep. 1015.

Only those lands may be lawfully taken from the railroad company which were in fact mineral lands at the time of patent. The expression "mineral lands," as here used, is no longer open to question. It includes only such lands as were, at the time of the grant (patent), known to be so valuable for their minerals as to justify expenditure for their extraction.

Davis v. Wiebbold, 139 U. S. 507, 524, 35 L. ed. 238, 244, 11 Sup. Ct. Rep. 628; Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, 58 L. ed. 936, 939, 34 Sup. Ct. Rep. 507.

A mineral patent would not issue for a single acre in the Elk hills on the showing of mineral made by the government in this case. This is so because the evidence is not sufficient to prove a discovery of mineral.

Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468.

Far more proof is required to take land out of the category established by its nonmineral patent than is required to establish a miner's "discovery."

Ibid.

Without legal damage to the government there can be no relief on the ground of fraud. This is the rule which this court has applied in a similar suit by a private individual (Southern Development Co. v. Silva, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435). The same rule has been held to apply in suits by the government itself.

United States v. San Jacinto Tin Co. 125 U. S. 273, 285, 31 L. ed. 747, 751, 8 Sup. Ct. Rep. 850; United States v. Stinson, 197 U. S. 200, 205, 49 L. ed. 724, 725, 25 Sup. Ct. Rep. 426.

Mere indications of the existence of oil are not proof of its existence or of its quantity or location.

Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 673, 20 Mor. Min. Rep. 283; Nevada Sierra Oil Co. v. Miller, 97 Fed. 681; Miller v. Chrisman, 140 Cal. 444, 98 Am. St. Rep. 63, 73 Pac. 1083, 74 Pac. 444; Olive Land & Development Co. v. Olmstead, 103 Fed. 568, 20 Mor. Min. Rep. 700; United States v. McCutchen, 238 Fed. 575; Bay v. Oklahoma Southern Gas, Oil & Min. Co. 13 Okla. 425, 73 Pac. 936; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; New England & C. Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180; McLemore v. Express Oil Co. 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59; Dughi v. Harkins, 2 Land Dec. 721; Davis v. Wiebbold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Hutton v. Forbes, 31 Land Dec. 325; Southwestern Oil Co. v. Atlantic P. R. Co. 39 Land Dec. 335; Re Butte Oil Company, 40 Land Dec. 602.

Belief not based on clear demonstration is not proof of mineral character.

Deffeback v. Hawke, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; Iron Silver Min. Co. v. Reynolds, 124 U. S. 374, 31 L. ed. 466, 8 Sup. Ct. Rep. 598; Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co. 143 U. S. 394, 36 L. ed. 201, 12 Sup. Ct. Rep. 543, 17 Mor. Min. Rep. 436; Sullivan v. Iron Silver Min. Co. 143 U. S. 431, 36 L. ed. 214, 12 Sup. Ct. Rep. 555.

Greater evidence is required to cancel a patent than would have warranted a refusal to grant it in the first place.

United States v. Marshall Silver Min. Co. 129 U. S. 579, 588, 32 L. ed. 734, 737, 9 Sup. Ct. Rep. 343, 16 Mor. Min. Rep. 205.

Fraud cannot be predicated upon the expression of an opinion concerning the existence of hidden mineral deposits.

2 Addison, Torts, Wood's ed. § 1186. Black, Rescission, § 77; Southern Development Co. v. Silva, 125 U. S. 247, 252, 31 L. ed. 678, 681, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Gordon v. Butler, 105 U. S. 553, 26 L. ed. 1166; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Synnott v. Shaughnessy, 130 U. S. 572, 32 L. ed. 1038, 9 Sup. Ct. Rep. 609, 17 Mor. Min. Rep. 213; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 58 L. ed. 936, 34 Sup. Ct. Rep. 507.

The respect due to patent titles is such that they can be set aside by the extraordinary relief of cancelation only where the proof is clear, both that the government has lost what it was entitled to keep, and that it has suffered this loss through the intentional wrong of the patentee.

United States v. Stinson, 197 U. S. 200, 49 L. ed. 724, 25 Sup. Ct. Rep. 426; Maxwell Land-Grant Case, 121 U. S. 325, 30 L. ed. 949, 7 Sup. Ct. Rep. 1015; United States v. San Jacinto Tin Co. 125 U. S. 273, 299, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; United States v. Iron Silver Min. Co. 128 U. S. 673, 676, 32 L. ed. 571, 572, 9 Sup. Ct. Rep. 195; United States v. Clark, 200 U. S. 601, 608, 50

L. ed. 613, 616, 26 Sup. Ct. Rep. 340; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239, 58 L. ed. 936, 939, 34 Sup. Ct. Rep. 507; Washington Securities Co. v. United States, 234 U. S. 76, 58 L. ed. 1220, 34 Sup. Ct. Rep. 725; United States v Des Moines Nav. & R. Co. 142 U. S. 510, 541, 35 L. ed. 1099, 1108, 12 Sup. Ct. Rep. 308.

A false representation must be relied upon to be actionable either in law or equity.

Southern Development Co. v. Silva, 125 U. S. 247, 250, 31 L. ed. 678, 680, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit by the United States to cancel a patent issued December 12, 1904, to the Southern Pacific Railroad Company for eight full and two partial sections of land within the indemnity limits of the grant made to that company by an act of Congress of July 27, 1866, chap. 278, 14 Stat. at L. 292, it being charged in the bill that the railroad company [7] fraudulently obtained the patent by falsely representing to the Land Department that the lands were not mineral but agricultural, when it was known that they were mineral. From the evidence presented the district court found that the charge was true, and entered a decree of cancelation, and this was reversed by the circuit court of appeals, one judge dissenting. 162 C. C. A. 19, 249 Fed. 785.

"All mineral lands" other than those containing coal or iron were excluded from the grant, and this exclusion embraced oil lands. Burke v. Southern P. R. Co. 234 U. S. 669, 676–679, 58 L. ed. 1527, 1543, 1544, 34 Sup. Ct. Rep. 907. As will be seen presently, there can be no doubt that the patent was procured by representing that the lands were not mineral. Whether this representation was false turns upon the character of the lands as known when the patent was sought and obtained. If they then were known to be valuable for oil, as the government asserts they were, they were mineral in the sense of the granting act.

To compensate for losses to the grant within its primary limits the railroad company was entitled to select other lands of like area within the indemnity limits, approval by the Secretary of the Interior being essential to passing the selections to patent. The established mode of making the selections was by presenting at the local land office selection lists designating the lands lost and those selected, with supporting affidavits showing, among other things, that the lands selected were of the character contemplated; that is to say, were not mineral but agricultural. These lists and affidavits would then be examined in that office and in the General Land Office, and ultimately the selections would be passed to the Secretary of the Interior for his action. That course was followed here.

The original list was presented November 14, 1903, but it encountered obstacles which led to the presentation of a substituted list covering the same lands on September 6, 1904. [8] Both lists were presented by the company's land agent, Mr. Eberlein, and were accompanied by affidavits made by him, stating that the lands selected "are not interdicted mineral," but "are of the character contemplated by the grant," and that "he has caused" them "to be carefully examined by the agents and employees of said company as to their mineral or agricultural character, and that to the best of his knowledge and belief none of the lands returned in said list are mineral lands." In acting on the substituted list, the officers of the Land Department relied upon and gave effect to the statements in supporting affidavits, and the selections were accordingly approved and passed to patent.

In truth, Mr. Eberlein had not examined the lands or caused them to be examined by others. Nor had any examination of them been made on behalf of the railroad company, save such as is inferable from the conduct of its geologists and others presently to be noticed.

The lands were in the Elk hills in Kern county, California; were rough, semiarid, and unfit for cultivation; were devoid of timber, springs, or running water, and had but little value for grazing. Oil had been discovered in that region as early as 1899, and this had been followed by development and production on an extensive scale. In 1903 and 1904 there were many producing wells about 25 miles to the east, and many within a much shorter distance to the west and south, some within 3 or 4 miles. The railroad company was then maintaining a corps of geologists,—all informed by experience in the California oil fields,—and under their supervision was searching for, developing, and producing oil for fuel purposes. In 1902, upon the recommendation of one of its geologists, it withdrew

from sale many of its patented lands surrounding and adjacent to those in suit "because they were in or near oil territory;" and early in 1903 it entered upon a systematic examination of its lands in [9] that territory "to determine as far as can be done from surface indications and geological structure where oil is to be expected in this region." In a letter to Mr. Kruttschnitt, one of the company's vice presidents, the chief geologist said, when about to take up the examination: "So far as I can judge from the trip I have just made over this territory, this work promises results of greatest value to the company."

The lands in suit were surveyed in 1901, and the approved plat was filed in the local land office in May, 1903. The field notes denominated the lands as mineral, and described them as in a mineral district "within which many successful oil wells have been developed." As before stated, the original selection list was presented November 14, 1903. Mr. Kruttschnitt already had written to the company's attorney at Washington, requesting that "special attention" be given to securing a patent for the lands when selected; and shortly thereafter Mr. Eberlein wrote to the attorney, saying: "I am particularly anxious in regard to this list, as the lands adjoin the oil territory, and Mr. Kruttschnitt is very solicitous in regard to it." Other letters and telegrams show that this special concern or anxiety persisted until the patent was issued.

In 1903 the company concluded to lease such of its lands as were considered "valuable for oil purposes" to a subsidiary company which was to be a sort of fuel department, and to have charge of the development and production of oil. The geologists were requested to designate the lands to be thus leased, and as a result of their investigation and recommendation several sections adjacent to and some immediately adjoining those in suit were included. The lease was to be signed on behalf of the railroad company by Mr. Eberlein as land agent, and was laid before him for that purpose on August 2, 1904. Perceiving at once that its execution would not be in accord [10] with his action in pressing the pending selection list, he took the matter up with some of his superiors. To one he said in a letter: "We have selected a large body of lands interspersed with the lands sought to be conveyed by this lease, and which we have represented as nonmineral in character. Should the existence of this lease become known, it would go a long way toward establishing the mineral character of the lands referred to, and which are still unpatented. We could not successfully resist a mineral filing after we have practically established the mineral character of the land. I would suggest delay at least until this matter of patent can be adjusted." To the same officer he protested against the action of the geologists in examining unpatented lands because "it was charging the company with notice." And to another, in New York, he explained "all phases of the matter," with the result that the "impropriety of the lease at that time" and the "very ambiguous position in which we would be placed" were recognized, and he was instructed to withhold his signature and to place and keep all correspondence and papers relating to the lease in a separate and private file not accessible to others. He followed the instruction and the special or secret file remained in his possession "until," as he testified, "it was pried out" at the hearing.

But notwithstanding what was brought to his attention through the proposed oil lease, Mr. Eberlein continued actively to press the pending selection, and when, about a month later, he presented the substituted selection list, it was accompanied by affidavits wherein he repeated his prior representation that the lands were not mineral. After presenting this list he had a conference with the chief geologist which prompted the latter, when writing to a superior officer, to explain that "for reasons of policy regarding certain unpatented lands it will be best not to execute the lease . . . at present."

[11] The lease was placed by Mr. Eberlein in the special or secret file, and some time afterward, when an effort was made to find it, he denied all knowledge of it. The denial was brought to the attention of the chief geologist, and he at once wrote to Mr. Eberlein, calling attention to the conference just mentioned, and stating: "You explained that you were rushing certain lands for final patent, and that the immediate execution of the lease showing our idea of what were oil lands might interfere with you, and we agreed to defer the execution until that danger was passed." The chief geologist was a witness at the hearing, and when asked what danger was meant, answered: "The danger that these lands might be delayed and not be patented because of their mineral character."

All that has been recited thus far is

proved so well that it is beyond dispute. Fairly considered, it shows that when the patent was sought and obtained the lands had no substantial value unless for oil mining; that the interest and anxiety displayed by the company's officers in securing the patent were wholly disproportionate to the value of the lands for any other purpose; that the lands lay within a recognized and productive oil region which the company's geologists had been systematically examining to determine in what lands oil was to be expected, and that upon the advice and recommendation of its geologists the company was treating and dealing with adjacent and adjoining lands, of which it was the owner, as valuable for oil. Of course among practical men the character—whether oil or otherwise—of these adjacent and adjoining lands had some bearing on the character of those in suit, and this was given pointed recognition when the company's officers halted the signing of the proposed oil lease pending action on the selection list, and caused the correspondence and papers relating to the lease to be secreted in a special and private file.

We think the natural, if not the only, conclusion from [12] all this, is that, in pressing the selection, the officers of the railroad company were not acting in good faith, but were attempting to obtain the patent by representing that the lands were not mineral when they believed the fact was otherwise.

The observable geological and other physical conditions at the time of the patent proceedings, as shown by the evidence, were as follows: The area called the Elk hills was about 6 miles wide and 15 long, and constituted an anticlinal fold or elongated dome,—an occurrence favorable to the accumulation and retention of oil. The lands in suit were about its center. From 5 to 10 miles to the west was the Temblor range, the main uplift of that region. Along the east flank of that uplift for a distance of 30 miles was a series of outcrops or exposures of Monterey (diatomaceous) shales, the source of oil in California, and porous sandstone in which oil generally finds its ultimate reservoir. These strata were of exceptional thickness, and it was apparent that oil in considerable quantity had been seeping or wasting from the sandstone. The dip of the strata was towards the Elk hills, and there were no indications of any faulting or thinning in that direction. Between the outcrop and the Elk hills upwards of two hundred wells had found the oil-bearing strata and were being profitably operated, several of the wells being on a direct line towards the lands in suit and within 3 or 4 miles of them. In and beyond the Elk hills were oil seepages and other surface indications of the existence of oil in the underlying strata, one of the seepages being near the lands in suit. Two wells had been sunk in the Elk hills, but obviously had not gone to an adequate depth and were not productive, although some oil was reached by one.

Geologists and men of wide experience and success in oil mining—all of whom had examined that territory and [13] some of whom had been familiar with it for years—were called as witnesses by the government, and gave it as their opinion, having regard to the known conditions in 1903 and 1904, as just outlined, that the lands were valuable for oil, in that an ordinarily prudent man, understanding the hazards and rewards of oil mining, and desiring to engage therein for profit, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

Other geologists and oil operators, called by the company, gave it as their opinion that the lands were not, under the conditions stated, valuable for oil: but, as respects the testimony of some, it is apparent that they were indisposed to regard any lands as within that category until they were demonstrated to be certainly such by wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping. This is a mistaken test, in that it takes no account of geological conditions, adjacent discoveries, and other external conditions upon which prudent and experienced men in the oil mining regions are shown to be accustomed to act and make large expenditures. And the testimony of some of these witnesses is weakened by the fact that their prior acts in respect of these lands, or others in that vicinity similarly situated, were not in accord with the opinions which they expressed.

After considering all the evidence, we think it is adequately shown that the lands were known to be valuable for oil when the patent was sought and obtained, and by this we mean that the known conditions at that time were such as reasonably to engender the belief that

the lands contained oil of such quality and in such quantity as would render its extraction profitable, and justify expenditures [14] to that end. See Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 58 L. ed. 936, 34 Sup. Ct. Rep. 507.

The railroad company places some reliance on the fact that after the presentation of the original selection list, and before the substituted one was tendered, a special agent of the General Land Office examined the lands and reported them as nonmineral. But there is nothing in this that can help the company. The agent's report was made in another connection, and was not considered by the land officers when they approved the selection. It did not relieve the company from showing that the lands selected were not mineral; nor did the company understand that it had any such effect. Mr. Eberlein knew of the report several months before he and other officers of the company became troubled over the proposed oil lease and concluded that, if given publicity, it would endanger the pending selection. Besides, if the report could be considered here, it would be without any real evidential value, for it appears from testimony given by the agent at the hearing that he was not a geologist or familiar with oil mining, and that his examination of the lands was at best only superficial.

The company makes the contention that drilling done since the patent was issued has demonstrated that the lands have no value for oil. Assuming, without so deciding, that the contention would help the company if sustained by the evidence, we think it is not sustained. The drilling relied upon was done after 1909 upon lands in the Elk hills other than those in suit. Several wells were started and not more than three were successful. The three were the only ones that were drilled in favorable locations and to an adequate depth, and they penetrated oil sands of considerable thickness and produced a large quantity of oil, but were shut down for reasons not made clear by the record. They were drilled by an oil company which was controlled by the railroad company. [15] The other wells failed for reasons which prevent the outcome from having any significance here. In some the drilling was not carried to an adequate depth because the right to proceed was thought to be uncertain by reason of an executive withdrawal of the lands.

We conclude that the application of prior decisions to the case made by the evidence entitles the government to the relief sought, as was held by the district court. See United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; J. J. McCaskill Co. v. United States, 216 U. S. 504, 54 L. ed. 590, 30 Sup. Ct. Rep. 388; Diamond Coal & Coke Co. v. United States, supra; Washington Securities Co. v. United States, 234 U. S. 76, 58 L. ed. 1220, 34 Sup. Ct. Rep. 725.

Decree of Circuit Court of Appeals reversed.

Decree of District Court affirmed.

ROBERT F. STROUD, Plff. in Err.,
v.
UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 15-22.)

Homicide — first degree — mitigation of punishment.

1. A conviction for murder as charged in the indictment, which embraced the elements constituting murder in the first degree, is not rendered less than one for first-degree murder merely because the jury exercised its right, under the Criminal Code, § 330, to mitigate the punishment to imprisonment for life.

[For other cases, see Homicide, I. in Digest Sup. Ct. 1908.]

Criminal law — former jeopardy — reversal of first conviction.

2. A person found guilty of murder in the first degree by a verdict which, conformably to the Criminal Code, § 330, mitigates the punishment to life imprisonment, is not placed twice in jeopardy by an unqualified conviction for first-degree murder carrying the death penalty in a new trial had after the earlier conviction was reversed upon a writ of error sued out by the accused.

[For other cases, see Criminal Law, II. in Digest Sup. Ct. 1908.]

Appeal — discretion below — venue — jury.

3. The discretion of the trial judge in a criminal case in overruling motions to change the venue on grounds of local prejudice, and to quash the panel of prospective

---

Note. — On former jeopardy — see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenburg v. Com. 4 L.R.A. 543; Ex parte Lange, 21 L. ed. U. S. 872; and United States v. Perez, 6 L. ed. U. S. 165.

As to review of discretionary action of court below—see note to Barrow v. Hill, 14 L. ed. U. S. 48.

As to challenges to jurors—see notes to Harrison v. United States, 41 L. ed. U. S. 104, and Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727.

jurors on like grounds, will not be disturbed by an appellate court except for abuse.

[For other cases, see Appeal and Error, VIII. i, 2; VIII. i, 6, in Digest Sup. Ct. 1908.]

Appeal — harmless error — refusing challenge of juror for cause.

4. An erroneous ruling in a homicide case upon defendant's challenge of a juror for cause could not prejudice the accused where such juror was peremptorily challenged by the accused, and the latter was in fact allowed two more than the statutory number of peremptory challenges, and there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable.

[For other cases, see Appeal and Error, VIII. m, 6, in Digest Sup. Ct. 1908.]

Criminal law — self-incrimination — search and seizure.

5. The use in evidence in a criminal case of letters voluntarily written by the accused after the crime, while he was in prison, and which came into the possession of the prison officials under established practice reasonably demanded to promote discipline, did not infringe the constitutional safeguards against self-incrimination or unreasonable searches and seizures.

[For other cases, see Criminal Law, III. b, 2, in Digest Sup. Ct. 1908.]

[No. 276.]

Argued October 22, 1919. Decided November 24, 1919.

IN ERROR to the District Court of the United States for the District of Kansas to review a conviction for murder in the first degree. Affirmed.

The facts are stated in the opinion.

Mr. **Martin J. O'Donnell** argued the cause, and, with Mr. Isaac B. Kimbrell, filed a brief for plaintiff in error:

The constitutional prohibition against double jeopardy incorporated in the phrase of the 5th Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life," is a prohibition directed to the courts of the United States, which operates to deprive them of jurisdiction to try any person more than once for his life for the same offense, and neither the consent of the defendant nor the action of any department of the government can operate to confer upon the courts a jurisdiction thus denied by the organic law.

Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281, 1 Am. Crim. Rep. 532; Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; United States v. Gibert, 2 Sumn. 39, Fed. Cas. No. 15,204; Com. v. Cook, 6 Serg. & R. 577, 9 Am. Dec. 465; Schick v. United States, 195 U. S. 69, 49 L. ed. 102, 24 Sup. Ct. Rep. 826, 1 Ann. Cas. 585; Golding v. State, 31 Fla. 262, 12 So. 525; Re Bennett, 84 Fed. 324; Reg. v. Murphy, 38 L. J. P. C. N. S. 53, 6 Moore, P. C. C. N. S. 177, 16 Eng. Reprint, 693, L. R. 2 P. C. 535, 21 L. T. N. S. 598, 17 Week. Rep. 1047, 4 Bl. Com. 11; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Lewis v. United States, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; Thompson v. Utah, 170 U. S. 346, 42 L. ed. 1065, 18 Sup. Ct. Rep. 620; Cooley, Const. Lim. 319; Bishop, New Crim. Law, §§ 1043–1047.

This court is committed to the doctrine that the rights of Englishmen at the common law as outlined by Blackstone will be held to be rights which are secured to Americans by the incorporation of common-law maxims in the Constitution.

Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Chisholm v. Georgia, 2 Dall. 419, 435, 1 L. ed. 440, 447; Den. ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 276, 15 L. ed. 372, 374; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Gompers v. United States, 233 U. S. 604, 610, 58 L. ed. 1115, 34 Sup. Ct. Rep. 693, Ann. Cas. 1915D, 1044; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

There can be no new trial in a capital sense.

Rex v. Mawbey, 6 T. R. 638, 101 Eng. Reprint, 736, 3 Revised Rep. 282, 1 Chitty, Crim. Law, Eng. ed. p. 654, 2 Russell, Crimes, bk. 6, chap. 1, § 1, 2 Lord ed. p. 589, 2 Tidd, Pr. p. 820; Archbold, Crim. Pr. & Pl. 177; Rex v. Fowler, 4 Barn. & Ald. 273, 106 Eng. Reprint, 937; Rex v. Edwards, 4 Taunt. 309, 128 Eng. Reprint, 348, Russ & R. C. C. 234, 2 Leach, C. L. 621, 3 Campb. 207, 13 Revised Rep. 601; Reg. v. Murphy, 38 L. J. P. C. N. S. 53, 6 Moore, P. C. C. N. S. 177, 16 Eng. Reprint, 693, L. R. 2 P. C. 535, 21 L. T. N. S. 598, 17 Week. Rep. 1047; Erving v. Cradock, Quincy (Mass.) 553; United States v. Gilbert, 2 Sumn. 39, Fed. Cas. No. 15,204; Reg. v. Bertrand, 10 Cox, C. C. 621, 4 Moore, P. C. C. N. S. 460, 16 Eng. Reprint, 391, 36 L. J. P. C. N. S. 51, L. R. 1 P. C. 520, 16 L. T. N. S. 752, 16 Week.

Rep. 9; Shepherd v. People, 25 N. Y. 406; People v. Comstock, 8 Wend. 549.

The plaintiff in error did not bring about the destruction of the former verdict or judgment. The United States, acting through its Solicitor General, filed a motion moving that the court reverse the judgment, and in pursuance of the confession and motion on the part of the United States the judgment was reversed and remanded for further proceedings. Consequently the fallacious doctrine of waiver of former jeopardy does not fit the facts of this case.

16 C. J. 258; People v. McGrath, 202 N. Y. 445, 96 N. E. 92; State v. Snyder, 98 Mo. 555, 12 S. W. 369; Ex parte Snyder, 29 Mo. App. 256; State v. Adams, 11 S. D. 431, 78 N. W. 353; State v. Norvell, 2 Yerg. 24, 24 Am. Dec. 458; State v. Parish, 43 Wis. 395.

To hold that a person convicted of a capital crime by prosecuting a writ of error waives his right to rely on the constitutional prohibition against double jeopardy is to hold that this constitutional guaranty can never be invoked by a person so convicted.

Hartung v. People, 26 N. Y. 187; Scott v. United States, Morris (Iowa) 142; State v. Mikesell, 70 Iowa, 176, 30 N. W. 474; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

Rule three of this court requires it to follow the former practice of the court of King's bench; and as that rule has not been altered or modified since its adoption, either by the court or by act of Congress, as to capital crimes, it was without power to award a trial de novo on the former writ of error.

Rio Grande Irrig. & Colonization Co. v. Gildersleeve, 174 U. S. 603, 43 L. ed. 1103, 19 Sup. Ct. Rep. 761; Rex v. Mawbey, 6 T. R. 638, 101 Eng. Reprint, 736, 3 Revised Rep. 282; Archbold, Crim. Pr. & Pl. 177; Chitty, Crim. Law, Eng. ed. p. 654; 2 Russell, Crimes, bk. 6, chap. 1, § 1, 2 Lord ed. p. 589; 2 Tidd, Pr. p. 820; Rex v. Ellis, 5 Barn. & C. 395, 108 Eng. Reprint, 147; Rex v. Bourne, 7 Ad. & El. 58, 112 Eng. Reprint, 393; Re Frederich, 149 U. S. 70, 37 L. ed. 653, 13 Sup. Ct. Rep. 793; Walsh v. Com. 224 Mass. 39, 112 N. E. 486; Ex parte Page, 49 Mo. 291; Shepherd v. People, 25 N. Y. 406; Lowenberg v. People, 27 N. Y. 336; Hartung v. People, 26 N. Y. 167; Elliott v. People, 13 Mich. 365; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Ex parte Lange, 18 Wall. 163, 21 L. ed. 872.

The former verdict disposed of two issues in the case: first, guilty as charged; second, acquittal of the species of charge warranting capital punishment. The former writ of error to this court was prosecuted from the judgment on the phase of the verdict finding defendant guilty of the crime. Therefore the verdict acquitting the defendant of the species warranting the infliction of the death penalty remains in full force and effect.

United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; Ballew v. United States, 160 U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263; Re Frederich, 149 U. S. 70, 74, 37 L. ed. 653, 656, 13 Sup. Ct. Rep. 793; Rex v. Bourne, 7 Ad. & El. 58, 112 Eng. Reprint, 393; Camp v. Gress, 250 U. S. 308, 63 L. ed. 997, 39 Sup. Ct. Rep. 478; United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; Coughlin v. McElroy, 74 Conn. 404, 92 Am. St. Rep. 224, 50 Atl. 1025; State v. Clouser, 72 Iowa, 303, 33 N. W. 686; Ex parte Medway, 23 Wall. 504, 23 L. ed. 160, 5 Reeves, History of English Law, p. 460; Yong's Case, 4 Coke, 40a, 76 Eng. Reprint, 984; Whart. Homicide, 1049, 1050; Rex v. Jennings, Russ. & R. C. C. 388.

The district court of the United States is empowered by § 53 of the Judicial Code, upon the application of a defendant in a criminal case, to transfer the cause for trial to another division of the district, and the denial of a defendant's application for such transfer is error fatal to the verdict in a case where it appears that, because of prejudice against him on the part of the inhabitants of the division in which the trial was had, defendant cannot have a trial by an impartial jury such as the Constitution contemplates.

3 Bl. Com. pp. 294, 350; Reg. v. Barrett, Ir. Rep. 4 C. L. 285, 18 Week. Rep. 671; Rex v. Cowle, 2 Burr. 834, 97 Eng. Reprint, 587; Crocker v. Justices of Superior Ct. 208 Mass. 162, 94 N. E. 369, 21 Ann. Cas. 1061; State v. Flaherty, 42 W. Va. 240, 24 S. E. 885; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696; Hendrix v. United States, 219 U. S. 79, 55 L. ed. 102, 31 Sup. Ct. Rep. 193; Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; Lynch v. Horry, 1 S. C. L. (1 Bay) 229; Western

Coal & Min. Co. v. Jones, 75 Ark. 76, 87 S. W. 440.

The district court deprived defendant of his right to a trial by an impartial jury of the state and district of Kansas, by refusing to quash the jury panel where it appeared that the district attorney, in attempting to force a trial during the absence of defendant's counsel, while they were unavoidably detained in the trial of a cause in an adjoining state before a court of general jurisdiction, made and caused his affidavit to be read in the hearing of the panel, reciting his unwarranted conclusion that defendant's said counsel had deserted their client, the defendant, and that they had proposed to enter a plea of guilty, and where it appeared that the judge of said court, during the unavoidable absence of defendant's counsel, denounced them in the presence and hearing of the panel as being guilty of professional misconduct, declaring that if they were within the jurisdiction of that district court, he would order them into custody of the marshal, thus and thereby depriving defendant of his constitutional right to be tried for his life by an impartial jury of the state and district where the homicide was alleged to have been committed.

Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; State v. Flaherty, 42 W. Va. 240, 24 S. E. 885; Western Coal & Min. Co. v. Jones, 75 Ark. 76, 87 S. W. 440, 4 Bl. Com. 350; 1 Co. Litt. 115b, 156b; 5 Bacon, Abr. Juries (E) I, 342; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Allen v. United States, 52 C. C. A. 597, 115 Fed. 3; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Curry v. State, 5 Neb. 414; Dauncey v. Berkeley, 3 Chitty, Gen. Pr. 795; Hesketh v. Braddock, 3 Burr. 1847, 97 Eng. Reprint, 1130.

The law will presume prejudice in a case where the court refused to sustain defendant's challenge for cause, and defendant was compelled to use his peremptory challenges to exclude a juror properly challenged for cause, where, before the jury was sworn, the peremptory challenges were exhausted.

People v. Weil, 40 Cal. 268; Trenor v. Central P. R. Co. 50 Cal. 222; Hubbard v. Rutledge, 57 Miss. 7; State v. Brown, 15 Kan. 400, 2 Am. Crim. Rep. 423.

This for the very plain reason that the act of the court in refusing to sustain a challenge for cause, and thereby compelling the defendant to use his peremptory challenge to exclude a juror, necessarily, by this conduct, denies to defendant that peremptory challenge which the law allows as his absolute right.

Boles v. State, 13 Smedes & M. 398; Williams v. State, 32 Miss. 390, 66 Am. Dec. 615; Finn v. State, 5 Ind. 400; Van Blaricum v. People, 16 Ill. 364, 63 Am. Dec. 316.

The court, by refusing to sustain defendant's challenges for cause, which were well founded, deprived the defendant of the right to the twenty challenges allowed by the statute, and thereafter denied him the right to the thirty-five challenges allowed by the Constitution, in which the common-law rule on this subject is incorporated.

Lewis v. United States, 146 U. S. 376, 36 L. ed. 1014, 13 Sup. Ct. Rep. 136; 4 Bl. Com. p. 354.

It is error in a first-degree murder case in a court of the United States to sustain the challenge of the government to a juror qualified under the law of the state in which the court sits to be a juror in a first-degree murder case for the reasons (a) that § 275 of the Penal Code requires that the qualifications of jurors in the state courts shall determine their qualifications in the United States courts, and (b) by virtue of § 330, the command of the law as to the measure of punishment for such crime is fulfilled by a verdict of guilty, with the words "without capital punishment" added thereto.

St. Clair v. United States, 154 U. S. 147, 38 L. ed. 941, 14 Sup. Ct. Rep. 1002; State v. Lee, 91 Iowa, 499, 60 N. W. 119; State v. Garrington, 11 S. D. 178, 76 N. W. 326; Borowitz v. State, 115 Miss. 47, 75 So. 763; State v. Dooley, 89 Iowa, 584, 57 N. W. 414; People v. Stewart, 7 Cal. 140; Atkins v. State, 16 Ark. 568.

Conscientious scruples against capital punishment are not a ground for challenge by the state, where the jury are given the option to substitute imprisonment for the death penalty.

State v. Lee, 91 Iowa, 499, 60 N. W. 119; State v. Garrington, 11 S. D. 178, 76 N. W. 326; Winston v. United States, 172 U. S. 310, 43 L. ed. 459, 19 Sup. Ct. Rep. 212; State v. Ellis, 98 Ohio St. 21, 120 N. E. 218.

But a juror may be examined as to his scruples as a basis for peremptory challenge.

Hardy v. United States, 186 U. S. 228, 46 L. ed. 1139, 22 Sup. Ct. Rep.

889; State v. Dooley, 89 Iowa, 584, 57 N. W. 414.

The court erred in proceeding with the trial, for the reason that it affirmatively appears from the record that a list of the jurors was not served on the defendant two entire days before the trial began, or at all, and the rule for securing an impartial jury prescribed by the Statutes of William (7 Wm. III. chap. 3) and Anne (7 Ann. chap. 21), and incorporated in the 6th Amendment, and categorically adopted by U. S. Rev. Stat. § 1033, Comp. Stat. § 1699, 2 Fed. Stat. Anno. 2d ed. p. 688, was violated.

4 Bl. Com. 352; 4 Macauley, Hist. (Eng.) chap. 18; 3 Hallam, Const. Hist. (Eng.) 160; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; 2 Watson, Const. 1485–1489; Heydon's Case, 3 Coke, 7b, 76 Eng. Reprint, 637; Callan v. Wilson, 127 U. S. 540, 549, 32 L. ed. 223, 226, 8 Sup. Ct. Rep. 1301.

Because of the failure of the indictment to categorically specify the degree of murder charged in the language of the statute, defendant's rights under the 6th Amendment, guaranteeing that he be informed of the nature and cause of all accusations, were violated.

1 Bishop, New Crim. Proc. § 618; Rex v. Palmer, 1 Leach, C. L. 102; Com. v. Simonds, 11 Gray, 306; Com. v. Peas, 2 Gratt. 629; 2 Bishop, New Crim. Law, § 726; State v. O'Shea, 59 Kan. 596, 53 Pac. 876; State v. Jennings, 24 Kan. 642; State v. Adams, 20 Kan. 311; State v. Potter, 16 Kan. 80, 15 Kan. 302; State v. Bowen, 16 Kan. 475; State v. Heth, 60 Kan. 560, 57 Pac. 108; 2 Bishop, New Crim. Proc. §§ 591, 592, 595; United States v. Cruikshank, 92 U. S. 557, 23 L. ed. 593; United States v. Howard, 3 Sumn. 12, Fed. Cas. No. 15,403.

The court erred in that, in its charge to the jury, it limited the jury in its consideration of the issue of self-defense to the testimony of defendant's witnesses alone, and prevented the jury from considering all the facts and circumstances in the case on that issue, as detailed in the evidence of the witnesses for the government.

3 Hallam, Const. Hist. (Eng.) 162; 16 C. J. 775; Keith v. State, 50 Tex. Crim. Rep. 63, 94 S. W. 1044.

The trial court erred in refusing to order the return, and in admitting in evidence, over the objection and exception of the defendant, the letters deposited by Stroud with officers of the government for transmission through the mails, because "the law of the case" had been declared by this court.

Headley v. Challiss, 15 Kan. 602; 26 Am. & Eng. Enc. Law, 192, 193; Leese v. Clark, 20 Cal. 387; Balch v. Haas, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974; Davidson v. Dallas, 15 Cal. 75; Re Potts, 166 U. S. 263, 268, 41 L. ed. 994, 996, 17 Sup. Ct. Rep. 520; Stewart v. Salmon, 97 U. S. 361, 24 L. ed. 1044; The Lady Pike (Pearce v. Germania Ins. Co.) 96 U. S. 461, 24 L. ed. 672; Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Wayne County v. Kennicott, 94 U. S. 499, 24 L. ed. 260; Skillern v. May, 6 Cranch, 267, 3 L. ed. 220, 4 Cranch, 137, 2 L. ed. 574; Gains v. Rugg (Gaines v. Caldwell) 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; Hastings v. Foxworthy, 45 Neb. 676, 34 L.R.A. 321, 63 N. W. 955; Phelan v. San Francisco, 20 Cal. 40; Fitzpatrick v. Graham, 56 C. C. A. 95, 119 Fed. 353; Sharon v. Hill, 11 Sawy. 290, 26 Fed. 337; Masterson v. Howard, 18 Wall. 99, 21 L. ed. 764; Ohio C. R. Co. v. Central Trust Co. 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. Rep. 235.

The decision of the district court denying defendant's petition for the return of his letters after it had taken jurisdiction of the subject-matter set forth in the petition, and found that said letters had come into possession of the government as the result of its own unlawful act in unlawfully seizing them and confiscating them by its warden, and admitting the same in evidence, in violation of its own Constitution, was reversible error.

Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117; United States v. Mounday, 208 Fed. 186; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Underwood v. State, 13 Ga. App. 206, 78 S. E. 1103; Risher v. State, 94 Ga. 366, 47 Am. St. Rep. 175, 21 S. E. 593; Whart. Crim. Ev. § 516, p. 1076; Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; United States v. Wilson, 163 Fed. 338; Rex v. Barnett, 3 Car. & P. 600; Rex v. Kinsey, 7 Car. & P. 447; Tsuie Shee v. Backus, 156 C. C. A. 249, 243 Fed. 551; Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599; United States v. McHie, 194 Fed. 894; Lyman v. United States, 145 C. C. A. 581, 241 Fed. 948; United States v. Hee, 219 Fed. 1020;

United States v. Abrams, 230 Fed. 315; United States v. Friedberg, 233 Fed. 317; United States v. Jones, 230 Fed. 266; United States v. Lombardo, 228 Fed. 981; United States v. Mills, 185 Fed. 318; Flagg v. United States, 147 C. C. A. 367, 233 Fed. 481; People ex rel. Ferguson v. Reardon, 197 N. Y. 236, 27 L.R.A.(N.S.) 141, 134 Am. St. Rep. 871, 90 N. E. 829; People v. Coombs, 36 App. Div. 284, 55 N. Y. Supp. 276; Ehrich v. Root, 134 App. Div. 432, 119 N. Y. Supp. 395; Re Foster, 139 App. Div. 769, 124 N. Y. Supp. 667; People v. Rosenheimer, 70 Misc. 433, 128 N. Y. Supp. 1093; Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117; United States v. Wong Quong Wong, 94 Fed. 832; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Greenl. Ev. § 219.

It was error to permit the jury to carry the indictment containing the indorsement "penalty, death," for the reason that the indorsement, together with the attitude of the court and prosecutor, tended to influence the jury to vote for a verdict which would result in capital punishment.

Ogden v. United States, 50 C. C. A. 380, 112 Fed. 523; Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778; Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50.

The judgment imposed upon the defendant included solitary confinement from the date of sentence to the date of execution. The solitary confinement feature was not authorized by law, and consequently the judgment is invalid and must be reversed.

Re Medley, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384.

Assistant Attorney General **Stewart** argued the cause, and, with Mr. W. C. Herron, filed a brief for defendant in error:

The alleged constitutional questions are frivolous, and the writ of error should be dismissed for lack of jurisdiction.

Berkman v. United States, 250 U. S. 114, 117, 63 L. ed. 877, 879, 39 Sup. Ct. Rep. 411; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191; Beecham v. United States, 223 U. S. 708, 56 L. ed. 623, 32 Sup. Ct. Rep. 518.

Changes of venue are within the sound discretion of the trial court, and will not be reviewed on error except upon clear showing of abuse of such discretion.

Cook v. Burnley, 11 Wall. 659, 20 L. ed. 29; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696; Brown v. United States, 168 C. C. A. 258, 257 Fed. 46.

If a challenge to the array because of alleged prejudice in the whole panel be permissible at all in the Federal courts (which is certainly doubtful), the matter is clearly within the sound discretion of the trial court, and its action is not reviewable on error except upon a clear showing of abuse of such discretion. No such showing is made in this record. The court could lawfully permit the jury to be present at the hearing of the motion for continuance (Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138), and nothing occurred at such hearing which can fairly be said to have prejudiced them.

Where a case is reversed and remanded for a new trial on confession of error by the state, there is no law of the case further than this, viz., that the defendant shall have a new trial. The reasons for the confessions of error are given above in the statement of this case, and the errors confessed were avoided on the retrial. This court knows what it intended by its mandate, and that the trial court obeyed it.

Steinfeld v. Zeckendorf, 239 U. S. 26, 60 L. ed. 125, 36 Sup. Ct. Rep. 14.

Challenges for cause in a criminal case in the Federal courts are not governed by state law.

Lewis v. United States, 146 U. S. 370, 36 L. ed. 1011, 13 Sup. Ct. Rep. 136; Pointer v. United States, 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410; St. Clair v. United States, 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002.

The overruling of a challenge for cause to men who were not on the trial jury did not deny the constitutional right to an impartial jury.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614.

The indictment duly charged the locus as within the exclusive jurisdiction of the United States, and the proof showed it.

Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Benson v. United States, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60; Battle v. United States, 209 U. S. 36, 52 L. ed.

670, 28 Sup. Ct. Rep. 422; Holt v. United States and Brown v. United States, supra.

The mere fact that a defendant is confined and in irons under an accusation of having committed a capital offense does not render statements by him incompetent, if they were made voluntarily, and were not obtained by putting the prisoner in fear, or by promises.

Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168; Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547.

The indictment may be taken into the jury room.

Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778.

The letters of defendant were properly admitted in evidence.

Johnson v. United States, 228 U. S. 457, 57 L. ed. 919, 47 L.R.A.(N.S.) 263, 33 Sup. Ct. Rep. 572; Perlman v. United States, 247 U. S. 7, 62 L. ed. 950, 38 Sup. Ct. Rep. 417.

The defendant cannot now successfully contend that he has been placed in jeopardy in either of the two former trials. He procured the writ of error in each case, upon which the judgments against him were set aside and the case remanded for proceedings de novo.

Trono v. United States, 199 U. S. 521, 50 L. ed. 292, 26 Sup. Ct. Rep. 121, 4 Ann. Cas. 773; United States v. Ball, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192.

The provision of U. S. Rev. Stat. § 1033, Comp. Stat. § 1699, 2 Fed. Stat. Anno. 2d ed. p. 688, that when a person is indicted for a capital offense, a list of the jurors, etc., shall be delivered to him at least two entire days before the trial, is not applicable to veniremen called upon special venire. The record in this case does not disclose an objection on the part of the defendant to proceeding with the trial until a list of the names of the ten additional special veniremen was served upon him. Neither does it appear in the record that the defendant insisted upon such list. The right secured to the defendant under § 1033 may be waived.

Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Hickory v. United States, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; Johnson v. United States, 225 U. S. 405, 56 L. ed. 1142, 32 Sup. Ct. Rep. 748; Goldsby v. United States, 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216.

The section last referred to is not applicable to veniremen called upon special venire for the purpose of completing the panel, where the same has been exhausted by challenge or excused jurors.

Stewart v. United States, 127 C. C. A. 477, 211 Fed. 41.

Mr. Justice **Day** delivered the opinion of the court:

Robert F. Stroud was indicted for the killing of Andrew Turner. The indictment embraced the elements constituting murder in the first degree. The homicide took place in the United States prison at Leavenworth, Kansas, where Stroud was a prisoner and Turner a guard. The record discloses that Stroud killed Turner by stabbing him with a knife which he carried concealed on his person.

Stroud was convicted in May, 1916, of murder in the first degree, and sentenced to be hanged. Upon confession of error by the United States district attorney the circuit court of appeals reversed this judgment. Stroud was [17] again tried at the May term, 1917, the jury in the verdict rendered found Stroud "guilty as charged in the indictment without capital punishment." Upon writ of error to this court the Solicitor General of the United States confessed error, and the judgment was reversed; the mandate commanded: "Such further proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding." In pursuance of this mandate the district court issued an order vacating the former sentence, and ordered a new trial. The trial was had, the jury found Stroud guilty of murder in the first degree as charged in the indictment, making no recommendation dispensing with capital punishment. Upon this verdict sentence of death was pronounced. This writ of error is prosecuted to reverse the judgment.

The case is brought directly to this court because of assignments of error alleged to involve the construction and application of the Constitution of the United States. The argument has taken a wide range. We shall dispose of such assignments of error as we deem necessary to consider in justice to the contentions raised in behalf of the plaintiff in error.

It is alleged that the last trial of the

case had the effect to put the plaintiff in error twice in jeopardy for the same offense, in violation of the 5th Amendment to the Constitution of the United States. From what has already been said it is apparent that the indictment was for murder in the first degree; a single count thereof fully described that offense. Each conviction was for the offense charged. It is true that upon the second trial the jury added "without capital punishment" to its verdict, and sentence for life imprisonment was imposed. This recommendation was because of the right of the jury so to do under § 330 of the Criminal Code (35 Stat. at L. 1152, chap. 321, Comp. Stat. § 10,504, 7 Fed. Stat. Anno. 2d ed. p. 983). [18] This section permits the jury to add to the verdict, where the accused is found guilty of murder in the first degree, "without capital punishment," in which case the convicted person is to be sentenced to imprisonment for life. The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first-degree murder. Fitzpatrick v. United States, 178 U. S. 304, 307, 44 L. ed. 1078, 1080, 20 Sup. Ct. Rep. 944.

The protection afforded by the Constitution is against a second trial for the same offense. Ex parte Lange, 18 Wall. 163, 21 L. ed. 872; Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655, and cases cited in the opinion. Each conviction was for murder as charged in the indictment, which, as we have said, was murder in the first degree. In the last conviction the jury did not add the words "without capital punishment" to the verdict, although the court in its charge particularly called the attention of the jury to this statutory provision. In such case the court could do no less than inflict the death penalty. Moreover, the conviction and sentence upon the former trials were reversed upon writs of error sued out by the plaintiff in error. The only thing the appellate court could do was to award a new trial on finding error in the proceeding; thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution. Trono v. United States, 199 U. S. 521, 533, 50 L. ed. 292, 296, 26 Sup. Ct. Rep. 121, 4 Ann. Cas. 773.

It is insisted that the court erred in not granting a change of venue. The plaintiff in error made a motion in the trial court, asking such an order. The chief grounds for the application appear to have been that the testimony for the government in the former trials had been printed and commented upon by the local press; that the evidence published was only such as the government had introduced, and its wide circulation by the medium of the press created prejudice in the minds of the inhabitants of Leavenworth [19] county against him, and that this prejudice existed to such an extent that the jury impaneled to try the case, though not inhabitants of Leavenworth county, were influenced more or less by the prejudice existing in that county against him; that at defendant's last trial the government, by issuing pardons to p isoners who claimed to have witnessed the homicide, produced only such witnesses as tended to support its theory of the guilt of the defendant of the crime of first-degree murder, and that at the same time the government invoked the rule that prisoners in the penitentiary who witnessed the homicide, being still prisoners under conviction and serving terms of more than one year, were not qualified witnesses on behalf of the defendant; that the cause was set for trial at a special term of the court beginning on May 20, 1918, and on said date the defendant's counsel were engaged in the state of Missouri in the trial of a cause; that the attorneys advised the judge of their inability to be present during the week the case was set for trial; that an affidavit, setting forth the above facts, was filed with the court, praying it not to enter upon the trial; that the counsel for the government submitted an affidavit in which it was stated that counsel for the defendant, Stroud, stated their wish and desire to escape further responsibility for the conduct of the defense, and expressed their hope that something would occur to make it unnecessary to appear longer in this cause in Stroud's behalf, and proposed that the government consent that the defendant plead guilty to the charge of second-degree murder, with the understanding that as a result thereof the court might sentence the defendant to prison for the remainder of his life; that said statement and affidavit were read in the presence and hearing of the special panel of prospective jurors in open court, said jurors being among those before whom the government proposed to put the defendant upon trial for murder; that at the close of the reading of the affidavit in the presence of the prospective [20] jurors, the district

judge stated from the bench that, in view of the statements set forth in the affidavit, he was compelled to feel that counsel had acted unprofessionally by not being there in court, at least one of them; that said facts were commented upon by the public press of Leavenworth county, and created prejudice against defendant and his attorneys; that defendant never authorized any person or attorney to make any such proposal to attorneys for the government, concerning a plea of guilty, for the reason that the defendant was not guilty of the charge contained in the indictment, or of murder in any degree, and that unless the jurors who had theretofore attended the court during the week of May 20, 1918, were discharged by order of the court, the defendant could not enjoy the right of a public trial by an impartial jury secured to him by the Constitution, and prayed an order transferring the case to another division of the district. The court overruled the motion except in so far as it asked for an exclusion of inhabitants of Leavenworth county as jurors; to that extent it was sustained. The motion to quash the panel, called to act as jurors, was made on like grounds, and was also overruled.

The division in which Leavenworth county is situated consists of fifty counties, and, after hearing these applications, the district court excluded persons from the jury who were residents of Leavenworth county, and refused to quash the panel upon the grounds alleged. Matters of this sort are addressed to the discretion of the trial judge, and we find nothing in the record to amount to abuse of discretion such as would authorize an appellate court to interfere with the judgment. Kennon v. Gilmer, 131 U. S. 22, 24, 33 L. ed. 110, 111, 9 Sup. Ct. Rep. 696.

Certain jurors were challenged for cause upon the ground that they were in favor of nothing less than capital punishment in cases of conviction for murder in the first degree. It may well be that as to one of these jurors, one [21] Williamson, the challenge should have been sustained. This juror was peremptorily challenged by the accused, and did not sit upon the jury. The statute, in cases of this character, allowed the accused twenty peremptory challenges; it appears that he was in fact allowed twenty-two peremptory challenges. Thus his right to exercise peremptory challenges was not abridged to his prejudice by an erroneous ruling as to the challenge for cause. In view of this fact, and since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground. See Hayes v. Missouri, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Holt v. United States, 218 U. S. 245, 248, 54 L. ed. 1021, 1028, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138.

Certain letters were offered in evidence at the trial containing expressions tending to establish the guilt of the accused. These letters were written by him after the homicide and while he was an inmate of the penitentiary at Leavenworth. They were voluntarily written, and under the practice and discipline of the prison were turned over ultimately to the warden, who furnished them to the district attorney. It appears that at the former trial, as well as the one which resulted in the conviction now under consideration, application was made for a return of these letters upon the ground that their seizure and use brought them within principles laid down in Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, and kindred cases. But we are unable to discover any application of the principles laid down in those cases to the facts now before us. In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither [22] testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights.

Other objections are raised in the elaborate brief filed in behalf of the plaintiff in error. We do not find it necessary to discuss them. In view of the gravity of the case they have been examined and considered with care, and we are unable to find that any error was committed to the prejudice of the accused.

Affirmed.

PACIFIC GAS & ELECTRIC COMPANY, Plff. in Err.,
v.
POLICE COURT OF THE CITY OF SACRAMENTO, CALIFORNIA, et al.

(See S. C. Reporter's ed. 22–26.)

Error to state court — when judgment is that of highest court.

1. A judgment of a California district court of appeal refusing certiorari to an inferior court is the judgment of the state court of last resort having power to consider the case so far as the appellate jurisdiction of the Federal Supreme Court is concerned, where such appellate court assumed jurisdiction of the cause, and the supreme court of the state refused, for want of jurisdiction, to review the judgment, although the district court of appeal may have erred in assuming jurisdiction, since this is purely a question of state law.

[For other cases, see Appeal and Error, 1147–1167, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — street railway franchise — added burden — street sprinkling — police power.

2. The obligation of the contract right which a street railway company has under its franchises to operate its railway in the streets of a municipality is not impaired by an ordinance enacted in the exercise of the police power, requiring the street railway company to sprinkle the surface of the streets occupied by its railway between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation.

[For other cases, see Constitutional Law, 1435–1439, in Digest Sup. Ct. 1908.]

Constitutional law — police power — street railway operation — street sprinkling.

3. The police power of a state extends to requiring street railway companies to sprinkle the surface of the streets occupied by their railways between the rails and tracks, and for a sufficient distance beyond the outer rails so as effectually to lay the dust and prevent the same from arising when the cars are in operation.

[For other cases, see Constitutional Law, IV. c, 2, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — street railway operation — street sprinkling.

4. A street railway company may, consistently with due process of law, be required by municipal ordinance to sprinkle the surface of the streets occupied by its tracks between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — street railway operation — street sprinkling.

5. The equal protection of the laws is not denied to a street railway company by a municipal ordinance under which it is required to sprinkle the surface of the streets occupied by its railway between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation.

[For other cases, see Constitutional Law, IV. a, 3, b, in Digest Sup. Ct. 1908.]

[No. 31.]

Submitted October 9, 1919. Decided December 8, 1919.

IN ERROR to the District Court of Appeal for the Third Appellate District of the State of California to review a judgment refusing to grant a writ of certiorari to review a judgment of the

---

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

As to when writ of error may run to inferior state court—see note to Kentucky v. Powers, 50 L. ed. U. S. 633.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument, 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to power to compel street railway to sprinkle tracks—see note to St. Paul v. St. Paul City R. Co. 36 L.R.A.(N.S.) 235.

On privilege of using street as a contract within the constitutional provision against impairing the obligation of contracts—see notes to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142, and Russell v. Sebastian, L.R.A.1918E, 892.

Superior Court for the County of Sacramento, in that state, convicting a street railway company of violating a street sprinkling ordinance. Affirmed.

See same case below, 28 Cal. App. 412, 152 Pac. 928.

The facts are stated in the opinion.

Mr. William B. Bosley submitted the cause for plaintiff in error:

The judgment of the district court of appeal which plaintiff in error seeks to have reviewed on this writ of error is a final judgment of the highest court of the state of California in which a decision in such case could be had, and is a decision in favor of the validity of a statute of the state of California, the validity of which was drawn in question in the district court of appeal on the ground that it was repugnant to the Constitution of the United States. Therefore, under and by virtue of the Constitution of the United States and § 237 of the Judicial Code, and on the authority of the decisions of this court in Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 50 L. ed. 596, 604, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Western Turf Asso. v. Greenberg, 204 U. S. 359, 362, 51 L. ed. 520, 522, 27 Sup. Ct. Rep. 384; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741, this court has jurisdiction to re-examine and reverse or affirm said judgment on this writ of error which was sued out by the plaintiff in error within the time allowed therefor by law.

The power of the several states of the Union, and their municipal corporations and political subdivisions, to levy and collect special or local assessments, is founded upon and limited by the existence of a special compensating benefit resulting to the owner of property benefited by the construction of some public improvement, to pay for which the assessment is levied.

Spring Street Co. v. Los Angeles, 170 Cal. 28, L.R.A.1918E, 197, 148 Pac. 217; Norwood v. Baker, 172 U. S. 269, 278, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187; Martin v. District of Columbia, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440; Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, L.R.A.1918E, 190, 36 Sup. Ct. Rep. 204; New York L. Ins. Co. v. Prest, 71 Fed. 815.

Any taking of private property for public use without compensation is a deprivation of property without due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 238, 41 L. ed. 979, 985, 17 Sup. Ct. Rep. 581.

Imposing upon those who own or operate railways in the streets of Sacramento the burden and expense of sprinkling a great part of such streets, while no corresponding burden is laid on the owners of such abutting property, denies to plaintiff in error and others who own and operate street railways in Sacramento the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States.

State v. Jackman, 69 N. H. 318, 42 L.R.A. 438, 41 Atl. 347, 11 Am. Crim. Rep. 607.

The ordinance in question is not a constitutional exercise of a right or power included in the police power.

License Cases, 5 How. 504, 583, 12 L. ed. 256, 291; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 688, 43 L. ed. 858, 860, 19 Sup. Ct. Rep. 565; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 600, 50 L. ed. 596, 609, 612, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 595, 598, 59 L. ed. 735, 741, 742, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 499, 501, 59 L. ed. 1423, 1429, 1430, L.R.A.1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 58, 59 L. ed. 1199, 1200, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675; Minnesota v. Barber, 136 U. S. 313, 319, 320, 34 L. ed. 455, 457, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Buchanan v. Warley, 245 U. S. 60, 74, 62 L. ed. 149, 160, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201.

It cannot be doubted that to compel a corporation to pay out its own money in performing a service to the public is to take its property for public use; nor that the 14th Amendment to the Constitution of the United States prohibits the states from taking private property for public use without just compensation.

Smyth v. Ames, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592,

593, 50 L. ed. 596, 609, 610, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 235, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581.

This case clearly comes within the rule declared by this court in Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59, 59 L. ed. 1199, 1200, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675, that the constitutional guaranty, i. e., the equal protection clause of the 14th Amendment, entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, including laws enacted as police regulations.

State v. Jackman, 69 N. H. 318, 42 L.R.A. 438, 41 Atl. 347, 11 Am. Crim. Rep. 607; Wilson v. United Traction Co. 72 App. Div. 233, 76 N. Y. Supp. 203.

The police power, when used in its broadest sense, is simply the power of government residing in every sovereign state; i. e., the power to create, define, and limit the political or legal rights and duties of human beings living in an organized civil society or state, and to control and regulate the conduct of such human beings in the exercise and enjoyment of their rights and the performance of their duties. So defined, the police power embraces the power of eminent domain, the power to coin money, the power to levy and collect taxes, the power to make war, the power to provide for the common defense, the power to regulate commerce, the power to create courts and to provide for the adjudication of controversies, and all of the other powers which, by reason of their having been the subject of special legislation from time immemorial, or by reason of their having been made the subject of special grants or limitations and restrictions in the Federal and state Constitutions, have come to be classified and given distinctive names by courts and the authors of legal treatises, and also embraces the great unclassified residuum of governmental power, inherent in the legal conception of sovereignty.

License Cases, 5 How. 504, 583, 12 L. ed. 256, 291; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 688, 43 L. ed. 858, 860, 19 Sup. Ct. Rep. 565; New York v. Miln, 11 Pet. 102, 139, 9 L. ed. 648, 662.

The term "police power" is perhaps more frequently used in a narrower sense as embracing the power to make and enforce laws the object of which is so to control and regulate the conduct of human beings that they, in the exercise and enjoyment of their constitutional and legal rights with respect to life, liberty, and property, and in the performance of their constitutional and legal duties, shall avoid doing injury and causing damage to others.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 528, 24 L. ed. 734, 736.

Once it is determined that the statute whose validity is in question is not a legitimate exercise of the police power as last above defined, but, on the contrary, will, by its necessary operation, if enforced, be destructive of rights granted or secured by the Constitution of the United States, this court does not hesitate to declare it void for repugnancy to that Constitution.

Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201.

On the other hand, if it is determined that the statute whose validity is drawn in question is a legitimate and reasonable exercise of the police power as so defined, that is to say, a statute the natural and necessary effect of the enforcement of which will be simply to compel those coming within its operation to exercise their own rights under the Constitution and laws of the land in such manner as to avoid injury to other individuals and detriment to the public, then the fact that enforcement of the law involves some restriction of the individual's freedom of conduct, or some limitation upon his use and enjoyment of his property, or will subject him to substantial expense by compelling alterations in structures or the installation of safeguards, or will subject him to loss by prohibiting him from continuing to conduct, by means of his property, some special kind of business deemed inimical to the public welfare, e. g., the manufacture and sale of alcoholic liquors, will not be deemed by this court to be a sufficient ground for holding such statute repugnant to the 14th Amendment to the Constitution of the United States.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82.

The cases involving the constitutionality of statutes enacted in the exercise

of the police power, as so defined, may conveniently be divided into three classes, as follows, viz.: (1) Cases involving statutes whose constitutionality is drawn in question upon the ground that the direct object of their enactment and enforcement, whatever may have been the motive of the legislature in enacting them, or the indirect results intended to be accomplished by them, is one whose accomplishment is prohibited by the Constitution of the United States. To this class belongs the case of Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201.

(2) Cases involving statutes whose constitutionality is drawn in question upon the ground that, even though the object sought to be accomplished by their enactment and enforcement is legitimate and meritorious, and even though the means provided for the accomplishment of such objects do not in principle come within any express prohibition of the Constitution of the United States, nevertheless they impose restrictions and burdens upon individuals in the exercise and enjoyment of their liberty, or in respect to their use and enjoyment of property, so unreasonable and oppressive as to be tantamount to a deprivation of liberty or property without due process of law. To this class belong the case of Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82, and the other cases referred to above. In this class of cases the constitutionality of the statute is generally sustained, though in extreme cases such a statute, or an administrative order made pursuant thereto, may be declared void.

See Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

Cases involving statutes whose constitutionality is drawn in question on the ground that, however legitimate and proper may be the ultimate object sought to be accomplished by their enactment and enforcement, the means employed to accomplish that object involve the taking of property from the owner for the private use of another, or the taking of private property for public use without just compensation, or a denial of the equal protection of the laws, or an infringement of some other right secured by the Constitution of the United States. This class includes such cases as Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R. 1915D, 701, 35 Sup. Ct. Rep. 753; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A. 1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869.

Mr. **Edward M. Cleary** submitted the cause for defendants in error. Messrs. Archibald Yell and Hugh B. Bradford were on the brief:

Municipalities have the right to exercise police power within their territorial limits.

Aldred's Case, 9 Coke, 59, 77 Eng. Reprint, 821; Pond, Public Utilities, § 93; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. ed. 734; Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Elliott, Roads & Streets, §§ 84, 85; Re Junqua, 10 Cal. App. 602, 103 Pac. 159.

For a discussion of police power see—New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 367, 37 L. ed. 769, 771, 13 Sup. Ct. Rep. 870; Southern P. Co. v. Portland, 177 Fed. 958; Collins v. Lean, 68 Cal. 284, 9 Pac. 173; Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 68, 42 L. ed. 952, 18 Sup. Ct. Rep. 513.

The city cannot devest itself of the police power.

Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 665; Coatesville v. Coatesville Electric Light, Heat & P. Co. 32 Pa. Super. Ct. 513; Elliott, Railroads, § 1082; Joyce, Franchises, § 366; Abbott, Mun. Corp. § 854; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; McQuillin, Mun. Corp. § 473; San José v. San José & S. C. R.

Co. 53 Cal. 475; Re Ackerman, 6 Cal. App. 9, 91 Pac. 429; Plumas County v. Wheeler, 149 Cal. 762, 87 Pac. 909; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Cincinnati, I. & W. R. Co. v. Connersville, 170 Ind. 316, 83 N. E. 503; Chicago, St. P. M. & O. R. Co. v. Douglas County, 134 Wis. 197, 14 L.R.A.(N.S.) 1074, 114 N. W. 511; Chicago v. Chicago Union Traction Co. 199 Ill. 259, 59 L.R.A. 666, 65 N. E. 243; Wabash R. Co. v. Defiance, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748; German Ins. Co. v. Com. 141 Ky. 606, 133 S. W. 793.

The constitutionality or legality of a statute or ordinance is presumed until it has been overthrown by the arguments opposed.

Re Thomas, 10 Cal. App. 375, 102 Pac. 19; Re Flaherty, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981; People v. Zimmerman, 11 Cal. App. 115, 104 Pac. 590; People ex rel. Morgan v. Hayne, 83 Cal. 111, 7 L.R.A. 348, 17 Am. St. Rep. 211, 23 Pac. 1; Tucker v. Barnum, 144 Cal. 271, 77 Pac. 919; Re San Chung, 11 Cal. App. 517, 105 Pac. 609.

The question of whether the ordinance is reasonable or not, and therefore a proper exercise of the police power, is one for the court to decide.

Merced County v. Fleming, 111 Cal. 51, 43 Pac. 392.

Ordinances requiring the street railways to sprinkle their roadbeds so as to keep down the dust have generally been approved by the court and by the textwriters.

Elliott, Railroads, § 1082; Tiedeman, Pol. Power, § 194; Dill. Mun. Corp. 5th ed. § 1276; Elliott, Roads & Streets, § 958; Toledo, P. & W. R. Co. v. Chenoa, 43 Ill. 209; Robertson v. Wabash, St. L. & P. R. Co. 84 Mo. 119; Gahagan v. Boston & L. R. Co. 1 Allen, 187, 79 Am. Dec. 724; Chicago v. Chicago Union Traction Co. 199 Ill. 259, 59 L.R.A. 666, 65 N. E. 243; Merz v. Missouri P. R. Co. 14 Mo. App. 459; Whitson v. Franklin, 34 Ind. 392; Nellis, Street Railways, § 157; McQuillin, Mun. Corp. § 3774; 2 Wilcox, Municipal Franchises, 691; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623; City & Suburban R. Co. v. Savannah, 77 Ga. 731, 4 Am. St. Rep. 106; State v. Canal & C. R. Co. 50 La. Ann. 1189, 56 L.R.A. 287, 24 So. 265; Chester v. Chester Traction Co. 5 Pa. Dist. R. 609, 4 Pa. Super. Ct. 575; St. Paul v. Haugbro, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 Ann. Cas. 580; St. Paul v. St. Paul City R. Co. 114 Minn. 250, 36 L.R.A.(N.S.) 235, 130 N. W. 1108, Ann. Cas. 1912B, 1136; Pittsburgh & B. Pass. R. Co. v. Birmingham, 51 Pa. 41; Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696.

Dust is a menace to health.

Ex parte Lacey, 108 Cal. 328, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411.

Mr. Chief Justice **White** delivered the opinion of the court:

By ordinance the city of Sacramento made it the duty of "every person, firm or corporation owning, controlling or operating any street railroad, suburban railroad, or interurban railroad upon and along any of the streets of the city of Sacramento shall, without cost to the city during the months of June, July, August, September and October of each year, and at such other times as may be necessary to keep the dust laid, sprinkle with water the surface of the street, occupied by such railroad, between the rails and tracks and for a sufficient distance beyond the outermost rails thereof, so as to effectually lay the dust and prevent the same from arising when the cars are in operation."

The Gas Company, plaintiff in error, operated lines of street railway in Sacramento under franchise granted by the city. It refused to obey the ordinance and was prosecuted in the city police court, and there asserted that the ordinance was in conflict with the due process and equal protection of the laws clauses of the 14th Amendment to the Constitution of the United States.

From a sentence imposing upon it a money penalty, it appealed to the superior court for the county of Sacramento, and from the judgment of that court, confirming [**24**] the conviction, it prosecuted an appeal to the supreme court of the state, which court refused to review the case, on the ground that it was without jurisdiction. Thereupon the company, alleging the illegality of the conviction upon various grounds, among others, that the ordinance was repugnant to the 14th Amendment, petitioned the district court of appeal for the third appellate district for a writ of certiorari requiring the superior court to send up the record for review. The petition was demurred to as stating no cause of action and on the further ground that it disclosed no jurisdiction in the court to review. Although it expressed doubt on the subject, the court took jurisdiction, reviewed the conviction, held that the city had power under the state Con-

stitution and laws to pass the ordinance, and that it was not repugnant to the Constitution of the United States. The certiorari was refused. A review of this judgment was then asked at the hands of the supreme court of the state, but that court again refused to interfere, on the ground of its want of jurisdiction. The writ of error which is before us was then prosecuted by the Gas Company to the judgment of the district court of appeal refusing to grant the writ of certiorari.

At the threshold a motion to dismiss requires to be considered. It is based upon the ground that the court below had, under the state Constitution and laws, no power to review by certiorari the action of the superior court, and therefore that court was the court of last resort competent to decide the cause. But this disregards the fact that the district court of appeal assumed jurisdiction of the cause, and that the supreme court of the state declined to review its judgment for want of jurisdiction. As whether, under the circumstances, the district court of appeal rightfully assumed jurisdiction by certiorari, is a question of purely state law, which we may not review, the judgment of that court is the judgment of the state [25] court of last resort having power to consider the case, and the motion to dismiss is denied.

Besides the due process and equal protection clauses of the 14th Amendment, the contract clause of the Constitution of the United States is relied upon in the assignments. In argument, however, that contention is based, not upon the impairment by the ordinance of any particular contract right, but upon the unwarranted burden which it is asserted would result from enforcing the ordinance as against the railroad company because of the general authority which it possessed under its franchises to operate its railroad in the streets. But this at once establishes that the consideration of the contract clause is negligible, and hence, that it is only necessary to pass upon the contentions under the due process and equal protection clauses. This results, since, if the police power of the city to provide by the ordinance for the protection of the health and safety of the people was unrestrained by any contract provision, the police power necessarily dominated the right of the company under its franchises to use the streets, and subjected that right to the authority to adopt the ordinances in question.

Further, as the right of the city to adopt such ordinance, so far as the state Constitution and laws are concerned, is concluded by the decision below, and as it is elementary that the due process clause of the 14th Amendment does not restrain the states in the exercise of their legitimate police power, it follows that the case narrows down to a consideration of whether the ordinance in question was generically embraced by the police power of the state, and, if it was, whether the power was so abused as to cause its exertion to exceed the limits of the police power, thus bringing the ordinance under the prohibitions of the due process and equal protection clauses of the 14th Amendment.

That the regulation made by the ordinance was inherently [26] within the police power is, we think, too clear for anything but statement. We cite in the margin, however, decided cases dealing with the subject, in some of which the power here in question, when exerted for the same purpose and to the same extent, was upheld, and in others of which, although the manifestations of the exercise of the power were somewhat different, its existence was accepted as indisputable; and to text-writers who state the same view.[1]

That the power possessed was, on the face of the ordinance, not unreasonably exerted, and therefore that its exercise was not controlled by the due process clause of the 14th Amendment, is, we are also of opinion, equally clear. And this is true likewise of the contention as to the equal protection clause of the Amendment, since that proposition rests upon the obviously unwarranted assumption that no basis for classification resulted from the difference between the operation of the street railway cars moving on tracks in the streets of the city and the movement of a different character of vehicles in such streets.

Affirmed.

[1] State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623; City & Suburban R. Co. v. Savannah, 77 Ga. 731, 4 Am. St. Rep. 106; State v. Canal & C. R. Co. 50 La. Ann. 1189, 56 L.R.A. 287, 24 So. 265; St. Paul v. St. Paul City R. Co. 114 Minn. 250, 36 L.R.A.(N.S.) 235, 130 N. W. 1108, Ann. Cas. 1912B, 1136; Newcomb v. Norfolk Western Street R. Co. 179 Mass. 449, 61 N. E. 42; Elliott, Railroads, § 1082; Dill. Mun. Corp. 5th ed. § 1276; Nellis, Street Railways, § 157; McQuillin, Mun. Corp. p. 3774; Elliott, Roads & Streets, § 958.

[27] POSTAL TELEGRAPH-CABLE COMPANY, Petitioner,
v.
WARREN-GODWIN LUMBER COMPANY.

(See S. C. Reporter's ed. 27-32.)

Commerce — conflicting state and Federal regulations — telegraph companies — limiting liability for unrepeated message.

Congress has so far occupied the entire field of the interstate business of telegraph companies by enacting the provisions of the Act of June 18, 1910, respecting interstate telegraph rates, as to exclude state action invalidating a contract limiting the liability of a telegraph company for error in sending an unrepeated interstate message to the refunding of the price paid for the transmission of the message.

[For other cases, see Commerce, I. c; III. o, in Digest Sup. Ct. 1908.]

[No. 91.]

Argued and submitted November 17, 1919. Decided December 8, 1919.

ON WRIT of Certiorari to the Supreme Court of the State of Mississippi to review a judgment which reversed, with a direction to enter judgment for the plaintiff, a judgment of the Circuit Court of Hinds County, in that state, in favor of defendant in a suit against a telegraph company for error in transmitting an unrepeated interstate message. Reversed and remanded for further proceedings.

See same case below, 116 Miss. 660, 77 So. 601.

The facts are stated in the opinion.

Mr. Ellis B. Cooper argued the cause, and, with Messrs. J. T. Brown and J. N. Flowers, filed a brief for petitioner:

The transmission of messages from one state to another by telegraph is interstate commerce.

Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067.

The power to regulate and control interstate commerce is vested in Congress.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Reid v Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

When Congress acts, state laws on the same subject are superseded.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Erie R. Co. v. New York, 233 U. S. 671, 58 L. ed. 1149, 52 L.R.A.(N.S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 419, 58 L. ed. 1382, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Jones v. Southern

Note.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On validity of state statute imposing penalty for default or mistake in transmission or delivery of interstate telegram—see note to Western U. Teleg. Co. v. Crovo, 55 L. ed. U. S. 499.

On legislative regulation of tolls, rates, or prices—see note to Winchester & L. Turnp. Co. v. Croxton, 33 L.R.A. 177.

On validity of limitation of liability of telegraph company for unrepeated messages—see notes to Western U. Teleg. Co. v. Dant, L.R.A.1915B, 685; Strong v. Western U. Teleg. Co. 30 L.R.A.(N.S.) 409, and Western U. Teleg. Co. v. Milton, 11 L.R.A.(N.S.) 561.

On applicability of stipulation as to repeating telegraph messages to failure or delay in transmission or delivery—see note to Box v. Postal Teleg. Cable Co. 28 L.R.A.(N.S.) 566.

On state law affecting telegraphs as regulation of interstate commerce—see note to Western U. Teleg. Co. v. Commercial Mill. Co. 36 L.R.A.(N.S.) 220.

On power of states to impose burdens upon interstate telegraph and telephone companies—see note to Postal Teleg. Cable Co. v. Baltimore, 24 L.R.A. 161.

Exp. Co. 104 Miss. 126, 61 So. 165; St. Louis & S. F. R. Co. v. Woodruff Mills, 105 Miss. 214, 62 So. 171.

The inaction of Congress in no wise affected its power over the subject.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

By the Act of June 18, 1910, Congress has undertaken to occupy the field of interstate commerce by telegraph, and assume exclusive jurisdiction and authority in the regulation thereof.

Bailey v. Western U. Teleg. Co. 97 Kan. 619, 156 Pac. 716; Bateman v. Western U. Teleg. Co. 174 N. C. 97, L.R.A.1918A, 803, 93 S. E. 467; Boyce v. Western U. Teleg. Co. 119 Va. 14, 89 S. E. 106; Unrepeated Message Case, 44 Inters. Com. Rep. 670; Durre v. Western U. Teleg. Co. 165 Wis. 190, 161 N. W. 755; Gardiner v. Western U. Teleg. Co. 145 C. C. A. 399, 231 Fed. 405, 243 U. S. 644, 61 L. ed. 944, 37 Sup. Ct. Rep. 405; Haskell Implement & Seed Co. v. Postal Teleg-Cable Co. 114 Me. 277, 96 Atl. 219; Meadows v. Postal Teleg.-Cable Co. 173 N. C. 240, 91 S. E. 1009; Norris v. Western U. Teleg. Co. 174 N. C. 92, 93 S. E. 465; Western U. Teleg. Co. v. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175; Western U. Teleg. Co. v. Bilisoly, 116 Va. 562, 82 S. E. 91; Western U. Teleg. Co. v. First Nat. Bank, 116 Va. 1009, 83 S. E. 424; Western U. Teleg. Co. v. Schade, 137 Tenn. 214, 192 S. W. 924; Western U. Teleg. Co. v. Lee, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026, 15 N. C. C. A. 1; Western U. Teleg. Co. v. Foster, 224 Mass. 365, P.U.R.1916F, 176, 113 N. E. 192; Western U. Teleg. Co. v. Hawkins, 198 Ala. 682, 73 So. 973; Western U. Teleg. Co. v. Dant, 42 App. D. C. 398, L.R.A.1915B, 685, Ann. Cas. 1916A, 1132; Williams v. Western U. Teleg. Co. 203 Fed. 140; White v. Western U. Teleg. Co. 38 Inters. Com. Rep. 500.

Mr. **William D. Anderson** submitted the cause for respondent:

Until specific action by Congress regulating the liability of telegraph companies to their patrons in respect to interstate commerce, the laws of the states are applicable.

Southern R. Co. v. Reid, 222 U. S. 424, 436, 56 L. ed. 257, 260, 32 Sup. Ct. Rep. 140; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148.

By the Act of June 18th, 1910, Congress did not undertake to occupy the entire field of interstate commerce by telegraph, and assume exclusive jurisdiction and authority in the regulation thereof.

Dickerson v. Western U. Teleg. Co. 114 Miss. 115, 74 So. 779; Western U. Teleg. Co. v. Bailey, 108 Tex. 427, 196 S. W. 516; Western U. Teleg. Co. v. Boegli, — Ind. —, 115 N. E. 773; Des Arc Oil Mill v. Western U. Teleg. Co. 132 Ark. 335, 6 A.L.R. 1081, 201 S. W. 273.

Mr. Chief Justice **White** delivered the opinion of the court:

In Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098, the court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from [28] liability for its negligence, but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be valid, and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited.

In Western U. Teleg. Co. v. Showers, 112 Miss. 411, 73 So. 276, the supreme court of that state was called upon to consider the validity of a contract by a telegraph company limiting its responsibility for missending an unrepeated message essentially like the contract which was considered and upheld in the Primrose Case. The court decided that, as the Act of Congress of June 18, 1910 (36 Stat. at L. 539, 545, chap. 309, Comp. Stat. § 8563, 5 Fed. Stat. Anno. 2d ed. p. 1108), had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, Congress had taken possession of the field and thus excluded state legislation, and hence such a contract was valid and enforceable in accordance with the rule laid down in the Primrose Case. In

holding this, however, the court pointed out that, but for the act of Congress, a different rule would apply, as, under the state law, such a contract was invalid because it was a stipulation by a carrier limiting its liability for its negligence.

In Dickerson v. Western U. Teleg. Co. 114 Miss. 115, 74 So. 779, the validity of a like contract by a telegraph company for the sending of an unrepeated message once again arose for consideration. In passing upon it the court declared that the ruling previously made in the Showers Case, as to the operation of the Act of Congress of 1910, was erroneous. Coming, therefore, anew to reconsider that subject, it was held that the Act of Congress of 1910 had not extended the power of Congress over the rates of telegraph companies for interstate business and the contracts made by them as to such subject, and hence the [29] Showers Case, in so far as it held to the contrary, was overruled. Thus removing the contract from the operation of the national law and bringing it under the state law, the court held that the contract was void and not susceptible of being enforced, because it was a mere contract exempting the telegraph company from the consequences of its negligence.

The case before us involving the extent of the liability of the Telegraph Company for an unrepeated interstate message governed by a contract like those considered in the previous cases was decided by a state circuit court after the decision in the Showers Case and before the overruling of that case by the Dickerson Case. Presumably, therefore, the court, because of the Showers decision, upheld the validity of the contract and accordingly limited the recovery. The appeal which took the case to the court below, however, was there heard after the decision in the Dickerson Case. In view of that situation the court below, in disposing of the case, expressly declared that the only issue which was open was the correctness of the ruling in the Dickerson Case, limiting the operation and effect of the Act of Congress of June 18, 1910. Disposing of that issue, the ruling in the Dickerson Case was reiterated and the contract, although it concerned the transmission of an interstate message, was declared not affected by the act of Congress and to be solely controlled by the state law, and to be therefore void. That subject presents, then, the only Federal question, and, indeed, the only question in the case.

For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court below in the Dickerson Case as to the correctness of its ruling in the Showers Case (Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024), but content [30] ourselves with saying that we are of opinion that the effect which was given to them was a mistaken one. We come at once, therefore, to state briefly the reasons why we conclude that the court below mistakenly limited the Act of Congress of 1910, and why, therefore, its judgment was erroneous.

In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish,—a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws.

In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited, of course, by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose Case, the right to contract on such subject was embraced within the grant of the primary ratemaking power.

In the third place, as the act expressly provided that the telegraph, telephone, or cable messages to which it related may be "classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the Federal [31] control the very power which the

construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that, as pointed out by the Inter-State Commerce Commission (Cultra v. Western U. Teleg. Co. 44 Inters. Com. Rep. 670), from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the circuit court of appeals of the eighth circuit, dealing with the same subject (Gardner v. Western U. Teleg. Co. 145 C. C. A. 399, 231 Fed. 405); and by the numerous and conclusive opinions of state courts of last resort, which, in considering the Act of 1910 from various points of view, reached the conclusion that that act was an exertion by Congress of its authority to bring under Federal control the interstate business of telegraph companies, and therefore was an occupation of the field by Congress which excluded state action (Western U. Teleg. Co. v. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175; Haskell Implement & Seed Co. v. Postal Teleg.-Cable Co. 114 Me. 277, 96 Atl. 219; Western U. Teleg. Co. v. Bilisoly, 116 Va. 562, 82 S. E. 91; Bailey v. Western U. Teleg. Co. 97 Kan. 619, 156 Pac. 716; Durre v. Western U. Teleg. Co. 165 Wis. 190, 161 N. W. 755; Western U. Teleg. Co. v. Schade, 137 Tenn. 214, 192 S. W. 924; Meadows v. Postal Teleg. & Cable Co. 173 N. C. 240, 91 S. E. 1009; Norris v. Western U. Teleg. Co. 174 N. C. 92, 93 S. E. 465; Bateman v. Western U. Teleg. Co. 174 N. C. 97, L.R.A.1918A, 803, 93 S. E. 467; Western U. Teleg. Co. v. Lee, 174 [32] Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026, 15 N. C. C. A. 1; Western U. Teleg. Co. v. Foster, 224 Mass. 365, P.U.R.1916F, 176, 113 N. E. 192; Western U. Teleg. Co. v. Hawkins, 14 Ala. App. 295, 70 So. 12).

It is indeed true that several state courts of last resort have expressed conclusions concerning the act of Congress applied by the court below in this case. But we do not stop to review or refer to them, as we are of opinion that the error in the reasoning upon which they proceed is pointed out by what we have said and by the authorities to which we have just referred.

It follows that the judgment below was erroneous, and it must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice **Pitney** dissents.

CITY OF LOS ANGELES et al., Appts.,
v.
LOS ANGELES GAS & ELECTRIC CORPORATION.

(See S. C. Reporter's ed. 32-40.)

Municipal corporations — powers — constructing street lighting system — police power or proprietary capacity.

1. The construction of a municipal electric street lighting system was not done in the city's governmental capacity, —an exertion of police power,—but in its proprietary or quasi private capacity, and therefore the city is subordinate in right to a private corporation which was an earlier and lawful occupant of the field. [For other cases, see Municipal Corporations, II. f, in Digest Sup. Ct. 1908.]

Constitutional law — police power — due process of law — municipal lighting plant — displacement of private systems — compensation.

2. A municipality may not, consistently with U. S. Const., 14th Amend., as a matter of public right, clear a space for the construction of its own street lighting system by removing or relocating the instrumentalities of a privately owned lighting system occupying the public streets under a franchise legally granted, without com-

---

Note.—For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to compensation to be paid to a public utility company upon taking its plant—see note to Appleton Waterworks Co. v. Railroad Commission, 47 L.R.A. (N.S.) 770.

On privilege of using street as a contract within the constitutional provision against impairing the obligation of contracts—see notes to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142; Russell v. Sebastian, L.R.A.1918E, 892.

pensating the owner of such system for the rights appropriated.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 2, in Digest Sup. Ct. 1908.]

[No. 50.]

Argued October 23, 1919. Decided December 8, 1919.

APPEAL from the District Court of the United States for the Southern District of California to review a decree enjoining the execution of a municipal ordinance providing for a municipal electric street lighting system in such a way as to trespass upon a privately owned lighting system. Affirmed.

See same case below, 241 Fed. 912.

The facts are stated in the opinion.

Mr. **W. B. Mathews** argued the cause, and, with Mr. Albert Lee Stephens, filed a brief for appellants:

The order of the municipal authorities was in conformity with conditions attached to the company's franchise at its inception, and which are binding on the company.

Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Curtis, Electricity, § 223; Mitchell v. Dakota Cent. Teleph. Co. 25 S. D. 409, 127 N. W. 582.

The company, besides being bound by contractual conditions attached to its franchise at its inception, is subject to reasonable regulation by the city in the exercise of its police power.

Dill. Mun. Corp. § 1269; Elliott, Roads & Streets, §§ 939, 1066; Merced Falls Gas & E. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239.

The regulatory measures complained of are presumed to be reasonable, and the burden is on the company to show the contrary.

People v. Stokes, 281 Ill. 159, 118 N. E. 87; Portland v. Montgomery, 38 Or. 215, 62 Pac. 755; Dill. Mun. Corp. 5th ed. §§ 591, 649; Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725.

The company failed to plead or prove facts sufficient to show that the ordinance and order complained of are arbitrary, unreasonable, or confiscatory.

Soon Hing v. Crowley, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; Cooley, Const. Lim. 7th ed. 257, 258; Western U. Teleg. Co. v. Electric Light & P. Co. 178 N. Y. 325, 70 N. E. 866; Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co. 49 C. C. A. 524, 111 Fed. 663; Cumberland Teleg. & Teleph. Co. v. Louisville Home Teleph. Co. 114 Ky. 892, 72 S. W. 4; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725.

The district court erroneously assumed that the question of public necessity for the establishment of the municipal electric lighting system was for the determination of that court, and that unless the city proved that such necessity existed, the police power could not be availed of to force the company from positions it had taken in the public streets.

Miller v. Fitchburg, 180 Mass. 32, 61 N. E. 277; Revere Water Co. v. Winthrop, 192 Mass. 455, 78 N. E. 497; Platt v. San Francisco, 158 Cal. 74, 110 Pac. 304.

The district court was not justified in holding that the company is protected by the principle that first in time is first in right, against the enforcement of regulatory measures requiring it to change the location of its structures in a public street, in order to make room for a later utility.

Merced Falls Gas & E. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co. 49 C. C. A. 524, 111 Fed. 663; Michigan Teleph. Co. v. Charlotte, 93 Fed. 11.

The district court erred in holding that the ordinance and order complained of are unreasonable and arbitrary, on the ground that they have the effect of impairing the obligation of the contract between the company and the state, in violation of § 10 of article 1 of the Constitution of the United States.

Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Slaughter-House Cases, 16 Wall. 36, 62, 21 L. ed. 394, 404; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678.

The district court erred in holding that the ordinance and order complained of have the effect of depriving the company of its property and rights without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

Michigan Teleph. Co. v. Charlotte, 93 Fed. 11; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364.

The district court erred in holding that the ordinance and order complained of

have the effect of denying to the company the equal protection of the laws, in violation of the 14th Amendment of the Constitution of the United States.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The district court erred in holding that the ordinance and order complained of have the effect of taking the company's property without just compensation, and of depriving the company of its property or rights without due process of law, in violation of the 5th Amendment of the United States Constitution.

Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703.

The district court erred in holding that the ordinance and order complained of are unreasonable and arbitrary, on the ground that they are, in effect, the taking or damaging of private property for public use without just compensation, in violation of § 14 of article 1 of the Constitution of California.

Merced Falls Gas & E. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Lewis, Em. Dom. § 248.

The district court erred in holding that the ordinance complained of constitutes an unlawful attempt to delegate legislative power to the board of public works of the city.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; Harbor Comrs. v. Excelsior Redwood Co. 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375.

Messrs. Albert Lee Stephens, Charles S. Burnell, and W. B. Mathews also filed a brief for appellants:

The proposed enforcement of the ordinance against appellee's utility, so as to secure a place in the street for the municipal utility, being consistent with the reservation in favor of the city, under appellee's franchise, of the right to direct appellee's use of the street, may not properly be considered either a revocation or an impairment of any right or obligation under such franchise.

Merced Falls Gas & E. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239; Hamilton, G. & C. Traction Co. v. Hamilton & L. Electric Transit Co. 69 Ohio St. 402, 69 N. E. 991.

The distinction attempted to be made by the lower court and by counsel for appellee, between proprietary instrumentalities and governmental interests as objects of the police power, is entirely unfounded.

McQuillin, Mun. Corp. § 2645; Dill. Mun. Corp. § 1298; Mauldin v. Greenville, 33 S. C. 1, 8 L.R.A. 291, 11 S. E. 434; Hequembourg v. Dunkirk, 49 Hun, 550, 2 N. Y. Supp. 447.

Mr. **Paul Overton** argued the cause, and, with Mr. Herbert J. Goudge, filed a brief for appellee:

Appellee's franchise is an irrevocable contract.

Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282.

Appellee's franchise vested it with an easement or right of way in the streets occupied by its lines of poles and wires, which easement or right of way is property under the protection of the constitutional guaranties.

Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed. 523; Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; Stockton Gas & E. Co. v. San Joaquin County, 148 Cal. 319, 5 L.R.A.(N.S.) 174, 83 Pac. 54, 7 Ann. Cas. 511; Re Russell, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914A, 152; South Pasadena v. Pasadena Land & Water Co. 152 Cal. 579, 93 Pac. 490; Hamilton, G. & C. Traction Co. v. Hamilton & L. Electric Transit Co. 69 Ohio St. 402, 69 N. E. 991.

The ordinance and order of the city will impair the obligation of appellee's franchise.

Los Angeles Gas & E. Co. v. Los Angeles, 241 Fed. 920; Re Johnston, 137 Cal. 115, 69 Pac. 973; 15 Am. & Eng. Enc. Law, 1049; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 554, 57 L. ed. 633, 640, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

The ordinance is violative of the due process clause of the Federal Constitution.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17

Sup. Ct. Rep. 581; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Ross v. Oregon, 227 U. S. 150, 162, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 555, 58 L. ed. 721, 725, 34 Sup. Ct. Rep. 364.

The ordinance and order of the city involve a taking of appellee's property contrary to the constitutional guaranties.

Hamilton, G. & C. Traction Co. v. Hamilton & L. Electric Transit Co. 69 Ohio St. 402, 69 N. E. 991; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; Belleville v. St. Clair County Turnp. Co. 234 Ill. 428, 17 L.R.A.(N.S.) 1071, 84 N. E. 1049; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557.

The ordinance and order of the city will damage appellee's property without just compensation having first been made, as required by the Constitution of the state of California.

Chicago v. Taylor, 125 U. S. 161, 166, 31 L. ed. 638, 641, 8 Sup. Ct. Rep. 820; Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; Rigney v. Chicago, 102 Ill. 64.

While it has been repeatedly decided that when Federal jurisdiction is invoked on the ground of the impairment of the obligation of a contract, this court will decide for itself, without reference to the state decisions, the extent of the contract rights claimed to have been impaired (see Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; J. W. Perry Co. v. Norfolk, 220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73), it is nevertheless enlightening to consider the construction placed by the courts of the state upon this constitutional grant. The state's construction should be followed when in favor of the grantee.

People v. Stephens, 62 Cal. 209; Re Johnston, 137 Cal. 115, 69 Pac. 973.

In constructing and operating an electrical distributing system the city is not performing a governmental function, but is acting in a proprietary capacity.

Vilas v. Manila, 220 U. S. 345, 356, 55 L. ed. 491, 495, 31 Sup. Ct. Rep. 416; 28 Cyc. 125; South Carolina v. United States, 199 U. S. 437, 463, 50 L. ed. 261, 270, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; South Pasadena v. Pasadena Land & Water Co. 152 Cal. 579, 93 Pac. 490; Chafor v. Long Beach, 174 Cal. 478, L.R.A.1917E, 685, 163 Pac. 670, Ann. Cas. 1918D, 106; Vallejo Ferry Co. v. Vallejo, 146 Cal. 393, 80 Pac. 514; Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, 8 Ann. Cas. 614; 4 McQuillin, Mun. Corp. § 1801, p. 3860; Eaton v. Weiser, 12 Idaho, 544, 118 Am. St. Rep. 225, 86 Pac. 541, 20 Am. Neg. Rep. 504; Eastern Illinois State Normal School v. Charleston, 271 Ill. 602, L.R.A.1916D, 991, 111 N. E. 573; Safety Insulated Wire & Cable Co. v. Baltimore, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; Chicago v. Selz, S. & Co. 104 Ill. App. 381; New York v. Bailey, 2 Denio, 433; Athens v. Miller, 190 Ala. 82, 66 So. 702; Asher v. Independence, 177 Mo. App. 1, 163 S. W. 574; Brumm v. Pottsville Water Co. 9 Sadler (Pa.) 483, 22 W. N. C. 137, 12 Atl. 855; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Wichita Water Co. v. Wichita, 234 Fed. 415; Seattle v. Stirrat, 55 Wash. 560, 24 L.R.A.(N.S.) 1275, 104 Pac. 834; Re Rapid Transit R. Comrs. 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366.

As between two electric distributing systems, priority of position gives superiority of right.

Edison Electric Light & P. Co. v. Merchants' & Mfrs' Electric Light, Heat & P. Co. 200 Pa. 219, 86 Am. St. Rep. 712, 49 Atl. 766; Edison Electric Illuminating Co. v. Citizens Electric Co. 235 Pa. 492, 84 Atl. 438; Paris Electric Light & R. Co. v. Southwestern Teleg. & Teleph. Co. — Tex. Civ. App. —, 27 S. W. 902; Rutland Electric Light Co. v. Marble City Electric Light Co. 65 Vt. 377, 20 L.R.A. 821, 36 Am. St. Rep. 868, 26 Atl. 635; Bell Teleph. Co. v. Belleville Electric Light Co. 12 Ont. Rep. 571.

The ordinance and order are not a valid exercise of the police power.

Freund, Pol. Power, §§ 511, 512, pp. 546, 547; Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; Re Johnston, 137 Cal. 115, 69 Pac. 973; Pacific Teleph. & Teleg. Co. v.

Eshleman, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; State v. Missouri P. R. Co. 242 Mo. 339, 147 S. W. 118.

Public necessity will not justify the taking of private property without just compensation.

Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822.

Mr. Justice **McKenna** delivered the opinion of the court:

The appellant city is a municipal corporation of the state of California, and the other appellants are its officers, having official relation to it and its rights and powers.

The appellee is a California corporation invested with and in exercise of a franchise for generating and selling electricity through a system of poles and wires and other works in the public streets of Los Angeles, among others, in that known as York boulevard.

It, the appellee,—to which we shall refer as the corporation,—brought this suit in the district court to declare invalid and restrain the execution of an ordinance of the city providing for a municipal electric street-lighting system and making way for it in such way, it is charged, that it obstructed, trespassed upon, and made dangerous [**34**] the system of the corporation, in violation of its rights under the Constitution of the United States.

The district court granted the prayer of the bill upon the grounds relied on, and hence the appeal from its decision direct to this court.

The ordinance attacked is very long by reason of its repetitions. It, however, can be intelligibly reduced to a few provisions. It was passed March 6, 1917, and approved the next day, and declares in its title its purpose to be to provide for the removal and relocation of poles and other property in the public streets of the city "when necessary in order that the municipal electrical street lighting system may be constructed, operated, and maintained." Such system and its installation "as speedily as may be practicable" is declared necessary "for the public peace, health, and safety."

It is recited that certain "fixtures, appliances, and structures" (they are enumerated) are maintained in the streets, and it is necessary "in order that sufficient space may be secured for the said municipal electrical system . . . and that the work of constructing and establishing the same may be carried on, to provide for the removal or relocation of poles and other properties so maintained by such persons and corporations."

It is therefore ordained that (§ 1) whenever it shall appear to the board of public works that the removal or relocation of such "fixtures, appliances, or structures" (there is an enumeration again which we omit as useless repetition) is necessary in order that the municipal system may have place, the board shall give notice to the person, firm, or corporation owning or controlling the property to remove or relocate the same. The notice to designate the property to be removed and the place to which it shall be removed, and it shall be the duty of such person, firm, or corporation to comply with the notice within five days of its receipt. To fail or refuse to so [**35**] comply or to diligently prosecute the work of removal is made unlawful (§§ 2 and 3), and (§ 4) made a misdemeanor punishable by a fine of not more than $500, or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment. Each day's delay is made a separate offense.

In case of failure to remove or prosecute the work of removal the board of public works is given power to do what the notice directs. (§ 5.)

By § 6 the dependency of the city upon private contracts for lighting the public streets and other public places is declared, some of which contracts, it is said, have expired, and all will have expired by July, 1917, thus making the completion of the municipal system necessary to provide for lighting the streets without interruption and the removal or relocation of the appliances owned or controlled by various persons, firms, or corporations immediately necessary in order that the city may complete and install its system. And it is declared that the "ordinance is urgently required for the immediate preservation of the public peace, health, and safety."

The ordinance was preceded by acts of interference by the city with the property of the corporation in other streets and also in York boulevard, which interference was enjoined by interlocutory and final decree by the superior court of Los Angeles county in a suit brought by the corporation,—the city not defending. And it was interference, not displacement, and the court's decree was adapted to the extent of the interference. The decree as to other streets than York boulevard was as follows: ". . . from in any manner trespassing upon, interfer-

ing with, moving, or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff [the corporation in this case]; or erecting or placing any pole, cross arm, or other electrical appliance or equipment, or attaching any wire or cable to or upon [36] any pole, cross arm, or other electrical appliance or equipment in a fixed position within the distance from any pole, cross arm, wire, or other electrical appliances or equipment owned or controlled wholly or in part by plaintiff [the corporation in this case], as prescribed by the laws of the state of California and the rules and regulations of the Railroad Commission of said state; . . ." As to York boulevard the decree was as follows: ". . . from conveying, running, or transmitting electric power or energy through the lines and wires heretofore erected and constructed by said city of Los Angeles, its agents, servants, and employees," until the wires, poles, and equipment of the city are removed to the distance "prescribed by the laws of the state of California and the rules and regulations of the Railroad Commission thereof."

The decree contained a provision upon which the city bases a contention, or rather a suggestion, to which we shall presently refer. The provision is as follows: "Nothing herein contained shall be construed as prohibiting or restraining the city of Los Angeles or its proper boards, officers, or agents from carrying into effect any ordinance of said city providing for the removal or relocation of poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances, or structures owned or controlled by said plaintiff [the corporation in this case], and located in, upon, over, or under any public street or other public place of said city."

The ground or basis of the ordinance of March 6, 1917, here involved, is the same as that of the interference in the suit in the state court; that is, the right to displace the corporation's property in order that the municipal system may be operated or erected. There is no attempt here, as there was no attempt in that suit, at absolute displacement. The order of the board of public works, issued in accordance with the direction of the ordinance, required the corporation to change or shift or lower its wires to [37] the detriment of their efficient use, as it is contended. There is some conflict as to the extent and effect, which, however, we are not called upon to reconcile. It was stipulated "that the value of the right to exercise the franchises of the Los Angeles Gas & Electric Corporation in the public streets and thoroughfares of the city of Los Angeles exceeded the sum of $3,000 and was in excess of $4,000." And it was testified that if the city, in constructing its system, proceeds as it has done in ordering the removal of poles and wires, it will cost the corporation between $50,000 and $60,000; but, passing by the particular instance of interference, and considering the ordinance's broad assertion of right, the contention of the city and the corporation are in sharp contradiction.

We say "the ordinance's broad assertion of right" to distinguish the narrower right of the city to erect a system of its own. Of the latter right there is no question. The district court conceded it, indeed, praised the project, but decided that it could not be exercised to displace other systems, without compensation, occupying the streets by virtue of franchises legally granted. Thus the only question is whether the city may, as matter of public right and without compensation, clear a "space" for the instrumentalities of its system by removing or relocating the instrumentalities of other systems. The city asserts the affirmative,—asserts the right to displace other systems as an exercise of the police power, and, further, as an incident of its legislative power. It is further asserted that these powers are attributes of government, and that their exercise, when not palpably arbitrary, is not subject to judicial interference. And that "every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power [in this case the city]; and a contrary conclusion will never be reached upon light consideration." Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725.

[38] In counter propositions the corporation urges its franchise and the right it conveys to occupy the streets of the city,—rights, it is said, having the inviolability of a contract and the sanctity of private property; not, indeed, free from reasonable regulation, if such regulation is governmental, but free from molestation or displacement to make "space" for a city system, for that is proprietary. We have, therefore, the not unusual case of rights asserted against governmental power,—a case somewhat fruitful of disputable considerations and upon which judgment may not be easy or free from controversy. But there is some point where power or rights must prevail, however plausible or specious the argu-

ment of either against the other may be. As, for example, in the present case. The city has undoubtedly the function of police; it undoubtedly has the power of municipal lighting and the installation of its instrumentalities (Russell v. Sebastian, 233 U. S. 195, 202, 58 L. ed. 912, 920, L.R.A.1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282); but function and power may be exceeded, and, so far as wrongful, be restrained. And such was the conclusion of the district court, applying the Constitution of the United States, and such the ground of its judgment.

In what way the public peace or health or safety was imperiled by the lighting system of the corporation, or relieved by its removal or change, the court was unable to see, and it is certainly not apparent. The court pointed out that there were several lighting systems in existence and occupying the streets, and that there was no contest, or disorder, or overcharge of rates, or peril or defect of any kind; and therefore concluded that the conditions demonstrated that while the city might install its own system, there was no real "public necessity" arising from consideration of public health, peace, or safety requiring the city to engage in the business of furnishing light.

The court reasoned and concluded that what the city did was done not in its governmental capacity,—an exertion of the police power,—but in its "proprietary or quasi [39] private capacity;" and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized, and the difference in attendant powers pointed out, in decisions of this court. Vilas v. Manila, 220 U. S. 345, 55 L. ed. 491, 31 Sup. Ct. Rep. 416; Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 508, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762.

The city's contentions are based on a confusion of these capacities and the powers or rights respectively attributed to them, and upon a misunderstanding of the reservations in the decree of the state court. The reservations were made only in prudence, not to define the existence or extent of powers, and forestall their challenge, but to leave both to the occasion when either of them might be asserted or denied. And it is clear that it was not intended to confound the capacities in which the city might act, and the relation of the city's acts to those capacities.

It is not necessary to repeat the reasoning or the examples of the cases cited above, by which and in which the different capacities of the city are defined and illustrated. A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law,—the payment of compensation.

The franchise of the present controversy was granted prior to 1911, and hence has the attributes and rights described in Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282. Its source, as was that of the franchise in that case, is the Constitution of [40] the state, and is that "of using the public streets and thoroughfares thereof . . . for introducing into and supplying" a city "and its inhabitants either with gaslight or other illuminating light." We said of such that the "breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light." And again: "The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served." We can add nothing to this definition of rights, and, we may repeat, they did not become immediately violable or become subsequently violable.

It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to

one lighting system in order to make way for another. And this the 14th Amendment forbids. What the grant was at its inception it remained, and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated.

We think, therefore, that the decree of the District Court protecting the corporation's rights from disturbance under the ordinance in question must be and it is affirmed.

Mr. Justice **Pitney** and Mr. Justice **Clarke** dissent.

---

[41] ROBERT P. ERVIEN, Commissioner of Public Lands of the State of New Mexico, Appt.,

v.

UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 41–48.)

Public lands — New Mexico land grant — use of proceeds — breach of trust.

The specific enumeration in the New Mexico Enabling Act of June 20, 1910, of the purposes for which the public lands therein granted to that state may be disposed of, and the further provision that the natural products and money proceeds of such lands shall be subject to the same trusts as the lands themselves, renders invalid state legislation authorizing the commissioner of public lands of that state to expend annually not to exceed 3 cents on the dollar from the annual income of his office from sales and leases of the public lands for making known the resources and advantages of the state generally, and particularly to home seekers and investors, and such a threatened breach of trust will be enjoined at the instance of the United States.

[For other cases, see Public Lands, I. c, 5, in Digest Sup. Ct. 1908.]

[No. 72.]

Submitted November 11, 1919. Decided December 8, 1919.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed, with a direction to enter a decree for the plaintiff, a decree of the District Court for the District of New Mexico, dismissing the bill in a suit to enjoin a threatened breach of trust by the commissioner of public lands of the state of New Mexico. Affirmed.

See same case below, 159 C. C. A. 7, 246 Fed. 277.

The facts are stated in the opinion.

Mr. **A. B. Renehan** submitted the cause for appellant. Mr. Carl H. Gilbert was on the brief:

This was a suit against the state of New Mexico.

Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Sundry African Slaves v. Madrazo, 1 Pet. 110, 7 L. ed. 73; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; Louisiana ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 Sup. Ct. Rep. 511; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919.

The trust estate is chargeable with the reasonably necessary expenses of its administration.

Atty. Gen. ex rel. Bignold v. Norwich, 2 Myl. & C. 424, 40 Eng. Reprint, 702; Crump v. Baker, 18 Ves. Jr. 285, 34 Eng. Reprint, 325; Meddaugh v. Wilson, 151 U. S. 333, 38 L. ed. 183, 14 Sup. Ct. Rep. 356; Perry, Trusts, § 910; Rex v. Sewer Comrs. 1 Barn. & Ad. 232, 109 Eng. Reprint, 773, 9 L. J. Mag. Cas. 30; Rex v. Essex, 4 T. R. 591, 100 Eng. Reprint, 1193, 2 Revised Rep. 470; Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Worrall v. Harford, 8 Ves. Jr. 8, 32 Eng. Reprint, 251.

The reasonableness of expenses depends on the nature of the trust.

Hill, Trustees, chap. 5, p. 570.

Publicity is required in trusts to sell.

Connolly v. Parsons, 3 Ves. Jr. 628, note, 30 Eng. Reprint, 119, note; Dounes v. Grazebrook, 3 Meriv. 208, 36 Eng. Reprint, 80, 17 Revised Rep. 62; Mortlock v. Buller, 10 Ves. Jr. 309, 32 Eng. Reprint, 863, 7 Revised Rep. 417; Ord v. Noel, 5 Madd. Ch. 440, 56 Eng. Reprint, 963, 21 Revised Rep. 328; Wilkins v. Fry, 1 Meriv. 268, 35 Eng. Reprint, 673, 2 Rose, 375, 15 Revised Rep. 110.

A contract for sale must not be entered into under circumstances of haste or improvidence.

Ord v. Noel, 5 Madd. Ch. 440, 56 Eng. Reprint, 963, 21 Revised Rep. 328.

The trial court should have considerable latitude of discretion in determining what expenses are reasonable.

Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

Reasonableness of expenses is gauged by business usage.

Perry, Trusts, § 770; Phelps v. Harris, 101 U. S. 380, 25 L. ed. 859.

Where, as here, the question is solely one of whether or not the trustee is efficiently discharging his duties, the administration of the trust should not be interfered with by injunction unless a gross abuse of discretion be shown.

Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; Colton v. Colton, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

Assistant Attorney General **Frierson** submitted the cause for appellee. Assistant Attorney General Nebeker and Mr. Leslie C. Garnett filed a brief:

The district court had jurisdiction of the case.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Truax v. Raich, 239 U. S. 33, 37, 60 L. ed. 131, 133, L.R.A.1916D. 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Looney v. Crane Co. 245 U. S. 178, 191, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; Cavanaugh v. Looney, 248 U. S. 453, 456, 63 L. ed. 354, 357, 39 Sup. Ct. Rep. 142.

[45] Mr. Justice **McKenna** delivered the opinion of the court:

Suit to enjoin the expenditure by appellant, commissioner of public lands of the state of New Mexico, of any of the funds derived from the sale and lease of lands granted and confirmed to the state by the act admitting her into the Union. The right to sell or lease is asserted under a certain act of New Mexico entitled, "An Act Concerning the Publicity and Promotion of Public Resources and Welfare."

The Enabling Act was passed June 20, 1910 [36 Stat. at L. 557, chap. 310], and on August 21, 1911 [37 Stat. at L. 39], by a joint resolution of the Senate and House of Representatives, New Mexico and Arizona were admitted into the Union upon an equal footing with the original states.

By the Enabling Act certain grants of public lands were made to New Mexico for purposes of which there was a specific enumeration.

It is provided by § 10 of the act that the lands granted and transferred thereby "shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

And it is further provided that the "disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust."

It is made the duty of the Attorney General of the [46] United States to prosecute in the name of the United States such proceedings at law or in equity as may be necessary to enforce the provisions of the act "relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

The Constitutional Convention was required to provide, by an ordinance irrevocable without the consent of the United States and the people of the state, that the state and its people consent to the provisions of the act, and the Constitution of the state did so provide.

The legislature of the state, on March 8, 1915, passed, over the governor's veto, an act entitled as we have designated, the first section of which is as follows:

"Sec. 1. It shall be unlawful for the commissioner of public lands to expend for making known the resources and advantages of this state generally and particularly to home seekers and investors, more than 3 cents on the dollar of the annual income of his office from sales and leases of lands, but, up to such limit of money annually, he may give or cause to be given publicity to such resources and advantages, and do or cause to be done all incidental work, in his judgment advisable to be done."

The commissioner receives from sales and leases of the lands granted a large income annually, the income for the year ending December 31, 1914, being approximately $741,000, and he threatens to expend 3 cents on the dollar of the annual income derived from sales and leases to give publicity to the resources and advantages of the state generally in conformity with the act of the legislature of March 8, 1915, and, unless restrained, will do so.

The answer, though in form a denial of some of the averments of the bill and an admission of others, is really an objection to its sufficiency to authorize the relief prayed, and the ground of objection is that the bill, taken as a whole,

"is no more than an attempt to interfere with the due administration of a trust estate by the trustee, the [47] state of New Mexico, which requires the payment of necessary and proper expenses out of the income or proceeds of the trust property, the grantor of the trust, the government of the United States, having made no other provision for the payment of such necessary and proper costs and expenses; and defendant avers that the expenditure of a small portion of such income and proceeds for the purpose of advertising the resources of the state and the value of its lands, with the hope of thereby increasing the demand for the purchase and leasing of such lands and in the enhancing of the prospective prices to be derived therefrom, is a proper and necessary expense of the administration of said trust estate."

A temporary injunction was applied for and denied, and subsequently the case by stipulation was submitted upon bill and answer, upon which it was ordered that the bill be and it was dismissed.

The decree was reversed by the circuit court of appeals, and the case remanded with direction to enter a decree for the United States. This appeal was then prosecuted.

The case is not in broad range and does not demand much discussion. There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted, and the enumeration is necessarily exclusive of any other purpose. And to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same. To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should "be deemed a breach of trust."

The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, in prophetic realization, it may be, that the state might be tempted [48] to do that which it has done, lured from patient methods to speculative advertising in the hope of a speedy prosperity.

It must be admitted there was enticement to it and a prospect of realization, and such was the view of the district court. The court was of opinion that a private proprietor of the lands would, without hesitation, use their revenues to advertise their advantage, and that that which was a wise administration of the property in him could not reach the odious dereliction of a breach of trust in the state.

The phrase, however, means no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations. The careful opinion of the Circuit Court of Appeals has made it unnecessary. We approve, therefore, its conclusion and affirm its decree.

Affirmed.

LIVERPOOL, BRAZIL, & RIVER PLATE STEAM NAVIGATION COMPANY, Petitioner,

v.

BROOKLYN EASTERN DISTRICT TERMINAL.

(See S. C. Reporter's ed. 48-54.)

Shipping — limiting liability — interest in adventure.

The value of a car float and a disabled tug lashed to either side of another tug which was actually responsible for a collision cannot, although they were all owned by the same person, be included, when limiting liability, conformably to U. S. Rev. Stat. §§ 4283-4285, which provide that the liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel.

[For other cases, see Shipping, V. c, 4, in Digest Sup. Ct. 1908.]

[No. 81.]

Argued November 14, 1919. Decided December 8, 1919.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York for the limitation of liability of a vessel owner. Affirmed.

See same case below, 162 C. C. A. 664, 250 Fed. 1021.

The facts are stated in the opinion.

Note.—On limitation of shipowner's liability—see note to Lawton v. Comer, 7 L.R.A. 55.

Mr. **Van Vechten Veeder** argued the cause, and, with Mr. Charles C. Burlingham, filed a brief for petitioner:

Where two vessels without motive power are lashed alongside and in tow of a steam tug, the three vessels forming a flotilla owned in common, engaged in the same adventure, and operated by the servants of the owner, the owner is entitled to limit his liability for negligent navigation only upon surrendering the whole flotilla.

The Main v. Williams, 152 U. S. 122, 131, 38 L. ed. 381, 384, 14 Sup. Ct. Rep. 486; Thompson Towing & Wrecking Asso. v. McGregor, 124 C. C. A. 479, 207 Fed. 209; The Columbia, 19 C. C. A. 436, 44 U. S. App. 326, 73 Fed. 226; Oregon R. & Nav. Co. v. Balfour, 33 C. C. A. 57, 61 U. S. App. 150, 90 Fed. 295; The San Rafael, 72 C. C. A. 388, 141 Fed. 270; Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co. 134 C. C. A. 575, 218 Fed. 161; The Bordentown, 40 Fed. 682; The Anthracite, 162 Fed. 388.

There may be no liability whatever in rem, and yet the shipowner may be entitled to limit his liability by surrendering the vessel which was concerned in the disaster.

The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; Richardson v. Harmon, 222 U. S. 96, 56 L. ed. 110, 32 Sup. Ct. Rep. 27.

The limitation statute, being in derogation of the common-law rights of the claimant, is to be construed strictly against the shipowner.

The Main v. Williams, 152 U. S. 122, 38 L. ed. 381, 14 Sup. Ct. Rep. 486.

Mr. **Samuel Park** argued the cause, and, with Mr. Henry E. Mattison, filed a brief for respondent:

A tug and her tow cannot be regarded as one vessel for the purpose of ascertaining their relations between themselves, or their several liabilities to respond for the consequences of a fault of one of them.

The W. G. Mason, 74 C. C. A. 83, 142 Fed. 913; The Transfer No. 21, 160 C. C. A. 469, 248 Fed. 459; The Coastwise, 147 C. C. A. 71, 233 Fed. 4; Van Eyken v. Erie R. Co. 117 Fed. 717; The Erie Lighter 108, 250 Fed. 497; The Mary P. Riehl, 259 Fed. 919; The Sunbeam, 115 C. C. A. 370, 195 Fed. 470; United States v. The Adhel, 2 How. 210, 11 L. ed. 239; The China, 7 Wall. 53, 19 L. ed. 67; Ralli v. Troop, 157 U. S. 402, 39 L. ed. 749, 15 Sup. Ct. Rep. 657; Cushing v. The John Fraser (The James Gray v. The John Fraser) 21 How. 194, 16 L. ed. 110; The Carrie L. Tyler, 54 L.R.A. 236, 45 C. C. A. 374, 106 Fed. 425; The Civilta, 103 U. S. 699, 26 L. ed. 599; Cushing v. The John Fraser (The James Gray v. The John Fraser) 21 How. 184, 16 L. ed. 106; Sturgis v. Boyer, 24 How. 122, 16 L. ed. 594; The John G. Stevens, 170 U. S. 122, 42 L. ed. 973, 18 Sup. Ct. Rep. 344; The Eugene F. Moran, 212 U. S. 466, 53 L. ed. 600, 29 Sup. Ct. Rep. 339; Union S. S. Co. v. The Aracan, 2 Asp. Mar. L. Cas. 350; L. R. 6 P. C. 127, 43 L. J. Prob. N. S. 30, 31 L. T. N. S. 42, 22 Week. Rep. 927.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a libel in admiralty brought by the petitioner against the respondent for a collision with the petitioner's steamship Vauban while it was moored at a pier in Brooklyn. The respondent does not deny liability, but claims the right to limit it under Rev. Stat. §§ 4283–4285, Comp. Stat. §§ 8021–8023, 6 Fed. Stat. Anno. 2d ed. pp. 336, 360, 363, to the value of the vessel that caused the damage. The moving cause was the respondent's steam tug Intrepid, which was proceeding up the East river, with a car float loaded with railroad cars lashed to its port side and on its starboard side a disabled tug, both belonging to the [52] respondent. By a stipulation dated August 3, 1917, it was agreed that the damage sustained was $28,036.98, with $5,539.84 interest. The value of the tug Intrepid was found to be $5,750, and the liability of the respondent was limited by the district court to that sum, with interest. The circuit court of appeals affirmed the decree without an opinion. 162 C. C. A. 664, 250 Fed. 1021. The case is brought here on the question whether the value of the whole flotilla should not have been included in the decree.

The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility. Cushing v. The John Fraser (The James Gray v. The John Fraser) 21 How. 184, 15 L. ed. 106; The J. P. Donaldson, 167 U. S. 599,

603, 604, 42 L. ed. 292, 294, 295, 17 Sup. Ct. Rep. 951; The Eugene F. Moran, 212 U. S. 466, 474, 475, 53 L. ed. 600, 603, 604, 29 Sup. Ct. Rep. 339; Union S. S. Co. v. The Aracan, L. R. 6 P. C. 127, 43 L. J. Prob. N. S. 30, 31 L. T. N. S. 42, 22 Week. Rep. 927, 2 Asp. Mar. L. Cas. 350. The rule is not changed by the ownership of the vessels. The John G. Stevens, 170 U. S. 113, 123, 42 L. ed. 969, 973, 18 Sup. Ct. Rep. 544; The W. G. Mason, 74 C. C. A. 83, 142 Fed. 913, 917; 212 U. S. 466, 475; L. R. 6 P. C. 127, 133. These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it. If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid, and so were more helplessly under its control than in the ordinary case of a tow.

It is said, however, that when you come to limiting liability, the foregoing authorities are not controlling,—that the object of the statute is "to limit the liability of vessel owners to their interest in the *adventure*" (The Main v. Williams, 152 U. S. 122, 131, 38 L. ed. 381, 384, 14 Sup. Ct. Rep. 486), and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it [53] was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. But that is the question, and it is not answered by putting it. The respondent answers the argument with the suggestion that, if sound, it applies a different rule in actions in personam from that which, as we have said, governs suits in rem. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the petitioner contends.

The statute follows the lead of European countries, as stated in The Main v. Williams, 152 U. S. 122, 126, 127, 38 L. ed. 381–383, 14 Sup. Ct. Rep. 486. Whatever may be the doubts as to the original grounds for limiting liability to the ship, or with regard to the historic starting point for holding the ship responsible as a moving cause (The Blackheath (United States v. Evans) 195 U. S. 361, 366, 367, 49 L. ed. 236, 237, 238, 25 Sup. Ct. Rep. 46), it seems a permissible conjecture that both principles, if not rooted in the same conscious thought, at least were influenced by the same semiconscious attitude of mind. When the continental law came to be followed by Congress, no doubt, alongside of the desire to give our shipowners a chance to compete with those of Europe, there was in some sense an intent to limit liability to the venture; but such a statement gives little help in deciding where the line of limitation should be drawn. No one, we presume, would contend that other unattached vessels, belonging, if you like, to the same owner, and co-operating to the same result with the one in fault, would have to be surrendered. Thompson Towing & Wrecking Asso. v. McGregor, 124 C. C. A. 479, 207 Fed. 209, 212–214; The Sunbeam, 115 C. C. A. 370, 195 Fed. 468, 470; The W. G. Mason, 74 C. C. A. 83, 142 Fed. 913, 919. The notion, as applicable to a collision case, seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III.: "If my dog kills your sheep and I, freshly after the fact, tender you the dog, you are without recourse against me." Fitzh. Abr. Barre, 290. The words of the [54] statute are: "The liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel." The literal meaning of the sentence is reinforced by the words "in no case." For clearly the liability would be made to exceed the interest of the owner "in such vessel" if you said frankly, "In some cases we propose to count other vessels in although they are not 'such vessel;'" and it comes to the same thing when you profess a formal compliance with the words, but reach the result by artificially construing "such vessel" to include other vessels if only they are tied to it. Earlier cases in the second circuit had disposed of the question there, and those in other circuits for the most part, if not wholly, are reconcilable with them. We are of opinion that the decision was right. The Transfer No. 21, 160 C. C. A. 469, 248 Fed. 459; The W. G. Mason, 74 C. C. A. 83, 142 Fed. 913; The Erie Lighter 108, 250 Fed. 490, 497, 498; Van Eyken v. Erie R. Co. 117 Fed. 712, 717.

Decree affirmed.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
EVA ROBERTS COLE, as Administratrix of the Estate of A. W. Roberts, Deceased, for Herself, Sarah F. Roberts, Claude Roberts, and Barnum Roberts.

(See S. C. Reporter's ed. 54-56.)

Constitutional law — due process of law — remedies and procedure — abolishing common-law defenses — contributory negligence.

1. A state may, consistently with due process of law, abolish the defense of contributory negligence.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — remedies and procedure — making contributory negligence a question for the jury.

2. There is nothing in the 14th Amendment to the Federal Constitution that deprives a state from providing in its Constitution that the defense of contributory negligence shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

[No. 290.]

Submitted on motion to dismiss or affirm November 17, 1919. Decided December 8, 1919.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Oklahoma County, in that state, in favor of plaintiff in an action for death. Affirmed.

See same case below, — Okla. —, 177 Pac. 570.

The facts are stated in the opinion.

Mr. R. J. Roberts submitted the cause for plaintiff in error. Messrs. C. O. Blake and John E. DuMars were on the brief:

The common-law defense of contributory negligence was not taken away or changed by the provision of article 23, § 6, of the Oklahoma Constitution.

McKennon v. Winn, 1 Okla. 334, 22 L.R.A. 501, 33 Pac. 582; Severy v. Chicago, R. I. & P. R. Co. 6 Okla. 153, 50 Pac. 162, 3 Am. Neg. Rep. 463; Pittman v. El Reno, 4 Okla. 638, 46 Pac. 495; St. Louis & S. F. R. Co. v. Long, 41 Okla. 190, 137 Pac. 1156, Ann. Cas. 1915C, 432; Hailey-Ola Coal Co. v. Morgan, 39 Okla. 71, 134 Pac. 29; Frederick Cotton Oil & Mfg. Co. v. Traver, 36 Okla. 717, 129 Pac. 747; Chicago, R. I. & P. R. Co. v. Duran, 38 Okla. 719, 134 Pac. 876; St. Louis & S. F. R. Co. v. Loftis, 25 Okla. 496, 106 Pac. 824; Missouri, K. & T. R. Co. v. Shepherd, 20 Okla. 629, 95 Pac. 243; Chicago, R. I. & P. R. Co. v. Pitchford, 44 Okla. 197, 143 Pac. 1146; Chickasha Cotton Oil Co. v. Brown, 39 Okla. 245, 134 Pac. 850.

There is no inherent difference between negligence of plaintiff and negligence of defendant,—both are contributory; and the Oklahoma supreme court has frequently and expressly recognized the rule that whether or not an act is negligent is a question of law only, except where the minds of reasonable men might differ with reference thereto.

Missouri, K. & T. R. Co. v. Shepherd, 20 Okla. 629, 95 Pac. 243; St. Louis & S. F. R. Co. v. Loftis, 25 Okla. 496, 106 Pac. 824; Muskogee Vitrified Brick Co. v. Napier, 34 Okla. 618, 126 Pac. 792; Midland Valley R. Co. v. Bailey, 34 Okla. 193, 124 Pac. 987; Smith v. Acme Mill. Co. 34 Okla. 439, 126 Pac. 190; St. Louis & S. F. R. Co. v. Hess, 34 Okla. 615, 126 Pac. 760.

These decisions of the Oklahoma supreme court were in accordance with the established rule.

1 Shearm. & Redf. Neg. 6th ed. §§ 52, 56.

The right to the defense of contributory negligence, and to such defenses as bar recovery, became a substantial, vested right, protected by the Federal Constitution, at the time of the occurrence upon which the action was brought.

Cooley, Const. Lim. 521; Bicknell v. Comstock, 113 U. S. 149, 28 L. ed. 962, 5 Sup. Ct. Rep. 399; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Pritchard v. Norton, 106 U. S. 141, 27 L. ed. 110, 1 Sup. Ct. Rep. 102; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488; Merchants Nat. Bank v. East Grand Forks, 94 Minn. 246, 102 N. W. 703.

The guaranty of due process and the equal protection of law assures a continuance of a government of impartial laws, and the existence of judicial tribunals to construe and apply them; and the 14th Amendment having had in view principles, conditions, and meanings in

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

jurisprudence as known at the time of the adoption, evasion by attempts at violation of those meanings is forbidden.

McGehee, Due Process of Law, 59; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Huber v. Guggenheim, 89 Fed. 601; Thayer, Ev. pp. 191–193; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67.

The constitutional convention unquestionably had the power to vary the common law and to reject the rules making assumption of risk and contributory negligence defenses, but it has not done so.

St. Louis & S. F. R. Co. v. Long, 41 Okla. 190, 137 Pac. 1156, Ann. Cas. 1915C, 432.

The guaranty of the equal protection of the laws and due process of law forbids the investment of arbitrary powers of determination and use of variant standards for the test of negligence. Judicial power is jurisdiction, and there can be no judgment without jurisdiction, and a judical determination, or confession, or admission; and juries have no judicial powers under the Constitution and laws of Oklahoma, and there has been no pretense of conferring such powers as to this question.

Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064; McGehee, Due Process of Law, pp. 59, 60; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 314, 120 N. W. 756, 21 Am. Neg. Rep. 394; Cooley, Const. Lim. 589; Baker v. Newton, 27 Okla. 446, 112 Pac. 1034; Hopkins v. Nashville, C. & St. L. R. Co. 96 Tenn. 409, 32 L.R.A. 354, 34 S. W. 1031; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Luce v. Garrett, 4 Ind. Terr. 54, 64 S. W. 613; Ervine's Appeal, 16 Pa. 256, 55 Am. Dec. 499; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 809, 20 Am. St. Rep. 123, 46 N. W. 128; Wiseman v. Tanner, 221 Fed. 714; Blaker v. State, 130 Ind. 203, 29 N. E. 1077.

Messrs. **W. A. Ledbetter** and **H. L. Stuart** submitted the cause for defendants in error. Messrs. R. R. Bell and E. P. Ledbetter were on the brief:

A state may abolish contributory negligence as a defense.

Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553.

If a state can abolish contributory negligence as a defense, it certainly has the power to declare that the defense of contributory negligence shall be one of fact, to be determined by the jury.

Bowersock v. Smith, 243 U. S. 29, 35, 61 L. ed. 572, 577, 37 Sup. Ct. Rep. 371; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67–78, 59 L. ed. 1204–1211, 35 Sup. Ct. Rep. 678; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211–220, 60 L. ed. 961–964, L.R.A.1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505; St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223–228, 60 L. ed. 966–969, 36 Sup. Ct. Rep. 602.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action brought by the defendant in error for knocking down and killing her intestate, Roberts. He stepped upon the railroad track when a train was approaching in full view, and was killed. It may be assumed, as the state court assumed, that, if the question were open for a ruling of law, it would be ruled that the plaintiff could not recover. But the Oklahoma Constitution provides that "the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." Art. 23, § 6. The case was left to the jury, and they found a verdict for the plaintiff. Judgment was entered for her and was affirmed on error by the supreme court of the state, which held that the provision applied to the case, and that, when so applied, it did not contravene the 14th Amendment of the Constitution of the United States.

The state Constitution was in force when the death occurred, and therefore the defendant had only such right to the defense of contributory negligence as that Constitution allowed. The argument that the railroad company had a vested right to that defense is disposed of by the decisions that it may be taken away altogether. Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer), 250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553; Bowersock v. Smith, 243 U. S. 29, 34, 61 L. ed. 572, 577, 37 Sup. Ct. Rep. 371. It is said that legislation cannot [56] change the standard of conduct, which is matter of law in its nature, into matter of fact,

and this may be conceded; but the material element in the constitutional enactment is not that it called contributory negligence fact, but that it left it wholly to the jury. There is nothing, however, in the Constitution of the United States or its Amendments, that requires a state to maintain the line with which we are familiar between the functions of the jury and those of the court. It may do away with the jury altogether (Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678), modify its constitution (Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494), the requirements of a verdict (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, L.R.A.1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505), or the procedure before it (Twining v. New Jersey, 211 U. S. 78, 111, 53 L. ed. 97, 111, 29 Sup. Ct. Rep. 14; Frank v. Mangum, 237 U. S. 309, 340, 59 L. ed. 969, 985, 35 Sup. Ct. Rep. 582). As it may confer legislative and judicial powers upon a commission not known to the common law (Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67), it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the states, and the controversy with regard to their powers in matters of law more generally as illustrated in Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168, and Georgia v. Brailsford, 3 Dall. 1, 4, 1 L. ed. 483, 484, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished, when the ground might have been altogether removed.

Judgment affirmed.

---

[57] TALBOT DARBY BRAGG, Plff. in Err.,
v.
R. S. WEAVER et al.

(See S. C. Reporter's ed. 57–62.)

Constitutional law — due process of law — eminent domain — notice and hearing.

1. Where the intended use of property taken by eminent domain is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate, these being legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 696–773; Eminent Domain, 73–75, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — eminent domain — notice and hearing.

2. It is essential to due process of law that the mode of determining the compensation to be paid for property taken by eminent domain be such as to afford the owner an opportunity to be heard.

[For other cases, see Constitutional Law, 696–773; Eminent Domain, 73–75, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — eminent domain — notice and hearing.

3. A sufficient opportunity to be heard respecting the compensation to be paid for the taking, under legislative sanction, of earth from land adjoining a highway, to be used in repairing the road, is afforded to the owner of such land, where the law contemplates that, in the absence of agreement, the compensation is to be assessed primarily by viewers, whose award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable, and that from the decision of the supervisors an appeal may be taken as of right to a court of general jurisdiction, in which the matter may be heard de novo, and where, under such law, the proceedings looking to an assessment may be initiated by the owner as well as by the road officers, either of whom may apply to a justice for the appointment of viewers, and where, although there is no express provision for notice at the inception or during the early stages of the proceedings, the statute provides that the claimant, if not present when

---

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required generally to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

Generally, as to what constitutes a taking of private property for public use—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; Osborne v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; and A. Backus, Jr., & Sons v. Fort Street Union Depot Co. 42 L. ed. U. S. 853.

the supervisors' decision is made, shall be notified in writing and shall have thirty days after such notice within which to appeal, and that if he be present when the decision is made, he is regarded as receiving notice at that time, the thirty days for taking the appeal beginning to run at once.

[For other cases, see Constitutional Law, 696–773; Eminent Domain, 73–75, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — eminent domain — notice and hearing.

4. Where adequate provision is made for the certain payment without unreasonable delay of compensation for property taken by eminent domain, the taking does not contravene due process of law in the sense of U. S. Const., 14th Amend., merely because it precedes the ascertainment of what compensation is just.

[For other cases, see Constitutional Law, 696–773; Eminent Domain, VI. c, in Digest Sup. Ct. 1908.]

[No. 22.]

Argued October 13, 1919. Decided December 8, 1919.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a decree which, by refusing an appeal, in effect affirmed a decree of the Circuit Court of Lunenburg County, in that state, refusing to enjoin an alleged trespass. Affirmed.

The facts are stated in the opinion.

Mr. **George E. Allen** argued the cause, and, with Mr. John Garland Pollard, filed a brief for plaintiff in error:

The Virginia statutes are violative of the 14th Amendment of the Constitution of the United States, because they authorize the taking by public officials of private property for public use, without due process of law.

Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312; Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Embree v. Kansas City & L. B. Road Dist. 240 U. S. 242, 60 L. ed. 624, 36 Sup. Ct. Rep. 317; St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 60 L. ed. 1072, 36 Sup. Ct. Rep. 647; Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 63, 67; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The extreme possibilities of the statute may be resorted to in order to test a law.

Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192.

The question whether the purpose of the taking is for a public use is a judicial question.

Sears v. Akron, 246 U. S. 242, 62 L. ed. 688, 38 Sup. Ct. Rep. 245.

Mr. **J. D. Hank, Jr.**, argued the cause, and, with Mr. John R. Saunders, Attorney General of Virginia, and Messrs. F. B. Richardson and N. S. Turnbull, Jr., filed a brief for defendants in error:

The state of Virginia, in the exercise of its sovereign power of eminent domain, may take private property for public use.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Cincinnati v. Louisville & N. R. Co. 223 U. S. 390, 56 L. ed. 481, 32 Sup. Ct. Rep. 267.

State statutes are presumed to be constitutional.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

No notice or hearing upon the expediency or necessity of the taking of private property for public use is required.

Lancaster v. Augusta Water Dist. 108 Me. 137, 79 Atl. 463, Ann. Cas. 1913A, 1252; Crozier v. Fried Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771, 32 Sup. Ct. Rep. 488.

Compensation need not be paid in advance of the taking.

Williams v. Parker, 188 U. S. 491, 493, 47 L. ed. 559, 560, 23 Sup. Ct. Rep. 440; Mt. Vernon Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, 33, 60 L. ed. 507, 511, 36 Sup. Ct. Rep. 234; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 658, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; Sweet v. Rechel, 159 U. S. 380, 401, 40 L. ed. 188, 197, 16 Sup. Ct. Rep. 43; A. Backus, Jr., & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 568, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445; Shoemaker v. United States, 147 U. S. 282, 297, 37 L. ed. 170, 184, 13 Sup. Ct. Rep. 361; Tait v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697.

Mr. Justice **Van Devanter** delivered the opinion of the court:

By this suit the owner of land adjoining a public road in Virginia seeks an injunction against the taking of earth from his land to be used in repairing the road. The taking is from the most convenient and nearest place, where it will

be attended by the least expense, and has the express sanction of a statute of the state. Pollard's Code 1904, § 944a, clauses 21 and 22.[1] Whether the statute denies to the owner the due process of law guaranteed by the 14th Amendment is the Federal question in the case. It was duly presented in the state court, and, while no opinion was delivered, the record makes it plain that, by the judgment rendered, the court resolved the question in favor of the validity of the statute.

It is conceded that the taking is under the direction of public officers and is for a public use; also that adequate provision is made for the payment of such compensation as may be awarded. Hence no discussion of these matters is required. The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.

Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. ed. 206, 207; A. [59] Backus, Jr., & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; Adirondack R. Co. v. New York, 176 U. S. 335, 349, 44 L. ed. 492, 499, 20 Sup. Ct. Rep. 460; Sears v. Akron, 246 U. S. 242, 251, 62 L. ed. 688, 698, 38 Sup. Ct. Rep. 245.

But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court, carrying with it a right to have the matter determined upon a full trial. United States v. Jones, 109 U. S. 513, 519, 27 L. ed. 1015, 1017, 3 Sup. Ct. Rep. 346; A. Backus, Jr., & Sons v. Fort Street Union Depot Co. 169 U. S. 569, 42 L. ed. 859, 18 Sup. Ct. Rep. 445. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. Lent v. Tillson, 140 U. S. 316, 326, et seq., 35 L. ed. 419, 424, 11 Sup. Ct. Rep. 825; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 537, 40 L. ed. 247, 251, 16 Sup. Ct. Rep. 83; Wells, F. & Co. v. Nevada, 248 U. S. 165, 168, 63 L. ed. 190, 192, 39 Sup. Ct. Rep. 62. And see Capital Traction Co. v. Hof, 174 U. S. 1, 18–30, 45, 43 L. ed. 873, 879–883, 889, 19 Sup. Ct. Rep. 580.

With these principles in mind we turn to the statute in question. By clause 21 it authorizes certain officers engaged in repairing public roads to take earth for that purpose from adjacent lands, and by clause 22 it declares:

"If the owner or tenant of any such land shall think himself injured thereby, and the superintendent of roads, or his deputy, can agree with such owner as to the amount of damage, they shall report the same to the board of supervisors, or, if they cannot agree, a justice, upon application to him, shall issue a warrant to three freeholders, requiring them to view the said land, and ascertain what is a just compensation to such owner or tenant for the damage to him by reason of anything done under the preceding section. The said freeholders, after being sworn according to the provisions of § 3 of this act,[2] [60] shall accordingly ascertain such compensation and report the same to the board of supervisors. Said board may allow the full amount so agreed upon, or reported by said freeholders, or so much thereof as upon investigation they may deem reasonable, subject to such owner or tenant's right of appeal to the circuit court as in other cases."

The same statute, in clause 5, deals with the compensation to be paid for lands taken for roadways, and in that connection provides that the proprietor or tenant, if dissatisfied with the amount allowed by the supervisors, "may of right appeal to the circuit court of said county, and the said court shall hear the matter de novo" and determine and certify the amount to be paid. And a general statute (§ 838), which regulates the time and mode of taking appeals from decisions of the supervisors disallowing claims in whole or in part, provides that the claimant, if present when the decision is made, may appeal to the circuit

[1] Other enactments of March 12, 1912, chap. 151, March 21, 1914, chap. 174, and March 17, 1916, chap. 279, make the statute specially applicable here, but they require no particular attention.

[2] ". . . that they will faithfully and impartially discharge their duty as viewers."

court within thirty days thereafter, and, if not present, shall be notified in writing by the clerk, and may appeal within thirty days after service of the notice.

Apart from what is implied by the decision under review, no construction of these statutory provisions by the state court of last resort has been brought to our attention; so, for the purposes of this case, we must construe them. The task is not difficult. The words employed are direct and free from ambiguity, and the several provisions are in entire harmony. They show that, in the absence of an agreement, the compensation is to be assessed primarily by viewers; that their award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable; and that, from the decision of the supervisors, an appeal lies as of right to the circuit court, where the matter may be heard de novo. Thus, by exercising the right to appeal, the owner may obtain a full hearing in a court of justice,—one concededly possessing and exercising a general jurisdiction. An opportunity to have such a [**61**] hearing, before the compensation is finally determined, and when the right thereto can be effectively asserted and protected, satisfies the demand of due process.

Under the statute the proceedings looking to an assessment may be initiated by the owner as well as by the road officers. Either may apply to a justice for the appointment of viewers. Thus the owner is free to act promptly and upon his own motion, if he chooses.

But it is contended that where the road officers take the initiative,—as they do in many instances,—the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore without his having an opportunity to take an appeal. We think the contention is not tenable. It takes into account some of the statutory provisions and rejects others equally important. It is true there is no express provision for notice at the inception or during the early stages of the proceedings; and for present purposes it may be assumed that such a requirement is not even implied, although a different view might be admissible. See Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750. But the provisions relating to the later stage—the decision by the supervisors—are not silent in respect of notice, but speak in terms easily understood. Clauses 5 and 22, taken together, provide that the owner, if dissatisfied with the decision, shall have the right to appeal as in other cases. This presupposes that he will have some knowledge of the decision; and yet neither clause states how the knowledge is to be obtained, or when or how the right of appeal is to be exercised. All this is explained, however, when § 838 is examined. It deals with these questions in a comprehensive way and evidently is intended to be of general application. Of course, newly created rights of appeal of the same class fall within its operation unless the legislature provides otherwise. Here the legislature has not provided otherwise, and so has indicated that it is content to have the general statute applied. As before stated, that [**62**] statute provides that the claimant, if not present when the supervisors' decision is made, shall be notified thereof in writing, and shall have thirty days after such notice within which to appeal. If he be present when the decision is made, he is regarded as receiving notice at that time, and the thirty days for taking an appeal begin to run at once. It is apparent, therefore, that special care is taken to afford him ample opportunity to appeal, and thereby to obtain a full hearing in the circuit court.

The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the 14th Amendment merely because it precedes the ascertainment of what compensation is just. Sweet v. Rechel, 159 U. S. 380, 402, 407, 40 L. ed. 188, 197, 198, 16 Sup. Ct. Rep. 43; A. Backus, Jr., & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; Williams v. Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 306, 56 L. ed. 771, 776, 32 Sup. Ct. Rep. 488. And see Branson v. Gee, 25 Or. 462, 24 L.R.A. 355, 36 Pac. 527. As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

We conclude that the objections urged against the validity of the statute are not well taken.

Judgment affirmed.

[63] ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

DICKSEY WILLIAMS and Lucy Williams.

(See S. C. Reporter's ed. 63–67.)

Constitutional law — due process of law — rate regulation — penalties.

1. The imposition of severe penalties as a means of enforcing railway passenger rates prescribed by statute is not a denial of due process of law in a case in which it does not appear that the carrier was not afforded an adequate opportunity for safely testing the validity of the rate, or that its deviation therefrom proceeded from any belief that the rate was invalid.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — rate regulation — penalties.

2. So far as due process of law is concerned, the penalty imposed by a state statute upon a railway company which exacts more than the prescribed passenger fares may be given to the aggrieved passenger, to be enforced by private suit, and such penalty need not be confined or apportioned to his loss or damage.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — rate regulation — penalties.

3. The penalties prescribed by a statute giving to a passenger aggrieved by a carrier's exaction of a fare in excess of the prescribed rate the right to recover in a civil suit not less than $50 nor more than $300 and costs of suit, including a reasonable attorney's fee, cannot be said to be so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable, and hence to amount to a denial of due process of law.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 66.]

Argued November 11, 1919. Decided December 8, 1919.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Clark County, in that state, in favor of plaintiffs in a suit to recover penalties for overcharge by a carrier in the transportation of passengers. Affirmed.

See same case below, 131 Ark. 442, 199 S. W. 376.

The facts are stated in the opinion.

Mr. **Robert E. Wiley** argued the cause, and, with Messrs. Edward J. White and Edgar B. Kinsworthy, filed a brief for plaintiff in error:

This statute takes the carrier's property without due process of law, and denies to it the equal protection of the laws, contrary to the 14th Amendment, because the penalty is arbitrary and unreasonable, and not in proportion to the actual damages sustained.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 51 L. ed. 933, 942, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 205, 54 L. ed. 727, 731, 30 Sup. Ct. Rep. 467, 18 Ann. Cas. 989; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

The penalty is relatively exorbitant when considered in connection with its purpose.

Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214; St. Louis, I. M. & S. R. Co. v. Waldrop, 93 Ark. 42, 123 S. W. 778; Missouri P. R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752; St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18.

The statute is violative of the 14th Amendment because the penalties provided by it are so severe as to deprive the carrier of the right to resort to the courts to test its validity.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961.

No brief was filed for defendants in error.

Mr. Justice **Van Devanter** delivered the opinion of the court:

By a statute of Arkansas, regulating rates for the transportation of passengers between points within the state, [64] any railroad company that demands or collects a greater compensation than the statute prescribes is subjected "for every such offense" to a penalty of "not less than $50 nor more than $300 and costs of suit, including a reasonable attorney's fee," and the aggrieved passenger is given a right to recover the same

Note.—On excessive penalties as denial of constitutional rights—see notes to Washington v. Crawford, 46 L.R.A. (N.S.) 1039, and Rail & River Coal Co. v. Yaple, 59 L. ed. U. S. 608.

in a civil action. Act April 4, 1887, Laws 1887, p. 227; Kirby's Dig. 1904, § 6620; Act March 4, 1915, Laws 1915, p. 365; Kirby & C. Dig. 1916, § 8094.

In June, 1915, a company operating a line of railroad within the state demanded and collected 66 cents more than the prescribed fare from each of two sisters carried over part of its line when returning to their home from a school commencement elsewhere in the state; and in suits separately brought for the purpose, and afterwards consolidated, these passengers obtained judgments against the company for the overcharge, a penalty of $75 and costs of suit, including an attorney's fee of $25. The company appealed, asserting that the provision for the penalty was repugnant to the due process of law clause of the 14th Amendment; but the supreme court of the state sustained the provision and affirmed the judgments. 131 Ark. 442, 199 S. W. 376. To obtain a review of that decision the company prosecutes this writ of error.

The grounds upon which the provision is said to contravene due process of law are, first, that the penalty is "so severe as to deprive the carrier of the right to resort to the courts to test the validity" of the rate prescribed, and, second, that the penalty is "arbitrary and unreasonable, and not proportionate to the actual damages sustained."

It is true that the imposition of severe penalties as a means of enforcing a rate, such as was prescribed in this instance, is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity [**65**] of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches. The reasons why this is so are set forth fully and plainly in several recent decisions and need not be repeated now. Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 53 L. ed. 382, 400, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 207, 208, 54 L. ed. 727, 731, 732, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 659, et seq., 59 L. ed. 405, 410, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

And it also is true that where such an opportunity is afforded and the rate is adjudged valid, or the carrier fails to avail itself of the opportunity, it then is admissible, so far as due process of law is concerned, for the state to enforce adherence to the rate by imposing substantial penalties for deviations from it. Wadley Southern R. Co. v. Georgia, supra, pp. 667 et seq.; Gulf, C. & S. F. R. Co. v. Texas, 246 U. S. 58, 62, 62 L. ed. 574, 578, 38 Sup. Ct. Rep. 236.

Here it does not appear that the carrier had not been afforded an adequate opportunity for safely testing the validity of the rate, or that its deviation therefrom proceeded from any belief that the rate was invalid. On the contrary, it is practically conceded—and we judicially know—that if the carrier really regarded the rate as confiscatory, the way was open to secure a determination of that question by a suit in equity against the Railroad Commission of the state, during the pendency of which the operation of the penalty provision could have been suspended by injunction. Wadley Southern R. Co. v. Georgia, supra. See also Allen v. St. Louis, I. M. & S. R. Co. 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030; Rowland v. Boyle, 244 U. S. 106, 61 L. ed. 1022, P.U.R. 1917C, 685, 37 Sup. Ct. Rep. 577; St. Louis, I. M. & S. R. Co. v. McKnight, 244 U. S. 368, 61 L. ed. 1200, 37 Sup. Ct. Rep. 611. And the record shows that at the trial the carrier not only did not raise any question about the correct fare, but proposed and secured an instruction to the jury wherein the prescribed rate was recognized as controlling.

[**66**] It therefore is plain that the first branch of the company's contention cannot prevail.

The second branch is more strongly urged, and we now turn to it. The provision assailed is essentially penal, because primarily intended to punish the carrier for taking more than the prescribed rate. St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 106, 11 L.R.A. 452, 15 S. W. 18; St. Louis, I. M. & S. R. Co. v. Waldrop, 93 Ark. 42, 45, 123 S. W. 778. True, the penalty goes to the aggrieved passenger, and not the state, and is to be enforced by a private, and not a public, suit. But this is not contrary to due process of law; for, as is said in Missouri P. R. Co. v. Humes, 115 U. S. 512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110, "the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the pub-

lic, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion." Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state. See Marvin v. Trout, 199 U. S. 212, 225, 50 L. ed. 157, 162, 26 Sup. Ct. Rep. 31.

The ultimate question is whether a penalty of not less than $50 and not more than $300 for the offense in question can be said to bring the provision prescribing it into conflict with the due process of law clause of the 14th Amendment.

That this clause places a limitation upon the power of the states to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the states still possess a wide latitude of discretion in the matter, and that their enactments transcend the limitation only where the penalty [67] prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. Coffey v. Harlan County, 204 U. S. 659, 662, 51 L. ed. 666, 668, 27 Sup. Ct. Rep. 305; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 78, 52 L. ed. 108, 110, 28 Sup. Ct. Rep. 28; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 111, 53 L. ed. 417, 430, 29 Sup. Ct. Rep. 220; Collins v. Johnston, 237 U. S. 502, 510, 59 L. ed. 1071, 1079, 35 Sup. Ct. Rep. 649.

Of this penalty and the need for it the supreme court of the state says: "It is commonly known that carriers are not prone to adhere uniformly to rates lawfully prescribed, and it is necessary that deviation from such rates be discouraged and prohibited by adequate liabilities and penalties; and we regard the penalties prescribed as no more than reasonable and adequate to accomplish the purpose of the law and remedy the evil intended to be reached." Chicago, R. I. & P. R. Co. v. Davis, 114 Ark. 519, 525, 170 S. W. 245.

When the penalty is contrasted with the overcharge possible in any instance it, of course, seems large; but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Judgment affirmed.

Mr. Justice **McReynolds** dissents.

---

[68] CORSICANA NATIONAL BANK OF CORSICANA, Plff. in Err.,
v.
SAMUEL WISTAR JOHNSON.

(See S. C. Reporter's ed. 68-94.)

National banks — liability of director — excessive loan — knowing participation or assent.

1. Directors of a national bank cannot be held liable, under U. S. Rev. Stat. §§ 5200 and 5239, for knowingly participating in or assenting to an excessive loan unless such participation or assent was not through mere negligence, but was knowing and in effect intentional. If, however, a director deliberately refrains from investigating that which it is his duty to investigate, any violation of the statute must be regarded as in effect intentional.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

Trial — province of court and jury — weight of evidence.

2. What weight should be given to substantial evidence tending to support the plaintiff's view of disputed facts is for the jury, not the court, to determine.

[For other cases, see Trial, VI. a, in Digest Sup. Ct. 1908.]

Note.—On liability of bank directors in case of bad loans or investments—see notes to Greenfield Sav. Bank v. Abercrombie, 39 L.R.A.(N.S.) 173, and Bosworth v. Allen, 55 L.R.A. 751.

As to care required of bank directors —see note to Swentzel v. Penn Bank, 15 L.R.A. 305.

As to fact that loan by bank was excessive—see note to Elmo State Bank v. Hildebrand, 3 A.L.R. 59.

As to province of court and jury, generally—see note to King v. Delaware Ins. Co. 3 L. ed. U. S. 155.

On limitation of actions against directors of corporation for malfeasance or nonfeasance—see note to Ventress v. Wallace, L.R.A.1917A, 980.

Liability of national bank directors for excessive loan to one borrower.

The present discussion has been confined to the liability of directors for violation of the statutory duty, and does not consider the liability for a violation of the common-law duty.

Pleading — sufficiency of allegations — action against national bank director.

3. An allegation in the amended petition in an action against a director of a national bank for knowingly participating, contrary to U. S. Rev. Stat. §§ 5200 and 5239, in an excessive loan, that the transaction set forth was a loan of that character, whether regarded as one loan to two persons designated as a "firm," as the plaintiff alleges the fact to be, or regarded as two loans, as contended for by the defendant in his pleadings theretofore filed, is sufficient if the proof tends to show a single and excessive loan made to such persons jointly in any capacity, or made in form one half to each, but in substance as a single loan.

[For other cases, see Pleading, II. j, in Digest Sup. Ct. 1908.]

Evidence — weight — denial.

4. The denial by a director of a national bank, in an action against him for knowingly participating, contrary to U. S. Rev. Stat. §§ 5200 and 5239, in an excessive loan, that such loan was a single one, or that he knew it to be such, is not conclusive where there is substantial evidence inconsistent with such denial, tending to show facts and circumstances attendant upon the transaction of which he had knowledge, and subsequent conduct in the nature

---

That there is a common-law obligation resting upon national bank directors in addition to the duty imposed by statute is settled by the United States Supreme Court in the recent case of Bowerman v. Hamner, 250 U. S. 504, 63 L. ed. 1113, 39 Sup. Ct. Rep. 549, in which the court, after referring to Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638, and Jones Nat. Bank v. Yates, 240 U. S. 542, 60 L. ed. 788, 36 Sup. Ct. Rep. 429, cases dealing with the liability of bank directors for making false reports of the financial condition of the bank, says: "While the cited cases hold that in a suit for damages against national bank directors based solely upon a violation of duty imposed by the National Bank Act, it is not enough to show a negligent violation of the act, but that something more in effect than intentional violation must be shown to justify a recovery, and that this is the exclusive rule for measuring the responsibility of directors as to such violations, yet it is expressly pointed out in the opinion of the court that the act does not relieve such directors from the common-law duty to be honest and diligent, as is shown by the oaths which they are required to take to 'diligently and honestly administer the affairs of the association' as well as not to 'knowingly violate or willingly permit to be violated any of the provisions of this title,'—the National Bank Act. The rule thus announced would perhaps be applicable if the bill were limited to the charge of liability based solely upon the statutory prohibition of excessive loans, for it is reasonably clear that Bowerman did not have actual knowledge of the making of the loans or of anything else connected with the conduct of the bank. He deliberately avoided acquiring knowledge of its affairs, and wholly abdicated the duty of supervision and control which rested upon him as a director. The National Bank Act imposes various specific duties on directors other than those imposed by the common law, and it is obviously possible that a director may neglect one or more of the former and not any of the latter, or vice versa. For example, in this case we have the gross negligence of the appellant in failing to discharge his common-law duty to diligently administer the affairs of the bank made the basis for the contention that he did not 'knowingly' violate his statutory duty by permitting the excessive loans to be made. While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, this does not prevent the application of the common-law rule for measuring violations of common-law duties. And there is no sound reason why a bill may not be so framed that if the evidence fails to establish statutory negligence, but establishes common-law negligence, a decree may be entered accordingly, and thus the necessity for a resort to a second suit avoided."

The contrary statement in Zinn v. Baxter, 65 Ohio St. 341, 62 N. E. 327, an action brought in the state court against directors for making excessive loans, to the effect that the rights of the bank and of its stockholders, as well as the liability of its officers and directors, were fixed and imposed by the National Bank Act alone, and that the statutes of Ohio, the common law, and rules of equity as to such rights and liabilities, had no application, so far as it denies the existence of a common-law duty resting upon directors, is no longer correct.

The National Bank Act, after prescribing the limit of loans to individuals, makes the directors who have "knowingly" participated in a loan in excess of the limit liable in their personal and individual capacity for all damages sustained in consequence of the excess loan. In accord with the plain provisions of this act, it is held that a director who

of admissions by him, also inconsistent with such denial.

[For other cases, see Evidence, XII. m, in Digest Sup. Ct. 1908.]

National banks — powers — limitations on loan.

5. The limitation in U. S. Rev. Stat. § 5200, upon the total liabilities to a national bank of any single borrower, will not be construed as including his liability as surety or indorser for money borrowed by another, in view of the long-continued practice and administrative rulings of the Comptroller of the Currency not to include such liabilities in the computation.

[For other cases, see Banks, IV. g, in Digest Sup. Ct. 1908.]

National banks — liability of director — excessive loans — standing of borrower.

6. The question whether a director of a national bank knowingly participated in or assented to, contrary to U. S. Rev. Stat. § 5239, the making of a loan in excess of the limit prescribed by § 5200, is not to be confused by any consideration of the supposed personal or financial standing of the borrower.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

National banks — liability of director — excessive loan — defenses.

7. The absence of any improper motive

participated in or assented to a loan in excess of the limit fixed is personally liable for damages suffered thereby. Witters v. Sowles (1887) 31 Fed. 1, s. c. on subsequent appeal, 43 Fed. 405. In fact, it is made a condition of liability that the director has participated in or consented to the loan. A director who does not knowingly participate in excessive loans is not liable. First Nat. Bank v. Noyes, 168 C. C. A. 543, 257 Fed. 593.

Speaking generally of the liability of directors in a national banking association under the provisions of U. S. Rev. Stat. § 5239, Comp. Stat. § 9831, 6 Fed. Stat. Anno. 2d ed. p. 873, the court, in Grandprey v. Bennett, — S. D. —, 172 N. W. 514, an action in which the plaintiff counted upon false and incorrect reports, the court states that "directors of national banks are liable for violations of the provisions of the Federal statute only when such violations are committed with knowledge on the part of the violators that they are violating such provisions; but that there is 'in effect' an intentional violation of such provisions whenever a director deliberately refuses to examine that which it is his duty to examine, or deliberately refuses to do any act which, under such provisions, it is his duty to perform."

It has been held that there must be actual knowledge, participation, or assent. A director is not constructively chargeable with the knowledge of the cashier, to whom the business of the bank has been intrusted by the directors, who have acted with proper caution. Clews v. Bardon, 36 Fed. 617.

The Federal courts differ as to the liability of a director to suit under the provisions of the National Bank Act before it has been adjudged that acts have been committed which justify the forfeiture of the charter. It has been held that an adjudication that acts have been committed such as justify a forfeiture of the charter is necessary before suit can be brought. Welles v. Graves, 41 Fed. 459. The opinion in this case was by Judge Shiras, and the conclusion reached therein was approved by him in the subsequent case of Gerner v. Thompson, 74 Fed. 125, an action against directors for having published false reports of the condition of the bank.

And this rule was adhered to in Hayden v. Thompson, 67 Fed. 273, a bill in equity by the receiver of a national bank against the stockholders and directors to recover dividends paid without sufficient earnings, the court stating that, so far as the directors were concerned, their liability could only be enforced by the receiver, acting under the direction of the Comptroller, after the violation of the statute had been judicially determined by a court of the United States, and a forfeiture declared.

But the majority view is to the contrary,—that a forfeiture is not a condition precedent to the maintenance of an action against the directors. Stephens v. Overstolz, 43 Fed. 771; National Bank v. Wade, 84 Fed. 10; Cockrill v. Cooper, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 7. This is the implied holding of Zimn v. Baxter, 65 Ohio St. 341, 62 N. E. 327.

In Stephens v. Overstolz, supra, it appeared as a fact that the charter of the bank had been forfeited, but in the view of the court this is immaterial. The court states that "according to our view of § 5239, Comp. Stat. § 9831, 6 Fed. Stat. Anno. 2d ed. p. 873, two results, in no respect dependent upon each other, may follow the making of an excessive loan; that is to say, the Comptroller may, if he thinks proper, proceed to have the charter revoked, alleging the excessive loan as a violation of law; but whether he does so or not, a director of the bank who knowingly participates in or assents to the loan may be compelled to make good whatever damage results to the bank from making the same. This

or desire for personal profit on defendant's part is no defense to an action against a director of a national bank for violating U. S. Rev. Stat. §§ 5200 and 5239, by knowingly participating in or assenting to an excessive loan.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

National banks — liability of director — excessive loan — joint or several liability.

8. Every director of a national bank knowingly participating in or assenting to a loan in excess of the limit prescribed by U. S. Rev. Stat. § 5200, is made liable by § 5239, in his personal and individual capacity, without regard to the question whether other directors likewise are liable; and he may alone be sued.

[For other cases, see Banks, IV. e, 3; Joint Creditors and Debtors, I. in Digest Sup. Ct. 1908.]

National banks — liability of director — excessive loan — insolvency of bank — change of stock interest.

9. A national bank may recover from a director the damages sustained by reason of his knowing participation in or assent to an excessive loan, contrary to U. S. Rev. Stat. §§ 5200 and 5239, although it remained solvent or even prosperous, and irrespective of any changes in stockholding interest or control occurring between the time the cause of action arose and the time of the commencement of the suit or of the trial, and even if the new stockholders acquired their interests with knowledge of the fact that a loss had been sustained, and that such director was responsible for it.

[For other cases, see Banks, IV. e, 3; Estoppel, III. b, in Digest Sup. Ct. 1908.]

---

seems to us to be the obvious meaning of the law."

A difference of opinion exists as to the tribunal in which the liability must be enforced. According to Welles v. Graves, 41 Fed. 459,—a case involving a complicated state of facts,—the liability can be enforced only in equity. The court in Cockrill v. Cooper, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 7, assumed that the question is whether equity has jurisdiction at all of such an action. It is held that the suit may be brought in equity. That such a suit may be brought in equity is held also in Emerson v. Gaither, 103 Md. 564, 8 L.R.A.(N.S.) 738, 64 Atl. 26, 7 Ann. Cas. 1114.

In National Bank v. Wade, 84 Fed. 10, it is held that even though the statute does create a liability enforceable by an action at law, "nevertheless it does not diminish the jurisdiction of the courts in equity unless the conditions are such that the remedy at law is equally adequate and complete. In this case the transactions involved are complicated by the subsequent exchanging of promissory notes and taking of property as security for the loans which are alleged to have caused the losses complained of. These securities must be converted into money or otherwise disposed of before the amount of the loss can be definitely ascertained. It is obvious, therefore, that the complainant is entitled to relief in equity because the remedy at law is not adequate or complete."

According to Stephens v. Overstolz, 43 Fed. 771, it may be enforced in an action at law.

In Corsicana Nat. Bank v. Johnson, 134 C. C. A. 510, 218 Fed. 822, apparently a former trial of the principal case, it is held that an action by the bank to hold an officer liable for damages sustained by the bank in consequence of the defendant knowingly violating the provision of the statute limiting loans is a suit to recover damages, and such a suit may be maintained at law, and is not cognizable by a court of equity, in the absence of any showing of the inadequacy of the legal remedy which is available.

It has been held that in such an action at law the issues that should be submitted to the jury are: (1) Whether the loans made to the borrower were made at a time when he was already indebted to the bank in a sum equal to one tenth of its capital actually paid in; (2) whether such loans were knowingly made or assented to by the director or officers sought to be held liable; and (3) what portion of the money so loaned was lost. City Nat. Bank v. Crow, 27 Okla. 107, 111 Pac. 210, Ann. Cas. 1912B. 647.

A director to whom a loan has been made in excess of the limit fixed by the National Bank Act becomes liable as a debtor to the bank, but is not liable as participating in or assenting to the loan on behalf of the bank. Witters v. Sowles, 31 Fed. 1.

It has been held that a bank director cannot be held liable for inducing the bank to extend credit to an individual beyond the statutory limit, where he was not, at the time, acting as director, but as agent for the borrower. Hicks v. Steel, 142 Mich. 292, 4 L.R.A.(N.S.) 279, 105 N. W. 767.

Limitation of actions — action to enforce liability of bank director — excessive loans.

10. The two years' limitation of Vernon's Sayles's Tex. Civ. Stat. 1914, art. 5687, is not applicable to a cause of action against a national bank director for knowingly participating in or assenting to an excessive loan, but such suit is governed by the four years' limitation prescribed by art. 5690 for actions for which no limitation is otherwise prescribed.

[For other cases, see Limitation of Actions, III. f, in Digest Sup. Ct. 1908.]

Action — time of — suit against national bank director — excessive loan.

11. A cause of action against a national bank director for knowingly participating in an excessive loan, contrary to U. S. Rev. Stat. §§ 5200 and 5239, accrues when the bank, through his act, parts with the money loaned, receiving in return negotiable paper that it cannot lawfully accept because the transaction is prohibited. The damage, as well as the injury, is complete at that time, and the bank is not obliged to await the maturity of the paper before suing.

[For other cases, see Action or Suit, I. b; Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

Damages — liability of national bank director — excessive loans.

12. The entire sum loaned, plus interest and less salvage, should be treated as the damages sustained by a national bank through a director's knowing participation in or assent to an excessive loan, contrary to U. S. Rev. Stat. §§ 5200 and 5239, and not merely the excess above what lawfully might have been loaned, where the entire excess loan formed but a single transaction.

[For other cases, see Damages, VI. h, in Digest Sup. Ct. 1908.]

Corporations — powers — corporations operating jointly.

13. A national bank and a loan company organized under state law must, notwithstanding identity of stock ownership and close affiliation in management, be regarded for some purposes as separate corporations; for instance, as being capable in law of contracting with each other.

[For other cases, see Corporations, VI. i, in Digest Sup. Ct. 1908.]

Corporations — officers — common directors — identity of stock ownership.

14. In considering the practical effect of intercorporate dealings, especially as bearing upon the duties of common directors and the authority of stockholders to control them, identity of stock ownership ought not to be overlooked.

[For other cases, see Corporations, V. d, in Digest Sup. Ct. 1908.]

National banks — liability of director — excessive loans — transfer of borrower's indebtedness.

15. The damages sustained by a national bank by reason of a director's knowing participation in or assent to an excessive loan, contrary to U. S. Rev. Stat. §§ 5200 and 5239, are satisfied by a transfer of the borrower's notes and indebtedness to another corporation for their full face value if, and only if, the transfer is good and valid as against such corporation and its stockholders, or is duly ratified by them.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

National banks — liability of director — excessive loan — transfer of borrower's indebtedness — rescission.

16. A national bank director cannot escape liability, under U. S. Rev. Stat. §§ 5200 and 5239, for knowingly participating in or assenting to an excessive loan because of a sale of the borrower's notes and indebtedness for their full face value to a loan company having the same directors and managers as the bank, and identity of stock ownership, if the transfer was made under circumstances rendering it voidable as against the loan company and as against the stockholders of both corporations, and the stockholders of the loan company exercised their right to rescind without unreasonable delay and gave notice to the bank, and the bank, recognizing the justness of the claim, restored to the loan company what was accepted as the equivalent in value of that which the bank had received for the transfer, the director not having changed his position and not being prejudiced by such delay as there was in exercising the right to rescind.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

Corporations — dummy directors — power to rescind fraudulent transfer.

17. A transfer between two corporations having identity of stock ownership and directorates, which transfer was fraudulent as to the transferee corporation, could be annulled by a dummy board of directors chosen by, and acting for, the controlling stockholders for this very purpose, though such a change in personnel was unnecessary, as similar action by boards having identical membership would have had the same effect, if done by the express authority of the stockholders.

[For other cases, see Corporations, V. b, in Digest Sup. Ct. 1908.]

National banks — liability of director — excessive loan — transfer of borrower's indebtedness — rescission.

18. The rescission for fraud of a sale by a national bank of the notes and indebtedness of a borrower for their full face value to a loan company having the same directors and managers as the bank, and identity of stock interest, may not be challenged by a director in the bank in an action against him for having participated in, or assented to, an excessive loan to such borrower, contrary to U. S. Rev. Stat. §§ 5200 and 5239, merely because such rescission may have been had in order to permit the bank to bring the action.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

National banks — liability of directors — excessive loan — transfer of borrower's indebtedness — rescission — restitution.

19. The question whether a loan company having the same directors and managers as a national bank and identity of stock interest, upon rescinding for fraud a sale to it by the bank of the notes and indebtedness of a borrower for their full face value, received full restitution from the bank, is not material as bearing either upon the bank's right, under U. S. Rev. Stat. §§ 5200 and 5239, to sue a director for having knowingly participated in, or assented to, an excessive loan to such borrower, or upon the question of damages.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

[No. 23.]

Argued and submitted January 16, 1919. Decided December 8, 1919.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of Texas, directing a verdict in favor of defendant in a suit by a bank against a director for having knowingly participated in or assented to an excessive loan. Reversed and remanded to the District Court for further proceedings.

See same case below, 150 C. C. A. 665, 237 Fed. 1016.

The facts are stated in the opinion.

Mr. **Joseph Manson McCormick** argued the cause, and, with Messrs. Francis Marion Etheridge and Richard Mays, filed a brief for plaintiff in error:

The liability of one who appears to be a joint maker on the face of a note given for money borrowed from a national banking association, but who in fact is a surety, must be included in totaling his liability to the bank, to which § 5200 of the Revised Statutes of the United States, Comp. Stat. § 9761, 6 Fed. Stat. Anno. 2d ed. p. 761, applies.

Cochran v. United States, 157 U. S. 295, 39 L. ed. 707, 15 Sup. Ct. Rep. 628; Hyatt v. Anderson, 25 Ky. L. Rep. 132, 74 S. W. 1094; Hubbard v. Gurney, 64 N. Y. 463; 1 Brandt, Suretyship & Guaranty, 94.

Common directors lack authority to make contracts between their principal corporations.

1 Morawetz, Priv. Corp. 2d ed. § 528; Barrie v. United R. Co. 125 Mo. App. 96, 102 S. W. 1078; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 524, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; Sweeny v. Wheeling Grape Sugar & Ref. Co. 30 W. Va. 443, 8 Am. St. Rep. 97, 4 S. E. 431; Wardell v. Union P. R. Co. 103 U. S. 656, 26 L. ed. 511, 7 Mor. Min. Rep. 144; Noyes, Intercorporate Relations, § 124, p. 195; Cole v. Millerton Iron Co. 59 Hun, 217, 13 N. Y. Supp. 851, 133 N. Y. 164, 28 Am. St. Rep. 615, 30 N. E. 848; Bicocchi v. Casey-Swasey Co. 91 Tex. 264, 66 Am. St. Rep. 875, 42 S. W. 963.

The liability of defendant attached when the excessive loan was made, and not first when the notes were taken over by the bank from the loan company. This liability could only be extinguished by the bank receiving in some legal, unavoidable form the principal and interest of the notes in money or value, or by estoppel.

2 Elliott, Contr. § 1421; Gulf Compress Co. v. Harris, C. & Co. 158 Ala. 343, 24 L.R.A.(N.S.) 399, 48 So. 477; Bicocchi v. Casey-Swasey Co. supra.

Defendant in error dominated the bank until in May, 1909. During the period prior to this date the Statute of Limitations did not run.

National Bank v. Wade, 84 Fed. 15; 2 Perry, Trust, 2d ed. § 864; 2 Pom. Eq. Jur. § 1089; Poland v. Frazier, 64 Tex. 542; McCord v. Nabours, 101 Tex. 494, 109 S. W. 913, 111 S. W. 144; Blount v. Bleker, 13 Tex. Civ. App. 227, 35 S. W. 863; American Cotton Co. v. Heierman, 37 Tex. Civ. App. 312, 88 S. W. 845; Jacobs v. Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386; Bank of Hartford County v. Waterman, 26 Conn. 324; Witters v. Sowles, 31 Fed. 5; Welles v. Graves, 41 Fed. 468; Cockrill v. Butler, 78 Fed. 679; Power v. Munger, 3 C. C. A. 253, 10 U. S. App. 289, 52 Fed. 710; Briggs v. Spaulding, 141 U. S. 146, 35 L. ed. 668, 11 Sup. Ct. Rep. 924; Cockrill v. Abeles, 30 C. C. A. 223, 58 U. S. App. 648, 86 Fed. 505; Cooper v. Hill, 36 C. C. A. 402, 94 Fed. 582; Stephens v. Overstolz, 43 Fed. 771; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; Brown v. Farmers & M. Nat. Bank, 88 Tex. 265, 33 L.R.A. 359, 31 S. W. 285; Zinn v. Baxter, 65 Ohio St. 341, 62 N. E. 327.

Messrs. **Cullen F. Thomas, W. J. McKie,** and **Henry C. Coke** submitted the cause for defendant in error:

The liability of a surety on a note given to a national bank for money borrowed by the principal from the bank is not to be included in determining the surety's liabilities to the bank under

U. S. Rev. Stat. § 5200, Comp. Stat. § 9761, 6 Fed. Stat. Anno. 2d ed. p. 761.

Pratt's Dig. of National Banks, 1914, Rev. ed. p. 120.

Mr. Justice Pitney delivered the opinion of the court:

This was an action brought under § 5239, U. S. Rev. Stat., Comp. Stat. § 9831, 6 Fed. Stat. Anno. 2d ed. p. 873, in the then circuit, now district, court of the United States for the northern district of Texas, by plaintiff in error, a national banking association which we may call for convenience the Bank, against defendant in error, formerly a member of its board of directors and its vice president, to hold him liable personally for damages sustained by the Bank in consequence of his having knowingly violated, as was alleged, the provisions of § 5200, Rev. Stat., as amended June 22, 1906 (chap. 3516, 34 Stat. at L. 451, Comp. Stat. § 9761, 6 Fed. Stat. Anno. 2d ed. p. 761), by participating as such director and vice president in a loan of the Bank's funds to an amount exceeding one tenth of its paid-in capital and surplus.

The action appears to have been commenced in February, 1910, and, after delays not necessary to be recounted, was tried before the district court with a jury. A verdict was directed in favor of defendant, and the judgment thereon was affirmed by the circuit court of appeals, no opinion being delivered in either court. The judgment of affirmance is now under review.

The amended § 5200, Rev. Stat., as it stood at the time the alleged cause of action arose, reads as follows, the matter inserted by the amendment being indicated by brackets:

"Sec. 5200. The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company [71] or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in [and unimpaired and one-tenth part of its unimpaired surplus fund: Provided, however, that the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association]. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

The pertinent portion of the other section reads as follows:

"Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. . . . And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Under the rule settled by familiar decisions of this court, in order for the Bank to prevail in this action it must appear not only that the liabilities of a person, company, firm, etc., to the Bank for money borrowed, were permitted to exceed the prescribed limit, but that defendant, while a director, participated in or assented to the excessive loan or loans not through mere negligence, but knowingly and in effect intentionally (Yates v. Jones Nat. Bank, 206 U. S. 158, 180, 51 L. ed. 1002, 1015, 27 Sup. Ct. Rep. 638), with this qualification: that if he deliberately refrained from investigating that which it was his duty to investigate, any resulting violation of the statute must be regarded as "in effect intentional" [72] (Thomas v. Taylor, 224 U. S. 73, 82, 56 L. ed. 673, 678, 32 Sup. Ct. Rep. 403; Jones Nat. Bank v. Yates, 240 U. S. 541, 555, 60 L. ed. 788, 799, 36 Sup. Ct. Rep. 429).

The facts are involved, and need to be fully stated. And necessarily, in order to test the propriety of the peremptory instruction given by the trial judge, we must bring into view the facts and the reasonable inferences which tended to a different conclusion, and, where the evidence was in substantial dispute, must adopt a view of it favorable to plaintiff; but of course we do this without intending to intimate what view the jury ought to have taken, had the case been submitted to it.

On June 10, 1907, plaintiff, whose banking house was at Corsicana, Texas, had $100,000 capital and $100,000 surplus, aggregating $200,000, and making $20,000 the applicable limit under § 5200. Defendant was a director and vice president of the Bank, active—perhaps dominant—in the conduct of its banking business, and familiar with the state of its finances.

The averment of a breach of duty re-

lates to an alleged excessive loan or loans made on or about the date last mentioned to Fred Fleming and D. A. Templeton, who, for a considerable time, had been engaged in business as private bankers in Corsicana and in several other towns in Texas under the firm name of Fleming & Templeton, and also had conducted at Corsicana a branch bank for the Western Bank & Trust Company, a state institution of which Fleming was president and Templeton vice president, and whose main banking house appears to have been at Dallas, about 50 miles from Corsicana. There was evidence that, early in June, 1907, Fleming & Templeton terminated their private banking business at Corsicana and turned over their deposit accounts—between $30,000 and $40,000—to the Corsicana National Bank, plaintiff herein, together with money or exchange on the Western Bank & Trust Company sufficient to meet them. Whether the firm was in fact dissolved at that time or later, and [73] whether the dissolution applied to their other branches, or to the Corsicana business only, were points concerning which, under the evidence, there was some doubt.

On or about June 10th, while the president of the Bank was absent on vacation, defendant loaned for the Bank to Fleming and Templeton $30,000 (less discount) upon two promissory notes for $15,000 each, maturing in six months. Defendant testified that both Fleming and Templeton negotiated with him, asking for two separate loans of $15,000 each, telling him that they had dissolved partnership and were winding up and closing out at Corsicana, and would turn over between $30,000 and $40,000 of deposits to the Corsicana National Bank. He further testified: "One of the considerations of this loan was the transfer of the deposits and with it the accounts of Fleming & Templeton." He insisted that two separate loans were made, of $15,000 each, one to Fleming, for which Templeton was surety, the other to Templeton, for which Fleming was surety. But defendant's own account of the circumstances under which and the special inducement upon which the loan was made, with other evidence to be recited below, left room for a reasonable inference that there was in fact but a single loan, and that separate notes were taken in order to avoid the appearance of a loan in excess of the limit. They were in the usual form of joint and several notes, payable to plaintiff's order. One was signed "Fred Fleming, D: A. Templeton," the other, "D. A. Templeton, Fred Fleming," without naming either maker as surety. Discount to the amount of $900 was deducted, and the net proceeds, $29,100, were paid by a draft drawn by the Bank on the Western Bank & Trust Company to the order of "Fleming & Templeton," which was sent by mail, inclosed in a letter written upon the Bank's letterhead, dated June 10, 1907, and addressed to Templeton at Dallas, in which letter, after acknowledging receipt of the two notes for $15,000 each, "signed by [74] yourself and Fred Fleming," it was stated: "We have deducted the discount, $900, and hand you herewith our draft #A, 7830, on Western Bank & Trust Company, order Fleming & Templeton, for $29,100." The retained copy of this letter appears to have been introduced in evidence; at the foot, opposite the place of signature, are the initials "V. P." With regard to this, as also to certain other "V. P." letters dated in the following December and relating to renewal of the notes, defendant testified: "I think I signed the letters which are offered in evidence as exhibits H," etc.

There was evidence that the draft for $29,100 was indorsed in the firm name by Templeton and deposited in the Western Bank & Trust Company at Dallas to the credit of the joint account of Fleming & Templeton, to make up in part an overdraft amounting to more than $125,000; this account having been overdrawn constantly, and in large but varying amounts, since the preceding April.

As a result of an examination of the Bank, made a few days later, the Comptroller of the Currency wrote to its president under date June 22, severely criticizing the Fleming-Templeton loan, among others, as excessive under § 5200, Rev. Stat., Comp. Stat. § 9761, 6 Fed. Stat. Anno. 2d ed. p. 761, and saying: "Immediate arrangements must be made to reduce these loans to the legal limit." It was a fair inference that defendant knew of this letter, or, in the proper performance of his duties, would have known of it. Whether any reply was made to it did not appear.

Notwithstanding the warning thus given, when the notes matured in December they were renewed with defendant's assent for a further period of six months, joint notes being given to the Bank as before, and the further sum of $900 being paid by Fleming & Templeton to the Bank for interest in this way: plaintiff, under defendant's direction, charged the amount in a single [75] item to the Western Bank & Trust Company, for account of the borrowers, and the lat-

ter institution acknowledged the charge, gave credit to plaintiff for the amount, and charged it against the joint account of Fleming & Templeton. During December some correspondence passed between defendant at Corsicana, he writing as vice president of the Bank, and Templeton at Dallas, relating to the renewal of the notes, tending to show that they were regarded by both writers as representing a single obligation of "Fleming & Templeton." Thus, Templeton on December 3d wrote to defendant: "Referring to the notes of Fleming & Templeton," etc.; and defendant wrote to him on the following day mentioning "renewal notes of loan to you and Mr. Fleming."

The evidence tended to show that up to the time of the renewal the borrowers were apparently solvent, but that about January 15, 1908, they became manifestly and notoriously insolvent. The Western Bank & Trust Company closed its doors on that date and went into liquidation, with Fleming & Templeton owing it several hundred thousand dollars. About the same time Fleming and perhaps Templeton went into bankruptcy, and Templeton afterwards died, and their respective estates paid small dividends upon their obligations. The jury would have been warranted in finding that it was evident to defendant, as a banker, on and after the 15th of January, that there would be a substantial loss upon the Fleming and Templeton notes.

On February 6, 1908, an official bank examiner visited the Bank, with the result that on the 26th the Deputy Comptroller wrote, calling the attention of its officers to alleged repeated violations of the National Banking Law in the conduct of its affairs, specifying certain loans in excess of the limit prescribed by § 5200, among them "Fleming & Templeton, $30,000," and stating that "the directors who are responsible for the loans or permitted [**76**] them to be made should assume liability for any loss that may be sustained thereon, and not throw the burden of such loss on innocent stockholders." On March 11 the directors, including defendant, united in signing a letter to the Comptroller in reply to his criticisms, among other things saying: "Reference to the Fleming & Templeton item of $30,000 we beg to say that this item has been disposed of by the Bank and they now owe us nothing." It was a reasonable inference that defendant intended to admit that it was a single loan and in excess of the limit.

In explanation of the statement that it had been "disposed of by the Bank," the evidence tended to show that on February 12, 1908, nearly a month after the insolvency of Fleming and Templeton had become notorious, and a few days after the bank examiner's visit, defendant and the president of the Bank caused the two notes of December 10 to be transferred "without recourse" to an affiliated corporation known as the Corsicana National Land & Loan Company (they being directors and officers of this corporation also), upon payment of $29,400, the full face value less discount, as consideration; the payment being made by a transfer of credit upon the books of the Bank. Defendant relies upon this as wholly relieving the Bank from loss by reason of the loan, and consequently as releasing him from responsibility to the Bank. But the evidence tended to show further that the loan company in January, 1910, shortly before this suit was brought, rescinded the transaction upon the ground of fraud, and that there was a settlement as between the loan company and the Bank, based upon an acknowledgment by the latter of the former's right to rescind.

A brief account of the relations between these two corporations, and of their dealings respecting the notes in question, becomes material. The loan company was organized in the month of May, 1907, under the laws of the state of Texas, with $50,000 capital stock and with [**77**] stockholders and directors identical with those of the Bank. The capital of the company was subscribed for and paid out of a special dividend declared by the directors of the Bank for the purpose, and each stockholder had the same proportion of stock in the company as in the Bank. The purpose of the new corporation, as declared in its charter, was the "accumulation and loan of money." Defendant testified: "The purpose of the loan company, a state corporation, was to take such paper as the bank could not handle. It was organized by the stockholders of the bank and paid for out of the earnings of our bank. . . . The loans of the loan company were largely real estate loans. It was to help out the bank in every possible [way]." From the organization of the company in the spring of 1907 until the spring of 1909, defendant was a director and active in the management of the company as well as of the Bank. He testified that the stockholders of the two corporations were identical, and continued to be so during the entire period just mentioned; that "whenever there was a sale of bank

stock it carried with it that particular shareholder's stock in the loan company." During the same period the two corporations had the same president, vice president, and directors, while the assistant cashier of the Bank was secretary of the loan company.

So far as appeared, the transfer of the Fleming and Templeton notes to the loan company, and the payment made by the company to the Bank, were never expressly authorized or ratified by the stockholders of either corporation; nor did it appear that the stockholders of the loan company ever authorized its directors to employ its funds in taking bad or doubtful paper off the hands of the Bank at a loss; much less, to relieve the directors of the Bank from responsibility for its losses.

In April or May, 1909, there was a change in the control of the Bank, due to sales of a majority of the stock, followed [78] by a change of officers, defendant retiring as both stockholder and director. The corresponding shares of he stock of the loan company were transferred at the same time, and the new management officered the company as well as the Bank. So far as appeared from the evidence, the transfer of defendant's stock carried with it no agreement that he should not be held responsible to the Bank because of the Fleming and Templeton loan, nor any approval of the transfer of the loan to the loan company.

The Bank and the loan company held annual meetings of stockholders on January 11, 1910, at which, for the first time, so far as appears, the boards of directors were so selected that a majority of one board no longer were directors of the other corporation. This was done by electing, as five out of nine directors of the loan company, individuals holding one share of stock each, recently placed in their names for the purpose of qualifying them. They were not stockholders of the Bank; but, except for them, the stockholders of the two corporations still were the same, and it was a reasonable inference that the two meetings were attended by the same individuals. Minutes of these stockholders' meetings, and of certain meetings of the respective boards of directors, were introduced in evidence and supplemented by other testimony, from all of which the following additional corporate proceedings appeared. The stockholders of the loan company, more than a majority in interest being present, unanimously adopted a resolution reciting the taking of the notes of December 10, 1907, by the Bank from Fleming and Templeton, and that on or about January 15, 1908, the makers became insolvent and the notes worthless and uncollectable; and setting forth that, with knowledge of this fact, certain of the directors and officers of the Bank illegally and wrongfully transferred the notes to the loan company, for which the same officers and directors, [79] being likewise officers and directors of the loan company, illegally and wrongfully transferred to the Bank out of the funds of the loan company the face value of the notes, whereby the Bank had committed a wrong upon the loan company and was liable to it therefor; and by this resolution the directors of the company were authorized to adjust and settle this demand against the Bank, and to tender and return to the Bank the Fleming and Templeton notes and indebtedness with any collateral security held for them. The directors of the loan company thereafter and on the same day passed a resolution to the like effect, and appointed a committee to make demand upon the Bank for return of the money wrongfully transferred to the Bank for the notes, and to adjust and settle this demand; the notes and indebtedness of Fleming and Templeton and any collateral security held therefor being at the same time tendered and ordered to be returned to the bank. This committee appeared before the stockholders' meeting of the Bank and formally presented the demand, whereupon these stockholders authorized their board of directors to act upon the claim made on the Bank by the loan company, and to adjust and settle it if they should conclude that the Bank was liable to the loan company; otherwise to reject it. A few days later a meeting of the new board of directors of the Bank was held, at which a communication from the loan company committee was presented, in substance the same as that previously presented to the Bank stockholders, and the resolution of the Bank stockholders thereon was read; and thereupon the directors authorized the president of the Bank, if he believed the claim of the loan company to be just, to proceed to settle it in such a way as he might deem to be to the best interest of the Bank. Under this authority, the president of the Bank communicated to the loan company committee in substance that the Bank recognized the legality and justness of the claim of the loan company and [80] would pay it provided the company would purchase from the Bank a certain

cotton-mill property for the sum of $65,000, accept $30,000 of this in payment of its demand against the Bank, transfer to the Bank the Fleming and Templeton notes and indebtedness, with all collateral securing the same, and execute to the Bank its own promissory note for the remaining $35,000, with the cotton-mill property as security. This was agreed to by the directors of the loan company, and the settlement was carried out accordingly. Shortly after this, the present action was brought.

The "collateral security" above referred to appears to have consisted of certain shares of stock in a corporation known as the Fleming Ranch & Cattle Company, acquired in the winding-up of the bankrupt estate of Fleming. These shares, so far as the evidence showed, were the only thing of value recovered either by the loan company or by the Bank from the estates of the borrowers. After the present suit was commenced, the Fleming Ranch & Cattle Company was liquidated, and in the distribution of its assets the Bank received sums aggregating $9,149.34, which are credited as payments on account of its claim against defendant.

So far as the above-recited facts were in dispute, there was substantial evidence tending to support a view of them favorable to plaintiff's contentions. What weight should be given to it was for the jury, not the court, to determine. Hepburn v. Dubois, 12 Pet. 345, 376, 9 L. ed. 1111, 1123; Lancaster v. Collins, 115 U. S. 222, 225, 29 L. ed. 373, 374, 6 Sup. Ct. Rep. 33; Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 129, 29 L. ed. 837, 839, 6 Sup. Ct. Rep. 632; Ætna L. Ins. Co. v. Ward, 140 U. S. 76, 91, 35 L. ed. 371, 376, 11 Sup. Ct. Rep. 720; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 444, 57 L. ed. 586, 591, 33 Sup. Ct. Rep. 274.

We proceed to consider, in the order of convenience, the questions raised upon the record.

(1) And first, as to the direction of a verdict in favor of defendant. Plaintiff, in the amended petition upon which [81] the case went to trial, after a circumstantial statement respecting the transaction of June 10, 1907, alleged that the discount of the notes "was an excessive loan, whether regarded as one loan to the firm of Fleming & Templeton, as plaintiff alleges the fact to be, or regarded as two loans, as contended for by the defendant in his pleadings heretofore filed herein." The designation of Fleming & Templeton as a "firm" is but descriptive, and not essential, and the pleading is sufficient if the proof tended to show a single and excessive loan made to them jointly in any capacity, or made in form one-half to each, but in substance as a single loan.

In our opinion, the trial judge clearly erred in holding, as in effect he must have held, that there was no substantial evidence from which the jury might find that there was an excessive loan in the making of which defendant, as a director of the Bank, knowingly participated. That he acted for the Bank in the matter, and that he knew that any loan in excess of $20,000 was prohibited, he admitted. His denial that it was a single loan, or that he knew it to be such, is not conclusive; there being substantial evidence inconsistent with it, tending to show facts and circumstances attendant upon the transaction, of which he had knowledge, and also subsequent conduct in the nature of admissions by him, inconsistent with his testimony upon this point. The account of the negotiations, as given in defendant's own testimony; the fact that he knew that the firm of Fleming & Templeton, even if dissolved, was still in liquidation; that one of the inducements for the loan (or "loans") was the transfer of deposit accounts of equal or greater amount from the firm to the Bank; that Templeton alone (as shown by the exhibits) appears to have corresponded with defendant concerning the notes; that defendant himself, as vice president of the Bank, wrote to Templeton acknowledging receipt of the two notes for $15,000 each, "signed [82] by yourself and Fred Fleming," and having "deducted the discount, $900," inclosed the Bank's draft, "order Fleming & Templeton for $29,100;" that when the notes fell due in December the correspondence concerning their renewal was conducted by defendant with Templeton alone, and they were treated as representing a single loan, and the discount was charged by defendant or under his direction in a single item; that after the borrowers had become notoriously insolvent, in February, 1908, defendant took part in transferring the notes "without recourse" to the affiliated loan company in the manner and under the circumstances above stated; that the transfer was effected a few days after the visit of the bank examiner; that when the Deputy Comptroller wrote to the Bank, classifying "Fleming & Templeton $30,000" as an excessive loan, and demanding that the directors responsible for making it should assume the loss, defendant joined

in signing the reply that has been quoted;—all this, to say nothing of other circumstances that might be mentioned, would have warranted the jury in finding, notwithstanding defendant's denial, that in fact the disputed transaction was a single loan of $30,000, less discount, or, to be precise, $29,100, made to Fleming and Templeton jointly; that defendant knew and assented to this at the time; and that the taking of two notes was but a device to conceal the true nature of the transaction.

(2) Irrespective of whether there was but a single loan or were two separate loans, plaintiff in error contends that the liability of a surety must be added to his direct and primary liability in determining his total liabilities for money borrowed, within the meaning of Rev. Stat. § 5200, Comp. Stat. § 9761, 6 Fed. Stat. Anno. 2d ed. p. 761, and that in the present case, although the notes should be found to have represented two entirely separate loans, each within the limit, they must be added together in order to determine whether the limit was exceeded. Cochran v. United States, 157 U. S. 286, 295, 296, 39 L. ed. 704, 707, 708, 15 Sup. Ct. Rep. 628, is cited, where it was held [**83**] that the word "liabilities," as employed in § 5211, Rev. Stat. (Comp. Stat. § 9774, 6 Fed. Stat. Anno. 2d ed. p. 790), included contingent liabilities. We do not regard the case as controlling, because the purpose of that section, and the language employed, differ materially from the purpose and the language of the provision we are dealing with. As to whether in § 5200 the words "the total liabilities . . . of any person . . . for money borrowed," etc., require the liability of a surety or of an indorser for money borrowed by another to be added to his direct liability for money borrowed by himself in ascertaining whether the limit is exceeded,—whatever view we might entertain were the matter res nova,—we are advised that by the practice and administrative rulings of the Comptroller of the Currency during a long period, if not from the beginning of national banking, liabilities which are incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not included in the computation. We feel constrained to accept this as a practical construction of the section. And we are not prepared to say that in an action against a director who knows and relies upon the fact that a particular obligation is signed by one merely as surety, although not so described, the defendant may not be permitted to show the truth.

(3) In view of certain contentions urged here in behalf of defendant, and perhaps acceded to by the courts below, it should be said that the question whether defendant knowingly participated in or assented to the making of a loan in excess of the limit prescribed by § 5200 is not to be confused by any consideration of the supposed standing of the borrowers, personal or financial. The statutory limit is a special safeguard prescribed by Congress for the very purpose (among others) of preventing undue reliance upon the financial standing of borrowers. Nor would the absence of any improper motive or a desire for personal profit on defendant's part be a defense; nor the fact that [**84**] in spite of a loss upon this transaction the Bank remained solvent or even prosperous. Neither is the question of defendant's liability, or the extent of it, to be affected by the fact, if it be a fact, that other officers or directors of the Bank were in part responsible, yet defendant alone was sued; nor that the Bank refrained from suing him until after a change in the stockholding interest or control. Again, in the absence of some special agreement,—and none such appears,—it is immaterial whether the new stockholders were aware of the excessive loan, or of defendant's alleged liability in the premises, at the time they acquired their stock; or whether they possibly may now profit by an increase in the value of the shares in the event of a recovery against him.

It is clear from the language of § 5239, Rev. Stat. (Comp. Stat. § 9831, 6 Fed. Stat. Anno. 2d ed. p. 873), that *every* director knowingly participating in or assenting to a violation of any of the provisions of the act is "liable in his *personal* and *individual* capacity," without regard to the question whether other directors likewise are liable. The violation is in the nature of a tort, and the party injured may sue one or several of the joint participants. Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 132, 56 L. ed. 1009, 1023, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875. And the liability extends to "all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." In the present action the Bank represents the interest of its shareholders, as well as of its creditors; and if there was a violation of the act by defendant, with resulting diminution of its assets, the

Bank is entitled to recover the damages thus sustained, notwithstanding it remained solvent, and irrespective of any changes in its stockholding interest or control occurring between the time the cause of action arose and the time of the commencement of the suit or of the trial. Even if it appeared that new stockholders acquired their interests with knowledge of the fact that such a loss had been sustained and that defendant was responsible for it, [85] neither they nor the Bank would be thereby estopped from having full recovery from defendant. There is no reason in the law to disentitle a purchaser of shares from even relying upon the responsibility of directors to make good previous losses as an element adding intrinsic value to the shares. Compare Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 500, 71 Atl. 153.

(4) Defendant, among other defenses, pleaded the two-year Statute of Limitations of the state of Texas. Plaintiff demurred on the ground that this limitation was not a bar; and also replied, setting up certain facts that need not now be recited. The demurrer was overruled.

The provisions of the Texas statutes upon the subject are Vernon's Sayles's Civ. Stat. (Tex.) 1914, arts. 5687, 5688, and 5690, set forth in the margin.[1]

[86] In our opinion, the action is not one of the kinds specified in art. 5687, to which the two-year limitation applies, but is within the general description of art. 5690, and subject only to the limitation of four years. Hence the limitation pleaded was no defense; and it is not contended that there was any basis in fact for pleading the four-year limitation.

(5) Assuming the Fleming and Templeton notes were found to represent an excessive loan, knowingly participated in or assented to by defendant as a director of the Bank, in our opinion the cause of action against him accrued on or about June 10, 1907, when the Bank, through his act, parted with the money loaned, receiving in return only negotiable paper that it could not lawfully accept because the transaction was prohibited by § 5200, Rev. Stat. (Comp. Stat. § 9761, 6 Fed. Stat. Anno. 2d ed. p. 761). The damage as well as the injury was complete at that time, and the Bank was not obliged to await the maturity of the notes, because immediately it became the duty of the officers or directors who knowingly participated in making the excessive loan to undo the wrong done by taking the notes off the hands of the Bank and restoring to it the money that had been loaned. Of [87] course, whatever of value the Bank recovered from the borrowers on account of the loan would go in diminution of the damages; but the responsible officials would have no

[1] Art. 5687. There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such personal property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitations shall run against each item from the date of such delivery, unless otherwise specially contracted.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured.

Art. 5688. There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his copartner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.

Art. 5690. Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward.

right to require the Bank to pursue its remedies against the borrowers or await the liquidation of their estates. The liability imposed by the statute upon the director is a direct liability, not contingent or collateral.

(6) The question is raised whether the entire sum loaned, plus interest and less salvage, should be treated as damages sustained by the Bank through the violation of the provisions of § 5200, Rev. Stat.,—assuming it be found that defendant did knowingly violate them,—or whether only the excess above what lawfully might have been loaned (presumably $20,000) should be so regarded. We assume that if, in good faith and in the ordinary course of business, defendant had made a loan of $20,000 to Fleming and Templeton, and if, while this loan remained unpaid, he had afterwards and as a separate transaction unlawfully loaned them an additional $10,000, in excess of the limit, the damage legally attributable to his violation of the limiting provision would have been but $10,000. But that is not this case. According to the evidence, the $30,000, less discount, was paid out by the Bank as a single payment; and if the jury found it to have been loaned in excess of the statutory limit (whether in form one loan or two) it must be upon the ground that it was a single transaction. That being so, it would follow that the entire amount disbursed by the Bank was disbursed in violation of the law. The cause of action against a director knowingly participating in or assenting to such excessive loan would be complete at that moment, and entire; there would be no legal presumption that the borrowers would have accepted a loan within the limit, if their application for the excessive loan had been refused; nor that a director who in fact violated his duty as defined by law would, if mindful of it, have loaned them even $20,000. To mitigate in his favor [88] the damages resulting from a breach of his statutory duty by resorting to the hypothesis that if he had not disregarded the law in this respect he would have pursued a different course of action within the law, would be an unwarranted resort to fiction in aid of a wrongdoer, and at the expense of the party injured. Hence, the entire excessive loan would have to be regarded as the basis for computing the damages of the Bank.

(7) In behalf of defendant it is insisted that, assuming the loan was excessive, no loss accrued to the Bank by reason of it, because the Fleming and Templeton notes and indebtedness were transferred to the loan company February 12, 1908, for a cash consideration equivalent to their face value, less interest to maturity.

Plaintiff in error contends that the Bank and the loan company were so identical in ownership and united in management that the latter was but the alter ego of the former, and a loss to the loan company on the notes was the same as a loss to the Bank, not only practically, but in contemplation of law. On the other hand, the argument of defendant in error regards the two corporations as if they were wholly independent; treats the transfer of the notes from the Bank to the loan company, in February, 1908, as valid, and the money or credit contemporaneously transferred to the Bank like money coming from an outside party; and looks upon the retransfer in January, 1910, as voluntary on the part of the Bank and an unnecessary assumption of a loss that otherwise it had escaped.

We cannot accede to either contention in the extreme. Because the Bank and the loan company were distinct legal organizations, operating under separate charters, derived from different sources, and possessing independent powers and privileges, we are constrained to hold that, notwithstanding the identity of stock ownership and their close affiliation in management, for some purposes they must be regarded as separate corporations; for [89] instance, as being capable in law of contracting with each other. See Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S. 356, 372, 373, 375, et seq., 34 L. ed. 363, 367, 368, 10 Sup. Ct. Rep. 1004. But, in considering the practical effect of such intercorporate dealings, especially as bearing upon the duties of the common directors and the authority of the stockholders to control them, we need not and ought not to overlook the identity of stock ownership. Thus, the transfer of the notes in February, 1908, from the Bank to the loan company, in consideration of their full face value ostensibly or actually paid by the company to the Bank, evidently could have no effect in relieving the stockholding interest from loss, since each stockholder of one corporation had a corresponding interest in the stock of the other, and any theoretical saving that accrued to him as a stockholder of the Bank was balanced by a corresponding loss sustained in his capacity as a stockholder of the company. At the same time the stockholders, in reviewing

that transaction, might lawfully and properly base their action upon all the facts of the situation; recognizing the legal separateness of the corporations as existing in order to test the validity of the transfer and the feasibility of setting it aside without litigation, while giving effect to their community of interest in deciding whether this should be done, and, if so, then in what manner and upon what terms.

(8) Regarding the two corporations as legally separate, and ignoring for the moment the community of stockholding interest, it is plain that the transaction of February 12, 1908, in which the Bank sold the Fleming and Templeton notes and indebtedness to the loan company for their full face value, was prima facie tantamount to a satisfaction of the damages that the Bank had sustained by reason of the excessive loan; but that it had this effect, only provided the transaction was good and valid as against the loan company and its stockholders, or was duly ratified by them. For if it was invalid, or was made [90] under circumstances rendering it voidable by the loan company, or the stockholders, neither the Bank nor defendant was entitled to have the transaction stand for their benefit; and if in fact it was avoided for good cause, the Bank would be entitled to its action against defendant the same as if the annulled transaction never had occurred.

Was there good cause for the rescission? The fact that the same persons were directors and managers of both corporations subjects their dealings inter sese to close scrutiny. That two corporations have a majority or even the whole membership of their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where, in addition to this, the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 589, 23 L. ed. 329, 330, 3 Mor. Min. Rep. 688; Wardell v. Union P. R. Co. 103 U. S. 651, 657, et seq., 26 L. ed. 509, 511, 7 Mor. Min. Rep. 144; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 524, 27 L. ed. 1018, 1019, 3 Sup. Ct. Rep. 315; Richardson v. Green (Washburn v. Green) 133 U. S. 30, 43, 33 L. ed. 516, 521, 10 Sup. Ct. Rep. 280; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 552, 565, 36 L. ed. 1079, 1085, 1090, 13 Sup. Ct. Rep. 170.

The evidence having tended to show a transfer of the notes in question from the Bank to the loan company "without recourse," for a consideration equivalent to their full face value, after the insolvency of the makers had been brought to light, with resulting discredit of the notes as marketable paper and probable inability of the makers to pay them,—a transaction carried out by directors and [91] officers who acted as agents or trustees for both corporations, and one at least of whom, as the jury might find, was subject to criticism from the Comptroller of the Currency, and to an action at the suit of the Bank, for making an excessive loan,—it clearly was open to the jury to find that the transfer was fraudulent as against the loan company, and as against the stockholders of both companies. The jury should have been instructed to this effect; and further, that if they found the transfer to have been fraudulent, the stockholders had the right to rescind it within a reasonable time after discovery of the fraud; and that if, having such right, the stockholders of the loan company asserted it and gave notice of its claim to the Bank in the manner shown by the minutes, and the Bank, recognizing and acknowledging the justness of the claim, restored to the loan company what was accepted as the equivalent in value of that which the Bank had received in the transaction of February, 1908, this was not to be regarded as a voluntary or unnecessary assumption of loss by the Bank, but, on the contrary, the result, so far as defendant was concerned, was the same as if by court decree, in a suit brought by the loan company, or by the stockholders, the Bank had been compelled to make such restitution; and that thereafter the rescinded transaction could not be regarded as amounting, even in form of law, to a satisfaction of the damages sustained by the Bank as a result of the Fleming and Templeton loan.

So far as the evidence showed, neither the stockholders of the loan company, nor, indeed, its board of directors, ever expressly ratified or affirmed the trans-

fer. Nor does it appear that there was any unreasonable delay on the part of the stockholders in taking action to set it aside after they had become aware of the circumstances; such delay as there was the bank waived, as it had a right to do; and defendant does not appear to have changed his position or to have been prejudiced by reason of it.

[92] Assuming, in defendant's favor, that because the corporations were legally separate they could not undo the transaction of February, 1908, without formal corporate action, the procedure adopted was sufficient for the purpose. It is objected that the personnel of the boards was changed for the very purpose of accomplishing the rescission, and that the new members were mere figureheads or dummies for the controlling stockholders, and had no bona fide stock of their own. But if the transaction of 1908 was a fraud as against the loan company, and done without authority of the stockholders, they were quite within their rights in acting through dummies if necessary in order to set it aside. We do not think it was necessary to change the membership of the boards; similar action by boards having identical membership would have had the same effect, if done by the express authority of the stockholders in order to undo an improper and unlawful act of former directors, injurious to their interests.

It is said that the rescission was put through in order to enable the Bank to bring the present action against defendant. But it was not done to build up a ground of action against him, for this arose, if at all, prior to February 12, 1908, the damage to the Bank being sustained when, with his participation and assent, its money was paid to Fleming and Templeton in June, 1907, for promissory notes that the Bank could not lawfully take. Defendant's liability to the Bank, if he was liable, was direct and primary, and to it the notes occupied the status of collateral security. Had the disposition made of them in February, 1908, been valid and unassailable, it would have borne the appearance of a satisfaction of the damages only because the two corporations were legally separate; but in substance, so far as the stockholders were concerned, it would have satisfied nothing, because it merely transferred money to them in one capacity by taking it from them in another. Defendant had no right to have the transaction remain [93] in effect as a screen to protect him from suit by the Bank under § 5239, Rev. Stat. So far as it may be supposed to have protected him while it remained unrescinded, the result was entirely gratuitous, no consideration having proceeded from him in the matter. Indeed, if his act in shifting the discredited loan was done in part to give him immunity from such an action as the present, this would furnish an additional ground entitling the stockholders to set the transfer aside. And if, either on this ground, or on the ground that the transfer was put through for the advantage of one corporation at the expense of the other by officers or directors acting at the same time for both, and without the authority of the stockholders, the transaction was voidable by the stockholders and they resolved to avoid it, it would savor of absurdity to sustain defendant's contention that this was done in order to enable the Bank to sue him; for, of course, they would have the right to do it for that very purpose.

(9) In defendant's behalf it is insisted that, at the time of the proceedings of January, 1910, the value of the cotton-mill property was much less than $65,000, so that, in the exchange made, the Bank in effect parted with little or no value for the return to it of the Fleming and Templeton notes and indebtedness. But for reasons already sufficiently indicated, we are of opinion that defendant is not entitled to raise an inquiry into the value of this property, as bearing either upon the question of the Bank's right of action against him or upon the question of damages. If the loan company or the stockholders had good ground for rescinding the 1908 transaction, and this was done pursuant to their resolution, they might waive a return of the precise consideration and accept such equivalent in exchange as to them seemed proper. Because of the identity of the stockholding interest, the transaction, even while it stood, was, as we have shown, only a pseudo-satisfaction of the Bank's loss in the Fleming [94] and Templeton loan; and when the real parties affected by this loss undertook on just grounds to set aside the transfer of the notes, and took such proceedings through action of the two corporations as were necessary for that purpose, they had a right to recognize the community of interest in settling the terms upon which this should be done; and defendant has no standing to complain.

If there be a seeming inconsistency in sustaining a rescission of the 1908 transaction avowedly based upon the ground

that the loan company had unjustly been subjected to a loss therein, while at the same time we treat as unimportant the question whether, upon such rescission, full restitution was made to that company, it should be said that we treat it as unimportant only so far as defendant is concerned; and if there be inconsistency, it is no more than corrective of the unreality of the 1908 transaction itself. It is defendant who invokes that transaction as an actual realization by the Bank of full value through a sale of the notes that it held as collateral security for its claim against him. If, regarding it as an actual sale, it was voidable because done by agents acting at the same time in a dual capacity or for other reasons, he cannot complain that the parties entitled to avoid it treated it as actual for the purpose of setting it aside, and in the consequent readjustment recognized a substantial identity of interest between seller and purchaser in the rescinded transaction that rendered it hardly an actual sale. For, to the extent that the sale was a sham, there was no realization by the Bank upon the collateral security, and hence no satisfaction of the damages claimed against him.

The judgment under review must be reversed, to the end that there may be a new trial in accordance with the views above expressed.

Judgment reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

---

[95] WILLIAM T. WAGNER, Edward Wagner, and Sophie Wagner, Partners Doing Business under the Firm Name of W. T. Wagner's Sons, Plffs. in Err.,

v.

CITY OF COVINGTON.

(See S. C. Reporter's ed. 95–104.)

Taxes — validity — limitations of Federal Constitution.

1. When the Federal Supreme Court is called upon to test a state tax by the provisions of the Federal Constitution, its decision must depend, not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical application and effect of the tax as applied and enforced.

[For other cases, see Taxes I. a, 1, in Digest Sup. Ct. 1908.]

Commerce — licenses and taxes — peddlers and drummers — wholesalers.

2. A nonresident manufacturer of "soft drinks" doing a business in a municipality in the state which largely consists in carrying a supply of such drinks from one retailer's place of business to another's upon the vehicle in which the goods were brought across the state line, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold in the original unbroken cases, may be required to take out the license required of all wholesalers in soft drinks without infringing the commerce clause of the Federal Constitution.

[For other cases, see Commerce IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 61.]

Argued November 10 and 11, 1919. Decided December 8, 1919.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Kenton County, in that state, in favor of defendant in an action to recover back certain license fees exacted under municipal ordinances, and to enjoin the enforcement of a later ordinance calling for further like payments. Affirmed.

See same case below, 177 Ky. 385, 197 S. W. 806.

The facts are stated in the opinion.

Mr. **Harry Brent Mackoy** argued the cause, and, with Mr. William H. Mackoy, filed a brief for plaintiffs in error:

Interstate commerce is not subject to state regulation or control. Requiring a license fee for the privilege of engaging therein is a direct burden.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v.

Note.—On validity of license or occupation tax on hawkers and peddlers and persons engaged in soliciting orders by sample or otherwise, as an exercise of the police power—see notes to State v. Bayer, 19 L.R.A.(N.S.) 301; and Dozier v. State, 28 L.R.A.(N.S.) 265.

On validity of occupation tax under the commerce clause—see note to Western U. Teleg. Co. v. Taggart, 60 L.R.A. 691.

On discrimination between nonresidents by statute or municipal ordinance imposing license or occupation tax—see note to State v. Williams, 40 L.R.A. (N.S.) 286.

As to state licenses or taxes generally as affecting interstate commerce—see

North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 58 L. ed. 1337, 52 L.R.A.(N.S.) 574, 34 Sup. Ct. Rep. 826.

The right of sale in original packages is a necessary incident to the right to import, and continues until packages are commingled with the general mass of property in the state.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49,

---

notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; and Brown v. Maryland, 6 L. ed. U. S. 678.

Peddlers and drummers as related to interstate commerce.

Earlier cases considering this question will be found in a note appended to Stockard v. Morgan, 46 L. ed. 785.

A statute cannot be sustained as a valid exercise of the police power of the state to tax the occupation of peddlers which defines peddlers in such a way as to include persons engaged in interstate commerce, and taxes them as such. Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294.

So, a statute which imposes a license fee upon peddlers, hawkers, and solicitors places an unconstitutional burden upon interstate commerce in so far as it is made to apply to the solicitor for a nonresident concern. Re Kinyon, 9 Idaho, 642, 75 Pac. 268, 2 Ann. Cas. 699.

The business of traveling from place to place, taking orders and transmitting them to a nonresident manufacturer, for articles to be delivered in fulfilment of such orders, and which are in fact shipped in interstate commerce and delivered to the persons who ordered them, or the business of making such deliveries, cannot, consistently with the commerce clause of the Federal Constitution, be subjected to a state license tax. Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294 (solicitor for ranges); Rogers v. Arkansas, 227 U. S. 401, 57 L. ed. 569, 33 Sup. Ct. Rep. 298 (solicitor for buggies); Clark v. State, 4 Ala. App. 202, 59 So. 236, writ of certiorari denied in 180 Ala. 529, 61 So. 901 (solicitor for lightning rods); Miller v. State, 7 Ala. App. 183, 62 So. 307 (delivery man for sewing machines).

One who solicits orders for goods for a nonresident concern, and who, the goods being shipped to him in one package, breaks the original package, and delivers to each customer the article ordered by him, and receives the price therefor, is engaged in interstate commerce, and a statute making it a misdemeanor for a peddler or itinerant trader to sell goods, wares, or merchandise without a license is not operative against him. Stone v. State, 117 Ga. 292, 43 S. E. 740.

And one who, from samples, solicits orders for the products of a nonresident manufacturer, the goods being shipped to him in one large package, but each customer's order being wrapped separately, with his name marked thereon, which smaller packages he delivers to the customers, and receives the money therefor, is engaged in interstate commerce, and is not subject to a municipal ordinance which provides "that traveling salesmen or dealers who shall bargain or sell any goods, wares, or merchandise . . . for cash or by sample, or any other manner, for present or future delivery" within the corporate limits of the city, shall pay a license fee. Cason v. Quinby, 60 Fla. 35, 53 So. 741.

So, one is engaged in interstate commerce, and not required to take out a state license, who, as agent for a nonresident drug company, takes orders for patent medicines, sends the orders in to the drug company, which fills them, wraps each order, separately marked with the name of the customer, and ships them to its agent within the state, who delivers the packages in their original form. State v. Trotman, 142 N. C. 662, 55 S. E. 599.

A state may not, consistently with the commerce clause of the Federal Constitution, impose a license tax upon a

18 Sup. Ct. Rep. 757; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 45 Sup. Ct. Rep. 132; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Adams Exp. Co. v. Kentucky, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. Rep. 892; Rosenberger v. Pacific Exp. Co. 241 U. S. 48, 60 L. ed. 880, 36 Sup. Ct. Rep. 510; State ex rel. Black v. Delaye, 193 Ala. 500, L.R.A. 1915E, 640, 68 So. 995; Hall v. State, 39 Fla. 637, 23 So. 119; Parks Bros. & Co. v. Nez Perce County, 13 Idaho, 298, 121 Am. St. Rep. 261, 89 Pac. 949, 12 Ann. Cas. 1113; Carrollton v. Bazzette, 159

nonresident merchant, traveling from place to place within the state and soliciting orders by sample, lists, and catalogues, for groceries which are afterwards shipped into the state in carload lots to his order, and which he delivers from the cars to the persons ordering them. Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

Interstate commerce is unlawfully burdened by a municipal ordinance exacting a license fee from a person employed by a foreign corporation to solicit within the municipality orders for groceries which the company fills by shipping goods to him for the delivery to and collection of the purchase price from the purchasers, who have the right to refuse the goods if not equal to the sample, such goods always being shipped in distinct packages, corresponding to the several orders, except in the case of brooms, which, after being tagged and marked like the other articles, according to the number ordered, are then tied together in bundles of about a dozen, wrapped up conveniently for shipment. Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

And one who solicits orders for a nonresident grocery house, the orders being sent to the grocery house, where they are filled, each order being wrapped separately, and shipped in one large box to the solicitor, who delivers the packages to the persons ordering them, collecting for the same, and transmitting the money to the grocery concern, is engaged in interstate commerce, and is not required to take out a peddler's license. Menke v. State, 70 Neb. 669, 97 N. W. 1020.

A municipal ordinance imposing a license tax upon peddlers is invalid, as a restraint upon interstate commerce, in so far as it is made to apply to the solicitor for a nonresident tea house, who solicits orders for teas, coffees, etc., when such orders are sent to the home office, where they are put up in packages according to the quantities designated by the solicitor, but without the purchaser's name being written on the package, and are shipped back to the solicitor, who gets them from the railroad station, delivers them to the purchasers, collecting the price. Jewel Tea Co. v. Lee's Summit, 189 Fed. 280. The court stated that the shipment of the goods from the home office to the solicitor, the draying of them from the depot to the street in front of the customer's house, and the carrying them into the house, are all parts of one transaction, and that transaction is interstate commerce. A shipment like that cannot be divided into parts, so as to make one or more parts an intrastate shipment. They must all be taken and regarded as one shipment, and when across a state line it is an interstate shipment, and is covered by the commerce clause of the Federal Constitution.

A state license tax required of itinerant vendors is an interference with interstate commerce in so far as applied to a salesman who travels from place to place, taking orders from samples for ranges manufactured by a nonresident concern, where the ranges are shipped into the state, and delivered to the purchaser in their original package. Wrought Range Co. v. Campen, 135 N. C. 506, 47 S. E. 658.

And the license tax imposed by North Carolina Laws 1901, p. 116, § 52, upon all those engaged in the business of selling sewing machines in the state, is an unconstitutional interference with interstate commerce so far as applied to the sale of a single machine shipped into the state by a nonresident manufacturing corporation upon the written order of a customer, under an ordinary C. O. D. consignment. Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151.

A statute which assumes to impose a license fee upon one who solicits orders for buggies, which are transmitted to a nonresident manufacturer, the buggies to be delivered in fulfilment of such orders, is unconstitutional, as placing a burden upon interstate commerce. Wilcox v. People, 46 Colo. 382, 104 Pac. 408; State v. Byles, 22 Wyo. 136, 136 Pac. 114.

294; Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623; York Mfg. Co. v. Colley, 247 U. S. 21, 62 L. ed. 963, 38 Sup. Ct. Rep. 430; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Davis v. Virginia, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. Rep. 479; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475.

Original packages of interstate commerce themselves only become taxable when they have come to rest at their destination, or have become part of the general mass of property in the state.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Hinson v. Lott, 8 Wall. 148,

---

be regarded as a part of the interstate transaction between the nonresident manufacturer and the customer. Davis v. Virginia, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. Rep. 479.

But where a sale is made of goods theretofore shipped into the state, which, by reason of having been taken from their original package, or from some other cause, had ceased to be articles of interstate commerce, the transaction is not within the protection of the commerce clause.

Thus, one who goes about from place to place selling patent medicines of a nonresident manufacturer which the manufacturer has put up in small bottles and packages ready for use, and has shipped in bulk to such peddler, is not engaged in interstate commerce, and so is required to take out a peddler's license. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168.

Also one who establishes a line of credit with a nonresident merchant, and on his own account sells such merchant's goods from door to door, or takes orders for goods which he may not have with him, and delivers them on his next trip, is not engaged in interstate commerce, and so is liable for the license fees imposed upon peddlers and hawkers. Ballard v. Russell, 145 La. 636, 82 So. 730.

Nor would it alter the situation were he to sell such goods in such manner as the agent or representative of such nonresident merchant. Ibid.

Although one may be engaged in interstate commerce as to goods which he is delivering, which have been previously contracted for, yet he is not engaged in interstate commerce as to goods which he takes with him at the same time, and as to which negotiations for sale had not been made before they were brought into the state. Newport v. French Bros. Bauer Co. 169 Ky. 174, 183 S. W. 532.

And a statute forbidding the sale by an itinerant vendor of any except certain classes of articles without first obtaining a license, and which makes no distinction between articles produced in the state and those produced without, is not repugnant to the power given to Congress to regulate commerce, as applied to an agent of a nonresident wagon manufacturer, who has wagons and parts of wagons shipped to him from his employer, and, after unpacking them, puts the parts together and proceeds from place to place, offering the wagons for sale. Territory v. Russell, 13 N. M. 558, 86 Pac. 551.

Also one who solicits orders for the goods of a nonresident concern is not engaged in interstate commerce where the orders are never transmitted beyond the state, or accepted or filled by anyone beyond the state, but are filled from goods which he orders sent to him in bulk, and for which he pays as soon as they arrive. Re Prindle, 67 Kan. 364, 72 Pac. 864.

And a solicitor for aluminum ware of a nonresident manufacturer was held, in Eldorado Springs v. Highfill, 268 Mo. 501, 188 S. W. 68, not to be engaged in interstate commerce, and so bound to take out a canvasser's license, where the facts were that the goods were sold by the solicitor on condition that they would be satisfactory on examination; the solicitor sent no names of purchasers to the manufacturer, but ordered goods sufficient to cover prospective sales, the goods being shipped to him in bulk, and paid for by him or security given for the value at time of arrival; the goods were then sorted by the solicitor, and were delivered in accordance with the conditional sale, and, if satisfactory, were paid for, the solicitor having an agreement that on any order goods to a certain value not accepted by purchasers might be returned to the manufacturer at its expense. The court said that the interstate character of the shipment ceased upon the delivery of the goods by the foreign corporation to the solicitor, and the goods thereafter not moving in interstate commerce, the transactions became local in their nature.

The license or occupation tax imposed in each county upon the business of selling or delivering sewing machines under Alabama Act of March 31, 1911, § 32,

W. Va. 495, 64 Am. St. Rep. 871, 27 S. E. 225; McDermott v. State, 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

A current of commerce created by importing goods from one state into another continues until they have reached their final destination. A temporary interruption necessary to consummate a purchase does not destroy the interstate character of the transaction.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep.

---

wrapped separately, and marked with the purchaser's name, and then shipped to a delivery agent of such concern, who delivers them to the purchaser, is not required to take out a license, as he is engaged in interstate commerce. People v. Erickson, 147 N. Y. Supp. 226.

A municipal ordinance which imposes a license tax upon an agent for a nonresident manufacturer of "near beer" is invalid, as placing a burden upon interstate commerce, where the sole purpose of the ordinance is to make this class of business pay a certain tax for the general revenues of the city, without regard to matters of health, peace, or public morality. Loh v. Macon, 8 Ga. App. 744, 70 S. E. 149.

And an act of Congress imposing a license on brewers' agents was held, in Beitzell v. District of Columbia, 21 App. D. C. 49, not to apply to one who solicited orders for the products of a brewery located outside of the District, the orders being sent to the brewery, where they were filled and shipped direct to the consumer, the solicitor having no place in the District for the transaction of business or for the storage of the brewery's products.

But the annual license charge imposed by a state law upon the business of selling or offering for sale intoxicating liquors within the state by any traveling salesman who solicits orders in quantities of less than 5 gallons cannot be regarded, when applied to interstate transactions, as repugnant to the commerce clause of the Federal Constitution, in view of the provisions of a Federal statute that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein. Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733.

Agents for a nonresident manufacturer, who solicits orders for pictures to be enlarged, and also agents who deliver and collect for such pictures after they are enlarged, are engaged in interstate commerce, and so are not liable to a tax imposed upon peddlers and hawkers. Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Chicago Portrait Co. v. Macon, 147 Fed. 967; Ex parte Hull, 153 Fed. 459; Re Julius, 26 Ohio C. C. 423.

Nor does the fact that the delivering agents, at the time of delivery of the pictures previously ordered, sell frames therefor, make such delivery agents peddlers within the meaning of a municipal ordinance imposing a license tax upon peddlers and hawkers. Caldwell v. North Carolina, supra; Chicago Portrait Co. v. Macon, 147 Fed. 967; Re Julius, supra.

The sale within the state of a frame for a portrait made in another state to fill an order taken by a solicitor in the former state cannot be so separated from the rest of the dealings between the nonresident maker and the purchaser as to sustain the imposition of a license tax, under Alabama Act of March 7, 1907, § 17, where the order for the portrait contemplated its delivery in an appropriate frame, which the purchaser of the portrait should have the option of buying at the factory price. Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649. By this decision it is now settled that where the selling of the frame is a mere incident to the taking of the order for the portrait, it is within the protection of the commerce clause,—a question concerning which there had been much conflict prior to this decision.

Also an agent of a nonresident portrait manufacturer to whom the latter sends portraits made to fill orders taken by local solicitors, and, in a separate parcel, frames suitable for such portraits, the orders for which contemplate delivery in appropriate frames, which the customers may select at wholesale prices, cannot constitutionally be required to take out a peddler's license when engaged in putting the portraits into separate frames, delivering them, and offering the customers a choice of the different styles of frame, the customers taking one or none, at their option, since any sale of the frames must

294; Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623; York Mfg. Co. v. Colley, 247 U. S. 21, 62 L. ed. 963, 38 Sup. Ct. Rep. 430; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Davis v. Virginia, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. Rep. 479; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475.

Original packages of interstate commerce themselves only become taxable when they have come to rest at their destination, or have become part of the general mass of property in the state.

Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Hinson v. Lott, 8 Wall. 148,

---

be regarded as a part of the interstate transaction between the nonresident manufacturer and the customer. Davis v. Virginia, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. Rep. 479.

But where a sale is made of goods theretofore shipped into the state, which, by reason of having been taken from their original package, or from some other cause, had ceased to be articles of interstate commerce, the transaction is not within the protection of the commerce clause.

Thus, one who goes about from place to place selling patent medicines of a nonresident manufacturer which the manufacturer has put up in small bottles and packages ready for use, and has shipped in bulk to such peddler, is not engaged in interstate commerce, and so is required to take out a peddler's license. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168.

Also one who establishes a line of credit with a nonresident merchant, and on his own account sells such merchant's goods from door to door, or takes orders for goods which he may not have with him, and delivers them on his next trip, is not engaged in interstate commerce, and so is liable for the license fees imposed upon peddlers and hawkers. Ballard v. Russell, 145 La. 636, 82 So. 730.

Nor would it alter the situation were he to sell such goods in such manner as the agent or representative of such nonresident merchant. Ibid.

Although one may be engaged in interstate commerce as to goods which he is delivering, which have been previously contracted for, yet he is not engaged in interstate commerce as to goods which he takes with him at the same time, and as to which negotiations for sale had not been made before they were brought into the state. Newport v. French Bros. Bauer Co. 169 Ky. 174, 183 S. W. 532.

And a statute forbidding the sale by an itinerant vendor of any except certain classes of articles without first obtaining a license, and which makes no distinction between articles produced in the state and those produced without, is not repugnant to the power given to Congress to regulate commerce, as applied to an agent of a nonresident wagon manufacturer, who has wagons and parts of wagons shipped to him from his employer, and, after unpacking them, puts the parts together and proceeds from place to place, offering the wagons for sale. Territory v. Russell, 13 N. M. 558, 86 Pac. 551.

Also one who solicits orders for the goods of a nonresident concern is not engaged in interstate commeree where the orders are never transmitted beyond the state, or accepted or filled by anyone beyond the state, but are filled from goods which he orders sent to him in bulk, and for which he pays as soon as they arrive. Re Prindle, 67 Kan. 364, 72 Pac. 864.

And a solicitor for aluminum ware of a nonresident manufacturer was held, in Eldorado Springs v. Highfill, 268 Mo. 501, 188 S. W. 68, not to be engaged in interstate commerce, and so bound to take out a canvasser's license, where the facts were that the goods were sold by the solicitor on condition that they would be satisfactory on examination; the solicitor sent no names of purchasers to the manufacturer, but ordered goods sufficient to cover prospective sales, the goods being shipped to him in bulk, and paid for by him or security given for the value at time of arrival; the goods were then sorted by the solicitor, and were delivered in accordance with the conditional sale, and, if satisfactory, were paid for, the solicitor having an agreement that on any order goods to a certain value not accepted by purchasers might be returned to the manufacturer at its expense. The court said that the interstate character of the shipment ceased upon the delivery of the goods by the foreign corporation to the solicitor, and the goods thereafter not moving in interstate commerce, the transactions became local in their nature.

The license or occupation tax imposed in each county upon the business of selling or delivering sewing machines under Alabama Act of March 31, 1911, § 32,

19 L. ed. 387; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Robbins v. Taxing Dist. 120 U. S. 489, 495, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403.

There is a distinction between the right to impose a tax on the nonresident importer for the privilege of selling goods in the original packages and the right to impose a tax on the original packages themselves after they reach their destination and come to rest in the state.

7 Enc. U. S. Sup. Ct. Rep. 298–300.

---

is not an unconstitutional interference with interstate commerce, as applied to a foreign corporation which maintains a store or regular place of business in each county, from which all of the local agents in such county are supplied with sewing machines and appurtenances to be taken into the rural districts for sale or for rent, all transactions entering into such sales or renting being completed within a single county. Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493.

So, the business of erecting lightning rods within the corporate limits as the agent of a nonresident manufacturer on whose behalf such agent has solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license tax without violating the commerce clause of the Federal Constitution, although the contract under which the rods were shipped bound the seller, at his own expense, to attach them to the houses of the persons who ordered them. Browning v. Waycross, 233 U. S. 16, 58 L. ed. 828, 34 Sup. Ct. Rep. 578.

The state may make the license tax on the right to sell certain classes of goods by sample to consumers by canvassing from house to house apply to goods shipped from foreign states, when it applies equally to those of domestic origin. State v. Bayer, 34 Utah, 257, 19 L.R.A. (N.S.) 297, 97 Pac. 129.

In Ex parte Crowder, 171 Fed. 250, an agent for a nonresident carriage company solicited and received an order for a buggy, to be subsequently delivered. The sale was consummated by the delivery of a buggy from a stock kept by the manufacturer in a warehouse within the state. The agent, not having taken out a license, as required by statute of those engaged in the business of peddling, was arrested for violating the statute. In discharging a writ of habeas corpus and remanding the petitioner, the court stated that the statute was strictly a police and revenue statute, applicable to business to be transacted wholly within the state, and did not create an invidious burden upon interstate or foreign commerce, since it was general in its application, bearing evenly upon all peddlers without discriminating against persons, whether residents or nonresidents of the state, nor against commodities, whether produced within the state or imported from other states or countries.

A statute which provides that "it shall be unlawful for any person to travel from place to place in any county of this state for the purpose of carrying to sell, or exposing or offering to sell, barter, or exchange any goods, wares, merchandise or any other property whatever, without first obtaining a license therefor from the auditor of said county," is not unconstitutional, as placing a burden upon interstate commerce, since the act only includes persons traveling from place to place, carrying the goods which they sell, and does not include persons inducing sales of goods by sample for future delivery. Re Lipschitz, 14 N. D. 622, 95 N. W. 157.

Discrimination against manufactures or products of other states.

A statute forbidding without license the canvassing for or selling by sample of goods made in another state, after they have been shipped into the state passing the statute, while permitting such canvassing for domestic goods, violates the commerce clause of the Federal Constitution. State v. Bayer, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129.

And so a statute is unconstitutional and inoperative in so far as it requires a license of one who travels from place to place selling carriages which have been shipped into the state and does not require the same license of one who sells carriages which are of domestic manufacture. Ibid.

Also a municipal ordinance which imposes a license fee upon anyone who sells foreign-grown fruit from a wagon discriminates in favor of home-grown fruit and against foreign fruit, and so is an attempted interference with interstate commerce. State v. Bornstein, 107 Me. 260, 78 Atl. 281.

There is also a distinction between the right to impose a tax on an importer who is using persons licensed by the state to make sales for him within the state, and the right to impose a tax on the importer himself for making such sales, as is sought to be done here.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

The so-called "peddler" cases do not apply to the facts here.

Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Newport v. French Bros. Bauer Co. 169 Ky. 174, 183 S. W. 532; Watters v. Michigan, 248 U. S. 65, 63 L. ed. 129, 39 Sup. Ct. Rep. 29.

The property here does not acquire a situs whenever a driver stops his vehicle in front of a retail dealer's place of business, for the purpose of negotiating a sale.

Com. ex rel. Alexander v. Haggin, 30 Ky. L. Rep. 788, 99 S. W. 906; Com. v. Prudential L. Ins. Co. 149 Ky. 380, 149 S. W. 836; Com. v. Union Refrigerator Transit Co. 118 Ky. 131, 80 S. W. 490, 81 S. W. 268; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498.

The fact that containers of drinks are temporarily held in Kentucky until a driver calls for them cannot affect the questions here at issue.

Wells, F. & Co. v. State, 248 U. S. 165, 63 L. ed. 190, 39 Sup. Ct. Rep. 62; I. M. Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. ed. 413, 28 Sup. Ct. Rep. 247; Swift & Co. v. United States, 196 U. S. 375, 397, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A. (N.S.) 264, 30 Sup. Ct. Rep. 649.

If the construction here contended for should result in discrimination against citizens of Covington, Kentucky, it can make no difference.

Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 232, 21 L. ed. 146; Robbins v. Taxing Dist. 120 U. S. 489, 495, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

This court is not in any way bound by the opinions of the Kentucky court of appeals.

Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967.

The following recent decisions of this court support the contentions of plaintiffs in error as to what constitutes interstate commerce:

Weigle v. Curtice Bros. Co. 248 U. S. 285, 63 L. ed. 242, 39 Sup. Ct. Rep. 124; Hebe Co. v. Shaw, 248 U. S. 297, 304, 63 L. ed. 255, 259, 39 Sup. Ct. Rep. 125; Rast v. Van Deman & L. Co. 240 U. S. 342, 362, 60 L. ed. 679, 688, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455.

The following late decisions are also in accord with our contention that the license tax here imposed for the privi-

---

And in Com. v. Caldwell, 190 Mass. 355, 112 Am. St. Rep. 334, 76 N. E. 955, 5 Ann. Cas. 879, it was held that a statute which discriminated between agricultural products of the United States and those of other countries in reference to the requirement of a license fee to peddle the latter was an attempted interference with foreign commerce.

So, too, a statute which imposes a license tax upon solicitors for a nonresident portrait concern, and which provides that such statute shall not apply to merchants or dealers having a permanent place of business in the state, and keeping picture frames as part of their stock in trade, is invalid as an unjust discrimination in restraint of interstate commerce, as against nonresident concerns. Ex parte Hull, 153 Fed. 459.

A state statute imposing a heavy license tax upon the right to canvass from house to house for a certain limited number of articles not produced or manufactured within the state, and not injurious to health or morals, for the apparent purpose of favoring resident merchants with established places of business, violates the provisions of the Federal Constitution against abridging the privileges or immunities of the citizens of the United States, and denying the equal protection of the laws. State v. Bayer, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129.

lege of making sales is a direct burden upon the interstate commerce:

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 295, 296, 62 L. ed. 295, 298, 299, 38 Sup. Ct. Rep. 126; United States Glue Co. v. Oak Creek, 247 U. S. 321, 326, 327, 62 L. ed. 1135, 1140, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810.

Mr. A. E. Stricklett argued the cause and filed a brief for defendant in error:

The plaintiffs in error bring their merchandise, consisting of soft drinks, into the city of Covington, Kentucky, from Cincinnati, in the state of Ohio, on their own vehicles, without having received from their customers in the city of Covington previous orders or requests therefor, and there and then sell and deliver the same to the retail dealers in the city of Covington. These transactions are not interstate commerce, nor in any way directly connected with such commerce.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 517, 518, 48 L. ed. 538, 545, 546, 24 Sup. Ct. Rep. 365; Armour Packing Co. v. Lacy, 200 U. S. 226, 233, 50 L. ed. 451, 456, 26 Sup. Ct. Rep. 232; Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 214, 56 L. ed. 168, 170, 32 Sup. Ct. Rep. 38; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Dozier v. Alabama, 218 U. S. 124, 127, 54 L. ed. 965, 966, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Emert v. Missouri, 156 U. S. 296, 309, 311, 39 L. ed. 430, 433, 434, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; International Textbook Co. v. Pigg, 217 U. S. 91, 106, 54 L. ed. 678, 685, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Kehrer v. Stewart, 197 U. S. 60, 68, 49 L. ed. 663, 667, 25 Sup. Ct. Rep. 403; Rearick v. Pennsylvania, 203 U. S. 507, 510, 51 L. ed. 295, 296, 27 Sup. Ct. Rep. 159; Robbins v. Taxing Dist. 120 U. S. 489, 493, 495, 30 L. ed. 694, 696, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; Wagner v. Covington, 177 Ky. 385, 197 S. W. 806.

The judgment of the court of appeals of Kentucky is based on findings of facts which exclude a Federal question, and which this court accepts as conclusive; therefore the writ of error should be denied.

Chrisman v. Miller, 197 U. S. 313–319, 49 L. ed. 770–772, 25 Sup. Ct. Rep. 468; Wagner v. Covington, 177 Ky. 385, 197 S. W. 806; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220.

The writ of error should be denied because the judgment of the court of appeals of Kentucky is based on grounds sufficiently broad to sustain it, over which this court has no jurisdiction.

California Powder Works v. Davis, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; Newport v. Wagner, 168 Ky. 641, 182 S. W. 834, Ann. Cas. 1917A, 962; Garr, S. & Co. v. Shannon, 223 U. S. 468, 473, 56 L. ed. 510, 513, 32 Sup. Ct. Rep. 236; Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Rogers v. Jones, 214 U. S. 196, 204, 53 L. ed. 965, 969, 29 Sup. Ct. Rep. 635; Wagner v Covington, 177 Ky. 388, 197 S. W. 806.

The ordinance in question imposes an occupation tax upon all wholesale dealers in soft drinks; the tax imposed being uniform on all persons engaged in such business, whether residents or nonresidents. The ordinance does not, therefore, come within the constitutional inhibition.

Emert v. Missouri, 156 U. S. 296, 311, 39 L. ed. 430, 434, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Howe Mach. Co. v. Gage, 100 U. S. 676, 677, 25 L. ed. 754, 755; Kehrer v. Stewart, 197 U. S. 68, 69, 49 L. ed. 663, 668, 25 Sup. Ct. Rep. 403.

The transaction, rather than the origin of the commodity sold, determines whether the goods are moving in interstate commerce, and there must be some previous interstate transaction pursuant to which the goods are moving from one state to another, in order that a given transaction may be classed as interstate commerce.

Kirmeyer v. Kansas, 236 U. S. 568–570, 59 L. ed. 721–723, 35 Sup. Ct. Rep. 419.

Mr. Justice Pitney delivered the opinion of the court:

This was an action brought by plaintiffs in error in a state court of Kentucky against the city of Covington, a [99] municipal corporation of that state, to recover license fees theretofore paid by them under certain ordinances of the city for the conduct of their

business in Covington, and to enjoin the enforcement against them of a later ordinance calling for further like payments. The several ordinances, each in its turn, required all persons carrying on certain specified businesses in the city to take out licenses and pay license fees; among others, the business of wholesale dealer in what are known as "soft drinks." Plaintiffs were and are manufacturers of such drinks, having their factory and bottling works in the city of Cincinnati, in the state of Ohio, on the opposite side of the Ohio river from Covington. They have carried on and do carry on the business of selling in Covington soft drinks, the product of their manufacture, in the following manner: They have a list of retail dealers in Covington to whom they have been and are in the habit of making sales; two or three times a week a wagon or other vehicle owned by plaintiffs is loaded at the factory in Cincinnati and sent across the river to Covington, and calls upon the retail dealers mentioned, many of whom have been for years on plaintiffs' list and have purchased their goods under a general understanding that plaintiffs' vehicle would call occasionally and furnish them with such soft drinks as they might need or desire to purchase from plaintiffs; when a customer's place of business is reached by the vehicle the driver goes into the storeroom and either asks or looks to see what amount of drinks is needed or wanted; he then goes out to the vehicle and brings from it the necessary quantity, which he carries into the store and delivers to the customer; upon his trips to Covington he always carries sufficient drinks to meet the probable demands of the customers, based on past experience; but, with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiffs' place of business in Cincinnati, all [**100**] sales in Covington are made from the vehicle by the driver in the manner mentioned. Sometimes the driver succeeds in selling there the entire supply thus carried upon the wagon, sometimes only a part thereof; or he may return after having made but a few sales, or none at all; in which event he carries the unsold supply back to plaintiffs' place of business in Cincinnati. The soft drinks in question are delivered in stopped bottles or siphons, according to their nature, and these are placed (at the bottling works) in separate wooden or metal cases, each case being open at the top and holding a certain number of bottles or siphons, according to the nature of the drinks and the custom of the trade; the filled bottles or siphons are carried upon the vehicle, sold, and delivered in these cases, each case remaining entire and unbroken, and nothing less than a case being sold or delivered. The retail dealers usually pay cash, and purchase only the contents of the bottles, while the bottles and cases remain the property of plaintiffs and are subsequently collected, when empty, by plaintiffs' drivers or agents on their regular visits; there are, however, a few customers who pay for and thereafter own the bottles in which distilled water is delivered. The ordinances were and are respectively applicable to all wholesale dealers in such soft drinks in Covington, whether the goods were or are manufactured within or without the state.

The trial court, and, on appeal, the court of appeals of Kentucky, gave judgment for defendant, overruling the contention of plaintiffs that the ordinances as carried into effect against them were repugnant to the "commerce clause" (art. 1, § 8) of the Constitution of the United States (177 Ky. 385, 197 S. W. 806), and upon this Federal question the case is brought here by writ of error.

It is important to observe the precise point that we have to determine. It is indisputable that, with respect to the goods occasionally carried upon plaintiff's wagon from one [**101**] state to the other, in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality. The court of appeals in the present case, in line with its previous decisions in Newport v. Wagner, 168 Ky. 641, 646, 182 S. W. 834, Ann. Cas. 1917A, 962, and Newport v. French Bros. Bauer Co. 169 Ky. 174, 183 S. W. 532, recognizing the authority of the decisions of this court bearing upon the subject, conceded that this part of plaintiffs' business was not subject to state regulation (177 Ky. 388). At the same time the court held that, with respect to the remaining and principal part of the business conducted in Covington, that which consists in carrying a supply of goods from place to place upon wagons, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold, plaintiffs were subject to the licensing ordinances; and it is with this alone that we have to deal. If, with respect to this

portion of their business, plaintiffs may be subjected to the regulatory power of the state, acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state, might be repugnant to the Federal Constitution.

From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of itinerant vender or peddler,—a traveling from place to place within the state, selling goods that are carried about with the seller for the purpose. Plaintiffs in error insist that this view of the matter is untenable because the courts of Kentucky have held that sales made to a retail merchant for resale do not constitute peddling within the meaning of the statutes of that state. Standard Oil Co. v. Com. 107 Ky. 606, 609, 55 S. W. 8; Newport v. French Bros. Bauer Co. 169 [102] Ky. 174, 185, 183 S. W. 532. These decisions however, deal merely with a question of statutory definition; and it hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather upon the practical operation and effect of the tax as applied and enforced. The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax that, in its actual effect, violates no constitutional provision, by inaccurately defining it. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99.

We have, then, a state tax upon the business of an itinerant vender of goods as carried on within the state,—a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the "commerce clause." Woodruff v. Parham, 8 Wall. 123, 140, 19 L. ed. 382, 387; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Baccus v. Louisiana, 232 U. S. 334, 58 L. ed. 627, 34 Sup. Ct. Rep. 439.

The peddler's license tax considered in Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347, was denounced only because it amounted to a discrimination against the products of other states, and therefore to an interference with commerce among the states. To the same effect, Walling v. Michigan, 116 U. S. 446, 454, 29 L. ed. 691, 693, 6 Sup. Ct. Rep. 454.

[103] Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the state of Kentucky: to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not.

The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce has always been recognized. In Robbins v. Shelby Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, Mr. Justice Bradley, who spoke for the court, said (p. 497): "When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce." See also Crenshaw v. Arkansas, 227 U. S. 389, 399, 400, 57 L. ed. 565, 568, 569, 33 Sup. Ct. Rep. 294, where

the distinction was clearly set forth. And in all the "drummer cases" the fact has appeared that there was no selling from a stock of goods carried for the purpose, but only a solicitation of sales, with or without the exhibition of samples; the goods sold to be thereafter transported from without the state. Rogers v. Arkansas, 227 U. S. 401, 408, 57 L. ed. 569, 572, 33 Sup. Ct. Rep. 298; [**104**] Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 510, 51 L. ed. 295, 296, 27 Sup. Ct. Rep. 159; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Browning v. Waycross, 233 U. S. 16, 58 L. ed. 828, 34 Sup. Ct. Rep. 578; Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623; Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 153, 62 L. ed. 632, 636, 38 Sup. Ct. Rep. 295.

Judgment affirmed.

GILLIGAN
v.
CITY OF COVINGTON.

[No. 62.]

Announced by Mr. Justice **Pitney**:

By stipulation of counsel this case was heard with No. 61, and it is agreed that a similar judgment is to be entered.

Judgment affirmed.

Mr. Justice **McKenna** and Mr. Justice **Holmes** dissent.

OKLAHOMA RAILWAY COMPANY, Plff. in Err.,
v.
SEVERNS PAVING COMPANY and the City of Oklahoma City.

(See S. C. Reporter's ed. 104-107.)

Error to state court — proper judgment — saving right to hearing.

1. A judgment of the highest court of a state which, by affirming, without more, a judgment of the trial court directing a reassessment against the property itself instead of against a street railway company of the share of the expense of a pavement properly apportioned to a central strip in a highway owned in fee by the street railway company, leaves in serious doubt the right of the company to a new and adequate hearing in respect of the assessment, will be so modified and corrected by the Federal Supreme Court on writ of error as definitely to preserve such right.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — assessing street railway for public improvement.

2. The terms and conditions in a street railway franchise which require the street railway company under certain conditions to pave or pay for paving certain portions of occupied streets do not amount to a contract which prevents, on constitutional grounds, the imposition by the municipality upon a central strip in the highway owned in fee by the street railway company of its fair share, according to benefits, of the expense of paving such street.

[For other cases, see Constitutional Law, 1435–1439, in Digest Sup. Ct. 1908.]

[No. 106.]

Argued November 19 and 20, 1919. Decided December 8, 1919.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Oklahoma County, in that state, granting a writ of mandamus to compel a reassessment against the property itself instead of against a street railway company of the fair share of the expense of a pavement apportioned to a central strip in the highway owned in fee by the street railway company. Modified by preserving the right

---

Note.—On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

Generally as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

On liability of street railway for paving assessment—see note to Shreveport v. Prescott, 46 L.R.A. 193.

On privilege of using street as a contract within the constitutional provision against impairing the obligation of contracts—see notes to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142, and Russell v. Sebastian, L.R.A.1918E, 892.

On necessity for special benefit to sustain assessments for local improvements—see note to Re Madera Irrig. Dist. 14 L.R.A. 755.

of the street railway company to a hearing in respect of the assessment, and as so modified affirmed.

See same case below, — Okla. —, 10 A.L.R. —, 170 Pac. 216.

The facts are stated in the opinion.

Messrs. John B. Dudley and **Henry G. Snyder** argued the cause, and, with Mr. Henry E. Asp, filed a brief for plaintiff in error:

In no event can any greater burden with respect to paving be imposed upon the Oklahoma Railway Company than was outlined in the franchise ordinance No. 281 of the city, where the entire duty and burden of the railway company with respect to paving are detailed. The imposition of any other or greater burden than that provided for by the franchise is void under the Federal Constitution, as impairing the obligation of the franchise contract.

Oklahoma City v. Oklahoma R. Co. 20 Okla. 1, 16 L.R.A.(N.S.) 651, 93 Pac. 48; Oklahoma R. Co. v. St. Joseph's Parochial School, 33 Okla. 755, 127 Pac. 1087; Enid City R. Co. v. Enid, 43 Okla. 788, 144 Pac. 617; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Detroit United R. Co. v. Michigan, 242 U. S. 238, 249, 61 L. ed. 268, 273, P.U.R.1917B, 1010, 39 Sup. Ct. Rep. 87; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Coast Line R. Co. v. Savannah, 30 Fed. 646; Wright v. Georgia R. & Bkg. Co. 216 U. S. 420, 54 L. ed. 544, 30 Sup. Ct. Rep. 242; State ex rel. Kansas City v. Corrigan Consol. Street R. Co. 85 Mo. 263, 55 Am. Rep. 361; West Chicago Street R. Co. v. Chicago, 178 Ill. 339, 53 N. E. 112; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; Provisional Municipality v. Northrup, 14 C. C. A. 59, 30 U. S. App. 762, 66 Fed. 689; Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997; Madison v. Alton, G. & St. L. Traction Co. 235 Ill. 346, 85 N. E. 596; Moline v. Tri-City R. Co. 262 Ill. 122, 104 N. E. 271; Dean v. Paterson, 67 N. J. L. 199, 50 Atl. 620; McChesney v. Chicago, 213 Ill. 595, 73 N. E. 368.

Under the authority of Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U. S. 84, 57 L. ed. 1400, 33 Sup. Ct. Rep. 997, this franchise ordinance is a grant in perpetuity. The right to occupy the street surface for tracks therefore continues while the use continues. Exactly the same is true of the private right of way, which can be used for no other purpose than the laying and operation over of street railway tracks, and which, when this use is abandoned, reverts to the grantor.

Santa Fe, L. & E. R. Co. v. Laune, — Okla. —, 168 Pac. 1022.

In no event can a greater burden be imposed upon the railway company respecting paving, in so far as its private right of way is affected, than the burden provided in the dedication of such private rights of way, such dedication being made when the land in question was farm property, not within the city limits, the area included within such dedication having been subsequently taken into the city with knowledge of the restrictions contained in the plats and dedications, such restrictions and conditions having been the inducement of the railway company to build in these outlying districts, and constituting contracts which would be impaired, in violation of both state and Federal Constitutions, by the imposition of any or other greater burden as to paving than the plats and dedications provide for and require.

Atchison, T. & S. F. R. Co. v. Shawnee, 105 C. C. A. 377, 183 Fed. 85; Cincinnati v. Louisville & N. R. Co. 223 U. S. 390, 56 L. ed. 481, 32 Sup. Ct. Rep. 267; Browne v. Palmer, 66 Neb. 287, 92 N. W. 315; Bartlett v. Boston, 182 Mass. 460, 65 N. E. 827; Perth Amboy Trust Co. v. Perth Amboy, 75 N. J. L. 291, 68 Atl. 84; State, Tallon, Prosecutor, v. Hoboken, 59 N. J. L. 383, 36 Atl. 693; Tallon v. Hoboken, 60 N. J. L. 212, 37 Atl. 895; Boston Water Power Co. v. Boston, 194 Mass. 571, 80 N. E. 598; Board of Education v. Kansas City, 62 Kan. 374, 63 Pac. 600; Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co. 240 Pa. 519, 87 Atl. 968; Baker v. Chicago, R. I. & P. R. Co. 154 Iowa, 228, 134 N. W. 587; Kimball v. Chicago, 253 Ill. 105, 97 N. E. 257; Faller v. Latonia, 24 Ky. L. Rep. 2476, 74 S. W. 287; O'Donnell v. Pittsburgh, 234 Pa. 401, 83 Atl. 314; Parriott v. Hampton, 134 Iowa, 157, 111 N. W. 440; Bloomfield v. Allen, 146 Ky. 34, 7 L.R.A. (N.S.) 122, 141 S. W. 400; Delaware, L. & W. R. Co. v. Syracuse, 157 Fed. 700; Spaulding v. Wesson, 5 Cal. Unrep. 399, 45 Pac. 807; Noblesville v. Lake Erie & W. R. Co. 130 Ind. 1, 29 N. E. 484; Chicago v. Ward, 169 Ill. 392, 38 L.R.A. 849, 61 Am. St. Rep. 185, 48 N. E. 927; Jacksonville v. Jacksonville R. Co. 67 Ill. 543; St. Paul & P. R. Co. v.

Schurmier, 7 Wall. 272–289, 19 L. ed. 74–78; Atchison, T. & S. F. R. Co. v. Chanute, 90 Kan. 428, 133 Pac. 576.

The judgment in the court below deprives the railway company of its property without due process of law.

Wagner v. Leser, 239 U. S. 208, 60 L. ed. 230, 36 Sup. Ct. Rep. 66; Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, L.R.A. 1918E, 190, 36 Sup. Ct. Rep. 204; Embree v. Kansas City & L. B. Road Dist. 240 U. S. 242, 60 L. ed. 624, 36 Sup. Ct. Rep. 317; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 60 L. ed. 1072, 36 Sup. Ct. Rep. 647.

Mr. **D. A. Richardson** argued the cause, and, with Messrs. Russell G. Lowe, T. G. Chambers, B. A. Ames, and Streeter B. Flynn, filed a brief for defendants in error:

The franchise granted no exemption from the assessment of land owned by the railway company.

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Citizens' Bank v. Parker, 192 U. S. 73, 87, 48 L. ed. 346, 356, 24 Sup. Ct. Rep. 181; Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 177, 40 L. ed. 660, 661, 16 Sup. Ct. Rep. 471; New York ex rel. Schurz v. Cook, 148 U. S. 397, 409, 37 L. ed. 498, 502, 13 Sup. Ct. Rep. 645; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 51 L. ed. 399, 27 Sup. Ct. Rep. 202; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Tucker v. Ferguson, 22 Wall. 527, 22 L. ed. 805; Seton Hall College v. South Orange, 242 U. S. 100, 61 L. ed. 170, 37 Sup. Ct. Rep. 54; Union Pass. R. Co. v. Philadelphia, 101 U. S. 528, 25 L. ed. 912; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; Oklahoma City v. Shields, 22 Okla. 293, 100 Pac. 559; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 243, 50 L. ed. 172, 173, 26 Sup. Ct. Rep. 23; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466

The dedication or conveyance of the property in question contained no provision purporting to exempt the same from assessment under the general law of the state for paving purposes; and if it had done so, such provision would have been void.

Chicago & A. R. Co. v. McWhirt, 243 U. S. 422, 61 L. ed. 826, 37 Sup. Ct. Rep. 392; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678; Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117; Manigault v. Springs, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127; Hudson County Water Co. v. McCarter, 209 U. S. 349, 357, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; 3 Dill. Mun. Corp. 5th ed. § 1075; Richards v. Cincinnati, 31 Ohio St. 506; Jones v. Carter, 45 Tex. Civ. App. 450, 101 S. W. 514; Edwards Hotel & City Street R. Co. v. Jackson, 96 Miss. 547, 51 So. 803; Denver v. New York Trust Co. 229 U. S. 123, 57 L. ed. 1101, 33 Sup. Ct. Rep. 657.

The proceeding in and decree of the trial court, and the affirmance thereof by the supreme court of Oklahoma, do not deprive the railway company of its property without due process of law.

Bartlesville v. Holm, 40 Okla. 467, 9 A.L.R. 627, 139 Pac. 273; Norris v. Lawton, 47 Okla. 213, 148 Pac. 123; Coalgate v. Gentilini, 51 Okla. 552, 152 Pac. 95; Terry v. Hinton, 52 Okla. 170, 152 Pac. 518; Chickasha v. O'Brien, — Okla. —, 159 Pac. 282; Perry v. Davis, 18 Okla. 458, 90 Pac. 865; Kerker v. Bocher, 20 Okla. 729, 95 Pac. 981; Paulsen v. El Reno, 22 Okla. 734, 98 Pac. 958; Jenkins v. Oklahoma City, 27 Okla. 230, 111 Pac. 941; Lonsinger v. Ponca City, 27 Okla. 397, 112 Pac. 1006; Weaver v. Chickasha, 36 Okla. 226, 128 Pac. 305; Shultz v. Ritterbusch, 38 Okla. 478, 134 Pac. 961; Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

[**106**] Mr. Justice **McReynolds** delivered the opinion of the court:

In 1909 the owners platted Linwood Place, adjacent to Oklahoma City, for building lots, streets, etc. To procure extension of a street car line therein, they dedicated a strip 40 feet in width, lying along the center of what is now

known as Linwood boulevard, to plaintiff in error's predecessor, "its successors and assigns, with a like effect as though deeded and conveyed to said company in fee simple by separate deed," on condition, however, that the property should be subject to reasonable police regulations, that the grantee should construct crossings over the tracks and also put down curbing and pave the crossings whenever the boulevard itself should be paved. Subordinate to above grant the streets as shown on the plat were dedicated to the public for ordinary purposes of travel. Afterwards car tracks were laid in the center of the 40-foot strip and the corporate limits of Oklahoma City were extended to include Linwood Place.

In order to provide funds for paving the public roadways along Linwood boulevard, the city undertook in 1910 to lay a tax upon the adjacent property, and directed that it be apportioned according to benefits. The board of commissioners apportioned to the central strip as its proper share of the expenses, $12,046.16. Instead of assessing this amount directly against the property, the city council erroneously assessed it against the street car company. Thereafter, the city and the Severns Company, which had put down the paving, procured from the district court of Oklahoma county a mandamus directing a reassessment against the land itself, but a hearing upon objections thereto was not specifically provided for.

The supreme court of the state (— Okla. —, 10 A.L.R. —, 170 Pac. 216) declared: "The fee title to the strip of land in question [107] here appears to be in the railway company. . . . Its right is not merely an intangible privilege or an easement, but, under the terms of the dedication, is a fee-simple title. . . . The dominion and control of the strip of land in question here is not in the city authorities. If the street should be vacated by the city authorities, this private right of way would not revert to the abutting owners, but would continue to be the property of the railway company. The company took the fee from the original grantors by the dedication before the abutting owners acquired their titles." It then held the land was subject to assessment according to benefits resulting from the paving, and "that when the commissioners proceed in obedience to the decree of the court to reassess the property of the railway company an opportunity will be given the company to be heard and to complain or object to the amount of the assessment." Nevertheless, it ordered an affirmance of the judgment of the trial court, without more, and by so doing left in serious doubt the right of plaintiff in error to a new and adequate hearing in respect of the assessment. We think, therefore, that the judgment below should be modified and corrected so as definitely to preserve such right. So modified, it is affirmed. The costs here will be equally divided.

The terms and conditions in the original franchise granted by Oklahoma City to the plaintiff in error, which require it, under given conditions, to pave or pay for paving certain portions of occupied streets, are not applicable in the circumstances here presented, and cannot be relied upon to defeat the assessment now in question. The land supposed to be benefited belongs to the company; the city has made no contract which prevents imposition upon it of a fair share of the cost of beneficial improvements. Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466.

Modified and affirmed.

---

[108] THOMAS J. EVANS, Sole Surviving Receiver of the Citizens & Screven County Bank, Petitioner,

v.

NATIONAL BANK OF SAVANNAH.

(See S. C. Reporter's ed. 108-120.)

Usury — by national bank.

1. The National Bank Act establishes a system of general regulations, adopting the usury laws of the states only in so far as they severally fix the rate of interest. [For other cases, see Usury, I. c, in Digest Sup. Ct. 1908.]

Usury — by national bank — discounts — reserving interest in advance.

2. A national bank, having the power, under U. S. Rev. Stat. §§ 5136, 5197, to make discounts at the interest rate allowed by the state law, does not incur the penalty prescribed by § 5198 for taking usury merely because, in discounting short-term

---

Note.—As to lawfulness of taking interest in advance—see notes to Loganville Banking Co. v. Forrester, L.R.A. 1915D, 1195, and Bank of Newport v. Cook, 29 L.R.A. 761.

On forfeiture or other effect of taking or reserving illegal interest by national bank—see notes to Citizens' Nat. Bank v. Gentry, 56 L.R.A. 673, and Farmers' & M. Nat. Bank v. Dearing, 23 L. ed. U. S. 196.

notes in the ordinary course of business, it reserves interest in advance at the maximum interest rate allowed by the state law, although, under such law, interest charges reserved on a loan in advance by a state bank at the highest permitted rate constitute usury.

[For other cases, see Usury, I. c, in Digest Sup. Ct. 1908.]

[No. 67.]

Argued November 11 and 12, 1919. Decided December 8, 1919.

ON WRIT of Certiorari to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the Superior Court of Chatham County, in that state, sustaining a demurrer to the petition in a suit to recover a penalty for usury by a national bank. Affirmed.

See same case below, 21 Ga. App. 356, 94 S. E. 611.

The facts are stated in the opinion.

Mr. Frederick T. Saussy argued the cause and filed a brief for petitioner:

We call attention to the excessive charges made by the lender, on the actual discounts charged, and the averment in the petition that the same were paid at the maturity of each loan. These most important and vital allegations were seemingly ignored by the Georgia courts, which erroneously treated the petition as merely based on an allegation that 8 per cent per annum interest, and no more, had been charged in advance, and paid at maturity.

And even if the discounts actually charged in advance had in each of the loans been exactly at the rate of 8 per cent per annum (they were at a higher rate), such charges are usurious under the laws of Georgia.

Loganville Bkg. Co. v. Forrester, 143 Ga. 302, L.R.A.1915D, 1195, 84 S. E. 961.

Section 5197 of U. S. Rev. Stat., Comp. Stat. § 9758, 6 Fed. Stat. Anno. 2d ed. p. 744, mentions "loan or discount;" and this court has held that the terms "loan" and "discount" are synonymous.

National Bank v. Johnson, 104 U. S. 271, 26 L. ed. 742; Morris v. Third Nat. Bank, 73 C. C. A. 211, 142 Fed. 25.

If the act of Congress can be construed as contended for by counsel for respondent, and as decided by the court of appeals of Georgia in this case, then a national bank in Georgia, by making the maturity of the loan sufficiently remote, can charge any rate of interest the borrower will agree to pay it.

McCall v. Herring, 116 Ga. 244, 42 S. E. 468.

The state law is adopted by Congress, and what is usury under that law, if done by a person in that state, is usury if done by a national bank located in that state; and if taking interest in advance at the highest rate is usury under the law of that state, it is usury if done by a national bank in that state.

Timberlake v. First Nat. Bank, 43 Fed. 231; Citizens' Nat. Bank v. Donnell, 195 U. S. 374, 49 L. ed. 238, 25 Sup. Ct. Rep. 49; Daggs v. Phœnix Nat. Bank, 177 U. S. 549, 555, 44 L. ed. 882, 884, 20 Sup. Ct. Rep. 732.

The suit sufficiently shows that usury was charged and paid, irrespective of the enforced deposit of over $10,000 required by the lender, and sufficiently complied with the Georgia statute relating to pleading usury. As to the enforced deposit, the suit sufficiently shows the amount of usury charged, due to the enforced deposit; for the use of the money, being worth 7 per cent, would make that amount of interest on the enforced deposit usury that was charged. Of course it was paid, because the entire discount on the full face of the loans was paid, although the borrower had no use of the enforced deposit.

The measure of the rights of the national bank to interest is the state law.

Union Nat. Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 330, 331, 41 L. ed. 178, 179, 16 Sup. Ct. Rep. 1039.

The Georgia statute as to pleading the exact amount of usury charged has not been applied to any cases except where one seeks to recover or set off the usury as such, where exact figures are necessary.

Carswell v. Hartridge, 55 Ga. 415; Hollis v. Covenant Bldg. & L. Asso. 104 Ga. 322, 31 S. E. 215; King Bros. v Moore, 147 Ga. 43, 92 S. E. 757.

The enforcing of the deposit was clearly usury; it could not well be held otherwise than a usurious device; usury laws would be abrogated if the lender could require a deposit to be made as a condition to a loan; the worst forms of usury could thereby be practised, and we believe the practice has become one that is prevalent throughout our country. It is a makeshift to get more than legal interest; and while all sorts of explanations are offered for the requirement, such as maintaining the credit of

the borrower with the lender, making the account worth while to carry, etc., yet it so happens that the interest charged the borrower is calculated and paid on the entire face of the note; not on the net amount loaned.

East River Bank v. Hoyt, 32 N. Y. 119.

Mr. **Edward S. Elliott** argued the cause, and, with Mr. Jacob Gazan, filed a brief for respondent:

The acts of Congress providing for the creation and operation of national banks are the charter of such banks, and their terms and provisions are alone applicable to national banks.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29–33, 23 L. ed. 196–198; Hansford v. National Bank, 10 Ga. App. 270, 73 S. E. 405.

The acts of Congress, as construed by the courts of the United States, are the law of the land, and the courts of all the states are bound, in all matters relating to the National Bank Act, to conform their opinions and decisions to the construction of that law as announced by the United States courts.

Bates v. First Nat. Bank, 111 Ga. 758, 36 S. E. 949; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 558, 25 L. ed. 212, 213; First Nat. Bank v. McEntire, 112 Ga. 232, 37 S. E. 381; Reese v. Colquitt Nat. Bank, 12 Ga. App. 472, 77 S. E. 320; First Nat. Bank v. Davis, 135 Ga. 691, 36 L.R.A. (N.S.) 134, 70 S. E. 246; Haseltine v. Central Nat. Bank, 183 U. S. 134, 46 L. ed. 118, 22 Sup. Ct. Rep. 50.

Under the National Bank Act, not only by its express language, but also as construed by the United States courts, national banks are permitted to take discount at the highest legal rate authorized by the laws of the state in which such bank does business, and thus in Georgia discounting at 8 per cent does not constitute usury, although, if done by a state bank in Georgia, it would be usurious.

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Fleckner v. Bank of United States, 8 Wheat. 338, 5 L. ed. 631; Union Sav. Bank & T. Co. v. Dottenheim, 107 Ga. 614, 34 S. E. 217; Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1; Danforth v. National State Bank, 17 L.R.A. 622, 1 C. C. A. 62, 3 U. S. App. 7, 48 Fed. 271; Morris v. Third Nat. Bank, 73 C. C. A. 211, 142 Fed. 25; National Bank v. Johnson, 104 U. S. 271, 26 L. ed. 742; Atlantic State Bank v. Savery, 82 N. Y. 291; Pape v. Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183; McGill v. Ware, 5 Ill. 26; Vahlberg v. Keaton, 51 Ark. 541, 4 L.R.A. 462, 14 Am. St. Rep. 73, 11 S. W. 878; Hass v. Flint, 8 Blackf. 67; English v. Smock, 34 Ind. 116, 7 Am. Rep. 215; Tholen v. Duffy, 7 Kan. 409; Bank of Newport v. Cook, 29 L.R.A. 761, note; Newell v. National Bank, 12 Bush, 60; Duncan v. Maryland Sav. Inst. 10 Gill & J. 311; Lyons v. State Bank, 1 Stew. (Ala.) 469; Bank of Utica v. Wager, 2 Cow. 767; Grigsby v. Weaver, 5 Leigh, 213; Planters' Bank v. Snodgrass, 4 How. (Miss.) 627; Bank of Geneva v. Howlett, 4 Wend. 332; Maine Bank v. Butts, 9 Mass. 49; McCarthy v. First Nat. Bank, 223 U. S. 493, 499, 56 L. ed. 523, 525, 32 Sup. Ct. Rep. 240; Baker v. Lynchburg Nat. Bank, 120 Va. 208, 91 S. E. 157; Barnet v. Muncie Nat. Bank, 98 U. S. 558, 25 L. ed. 212; Thornton v. Bank of Washington, 3 Pet. 36, 7 L. ed. 594; Myer v. Muscatine, 1 Wall. 384, 17 L. ed. 564; Wheeler v. Union Nat. Bank, 96 U. S. 268, 24 L. ed. 833; Bank of Metropolis v. Moore, 5 Cranch, C. C. 518, Fed. Cas. No. 901, 13 Pet. 302, 309, 10 L. ed. 172, 176; Tyler, Usury, 155, 156; Mackenzie v. Flannery, 90 Ga. 599, 16 S. E. 710; National L. Ins. Co. v. Donovan, 238 Ill. 283, 87 N. E. 356; Rose v. Munford, 36 Neb. 148, 54 N. W. 219; Foster v. Pitman, 2 Neb. (Unof.) 672, 89 N. W. 763; Sanford v. Lundquist, 80 Neb. 414, 18 L.R.A.(N.S.) 633, 114 N. W. 279, 118 N. W. 129; Hoyt v. Bridgewater Copper Min. Co. 6 N. J. Eq. 253; Metz v. Winne, 15 Okla. 1, 79 Pac. 223; Covington v. Fisher, 22 Okla. 207, 97 Pac. 615; Newton v. Woodley, 55 S. C. 132, 32 S. E. 532, 33 S. E. 1; Heyward v. Williams, 63 S. C. 470, 41 S. E. 550; Tate v. Lenhardt, 110 S. C. 569, 96 S. E. 720; Marsh v. Martindale, 3 Bos. & P. 154, 127 Eng. Reprint, 85; Floyer v. Edwards, Cowp. pt. 1, p. 112, 98 Eng. Reprint, 995; Lloyd v. Williams, 2 W. Bl. 792, 96 Eng. Reprint, 465; Auriol v. Thomas, 2 T. R. 52, 100 Eng. Reprint, 29; Hammet v. Yea, 1 Bos. & P. 144, 126 Eng. Reprint, 826; Maddock v. Hammett, 7 T. R. 184, 101 Eng. Reprint, 922; McLean v. Lafayette Bank, 3 McLean, 587, Fed. Cas. No. 8,888; Alexandria Bank v. Mandeville, 1 Cranch, C. C. 552, Fed. Cas. No. 850; United States Bank v. Crabb, 2 Cranch, C. C. 299, Fed. Cas. No. 913; Union Bank v. Gosler, 2 Cranch, C. C. 349, Fed. Cas. No. 14,358; Union Bank v. Corcoran, 5 Cranch, C. C. 513, Fed. Cas.

No. 14,353; Branch Bank v. Strother, 15 Ala. 51; Baird v. Millwood, 51 Ark. 548, 11 S. W. 881; Bank of Newport v. Cook, 60 Ark. 288, 29 L.R.A. 761, 46 Am. St. Rep. 171, 30 S. W. 35; First Nat. Bank v. Waddell, 74 Ark. 241, 85 S. W. 417, 4 Ann. Cas. 818; McKiel v. Real Estate Bank, 4 Ark. 592; Thompson v. Real Estate Bank, 5 Ark. 59; Reed v. State Bank, 5 Ark. 193; Magruder State Bank, 18 Ark. 9; Savings Bank v. Bates, 8 Conn. 505; Philadelphia Loan Co. v. Towner, 13 Conn. 249; Phelps v. Kent, 4 Day, 96; Second Nat. Bank v. Smoot, 2 MacArth. 371; Mitchell v. Lyman, 77 Ill. 525; First Nat. Bank v. Davis, 108 Ill. 633; Willett v. Maxwell, 169 Ill. 540, 48 N. E. 473; Harris v. Bressler, 119 Ill. 467, 10 N. E. 188; Cobe v. Guyer, 237 Ill. 516, 86 N. E. 1071, affirming 139 Ill. App. 592; Maxwell v. Willett, 49 Ill. App. 564; Cole v. Lockhart, 2 Ind. 631; Bramblett v. Deposit Bank, 122 Ky. 324, 6 L.R.A.(N.S.) 612, 92 S. W. 283; Duncan v. Maryland Sav. Inst. 10 Gill & J. 299; Warren Deposit Bank v. Robinson, 18 Ky. L. Rep. 78, 35 S. W. 275; Lichtenstein v. Lyons, 115 La. 1051, 40 So. 454; Ticonic Bank v. Johnson, 31 Me. 414; Agricultural Bank v. Bissell, 12 Pick. 586; Lyman v. Morse, 1 Pick. 295, note; Cameron v. Merchants' & M. Bank, 37 Mich. 240; Smith v. Parsons, 55 Minn. 520, 57 N. W. 311; Marvine v. Hymers, 12 N. Y. 223; International Bank v. Bradley, 19 N. Y. 245; Bloomer v. McInerney, 30 Hun, 201; Hawks v. Weaver, 46 Barb. 164; New York Firemen Ins. Co. v. Sturges, 2 Cow. 664; New York Firemen Ins. Co. v. Ely, 2 Cow. 678; Bank of Utica v. Smalley, 2 Cow. 770, 14 Am. Dec. 526, affirmed in 8 Cow. 398; Manhattan Co. v. Osgood, 15 Johns. 162, reversed on other grounds in 3 Cow. 612, 15 Am. Dec. 304; Mowry v. Bishop, 5 Paige, 98; Utica Bank v. Phillips, 3 Wend. 408; Utica Ins. Co. v. Bloodgood, 4 Wend. 652; Anderson v. Schenck, 1 N. Y. Leg. Obs. 107; Fidelity Loan Asso. v. Connolly, 95 N. Y. Supp. 576; Bank of Salina v. Alvord, 31 N. Y. 473; State Bank v. Hunter, 12 N. C. (1 Dev. L.) 100; Crowell v. Jones, 167 N. C. 386, 83 S. E. 551; Monnett v. Sturges, 25 Ohio St. 384; Cook v. Courtright, 40 Ohio St. 248, 48 Am. Rep. 681; Penn Mut. L. Ins. Co. v. Carpenter, 40 Ohio St. 260; Lafayette Bank v. Findlay, 1 Ohio Dec. Reprint, 49; Covington v. Fisher, 22 Okla. 207, 97 Pac. 615; Planters' Bank v. Bivingsville Cotton Mfg. Co. 45 S. C. L. (11 Rich.) 677; Carolina Sav. Bank v. Parrott, 30 S. C. 61, 8 S. E. 199; Merchants & P. Bank v. Sarratt, 77 S. C. 141, 122 Am. St. Rep. 562, 57 S. E. 621; Wetmore v. Brien, 3 Head, 723; Webb v. Pahde, — Tex. Civ. App. —, 43 S. W. 19; Geisberg v. Mutual Bldg. & L. Asso. — Tex. Civ. App. —, 60 S. W. 478; Bank of St. Albans v. Scott, 1 Vt. 426; Bank of Burlington v. Durkee, 1 Vt. 399; Parker v. Cousins, 2 Gratt. 372, 44 Am. Dec. 388; Crump v. Trytitle, 5 Leigh, 251; State Bank v. Cowan, 8 Leigh, 238; Stribbling v. Bank of Valley, 5 Rand. (Va.) 132; Tiffany v. National Bank, 18 Wall. 409, 21 L. ed. 862.

Under the decisions of this court, it is absolutely necessary that the amount of usurious interest paid should be alleged, in order to warrant a recovery under the provisions of § 5198 (Comp. Stat. § 9759, 6 Fed. Stat. Anno. 2d ed. p. 747).

Brown v. Marion Nat. Bank, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390; McCarthy v. First Nat. Bank, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. Rep. 240.

The special deposit involved in this case is not usurious.

Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 588; 7 C. J. 630, 632; American Nat. Bank v. Presnall, 58 Kan. 69, 48 Pac. 556; 3 Am. & Eng. Enc. Law, 822, 824; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 115; Montagu v. Pacific Bank, 81 Fed. 602; Moreland v. Brown, 30 C. C. A. 23, 56 U. S. App. 722, 86 Fed. 257; Officer v. Officer, — Iowa, —, 90 N. W. 826; Sawyer v. Conner, 114 Miss. 363, L.R.A. 1918A, 61, 75 So. 131, Ann. Cas. 1918B, 388; Smith v. Sanborn State Bank, 147 Iowa, 640, 30 L.R.A.(N.S.) 517, 140 Am. St. Rep. 336, 126 N. W. 779; Titlow v. Sundquist, 148 C. C. A. 379, 234 Fed. 613; Reynes v. Dumont, 130 U. S. 355, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; Cooper v. National Bank, 21 Ga. App. 356, 94 S. E. 612.

The usury alleged in this case is not so pleaded as to warrant a recovery.

Tillman v. Morton, 65 Ga. 386; Trammell v. Woolfolk, 68 Ga. 628; Laramore v. Bank of Americus, 69 Ga. 722; Burnett v. Davis, 124 Ga. 543, 52 S. E. 927; Culver v. Wood, 138 Ga. 60, 74 S. E. 790; Lee v. King, 142 Ga. 609, 83 S. E. 272; King Bros. v. Moore, 147 Ga. 43, 92 S. E. 757; Sullivan v. Rich, 18 Ga. App. 301, 89 S. E. 429.

Mr. Justice **McReynolds** delivered the opinion of the court:

The court below rightly construed the pleadings as presenting only one substantial Federal question:—Did [**109**] respondent subject itself to the penalties prescribed for taking usury by discounting short-time notes in the ordinary course of business and charging therefor at the rate of 8 per centum per annum in advance? And we think it correctly answered that question in the negative.

Respondent is a national bank. Its powers in respect of discounts, whether transactions by it are usurious, and the consequent penalties therefor, must be ascertained upon a consideration of the National Bank Act of June 3, 1864, chap. 106, 13 Stat. at L. 99, 101, 108, Rev. Stat. §§ 5133 et seq., Comp. Stat. § 9658, 6 Fed. Stat. Anno. 2d ed. p. 651; Farmers & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; Barnet v. Muncie Nat. Bank, 98 U. S. 555, 558, 25 L. ed. 212, 213; Haseltine v. Central Nat. Bank, 183 U. S. 132, 134, 46 L. ed. 118, 119, 22 Sup. Ct. Rep. 50. Section 8 declares: "That every association formed pursuant to the provisions of this act . . . may elect or appoint directors . . . and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits . . ." Section 30, printed in the margin,[1] contains regulations [**110**] presently important in respect of usury. Among other things, it provides: "That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, . . ." All these provisions were carried into §§ 5136, 5197, and 5198, Revised Statutes, Comp. Stat. §§ 9661, 9758, 9759, 6 Fed. Stat. Anno. 2d ed. pp. 654, 744, 747, set out below.[2]

[**111**] The National Bank Act establishes a system of general regulations. It adopts usury laws of the states only in so far as they severally fix the rate of interest. Farmers & M. Nat. Bank v. Dearing, supra; National Bank v. Johnson, 104 U. S. 271, 26 L. ed. 742; Haseltine v. Central Nat. Bank, supra.

The Georgia Code (1910) contains the following:

"Sec. 3426.—What is lawful interest. The legal rate of interest shall remain 7 per centum per annum, where the rate per cent is not named in the contract, and any higher rate must be specified in writing, but in no event to exceed 8 per cent per annum.

"Sec. 3427.—What is usury. Usury is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest."

"Sec. 3436.—Beyond 8 per cent interest forbidden. [**112**] It shall not be lawful for any person, company, or cor-

[1] "Sec. 30. That every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate or interest." 13 Stat. at L. 108, chap. 106.

[2] "Rev. Stat. § 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . . . . .

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental

poration to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than 8 per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

Construing these sections, in Loganville Bkg. Co. v. Forrester (1915) 143 Ga. 302, L.R.A.1915D, 1195, 84 S. E. 961, the Georgia supreme court held that charges reserved in advance by a state bank at the highest permitted rate of interest on a loan, whether short or long time, constitute usury, and said (p. 305): "If the intent be to take only legal interest, a slight and trifling excess, due to mistake or inadvertence, will not taint the transaction with usury. . . . But if the purpose be to take from the money advanced, at the time of the loan, the legal maximum rate of interest, the transaction is an usurious one." Earlier opinions by the court express a different view of the same sections. In Mackenzie v. Flannery (1892) 90 Ga. 590, 599, 16 S. E. 710, it is said: "Nor can we determine, without reference to the evidence, whether the taking of 8 per cent interest in advance by way of discount was usurious. Eight per cent was legal if agreed upon in writing . . . and it is well settled that the taking of interest in advance on short loans in the usual and ordinary course of business is not usurious, if the interest reserved does not exceed the legal rate." See also Union Sav. Bank & T. Co. v. Dottenheim, 107 Ga. 606, 614, 34 S. E. 217; McCall v. Herring, 116 Ga. 235, 243, 42 S. E. 468.

Petitioner maintains the loans in question would have been usurious if made in Georgia by an individual or a state bank, and that the same rule applies notwithstanding the lender happened to be a national bank. Respondent insists that the Federal act permits it to discount short-time notes, reserving interest in advance at the maximum [113] interest rate allowed by the state law,—in this instance, 8 per centum.

In Fleckner v. Bank of United States, 8 Wheat. 338, 349, 354, 5 L. ed. 631, 633, 635, the charter of the Bank of the United States inhibited it from taking interest "more than at the rate of 6 per centum," and plaintiff claimed that by deducting interest at the rate of 6 per centum from the amount of a discounted note, the bank received usury. Replying to that point, this court, through Mr. Justice Story, said: "If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few, if any, charters, contain an express provision, authorizing,

---

powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

. . . . . .

"Rev. Stat. § 5197. Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, or territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

"Rev. Stat. § 5198. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. [That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.]" Act Feb. 18, 1875, chap. 80, 18 Stat. at L. 320.

in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word 'discount' is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious." See also McCarthy v. First Nat. Bank, 223 U. S. 493, 499, 56 L. ed. 523, 525, 32 Sup. Ct. Rep. 240.

This view has been generally adopted. Many supporting cases are collected in a note to Bank of Newport v. Cook, 29 L.R.A. 761, and in 39 Cyc. 948 et seq. "The taking of interest in advance, upon the discount of a note in the usual course of business by a banker, is not usury. This has long been settled, and is not now open for controversy." Tyler, Usury, 1872, p. 155. "That it is not [114] usury to discount commercial paper in the ordinary course of business is absolutely settled. This rule of law arose out of custom and does not depend upon statute." Webb, Usury, 1898, § 111.

Associations organized under the National Bank Act are plainly empowered to discount promissory notes in the ordinary course of business. To discount, ex vi termini, implies reservation of interest in advance; and, under the ancient and commonly accepted doctrine, when dealing with short-time paper such a reservation at the highest interest rate allowed by law is not usurious. Recognizing prevailing practice in business and the above-stated doctrine concerning usury, we think Congress intended to endow national banks with the power, which banks generally exercise, of discounting notes, reserving charges at the highest rate permitted for interest. To carry out this purpose, the National Bank Act provides that associations organized under it may reserve on any discount interest at the rate allowed by the state; and only when there is reservation at a rate greater than the one specified does the transaction become usurious.

The maximum interest rate allowed by the Georgia statute is 8 per centum. That marks the limit which a national bank there located may charge upon discounts; but its right to retain so much arises from Federal law. The latter also completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate.

Affirmed.

Mr. Justice **Pitney**, with whom concurred Mr. Justice **Brandeis** and Mr. Justice **Clarke**, dissenting:

I agree that in this case but one Federal question is properly presented for our consideration, and that is whether the National Bank of Savannah took usury, [115] in violation of §§ 5197 and 5198, U. S. Rev. Stat. Comp. Stat. §§ 9758, 9759, 6 Fed. Stat. Anno. 2d ed. pp. 744, 747, when, in discounting short-term notes in the ordinary course of business at its banking house in the state of Georgia, it knowingly reserved in advance a discount at the rate of 8 per centum per annum, computed upon the face of such notes, when by the laws of Georgia this was not allowed to be done by state banks of issue.

I agree that this question is to be determined by the provisions of § 5197; but, so far as it depends upon ascertaining the local rate of interest, we must determine it according to the law of the state of Georgia, because the cited sections make that law the criterion. It is settled that although the consequences of acceptance of usurious interest by a national bank and the penalties to be enforced are to be determined by the provisions of the National Banking Act, the ascertainment of the rate of interest allowable is to be according to the state law. Farmers & M. Nat. Bank v. Dearing, 91 U. S. 29, 32, 23 L. ed. 196, 198; Union Nat. Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 325, 331, 41 L. ed. 177, 178, 16 Sup. Ct. Rep. 1039; Haseltine v. Central Nat. Bank, 183 U. S. 132, 134, 46 L. ed. 118, 119, 22 Sup. Ct. Rep. 50.

The language of § 5197 is explicit. It allows a national bank to "take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state . . . where the bank is located, and no more, except that where by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the

laws of the state, . . . the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. . . ."

[116] I regard it as clear that by "the laws of the state" is meant not merely acts of legislation, much less a particular act or section, or a particular phrase in a single section. In order to determine the point in controversy we must take all applicable provisions of the statutes as interpreted and construed by the decisions of the court of last resort, and from their combined effect determine what is "interest at the rate allowed by the laws of the state."

The pertinent statute law of the state of Georgia is found in §§ 3426, 3427, and 3436 of the Code. The first of these defines "what is lawful interest," and prescribes 7 per centum per annum as the legal rate where no rate is named in the contract, and permits a higher rate to be specified in writing, "but in no event to exceed 8 per cent per annum." Section 3427 defines usury as "reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." And § 3436 declares: "It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than 8 per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever."

I agree that under the decisions of this court and the general current of authority, the discounting of short-term notes with a reservation of interest in advance at the highest rate allowed by statute is permissible in the absence of special restriction. Fleckner v. Bank of United States, 8 Wheat. 338, 349, 354, 5 L. ed. 631, 633, 635.

And I understand it to have been permitted in Georgia prior to the recent decision by the supreme court of that state in Loganville Bkg. Co. v. Forrester, 143 [117] Ga. 302, L.R.A.1915D, 1195, 84 S. E. 961. See Mackenzie v. Flannery, 90 Ga. 590, 599, 16 S. E. 710; Union Sav. Bank & T. Co. v. Dottenheim, 107 Ga. 606, 614, 34 S. E. 217; McCall v. Herring, 116 Ga. 235, 243, 42 S. E. 468.

The Forrester Case was decided April 13, 1915. The claim involved in the present suit includes a series of transactions, the first of which was on November 2, 1914, the last on October 18, 1915. A majority of these were prior to the decision in the Forrester Case; and as to them I agree that there was no violation of the Federal statute.

With respect to the others, I have reached a different conclusion. The case was decided on a demurrer to plaintiff's petition, in which it was alleged that defendant (now respondent) knowingly received and charged interest in excess of the highest contractual rate allowed under the laws of the state, specifying the particular dates and amounts. This necessarily imports a knowledge at the time of each transaction as to what then constituted the law of the state, supposing such knowledge need be averred.

As to these later transactions, with great respect for the views of my brethren, I am constrained to dissent from the opinion and judgment of the court because convinced that there is error in holding without qualification that, since the decision of the Forrester Case, 8 per cent is the rate of interest allowed and limited for state banks of issue by the laws of the state of Georgia. It seems to me erroneous to regard that decision as merely defining usury and thus settling what lawfully may be done by state banks in respect of taking interest in advance, and to ignore its effect, in combination with the quoted sections of the Code, as constituting the law of the state which fixes the maximum rate of interest for such banks, and therefore, under § 5197, United States Rev. Stat., establishes the limit for national banks located in that state. Plainly, I think, the purpose of Congress was [118] to place national banks upon a precise equality in this respect with banks of issue organized under state laws, and that where the local law places a higher or a lower limit upon such banks of issue than upon other lenders of money the same limit should be imposed upon the national banks.

The section has regard to substance, not merely to form; and in determining what is in substance the local rate of interest it is fallacious, I submit, to regard the multiplier only (say, 8 per cent) and ignore the multiplicand, since both factors have equal influence in producing the result. As in other cases of testing state laws by a Federal standard, the question is, What is the effect and operation of those laws, as construed and applied by the state court of last resort?

The difference between the effect of computing discount taken in advance according to the custom of bankers, by applying the allowed percentage to the face of the note,—termed "bank discount,"—and the effect of deducting an amount equivalent to exact interest on the sum actually loaned,—termed "true discount,"—is very substantial, and is recognized in the standard interest and discount tables, which contain computations on both bases. To illustrate by a comparison: If interest at the rate of 8 per centum per annum be reserved in advance and computed upon the face of a three months' note, it amounts to 2.040^8 per cent for the period, or at the rate of 8.1632 per centum per annum upon the money loaned; upon a six months' note it amounts to 4.1667 per cent for the period, or at the rate of 8.3333 per centum per annum; upon a nine months' note, to 6.383 per cent for the period, or at the rate of 8.511 per centum per annum; upon a one-year note it amounts to 8.695 per cent.

The legal problem is precisely analogous to that involved in comparing respective burdens of taxation imposed upon different properties or classes of property; [119] concerning which this court has more than once held that a law requiring that one class shall be taxed at the "same rate of taxation" paid by another requires that not only the percentage of the rate, but the basis of the valuation, shall be the same. Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 158, 162, 163, 25 L. ed. 903, 905–907; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 515, 61 L. ed. 1280, 1288, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88.

The laws of Georgia do not prohibit the taking of interest in advance by a state bank; and they permit it to be charged according to the usual course of banking, with this qualification: that if reserved in advance at the highest percentage, or at any percentage that has the effect of yielding to the lender more than at the rate of 8 per centum per annum upon the amount actually loaned, it is usurious. This qualification, which, since the decision of the Forrester Case, must be deemed to be the law of Georgia, has precisely the same effect as if it had been inserted by way of an amending proviso to § 3426 of the Code. That it happens to arise from the construction and application of that section together with §§ 3427 and 3436 by the state court of last resort can make no difference for present purposes.

The case before us comes squarely within the principle of Citizens' Nat. Bank v. Donnell, 195 U. S. 369, 373, 374, 49 L. ed. 238, 241, 242, 25 Sup. Ct. Rep. 49. There the question was whether a national bank in Missouri had taken usury contrary to §§ 5197 and 5198, U. S. Rev. Stat., Comp. Stat. §§ 9758, 9759, 6 Fed. Stat. Anno. 2d ed. pp. 744, 747, in taking interest computed at a percentage less than the highest rate allowed by the state law if agreed upon in writing, but at the same time violating a state prohibition against compounding interest oftener than once a year. This court held that the prohibition against frequent compounding affected the "rate of interest" within the meaning of those words in § 5198, and that this section was violated because the local prohibition was violated. I quote from the opinion (p. 374): "The rate of interest which a man receives is greater when [120] he is allowed to compound than when he is not, the other elements in the case being the same. Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the rate in that way, whatever may be the rules of the common law. The supreme court of Missouri holds that that is what the Missouri statute has done. On that point, and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the state court. Union Nat. Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 325, 331, 41 L. ed. 177, 178, 16 Sup. Ct. Rep. 1039. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year, it was at a rate greater than was allowed by U. S. Rev. Stat. § 5197, and it was forfeited."

For these reasons I am convinced that the respondent national bank, in knowingly discounting notes and reserving interest at the rate of 8 per centum per annum upon the face of the notes, in violation of the limitation imposed by the quoted sections of the Georgia Code as construed by the supreme court of that state in the Forrester Case, charged more than "interest at the rate allowed by the laws of the state," and that therefore the judgment in its favor ought to be reversed.

[121] HENRY PETERS, Eugene Peters, and Ætna Life Insurance Company, Plffs. in Err.,

v.

NELLIE VEASEY,[1] Administratrix of the Succession of Thomas Veasey, Deceased.

(See S. C. Reporter's ed. 121–123.)

Admiralty — exclusiveness of Federal jurisdiction — state Workmen's Compensation Laws.

1. A state Workmen's Compensation Law may not be applied to an injury sustained prior to the enactment of the Act of October 6, 1917, by a longshoreman while he was unloading a vessel lying in navigable waters, in view of the Judicial Code, §§ 24 and 256, giving Federal district courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it.

[For other cases, see Admiralty, I. b, 8, in Digest Sup. Ct. 1908.]

Admiralty — exclusiveness of Federal jurisdiction — state Workmen's Compensation Act — saving clause — retroactive effect.

2. A cause of action accruing before the enactment of the Act of October 6, 1917, is not affected by the provision of that act which amends the clauses of the Judicial Code, §§ 24 and 256, giving Federal district courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law was competent to give it, by adding the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state."

[For other cases, see Admiralty, I. b, 3; Statutes, II. v, in Digest Sup. Ct. 1908.]

[No. 77.]

Argued and submitted November 14, 1919. Decided December 8, 1919.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, on a rehearing, affirmed a judgment of the Civil District Court of the Parish of Orleans, in that state, in favor of plaintiff in a suit under the state Workmen's Compensation Act. Reversed and remanded for further proceedings.

See same case below, 142 La. 1012, 77 So. 948.

The facts are stated in the opinion.

[1] Death of Thomas Veasey, the defendant in error herein, suggested, and appearance of Nellie Veasey, as administratrix of the succession of Thomas Veasey, deceased, as the party defendant in error herein, filed and entered November 10, 1919, on motion of counsel for the defendant in error.

Mr. **George Janvier** argued the cause, and, with Messrs. William C. Dufour, Gustave Lemle, A. A. Moreno, and John St. Paul, Jr., filed a brief for plaintiffs in error:

The remedy of the Louisiana Workmen's Compensation Act (it provides compensation upon a prescribed scale for injuries and deaths of employees, without regard to fault) is a remedy unknown to the common law, and incapable of enforcement by the ordinary processes of any court; and hence, prior to the amendment of October 6, 1917, to the Judicial Code, was not among the common-law remedies which are saved to suitors from the exclusive admiralty jurisdiction by the Judiciary Act of 1879, § 9.

Southern P. Co. v. Jensen, 244 U. S. 207, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596.

Work performed by a stevedore on board a ship unloading at a wharf in navigable waters is maritime; his employment for such work and injuries suffered in it are likewise maritime, and the rights and liabilities arising from such work, employment, and injuries are clearly within the admiralty jurisdiction.

Ibid.

If a cause is maritime in nature admiralty is not deprived of the jurisdiction by the fact that the suit is one in personam, and not in rem.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A. (N.S.) 1157, 34 Sup. Ct. Rep. 733; Chelentis v. Luckenbach S. S. Co. 247 U. S. 372, 62 L. ed. 1171, 38 Sup. Ct. Rep. 501.

The amendment adopted October 6, 1917, to §§ 24 and 256 of the Judicial Code, is not retroactive.

Chelentis v. Luckenbach S. S. Co. supra; Auffm'ordt v. Rasin, 102 U. S. 620, 26 L. ed. 262; McGeehan v. Burke,

Note.—On the jurisdiction of admiralty over suit for injury to stevedore—see note to Atlantic Transport Co. v. Imbrovek, 51 L.R.A.(N.S.) 1157.

On Workmen's Compensation Acts, generally—see notes to Milwaukee v. Miller, L.R.A.1916A, 123, and Linnane v. Ætna Brewing Co. L.R.A.1917D, 80.

On applicability of the Federal Employers' Liability Act or state Compensation Acts to injuries within admiralty jurisdiction—see note to Southern P. Co. v. Jensen, L.R.A.1918C, 474.

37 La. Ann. 156; St. Louis Southwestern R. Co. v. Purcell, 68 C. C. A. 211, 135 Fed. 499; Coon v. Kennedy, 91 N. J. L. 598, 103 Atl. 207.

Mr. **Walter S. Penfield** submitted the cause for defendant in error. Messrs. Solomon Wolff, E. M. Stafford, F. B. Freeland, and Howell Carter, Jr., were on the brief:

A contract by which a stevedore employs a longshoreman, and, in the course of this employment, sends the longshoreman aboard a vessel to assist in loading her, is not maritime in its nature, especially where, as in the instant case, there is no allegation in the petition that the accident was caused by some negligence of the vessel, its owner, officers, or crew.

Campbell v. H. Hackfeld & Co. 62 C. C. A. 274, 125 Fed. 696.

The employment of the longshoreman may have been as well for work on shore as for work on the vessel, and admiralty is without jurisdiction where even a clearly maritime contract is so inseparably connected with a contract which is not maritime in its nature, that one cannot be decided without the other.

Turner v. Beacham, Taney, 583, Fed. Cas. No. 14,252.

Admiralty has no jurisdiction over preliminary contracts leading to maritime contracts, irrespective of the name given them.

The Tribune, 3 Sumn. 144, Fed. Cas. No. 14,171.

The nature and character of the contract of service decide whether they are within the jurisdiction of admiralty, and not the place of performance, whether on land or on water.

Wortman v. Griffith, 3 Blatchf. 528, Fed. Cas. No. 18,057.

It is error to contend that the place of injury controls the rights of men. That merely because one is injured on board a vessel, admiralty alone affords relief. It is not the place where the accident happened—it is the original contract of employment which determines.

Northern Pacific S. S. Co. v. Hall Bros. Marine R. & Shipbuilding Co. 249 U. S. 119, 63 L. ed. 510, 30 Sup. Ct. Rep. 221.

Even if the courts of Louisiana were, before the amendment of the Judicial Code, without jurisdiction to entertain the claim of the defendant in error, yet where, by a change in the law, they became seised of jurisdiction to entertain it, they could decide the case, if it was still pending undecided after jurisdiction was acquired.

Simmons v. Hanover, 23 Pick. 188; Bass v. Yazoo & M. Valley R. Co. 136 La. 528, 67 So. 355; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 138 La. 377, P.U.R.1916B, 356, 70 So. 332.

Where no remedy exists for an injury in the admiralty courts, the fact that such courts exist and exercise jurisdiction in other causes of action leaves the state courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty, as if the admiralty courts were unknown to the Constitution, and had no existence in our jurisprudence.

American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369.

Mr. Justice **McReynolds** delivered the opinion of the court:

In a proceeding under the Workmen's Compensation Law of Louisiana (No. 20, La. Acts 1914), the supreme court of that state affirmed a judgment against plaintiffs in error and in favor of Veasey, who claimed to have suffered injuries, August 6, 1915, while employed by Henry [**122**] and Eugene Peters as a longshoreman on board the "Seria," then lying at New Orleans. The steamer was being unloaded. While upon her and engaged in that work, Veasey accidentally fell through a hatchway. 142 La. 1012, 77 So. 948.

A compensation policy in favor of Peters, issued by the Ætna Life Insurance Company, was in force when the accident occurred.

The work in which defendant in error was engaged is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. In such circumstances, the Workmen's Compensation Law of the state had no application when the accident occurred. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 61, 58 L. ed. 1208, 1211, 1212, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733; Southern P. Co. v. Jensen, 244 U. S. 205, 217, 218, 61 L. ed. 1086, 1099, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596.

Clause third, § 24, of the Judicial Code [36 Stat. at L. 1091, chap. 231], confers upon the district courts of the United States jurisdiction "of all civil causes

of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Clause third, § 256, provides that the jurisdiction of the courts of the United States shall be exclusive in "all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." By an act approved October 6, 1917, chap. 97, 40 Stat. at L. 395, Comp. Stat. §§ 991(3), 1233, Fed. Stat. Anno. Supp. 1918, pp. 401, 414, Congress directed that both of these clauses be amended by inserting after "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," the words *"and to claimants the rights and remedies under the Workmen's Compensation Law of any state."* The court below erroneously concluded that this act should be given retroactive effect and applied in the [**123**] present controversy. There is nothing in the language employed, nor is there any circumstance known to us, which indicates a purpose to make the act applicable when the cause of action arose before its passage; and we think it must not be so construed.

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

Reversed.

Mr. Justice **Brandeis** and Mr. Justice **Clarke** dissent.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 123–127.)

Postoffice — compensation for carrying mails — weighing.

1. Payments to a railway company for carrying the mails during each four-year term upon the basis of weights taken immediately prior to the beginning of such term instead of annually must be deemed to satisfy the requirement of U. S. Rev. Stat. § 4002, that payment of specified sums per mile be made per annum according to weights, since such action accords with prior practice followed for many years, and was permitted by the letter of the statute, the carrier having submitted with full knowledge.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — carrying mails — duty of railway carrier.

2. Prior to the Act of July 28, 1916, railroads—with the exception of certain roads aided by land grants—were not required by law to carry the mails.

[For other cases, see Postoffice, IV. a, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — compulsion — implied contract.

3. A railway company which voluntarily accepts and performs mail transportation service, with knowledge of what the United States intends to pay, cannot recover any greater compensation, even though it might have been driven to perform the service for an inadequate compensation by the fear that a refusal would incur the hostility of persons living along its line, since this does not amount to compulsion by the United States, and cannot constitute the basis of a justiciable claim against it for taking property for public use under an implied contract to make adequate compensation.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

[No. 74.]

Argued May 2, 1919. Decided December 8, 1919.

APPEAL from the Court of Claims to review a judgment dismissing on demurrer a petition claiming increased compensation for carrying the mails. Affirmed.

See same case below, 53 Ct. Cl. 222.

The facts are stated in the opinion.

Messrs. **Edward G. Buckland** and **S. S. Ashbaugh** argued the cause, and, with Mr. Arthur P. Russell, filed a brief for appellant:

Carrying the mails is compulsory when this service is called for under the law by the Postmaster General.

Re Debs, 158 U. S. 577, 39 L. ed. 1100, 15 Sup. Ct. Rep. 900; Searight v. Stokes, 3 How. 151, 169, 11 L. ed. 537, 546; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 65 L.R.A. 397, 54 C. C. A. 608, 117 Fed. 434; Union P. R. Co. v. United States, 134 C. C. A. 325, 219 Fed. 427; Great Northern R. Co. v. United States, 149 C. C. A. 485, 236 Fed. 433; Union P. R. Co. v. United States, 104 U. S. 662, 26 L. ed. 884; Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 56 L. ed. 1236, 32 Sup. Ct. Rep. 702; Chicago & N. W. R. Co. v. United States, 104 U. S. 686, 26 L. ed. 893; Chicago, M. & St. P. R. Co. v. United States, 104 U. S. 687, 26 L. ed. 893; Eastern R. Co. v. United States, 129 U. S. 392, 32 L. ed. 731, 9 Sup. Ct. Rep. 320; Chicago, M. & St. P.

R. Co. v. United States, 198 U. S. 385, 49 L. ed. 1094, 25 Sup. Ct. Rep. 665.

The claimant has not by performance waived any right to demand pay for the true weight of mail carried each year. The statute cannot be waived.

Union P. R. Co. v. United States, 104 U. S. 664, 26 L. ed. 885.

It cannot be held that parcel post packages can be added after July 1, 1913, to the amount of mail carried by claimant, as ascertained by a weighing in the fall of 1912. This new matter taken from freight and express cannot be added by virtue of the words "subject to future orders," as found in the notice of adjustment dated November 13, 1913, so as to bring it within the decision in Eastern R. Co. v. United States, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320.

Assistant Attorney General **Brown** argued the cause and filed a brief for appellee:

This case is another of a long series which have arisen from the efforts of the railroad companies to secure increased compensation for carrying the mails, and in which it has been sought by one argument or another to escape the limitations of the Statute of 1873 and its amendments, and the effect of the practice which grew up under it. It would serve no useful purpose to review or even to list all of these cases, but it is interesting to notice that the point of compulsion here relied upon was involved in the following cases decided by this court:

Union P. R. Co. v. United States, 104 U. S. 662, 665, 26 L. ed. 884, 885; Eastern R. Co. v. United States, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320; Chicago, M. & St. P. R. Co. v. United States, 198 U. S. 385, 389, 49 L. ed. 1094, 1095, 25 Sup. Ct. Rep. 665; Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 56 L. ed. 1236, 32 Sup. Ct. Rep. 702; Delaware, L. & W. R. Co. v. United States, 249 U. S. 385, 63 L. ed. 659, 39 Sup. Ct. Rep. 348.

The appellant voluntarily performed the service.

Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 56 L. ed. 1236, 32 Sup. Ct. Rep. 702; Eastern R. Co. v. United States, 129 U. S. 391, 32 L. ed. 730, 9 Sup. Ct. Rep. 320; Delaware, L. & W. R. Co. v. United States, supra.

A promise will not be held to be implied in fact which is contrary to the expressed intention of the parties.

Earle v. Coburn, 130 Mass. 596; Columbus, H. V. & T. R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152; Municipal Waterworks Co. v. Ft. Smith, 216 Fed. 431.

The question being merely one of the meaning of the statute, there is a plain case for the application of the familiar rule as to the acceptance of long-continued departmental construction, not itself plainly erroneous, and impliedly sanctioned by the re-enactment of the statute.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272.

Mr. Justice **McReynolds** delivered the opinion of the court:

Appellant sued the United States to recover the difference between amounts received through the Postoffice Department and what it claims should have been paid for its services in carrying the mails during a series of years, ending June 30, 1914. The demand is based upon implied contracts alleged to arise from the following circumstances: First. Acceptance and transportation of the mails in reliance upon § 4002, Revised Statutes (Comp. Stat. § 7483, 8 Fed. Stat. Anno. 2d ed. p. 195), as amended. This directs payment of specified sums per mile per annum according to weights; and the claim is that because the Postoffice Department improperly construed and applied it, appellant received much less than it should have. Second. Acceptance and transportation of the mails under orders and coercion of the Postoffice Department, followed by failure to allow reasonable compensation therefor. Appellant claims its property was taken for public use and adequate compensation must be paid.

Concerning the challenged interpretation and application of § 4002, Revised Statutes, resulting in payments during each four-year term upon the basis of weights taken [**127**] immediately prior to the beginning of the same instead of annually, it suffices to say that the action taken accords with prior practice followed for many years; the letter of the statute permits it; the carrier submitted with full knowledge; and, impliedly, at least, it was sanctioned by this court in Delaware, L. & W. R. Co. v. United States, 249 U. S. 385, 63 L. ed. 659, 39 Sup. Ct. Rep. 348.

We think it must be treated as settled doctrine that, prior to the Act of July 28, 1916, chap. 261, 39 Stat. at L. 412, 429,—with the exception of certain roads

aided by land grants,—railroads were not required by law to carry the mails. Eastern R. Co. v. United States, 129 U. S. 391, 394, 32 L. ed. 730, 731, 9 Sup. Ct. Rep. 320; Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 650, 56 L. ed. 1236, 1239, 32 Sup. Ct. Rep. 702; Delaware, L. & W. R. Co. v. United States, supra. And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it cannot now claim an implied contract for a greater sum. It may be that any railroad, by failing to carry the mails, would incur the hostility of those living along its lines, and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States, and cannot constitute the basis of a justiciable claim against them for taking property.

The Court of Claims (53 Ct. Cl. 222) dismissed the petition upon demurrer, and its judgment is affirmed.

Mr. Justice **Brandeis** dissents.

---

[128] UNITED STATES, Appt.,
v.
BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al.

(See S. C. Reporter's ed. 128-134.)

Indians — status — United States as guardian — exhausting power.

1. The United States did not exhaust its power as the protector and guardian of the Osage Indians, by the enactment of the provisions of the Act of June 28, 1906, for the division of the Indian property, so as no longer to have as to them any mission or authority.

[For other cases, see Indians, I. in Digest Sup. Ct. 1908.]

United States — suit by Federal officers — illegal taxation of Indian lands.

2. Notwithstanding the subjection to state taxation of the surplus lands of the noncompetent Osage Indians which was effected by the Act of June 28, 1906, authority exists in the officers of the United States to invoke judicial relief against the enforcement of state tax assessments against such lands which are asserted to be based upon systematic, arbitrary, grossly excessive, discriminatory, and unfair valuations which amount to a perversion of the state laws, committed in order to defeat the property rights conferred by the Federal statute.

[For other cases, see United States, IV. a, in Digest Sup. Ct. 1908.]

Injunction — illegal taxation — multiplicity of suits — remedy at law.

3. The remedies afforded to individuals under the state law to correct errors in assessing taxes do not defeat the right of the United States, through its officers, to invoke equitable relief against the enforcement of state tax assessments on the surplus lands of noncompetent Osage Indians which are asserted to be based upon systematic, arbitrary, grossly excessive, discriminatory, and unfair valuations which amount to a perversion of the state laws, committed in order to defeat the property rights conferred by the Act of June 28, 1906, since the interposition of a court of equity to prevent the wrong complained of was essential in order to avoid a multiplicity of suits, and, in addition, such wrong was not a mere mistake or error committed in the enforcement of the state tax laws.

[For other cases, see Injunction, I. k, in Digest Sup. Ct. 1908.]

[No. 309.]

Argued April 16, 1919. Decided December 15, 1919.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the District Court for the Western District of Oklahoma, dismissing the bill in a suit by the United States to enjoin the enforcement of state taxation of surplus lands of noncompetent Osage Indians. Reversed and remanded for further proceedings.

See same case below, 166 C. C. A. 128, 254 Fed. 570.

The facts are stated in the opinion.

Note.—On rights and status of Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

As to enforceability of rights of Indians in courts of justice—see note to Missouri P. R. Co. v. Cullers, 13 L.R.A. 542.

As to exemption of Indian lands from taxation—see note to Allen County v. Simons, 13 L.R.A. 512.

On injunction to restrain collection of illegal taxes—see notes to Odlin v. Woodruff, 22 L.R.A. 699; Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden v. Armstrong, 42 L. ed. U. S. 445.

On jurisdiction of equity where remedy at law exists—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. 6 L.R.A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

As to right to enjoin acts under an unconstitutional statute as affected by other remedies in case such acts are done—see note to Harley v. Lindemann, 8 L.R.A.(N.S.) 124.

Mr. **Leslie C. Garnett** argued the cause, and, with Solicitor General King, filed a brief for appellant:

The United States has capacity to maintain this suit, and the right to sue in its own courts.

Brader v. James, 246 U. S. 88, 96, 62 L. ed. 591, 595, 38 Sup. Ct. Rep. 285; Hickman v. United States, 224 U. S. 413, 441, 56 L. ed. 820, 831, 32 Sup. Ct. Rep. 424; Levindale Lead & Zinc Min. Co. v. Coleman, 241 U. S. 432, 60 L. ed. 1080, 36 Sup. Ct. Rep. 644; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

There is no valid statute affording adequate relief.

Re Hickman, — Okla. —, 162 Pac. 176; Smith v. Garvin County, — Okla. —, 162 Pac. 463; Union P. R. Co. v. Weld County, 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510.

The case comes within the recognized heads of equity jurisdiction.

Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Dows v. Chicago, 11 Wall. 108, 112, 20 L. ed. 65, 67.

Equity has jurisdiction in this case to avoid a multiplicity of suits.

Smyth v. Ames, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

Equity has jurisdiction in this case to remove the cloud upon the title to these lands, occasioned by the lien of the illegal tax, and to restrain irreparable injury.

Ohio Tax Cases, 232 U. S. 576, 587, 58 L. ed. 737, 743, 34 Sup. Ct. Rep. 372.

Where the taxing officers, in enforcing a valid assessment, are guilty of an intentional and systematic discrimination against a class of property, with intention of imposing upon that class of property an undue burden of taxation, equity will afford relief.

Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 517, 61 L. ed. 1280, 1289, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88; Lacy v. McCafferty, 131 C. C. A. 494, 215 Fed. 354; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350.

Mr. **Preston A. Shinn** argued the cause, and, with Mr. Corbett Cornett, filed a brief for appellees:

The United States is not a proper party plaintiff, because Congress, the only body authorized to speak for the plaintiff, has emancipated the Osage Indians and their surplus lands, for the purposes of taxation, from governmental control.

United States v. Osage County, 193 Fed. 485, 133 C. C. A. 87, 216 Fed. 883; United States v. Waller, 243 U. S. 452, 61 L. ed. 843, 37 Sup. Ct. Rep. 430; McCurdy v. United States, 246 U. S. 263, 62 L. ed. 706, 38 Sup. Ct. Rep. 289.

The United States and each member of the Osage tribe of Indians had a plain, speedy, adequate, and complete remedy at law, and the bill of complaint is without equity.

Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 38, 39, 43 L. ed. 356, 357, 19 Sup. Ct. Rep. 90; Garfield County v. Field, — Okla. —, 162 Pac. 733; Atchison, T. & S. F. R. Co. v. Eldredge, — Okla. —, 166 Pac. 1085; Huckins Hotel Co. v. Oklahoma County, — Okla. —, 166 Pac. 1043; Canadian County v. Tinklepaugh, 49 Okla. 440, 152 Pac. 1119.

[**129**] Mr. Chief Justice **White** delivered the opinion of the court:

Although the subject was fully stated in McCurdy v. United States, 246 U. S. 263, 62 L. ed. 706, 38 Sup. Ct. Rep. 289, nevertheless, to throw light on this case, we recall the facts concerning the distribution of the land and funds of the Osage Tribe of Indians, made under the Act of Congress of June 28, 1906, 34 Stat. at L. 539, chap. 3572.

Of the tribal land there were reserved from allotment certain parcels, some of which were used by the United States or the tribe and others of which were used by individuals for the benefit of the tribe. From the remainder, each member was allotted three tracts of 160 acres each, of which one was to be designated and held as a homestead. Any land which remained was also to be allotted. The funds in trust in the hands of the United States were divided pro rata, to be held subject to the supervision of the United States. The oil, gas, coal, and other mineral rights in all the lands were reserved for the benefit of the tribe. The tract selected as a homestead was made inalienable and nontaxable, subject to the action of Congress. The land embraced by other than the homestead allotment, called surplus land, was made inalienable for a period of twenty-five years and nontaxable for three, subject to the action of Congress. Power was conferred, however, on the Secretary of the Interior, to give to the allottee a certificate of competency, upon receipt of which the surplus land held by such

an allottee became immediately alienable and taxable.

In September, 1917, the United States district attorney for the district of Oklahoma, by direction of the Attorney General, commenced this suit in the name of the United States, for the benefit of named noncompetent members of the Osage Tribe and of all other members [**130**] in the same situation, to prevent the enforcement of state and local taxes assessed against the surplus, although taxable, lands of said Indians for the eight years between 1910 and 1917, inclusive.

The defendants were the Board of County Commissioners of Osage County, including the county clerk and county treasurer, officials charged by the laws of the state with the enforcement of the taxes which were assailed. After averring the existence of authority in the United States, in virtue of its guardianship of the Indians, and as a result of the terms of the Allotment Act, to protect and safeguard the interests of the Indians from the enforcement of the illegal taxes complained of, the bill charged that the taxes in issue were "arbitrary, grossly excessive, discriminatory, and unfair, and were made in violation of the rights of the said Osage Indians guaranteed by the Constitution of the United States and the Constitution of the state of Oklahoma; . . . that the State Board of Equalization arbitrarily and systematically increased the assessments on such Indian lands for the year 1911 to an amount approximately nearly double the original amount of such assessments. . . ." It was averred that the tax assessments made on the Indian lands involved "were made without an inspection or examination of the land . . . that the said appraisers in making such appraisements discriminated against the lands of the Osage Indians as a class and systematically overvalued the same and systematically undervalued other property in said county; . . . that the assessments so made by said assessors were made in such an arbitrary and capricious manner as to amount to constructive fraud upon the taxpayers, and that the overvaluations made by said assessors were so grossly excessive as to justify the interference of a court of equity; . . ." It was alleged that the assessments complained of were of such a character that the [**131**] Secretary of the Interior had endeavored to have them corrected, but without result; that, in consequence of his having called the attention of Congress to the subject, the Act of March 2, 1917 [39 Stat. at L. 983, chap. 146], was passed, authorizing an appraisement by the said Secretary for the purpose of fixing the extent of the overassessment, and that such appraisement, which had been virtually completed, sustained the charges set forth in the bill.

There was annexed to the bill a statement of the result of the appraisement in thirty-six cases as compared with the assessments complained of. In one case it was alleged that the land of the Indian was assessed at $20 an acre, although by the affidavit of the county clerk it was shown that it was worth $3 per acre. In another case it was alleged that, for the purpose of taxation, the land was shown to be overvalued by 119 per cent. It was further averred that an offer had been made through the Secretary of the Interior to pay all the taxes assessed for all the years assailed upon the basis of the assessment made as the result of the act of Congress, but that the same had been refused, and that process for the sale of the lands for delinquent taxes was immediately threatened. The prayer was for relief by injunction as against the illegal assessments and for action by the court, looking to a payment of all delinquent taxes due by noncompetent Osage Indians on the basis of the appraisement made under the act of Congress.

On motion the court dismissed the bill on the ground "that the lands involved were by the act of Congress, approved June 28, 1906, declared subject to taxation, and that the plaintiff has no interest in said lands, and has no duty or authority to contest the taxes thereof, or the sale of said lands for unpaid taxes, . . ." On appeal the decree was affirmed on the ground that, as the state law afforded adequate means to the United States and the noncompetent Indians to correct errors in assessing [**132**] taxes, if any, there was no basis for invoking relief from a court of equity.

The argument here is exclusively directed to two grounds: the one enforced by the trial court and the other sustained by the court below. The first, however, is in argument here expanded into two points of view, since it challenges not only the authority of the officers of the United States to bring the suit, but the power of the United States to authorize them to do it. So far as the latter aspect is concerned, it proceeds upon the assumption that, by the Act of 1906, the United States exhausted its

power as the protector and guardian of the Osage Indians, and as to them had no longer any mission or authority whatever. We pass from this contention without further notice, as it is so obviously opposed to the doctrine upon the subject settled from the beginning, and so in conflict with the terms of the act of Congress, that nothing more need to be said concerning it. As to the first point of view, the proposition is this: That as the Act of 1906 subjected the surplus lands to taxation, it therefore brought them under the taxing laws of the state; and, it is insisted, that having been so brought, it results that until Congress otherwise provides, there exists no lawful authority in an officer of the United States to act in the name of the United States for the purpose of attacking the legality of a tax levied upon said lands under the laws of the state. But although the premise upon which the argument proceeds be admitted, that is, that in subjecting the lands to state taxation it was the purpose of Congress to subject them to the methods of levying and collecting the taxes provided by state law, including the remedial processes for the correction of errors, we fail to understand what relation that concession can have to the case in hand, since, on the face of the pleadings, the action taken by the United States was not to frustrate the act of Congress by preventing the operation of the state [133] law, but to prevent the systematic violation of the state law, committed for the purpose of destroying the rights created by the act of Congress. The argument therefore disregards the foundation for the relief sought, and proceeds upon the assumption that the exertion of power to prevent a perversion of state laws made to defeat the rights which the act of Congress gave is to be treated as a violation of the act of Congress and a refusal to apply the state law.

Certain is it that as the United States, as guardian of the Indians, had the duty to protect them from spoliation, and, therefore, the right to prevent their being illegally deprived of the property rights conferred under the Act of Congress of 1906, the power existed in the officers of the United States to invoke relief for the accomplishment of the purpose stated. Indeed, the Act of Congress of 1917, providing for the appraisement of the lands in question, by necessary implication, if not in express terms, treated the power of the officers of the United States to resist the illegal assessments as undoubted.

And the existence of power in the United States to sue which is thus established disposes of the proposition that, because of remedies afforded to individuals under the state law, the authority of a court of equity could not be invoked by the United States. This necessarily follows because, in the first place, as the authority of the United States extended to all the noncompetent members of the tribe, it obviously resulted that the interposition of a court of equity to prevent the wrong complained of was essential in order to avoid a multiplicity of suits (see Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601; Smyth v. Ames, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; Cruickshank v. Bidwell, 176 U. S. 73, 81, 44 L. ed. 377, 381, 20 Sup. Ct. Rep. 280; Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 283, 53 L. ed. 796, 798, 29 Sup. Ct. Rep. 426; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 506, 61 L. ed. 1280, 1285, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88); in the second place, because, as the wrong relied upon was not a mere mistake or error [134] committed in the enforcement of the state tax laws, but a systematic and intentional disregard of such laws by the state officers for the purpose of destroying the rights of the whole class of noncompetent Indians who were subject to the protection of the United States, it follows that such class wrong and disregard of the state statute gave rise to the right to invoke the interposition of a court of equity in order that an adequate remedy might be afforded (Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Regan v. Farmers' Loan & T. Co. 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Coulter v. Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 507, 61 L. ed. 1280, 1285, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88). In fact, the subject is fully covered by the ruling in Union P. R. Co. v. Weld County, 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510.

Reversed and remanded for further proceedings in conformity with this opinion.

FRANK A. BONE, Petitioner,
v.
COMMISSIONERS OF MARION COUNTY.

(See S. C. Reporter's ed. 134–145.)

Patents — novelty — foreign publication.

1. Patentable novelty cannot be asserted for a device which has been described in foreign printed publications.

[For other cases, see Patents, V. d, in Digest Sup. Ct. 1908.]

Patents — novelty — anticipation — infringement.

2. In view of the prior art, the only originality that can be accorded to the Bone patent, number 705,732, for a steel reinforced concrete retaining wall with a heel and toe at the base, so constructed that the weight of the retaining material upon the heel of the inclosed metal structure will operate to retain the wall in a vertical position, is in its special form, and there can be no infringement except by a copy of that form or a colorable imitation of it.

[For other cases, see Patents, V. d; V. e; XIV. a, in Digest Sup. Ct. 1908.]

[No. 63.]

Argued November 11, 1919. Decided December 15, 1919.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the District Court for the District of Indiana, dismissing the bill in a patent infringement suit. Affirmed.

See same case below, 161 C. C. A. 247, 249 Fed. 211.

The facts are stated in the opinion.

Mr. **Clarence E. Mehlhope** argued the cause, and, with Mr. Arthur H. Ewald, filed a brief for petitioner.

Mr. **V. H. Lockwood** argued the cause and filed a brief for respondents:

It has been the common practice in every unskilled occupation to strengthen the unstable parts of any structure with reinforcing iron, and in this only mechanics, and no invention, are involved.

Crouch v. Roemer, 103 U. S. 797, 26 L. ed. 426; Star Bucket Pump Co. v. Butler Mfg. Co. 198 Fed. 863.

Placing a brace in the framework of a machine to enable it to stand up to its work is not invention.

W. F. & John Barnes Co. v. Van Dyck Churchill Co. 130 C. C. A. 300, 213 Fed. 636.

In fact, bracing in so many ways is of such common use in machines, that, if the necessity of having a brace in any piece of mechanism is established, any person skilled in the art could readily introduce it, and without invention.

Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co. 201 Fed. 928.

Reinforcing the sides of a corrugated board box by wooden veneer or any other reinforcing is not invention.

Re Ferres, 192 Off. Gaz. 745.

Where it has been customary to place a large number of short rods in a large concrete structure at the point of great tension and where it will wear, there is no invention in using continuous rods located at such point.

Re Luten, 170 Off. Gaz. 246.

It has been held not to be invention to make the part of a bicycle frame which receives the gear strain of the pedal shaft, strong enough to withstand that strain.

Pope Mfg. Co. v. Arnold, S. & Co. 113 C. C. A. 517, 193 Fed. 652.

A mere enlargement of a shoulder pad to enable it to do its work is not invention, any more than strengthening it would be.

Schweichler v. Levinson, 78 C. C. A. 92, 147 Fed. 708.

A device made or disclosed before the patent anticipates that patent if such device would infringe the patent when made later than the patent.

Knapp v. Morss, 150 U. S. 221, 37 L. ed. 1059, 14 Sup. Ct. Rep. 81.

The courts have not looked with much favor upon the patents granted for concrete constructions reinforced by bars, as will appear from the following list of cases. Some workers in this art, and for a time the Patent Office Examiner, seemed to have gone wild in the matter of patents for reinforced concrete constructions consisting chiefly in locating reinforcing bars at points needing reinforcing. Thus, Mr. Luten, one of Mr. Bone's experts in our case, testifies that he applied for about eighty patents on reinforced concrete constructions, and had received about forty-two patents. Several of these got into the courts, as will appear from the decisions below, and have been uniformly held void for lack of invention. These

---

Note.—As to foreign patents and their effect—see note to Grant v. Walter, 37 L. ed. U. S. 553.

On anticipation of patents; prior patents and publication—see note to Leggett v. Standard Oil Co. 37 L. ed. U. S. 737.

are an unjust handicap to legitimate concrete construction business.

Hennebique Constr. Co. v. Armored Concrete Constr. Co. 163 Fed. 300, 94 C. C. A. 577, 169 Fed. 287; Ransome Concrete Co. v. German-American Button Co. 119 C. C. A. 622, 201 Fed. 528; Turner v. Moore, 198 Fed. 134, 128 C. C. A. 138, 211 Fed. 466; Carter v. Burch Plough Works Co. 211 Fed. 481; Thacher v. Baltimore, 219 Fed. 909; Drum v. Turner, 135 C. C. A. 74, 219 Fed. 188; Trussed Concrete Steel Co. v. Goldberg, 138 C. C. A. 106, 222 Fed. 506; Besser v. Merillat Culvert Core Co. 226 Fed. 783; Luten v. Sharp, 148 C. C. A. 478, 234 Fed. 880, 217 Fed. 76; United States Column Co. v. Benham Column Co. 225 Fed. 55, 151 C. C. A. 276, 238 Fed. 200; Turner v. Lauter Piano Co. 236 Fed. 252, 161 C. C. A. 48, 248 Fed. 930; Turner v. Deere & W. Bldg. Co. 161 C. C. A. 662, 249 Fed. 752; Luten v. Whittier, 163 C. C. A. 584, 251 Fed. 590; Luten v. Washburn, 165 C. C. A. 392, 253 Fed. 950; Luten v. Wilson Reinforced Concrete Co. 254 Fed. 107; Luten v. Allen, 254 Fed. 587; Luten v. Young, 254 Fed. 591; Luten v. Marsh, 254 Fed. 701.

A prior publication, if it discloses the invention, anticipates the patent, even if such prior device has never been built.

Walker, Patents, 57; E. M. Miller Co. v. Meriden Bronze Co. 80 Fed. 525.

If a mechanic, or one skilled in the art, would have supplied what the prior publication or device lacked or omitted, in order to make the patented device, such prior publication anticipates the patent.

Chase v. Fillebrown, 58 Fed. 378.

If the description in a prior printed publication is so full, clear, and exact that those skilled in the art would be enabled to make the patented device, the patent is anticipated by such publication.

Cohn v. United States Corset Co. 93 U. S. 366, 23 L. ed. 907; Downton v. Yeager Mill Co. 108 U. S. 466, 27 L. ed. 789, 3 Sup. Ct. Rep. 10; New Departure Bell Co. v. Bevin Bros. Mfg. Co. 19 C. C. A. 534, 38 U. S. App. 292, 73 Fed. 469.

Mr. Justice **McKenna** delivered the opinion of the court:

Suit brought in the district court of the United States for the district of Indiana to restrain the infringement of a patent for a retaining wall, which, to quote petitioner, is "a wall to prevent the material of an embankment or cut from sliding."

After issue joined and proofs submitted, the district court (Anderson, J.) entered a decree dismissing the bill for want of equity. The decree was affirmed by the circuit court of appeals, to review which action this writ of certiorari was granted.

The bill in the case is in the conventional form and alleges invention, the issue of a patent numbered 705,732, and infringement by respondent. The prayer is for treble damages, an injunction and accounting.

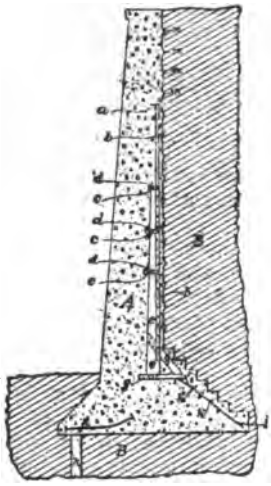
The answer of respondent is a serial denial of the allegations of the bill, and avers anticipation of petitioner's device by prior patents and publications in this and other countries.

This summary of the issues is enough for our purpose, and we need only add preliminarily to their discussion that Bone's device has the sanction of a patent and a decision sustaining it by the district court for the northern district of Ohio and the circuit court of appeals for the [**136**] sixth circuit. The difference of decision in that circuit and the seventh circuit is an important consideration and must be accounted for, which is best done by a display of the patent and the case.

First as to the patent: It describes the invention as being one that "relates to improvements in retaining walls for abutments to bridges . . . , and such places as it is desired to retain earth or other matter permanently in place with its face at an angle nearer vertical than it would naturally repose when exposed to the action of the elements or gravity;" and "consists principally of introducing into masonry of concrete, stone, or brick a framework of steel or iron in such way that the whole wall is so much strengthened thereby that the volume of the masonry may be greatly reduced, and yet the height, base, and strength against overturning, bulging, or settling will still be ample."

The following figure represents a cross-sectional view of the device—A representing the masonry, B the material retained, and B^1 the earth on which the wall rests. The metal parts within A are indicated by the smaller letters.

. [**137**] The patent does not insist upon that form of the masonry in all particulars. The base of the wall may be, it is said, "varied to suit the circumstances;" it, the base, may extend to



the rear rather than the front "with proper proportions of metal . . . the form shown in the drawings being what might be called an inverted T, while those suggested would be in the form of an L or reversed L."

The utility of the wall of these shapes is represented to be that it is "not so liable to be overturned from the pressure of material behind it as would be a wall of the same height and area of section, but having a rectangular, trapezoidal, or triangular shaped section," the latter shapes requiring more masonry. And it is said that the patented wall, "having more base and less weight" than such other shapes, "will rest more securely on a soft or yielding foundation, the weight of the material resting on the heel" causing the latter "to press on the earth below, and thus cause friction to prevent the whole wall from sliding outward." This is the especial effect of the patent, achieved by the wall of the shape described, and distinguishes it, is the contention, from the retaining walls of the prior art.

The patentee admits, however, that retaining walls had been "constructed of concrete and steel, but none" to his "knowledge" "had been supported on their own base as" his, nor had "any of them entirely inclosed the steel within the concrete" nor had "any of them used the weight of the material retained as a force to retain itself."

Such, then, is the wall and the utility attributed to it. The combinations which may be made with it are set forth in 17 claims, of which 1, 3, 5, 16, and 17 are involved in the present action. Counsel for petitioner considers, however, that 1 and 17 are so far illustrative that the others need not be given. They are as follows:

"1. The combination with a retaining wall having a [**138**] heel, of a metal structure embedded vertically in said wall and obliquely in said heel, so that the weight of the retained material upon the heel of the metal structure will operate to retain the wall in vertical position.

"17. The combination with a retaining wall having an inclined heel and a toe at opposite sides thereof, of a metal structure embedded within said wall and heel, said structure consisting of upright bents at the back part of the vertical wall and continuing down along the upper part of the heel of said wall to the back part thereof, whereby by reason of the toe and the heel the weight of the retained material upon the heel of the metal structure will operate to maintain the wall in a vertical position."

So much for the device of the patent. How far was it new or how far was it anticipated?

Bone's idea was conceived in 1898, and his patent issued in 1902 upon an application made in 1899; but, according to his counsel, the value of the invention was not recognized "until after the lapse of several years," when he, Bone, brought a suit against the city of Akron, Ohio, in the district court for the northern district of Ohio, in vindication of the patent and in reparation for its infringement. He was given a decree which was affirmed by the circuit court of appeals for the sixth circuit.

The district court (Judge Day) gave a clear exposition of the patent, the relation of its metal parts[1] to the masonry [**139**] parts, and their co-operating functions, and adjudged the patent valid and the wall of the city of Akron an infringement of it.

The circuit court of appeals affirmed the decree. The court said that the record disclosed nothing which anticipated "the substantial thought of the

[1] The following is an extract from Judge Day's opinion:

"The reinforcing members [metallic members] are placed near the back face of the wall and heel and near the lower face of the toe. The oblique reinforcing bars in the heel acting in conjunction with the uprights serve the function of a cantilever beam whereby the weight of the material pressing upon the heel is transferred to the upright portion of the wall and operates to retain the wall in a vertical position. . . .

"Considering the claims of the patent, and the testimony, I am of the opinion that

patent." If it had done so, or, to quote the exact language of the court, "If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures."[2]

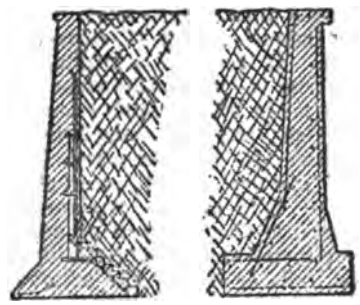
[140] On application for rehearing the court refused to direct the district court to open the case to permit the defendant to put in proof regarding a German publication of 1894.

Those decisions confronted the district court in the present suit and fortified the pretensions of the patent. They were attacked, however, as having been pronounced upon a different record, and this conclusion was accepted by the district court. The latter court found from the new evidence the existence of a structure upon the nonexistence of which the circuit court of appeals for the sixth circuit based its conclusion. The district court said that Bone was not the first to do the things he asserted he was the first to do, and that whatever the record in the sixth circuit might have shown, so far as the record before the court "was concerned, the absolute converse of that proposition" had "been demonstrated."

The court, therefore, as we have said, dismissed the bill for want of equity.

The decree was affirmed by the circuit court of appeals; indeed, the reasoning of the district court was approved after painstaking consideration of the patent and an estimate of the anticipatory defenses, none of which, the court said, was introduced in the Akron Case, "otherwise a different conclusion would have been reached," adducing the opinion of the court. 161 C. C. A. 247, 249 Fed. 214. This being so, and there is no doubt it is so, the present case is relieved of the authority or persuasion of the Akron Case, and it becomes necessary to consider the prior art and decide the extent and effect of its anticipation.

We have given a cross section of the device of the [141] patent, showing its shape and strengthening "metallic members," and the patent informs of their co-operative function. We reproduce the device and set by its side the Marion county wall for comparison.



BONE MARION COUNTY

If we may assign novelty to the Bone wall and consider it a broad advance

Bone, the patentee, was the first to reinforce the retaining wall, or similar wall of concrete or masonry in such a manner that the weight of the retained material would be utilized to impart through the reinforcing members tensile resistance to the stern or vertical part of the wall, thereby fortifying this part of the wall against breaking strains.

"This was an advancement in the art and possessed novelty, and the structure of the defendant city infringed this patent.

"While many of the features of concrete structures were old, yet this combination as outlined and described in this Bone application for a patent was new. It is also in evidence that there has been a large sale and general acquiescence in the Bone patent."

[2] The following is an extract from the opinion of the circuit court of appeals:

"The record discloses nothing anticipating the substantial thought of the patent. Masonry or concrete retaining walls were deep and heavy, and maintained by gravity in their resistance against a horizontal stress. There was no occasion for reinforcement. Sustaining walls had been built of concrete with vertical reinforcement; but they were maintained against side strain by crossties or beams, without which they might tip over. If the prior art had shown a structure intended for a retaining wall, and having a heel such that the weight of the earth thereon would tend to keep the wall erect, it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength; but we find no such earlier structures. Those which have that shape are sustaining walls only, and were so obviously unfit for use as retaining walls that no one seems to have seen the utility for that purpose, of which the form, when properly adapted and strengthened, was capable. There is also a prior wall, wholly of metal, fairly disclosing a unitary heel adapted to hold the wall erect; but to see that this could become merely a skeleton embedded in concrete may well have required, in 1898, more than ordinary vision. Upon the whole, we think invention was involved, and the claims are valid." [137 C. C. A. 515, 221 Fed. 944.]

publications that preceded Bone's and we also avail ourselves of the same to show that Bone's patent was a step, not a leap, in that progress, and that the only originality that can be accorded it is in its special form, and there can be no infringement except by a copy of that form or a colorable imitation of it. We do not think the Marion county wall is subject to either accusation, and the decree of the Circuit Court of Appeals is affirmed.

Mr. Justice Day took no part in the consideration or decision of this case.

---

[146] ELWOOD HAMILTON, Collector of Internal Revenue, Appt.,
v.
KENTUCKY DISTILLERIES & WAREHOUSE COMPANY. (No. 589.)

ALPHONS DRYFOOS, Eugene Blum, and Eugene Bascho, Appts.,
v.
WILLIAM H. EDWARDS, Collector of Internal Revenue. (No. 602.)

(See S. C. Reporter's ed. 146–168.)

States — relation to Federal government — police power.

1. Although the United States lacks the police power, this being reserved to the states, it is none the less true that when the United States exerts any of the powers conferred upon it by the Federal Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by the state of its police power, or that it may tend to accomplish a similar purpose.

[For other cases, see States, IV. d, in Digest Sup. Ct. 1908.]

War — power of Congress — constitutional limitations.

2. The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations; but the 5th Amendment to the Federal Constitution imposes, in this respect, no greater limitation upon the national power than does the 14th Amendment upon state power.

[For other cases, see War, VIII. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — police power — taking property without compensation.

3. If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may, for a permitted purpose, impose a like restriction consistently with the 5th Amendment without making compensation.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 2.]

Constitutional law — due process of law — war-time prohibition.

4. Private property was not taken for public purposes without compensation, contrary to U. S. Const., 5th Amend., by the enactment by Congress, in the exercise of the war power, of the provisions of the War-time Prohibition Act of November 21, 1918, fixing a period of seven months and nine days from its passage, during which distilled spirits might be disposed of free from any restriction imposed by the Federal government, and thereafter permitting, until the end of the war and the termination of demobilization, an unrestricted sale for export, and, within the United States, sales for other than beverage purposes.

[For other cases, see Constitutional Law, IV. b, 4.]

War — power of Congress — war-time prohibition.

5. Assuming that the implied power of Congress to enact such a measure as the War-time Prohibition Act of November 21, 1918, must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, the power is not limited to victories in the field and the dispersion of the hostile forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.

Courts — relation to legislative department — motives — wisdom — necessity.

6. The Federal Supreme Court may not, in passing upon the validity of a Federal statute, inquire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed.

[For other cases, see Courts, I. e, 3, a, in Digest Sup. Ct. 1908.]

Note.—For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

shapes described by Bone as having advantage over other shapes. And there was also the suggestion of the value of a firm connection between the "vertical and horizontal member." In other words, the publication showed a retaining [144] wall having a heel such that the weight of the earth thereon would tend to keep the wall erect,—an effect and operation that Bone declares in his patent no wall had attained prior to his invention. And that effect and operation the circuit court of appeals for the sixth circuit considered the essence of the Bone patent, and the court said that "it might be difficult to find invention in merely adding the form of reinforcement most suitable to create the desired tensile strength."

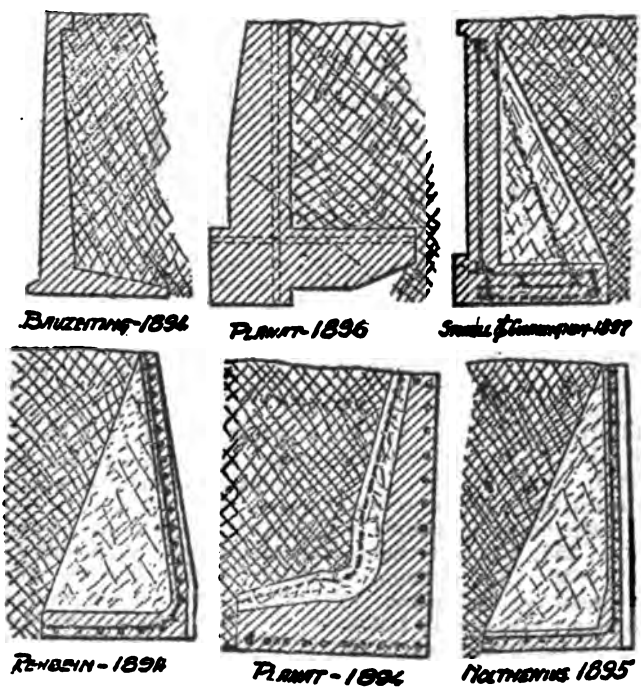
The Stowell & Cunningham structure is, as we have said, somewhat complex in its mechanical parts. But these are but details; the physical laws that they are to avail of are explained so that "the volume of masonry" of retaining walls may be reduced, yet retain their strength by the use of metallic reinforcements.

Counsel attacks the sufficiency of the asserted anticipations, especially the publications, and in effect says that whatever conceptions lurked in them conveyed no suggestion of a "concrete entity," to use counsel's words, to execute them, and laments that Bone should be robbed of the credit and reward of adding to the world's useful instrumentalities, which, but for him, would have remained in theories and the "dust from which respondent recovered them."

To execute theories by adequate instrumentalities may indeed be invention, but an answer to petitioner's contention we have given by our comment on the Bauzeitung and Planat publications and the fullness of their expositions. Bone may have been ignorant of them and his device may not have been their suggestion. They seem to have been unknown to American engineers, not even the interest of the controversy in the sixth circuit having developed their existence. From this local ignorance nothing can be deduced favorable to the patent. Its device having been described in printed publications, although in foreign countries, patentable novelty or originality cannot be asserted for it. Rev. Stat. § 4886, Act of March 3, 1897, 29 Stat. at L. 692, chap. 391, Comp. Stat. § 9430, 7 Fed. Stat. Anno. 2d ed. p. 23. [145] Such is the provision of the law, and we cannot relax it in indulgence to what may seem the individual's merit.

The Circuit Court of Appeals, to show the progress of the prior art, made use of the illustrations [3] of the patents and

[3]



publications that preceded Bone's and we also avail ourselves of the same to show that Bone's patent was a step, not a leap, in that progress, and that the only originality that can be accorded it is in its special form, and there can be no infringement except by a copy of that form or a colorable imitation of it. We do not think the Marion county wall is subject to either accusation, and the decree of the Circuit Court of Appeals is affirmed.

Mr. Justice Day took no part in the consideration or decision of this case.

---

[146] ELWOOD HAMILTON, Collector of Internal Revenue, Appt.,
v.
KENTUCKY DISTILLERIES & WAREHOUSE COMPANY. (No. 589.)

ALPHONS DRYFOOS, Eugene Blum, and Eugene Bascho, Appts.,
v.
WILLIAM H. EDWARDS, Collector of Internal Revenue. (No. 602.)

(See S. C. Reporter's ed. 146–168.)

States — relation to Federal government — police power.

1. Although the United States lacks the police power, this being reserved to the states, it is none the less true that when the United States exerts any of the powers conferred upon it by the Federal Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by the state of its police power, or that it may tend to accomplish a similar purpose.

[For other cases, see States, IV. d, in Digest Sup. Ct. 1908.]

War — power of Congress — constitutional limitations.

2. The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations; but the 5th Amendment to the Federal Constitution imposes, in this respect, no greater limitation upon the national power than does the 14th Amendment upon state power.

[For other cases, see War, VIII. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — police power — taking property without compensation.

3. If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may, for a permitted purpose, impose a like restriction consistently with the 5th Amendment without making compensation.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 2.]

Constitutional law — due process of law — war-time prohibition.

4. Private property was not taken for public purposes without compensation, contrary to U. S. Const., 5th Amend., by the enactment by Congress, in the exercise of the war power, of the provisions of the War-time Prohibition Act of November 21, 1918, fixing a period of seven months and nine days from its passage, during which distilled spirits might be disposed of free from any restriction imposed by the Federal government, and thereafter permitting, until the end of the war and the termination of demobilization, an unrestricted sale for export, and, within the United States, sales for other than beverage purposes.

[For other cases, see Constitutional Law, IV. b, 4.]

War — power of Congress — war-time prohibition.

5. Assuming that the implied power of Congress to enact such a measure as the War-time Prohibition Act of November 21, 1918, must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, the power is not limited to victories in the field and the dispersion of the hostile forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.

Courts — relation to legislative department — motives — wisdom — necessity.

6. The Federal Supreme Court may not, in passing upon the validity of a Federal statute, inquire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed.

[For other cases, see Courts, I. e, 3, a, in Digest Sup. Ct. 1908.]

Note.—For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Courts — relation to legislative department — war powers of Congress — passing of war emergency.

7. It requires a clear case to justify a court in declaring that a Federal statute adopted to increase war efficiency has ceased to be valid, on the theory that the war emergency has passed and that the power of Congress no longer continues.

[For other cases, see Courts, I. e, 8, a, in Digest Sup. Ct. 1908.]

War — power of Congress — passing of war emergency — war-time prohibition.

8. The War-time Prohibition Act of November 21, 1918, cannot be said to have ceased to be valid prior to the limitation therein fixed, viz., "the conclusion of the present war and thereafter until the termination of demobilization," on the theory that the war emergency has passed, where the Treaty of Peace has not yet been concluded, the railways are still under national control by virtue of the war powers, other war activities have not been brought to a close, and it cannot even be said that the man power of the nation has been restored to a peace footing.

War — power of Congress — war-time prohibition — implied repeal by 18th Amendment.

9. The existing restriction on the sale of distilled spirits for beverage purposes, imposed by the War-time Prohibition Act of November 21, 1918, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification.

War — termination — cessation of war activities — war-time prohibition.

10. The war with Germany cannot be said to have been concluded within the meaning of the War-time Prohibition Act of November 21, 1918, merely by reason of the actual termination of war activities.

[For other cases, see War, IX. in Digest Sup. Ct. 1908.]

War — war-time prohibition — termination.

11. The provision of the War-time Prohibition Act of November 21, 1918, that it shall not cease to be operative until the "conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President," is not satisfied by passing references in various messages and proclamations of the President to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the Army, or with officials of the War Department.

[Nos. 589 and 602.]

Argued November 20, 1919. Decided December 15, 1919.

APPEAL from the District Court of the United States for the Western District of Kentucky to review a decree enjoining the enforcement of the War-time Prohibition Act. Reversed. Also AN APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing the bill in a suit to enjoin the enforcement of the War-time Prohibition Act. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General **Frierson** argued the cause, and, with Solicitor General King and Mr. W. V. Gregory, filed a brief for appellant in No. 589:

The statute was enacted not under the general police power, but under the war powers of Congress, and its validity depends upon whether it is an appropriate means of carrying into effect the war powers of the Federal government.

United States v. Doremus, 249 U. S. 86, 63 L. ed. 493, 39 Sup. Ct. Rep. 214.

Congress is empowered to enact any law which has a substantial relation to the successful conduct of the war, and which is not forbidden by any express provision of the Constitution.

Northern P. R. Co. v. North Dakota, 250 U. S. 135, 149, 63 L. ed. 897, 903, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502; Gibbons v. Ogden, 9 Wheat. 195, 6 L. ed. 69; 2 Willoughby, Const. § 715, p. 1212; Legal Tender Cases, 12 Wall. 563, 20 L. ed. 316; Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 493, 506, 20 L. ed. 176, 179; Adair v. United States, 208 U. S. 161, 179, 52 L. ed. 436, 444, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Employers' Liability Cases (Howard v. Illinois C. R. Co.), 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550.

The regulation or prohibition of the sale and manufacture of intoxicants has a substantial and reasonable relation to the end to be accomplished by exerting the power to declare war.

M'Culloch v. Maryland, 4 Wheat. 422, 4 L. ed. 605; Lottery Case (Champion v. Ames) 188 U. S. 321, 355, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 493, 20 L. ed. 176.

The motives of Congress or of individual members of Congress cannot be inquired into by the courts.

United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308; Amy v.

Watertown, 130 U. S. 301, 319, 32 L. ed. 946, 952, 9 Sup. Ct. Rep. 530; Weber v. Freed, 239 U. S. 325, 60 L. ed. 308, 36 Sup. Ct. Rep. 131, Ann. Cas. 1916C, 317.

The validity of the act is not affected by the fact that it partakes of the nature of a police regulation.

Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Wilson v. United States, 232 U. S. 563, 567, 58 L. ed. 728, 731, 34 Sup. Ct. Rep. 347; Seven Cases v. United States, 239 U. S. 510, 515, 60 L. ed. 411, 415, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Cooley, Const. Lim. 732; Gibbons v. Ogden, 9 Wheat. 1, 202, 6 L. ed. 23, 71.

The statute does not constitute a taking of property, and does not contravene the 5th Amendment.

Mugler v. Kansas, 123 U. S. 623, 668, 31 L. ed. 205, 212, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

A state of war still exists, and the statute is in effect whether demobilization is complete or not.

United States v. Anderson, 9 Wall. 56, 70, 19 L. ed. 615, 619; J. Ribas y Hijo v. United States, 194 U. S. 315, 323, 48 L. ed. 994, 996, 24 Sup. Ct. Rep. 727; The Protector, 12 Wall. 700, 20 L. ed. 463.

Messrs. Wayne B. Wheeler and R. C. Minton filed a brief as amici curiæ in No. 589:

The War Prohibition Act is constitutional because it has a reasonable relation to the recognized authority of Congress to support the Army and Navy, and to other war powers. It conserves the essentials to an adequate support of the Army and Navy by preventing the waste of food, fuel, transportation facilities, and manpower used in the manufacture and sale of beer, wine, and other intoxicating liquors.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; United States v. Doremus, 249 U. S. 86, 63 L. ed. 493, 39 Sup. Ct. Rep. 214; Hoke v. United States, 227 U. S. 309, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905.

The War Prohibition Act does not take private property for public use without just compensation. The decisions of the courts are uniform that the government may prohibit the liquor traffic entirely without providing any compensation to the liquor dealers.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; New Orleans Gaslight Co. v. Louisiana Light & H. P. Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Menken v. Atlanta, 78 Ga. 677, 2 S. E. 559.

The 18th Amendment gives no guaranty to the liquor traffic to continue during the year from the date of ratification by thirty-six states.

Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079; Kresser v. Lyman, 74 Fed. 765; Moore v. Indianapolis, 120 Ind. 483, 22 N. E. 424; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845.

The war has not ended nor has demobilization terminated by the proclamation of the President of the United States.

The Protector, 12 Wall. 700, 20 L. ed. 463; J. Ribas y Hijo v. United States, 194 U. S. 315, 48 L. ed. 994, 24 Sup. Ct. Rep. 727; Commercial Cable Co. v. Burleson, 255 Fed. 99; Scatena v. Caffey, 260 Fed. 756.

There is a presumption of constitutionality.

United States v. Harris, 106 U. S. 635, 27 L. ed. 292, 1 Sup. Ct. Rep. 601; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

Messrs. **Levy Mayer** and **William Marshall Bullitt** argued the cause and filed a brief for appellee in No. 589:

The state's police power over the liquor traffic is absolute and exclusive.

Barbour v. Georgia, 249 U. S. 454, 63 L. ed. 704, 39 Sup. Ct. Rep. 316; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44.

The depreciation of brewery or distillery properties is a mere incident, for which damages are not recoverable.

Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

The state's power with respect to pre-existing liquor is an open question.

Barbour v. Georgia, 249 U. S. 454, 63 L. ed. 704, 39 Sup. Ct. Rep. 316; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; Wynehamer v. People, 13 N. Y. 378.

Congress has no power in peace time to prohibit the sale of whisky.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; McKinley v. United States, 249 U. S. 397, 63 L. ed. 668, 39 Sup. Ct. Rep. 324; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 352, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 856; Schenck v. United States, 249 U. S. 47, 52, 63 L. ed. 470, 473, 39 Sup. Ct. Rep. 247.

The exercise of the war power is subject to the restrictions contained in the 5th Amendment.

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

Whisky is property, and when taken for public use is entitled to protection under the 5th Amendment.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Wynehamer v. People, 13 N. Y. 378; Com. v. Campbell, 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; Com. v. Kentucky Distilleries & Warehouse Co. 143 Ky. 314, 136 S. W. 1032.

The War-time Prohibition Act takes the Kentucky Company's private property for public use, but makes no provision for just compensation to the owner. Therefore the act is unconstitutional.

Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201; Wynehamer v. People, 13 N. Y. 378; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; United States v. Cress, 243 U. S. 316, 61 L. ed. 746, 37 Sup. Ct. Rep. 380; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Crozier v. Fried Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771, 32 Sup. Ct. Rep. 488.

The War-time Prohibition Act has by its own terms ceased to be operative.

United States v. Hicks, 256 Fed. 707.

The War-time Prohibition Act has become obsolete.

Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep. 794.

Mr. **Walter C. Noyes** argued the cause, and, with Messrs. Moses J. Stroock, Arthur L. Strasser, and Walter S. Dryfoos, filed a brief for appellants in No. 602:

The district court had jurisdiction to entertain this suit.

Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Yee Gee v. San Francisco, 235 Fed. 757; Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 321, — C. C. A. —, 259 Fed. 525; Scatena v. Caffey, 260 Fed. 756.

A law, valid in its inception, may become shorn of constitutionality by a change of circumstances.

Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; Johnson v. Gearlds, 234 U. S. 422, 446, 58 L. ed. 1383, 1393, 34 Sup. Ct. Rep. 794; Castle v. Mason, 91 Ohio St. 303, 110 N. E. 463, Ann. Cas. 1917A, 164; Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, P.U.R.1919C, 364, 121 N. E. 772; United States v. Hicks, 256 Fed. 707.

The question of the present existence of a war necessity or emergency is either a judicial question or a political

or administrative one, determined by the President.

Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep. 794; Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

Messrs. Levi Cooke and George R. Beneman filed a brief as amici curiæ in No. 602:

The prohibition contained in the Act of November 21, 1918, can be so construed as to avoid the question of constitutional invalidity.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527; United States v. Jin Fuey Moy, 241 U. S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658.

Solicitor General **King** argued the cause, and, with Assistant Attorney General Frierson, filed a brief for appellee in No. 602.

Mr. Justice **Brandeis** delivered the opinion of the court:

The armistice with Germany was signed November 11, 1918. Thereafter Congress passed, and, on November 21, 1918, the President approved, the War-time Prohibition Act (chap. 212, 40 Stat. at L. 1045, 1046, Comp. Stat. §§ 3115½ee, 3115½f), which provides as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. . . ."

On October 10, 1919, the Kentucky Distilleries & Warehouse Company, owner of distillery warehouses and of whisky therein, brought in the district court of the United States for the western district of Kentucky a suit against Hamilton, collector of internal revenue for that district, alleging that the above act was void or had become inoperative, and praying that he be enjoined from interfering, by reason of that act, with the usual process of [154] withdrawal, distribution, and sale of the whisky in bond. The case was heard before the district judge on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss. A decision without opinion was rendered for the plaintiff; and, the defendant declining to plead further, a final decree was entered granting a permanent injunction in accordance with the prayer of the bill. A similar suit seeking like relief was brought on October 29, 1919, by Dryfoos, Blum, & Company, in the district court of the United States for the southern district of New York, against Edwards, collector for that district. That case was heard on November 5 before the district judge on like motions for a preliminary injunction and to dismiss. An opinion was filed November 14, 1919, holding the act in force; and on the following day a final decree was entered, dismissing the bill.

The essential facts in the two cases differ in this: In the Kentucky case the whisky was stored in a distillery warehouse; the plaintiff was the maker of the whisky; had owned it prior to the passage of the act; and had, since June 30, 1919, paid the revenue tax on part of it. In the New York case the liquors were in general and special bonded warehouses; the plaintiffs were jobbers; and it does not appear when they became the owners of the liquors. Both cases come here by direct appeal under § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. p. 794], were argued on the same day, and may be disposed of together. Four contentions are made in support of the relief prayed for: (1) That the act was void when enacted, because it violated the 5th Amendment; (2) that it became void before these suits were brought by reason of the passing of the war emergency; (3) that it was abrogated or repealed by the 18th Amendment; (4) that by its own terms it expired before the commencement of these suits. These contentions will be considered in their order.

First: Is the act void because it takes private property [155] for public purposes without compensation, in violation of the 5th Amendment? The contention is this: The Constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power "to make all laws necessary and proper for carrying

into execution" the war powers expressly granted. Art. 1, § 8, cl. 18. Congress might, under this implied power, temporarily regulate the sale of liquor, and, if reasonably necessary, forbid its sale in order to guard and promote the efficiency of the men composing the Army and the Navy, and of the workers engaged in supplying them with arms, munitions, transportation, and supplies. McKinley v. United States, 249 U. S. 397, 399, 63 L. ed. 668, 669, 39 Sup. Ct. Rep. 324. But the exercise of the war powers is (except in respect to property destroyed by military operations, United States v. Pacific R. Co. 120 U. S. 227, 239, 30 L. ed. 634, 638, 7 Sup. Ct. Rep. 490) subject to the 5th Amendment. United States v. Russell, 13 Wall. 623, 627, 20 L. ed. 474, 475. The severe restriction imposed by the act upon the disposition of liquors amounts to a taking of property; and, being uncompensated, would, at least as applied to liquors acquired before the passage of the act, exceed even the restriction held to be admissible under the broad police powers possessed by the states. Therefore, since it fails to make provision for compensation, which in every other instance Congress made when authorizing the taking or use of property for war purposes,[1] it is void. Such is the argument of the plaintiffs below.

[156] That the United States lacks the police power, and that this was reserved to the states by the 10th Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose. Lottery Case (Champion v. Ames) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Hipolite Egg Co. v. United States, 220 U. S. 45, 58, 55 L. ed. 364, 368, 31 Sup. Ct. Rep. 364; Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Seven Cases v. United States, 239 U. S. 510, 515, 60 L. ed. 411, 415, L.R.A.1916D, 164, 36 Sup. Ct. Rep. 190; United States v. Doremus, 249 U. S. 86, 93, 94, 63 L. ed. 493, 496, 497, 39 Sup. Ct. Rep. 214. The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations (Ex parte Milligan, 4 Wall. 2, 121-127, 18 L. ed. 281, 295-298; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; United States v. Joint Traffic Asso. 171 U. S. 505, 571, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; United States v. Cress, 243 U. S. 316, 326, 61 L. ed. 746, 752, 37 Sup. Ct. Rep. 380); but the 5th Amendment imposes in this respect no greater limitation upon the national power than does the 14th Amendment upon state power (Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66). If the nature and conditions of a restriction [157] upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may for a permitted purpose impose a like

[1] War acts authorizing the seizure or requisition of property:

March 4, 1917, chap. 180, 39 Stat. 1168, 1193, Comp. Stat. § 3115¼c; July 1, 1918, chap. 113, 40 Stat. at L. 634, 651, factories, ships, and war materials; June 15, 1917, chap. 29, 40 Stat. at L. 182, 183, Comp. Stat. § 3115ee; April 22, 1918, chap. 62, 40 Stat. at L. 535, November 4, 1918, chap. 201, 40 Stat. at L. 1020, Comp. Stat. § 3115¼d, street railroads, equipment, etc., and the acquisition of title to lands, plants, etc.; August 10, 1917, chap. 53, 40 Stat. at L. 276, 279, Comp. Stat. §§ 3115¼e, 3115¼hh (Food Control Act), foods, fuels, factories, packing houses, coal mines, coal supplies, etc.; March 21, 1918, chap. 25, 40 Stat. at L. 451, railroads; May 16, 1918, chap. 74, 40 Stat. at L. 550, 551, June 4, 1918, chap. 90, 40 Stat. at L. 593, houses, buildings, properties, etc., in District of Columbia; July 18, 1918, chap. 157, 40 Stat. at L. 913, 915, ships; July 16, 1918, chap. 154, 40 Stat. at L. 904, telephone and telegraph systems; October 5, 1918, chap. 181, 40 Stat. at L. 1009, 1010, mines, mineral lands, etc.

See also Act of June 3, 1916, chap. 134 (39 Stat. at L. 166, 213), for the mobilization of industries, which authorizes the seizure of munition plants, and provides that the compensation therefor shall be "fair and just," and the Act of March 4, 1917, chap. 180 (39 Stat. at L. 1168, 1169, Comp. Stat. § 3115½f), authorizing the acquisition of aëroplane patents by condemnation, for which $1,000,000 was appropriated.

restriction consistently with the 5th Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency.

There was no appropriation of the liquor for public purposes. The War-time Prohibition Act fixed a period of seven months and nine days from its passage, during which liquors could be disposed of free from any restriction imposed by the Federal government. Thereafter, until the end of the war and the termination of mobilization, it permits an unrestricted sale for export, and, within the United States, sales for other than beverage purposes. The uncompensated restriction upon the disposition of liquors imposed by this act is of a nature far less severe than the restrictions upon the use of property acquired before the enactment of the prohibitory law, which were held to be permissible in cases arising under the 14th Amendment. Mugler v. Kansas, 123 U. S. 623, 668, 31 L. ed. 205, 212, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 23, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. The question whether an absolute prohibition of sale could be applied by a state to liquor acquired before the enactment of the prohibitory law has been raised by this court, but not answered, because unnecessary to a decision. Bartemeyer v. Iowa, 18 Wall. 129, 133, 21 L. ed. 929, 930; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 32, 33, 24 L. ed. 989, 991, 992; Eberle v. Michigan, 232 U. S. 700, 706, 58 L. ed. 803, 806, 34 Sup. Ct. Rep. 464; Barbour v. Georgia, 249 U. S. 454, 459, 63 L. ed. 704, 707, 39 Sup. Ct. Rep. 316. See, however, Mugler v. Kansas, 123 U. S. 623, 625, 657, 31 L. ed. 205, 209, 8 Sup. Ct. Rep. 273. But no reason appears why a state statute, which postpones its effective date long enough to enable those engaged in the business to dispose of stocks on hand at the date of its enactment, should be obnoxious to the 14th Amendment; or why such a Federal law should be obnoxious [158] to the 5th Amendment. We cannot say that seven months and nine days was not a reasonable time within which to dispose of all liquors in bonded warehouses on November 21, 1918. The amount then in storage was materially less than was usually carried;[2] because no such liquor could be lawfully made in America under the Lever Food and Fuel Control Act (August 10, 1917, chap. 53, § 15, 40 Stat. at L. 276, 282, Comp. Stat. § 3115¼l) after September 9, 1917. And if, as is suggested, the liquors remaining in bond November 21, 1918, were not yet sufficiently ripened or aged to permit them to be advantageously disposed of within the limited period of seven months and nine days thereafter, the resulting inconvenience to the owner, attributable to the inherent qualities of the property itself, cannot be regarded as a taking of property in the constitutional sense. Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 332, 61 L. ed. 326, 341, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845.

Second: Did the act become void by the passing of the war emergency before the commencement of these suits? It is conceded that the mere cessation of hostilities under the armistice did not abridge or suspend the power of Congress to resort to prohibition of the liquor traffic [159] as a means of increasing our war efficiency; that the support and care of the Army and Navy during demobilization was within the war emergency; and that, hence, the act was valid when passed. The contention is that between the date of its enactment and the commencement of these suits it had become evident that hostilities would not be resumed; that demobilization had been effected; that thereby the war emergency was removed; and that when the emergency ceased the statute became void.

To establish that the emergency has passed, statements and acts of the Presi-

[2] The amount of distilled spirits of all kinds in bonded warehouses June 30, 1919, was 72,358,151.1 gallons as compared with 282,036,460.2, June 30, 1914; 253,668,341.3 gallons, June 30, 1915; 232,402,878.3 gallons, June 30, 1916; 194,832,682.6 gallons, June 30, 1917; 158,959,264.5 gallons, June 30, 1918. Report of the Commissioner of Internal Revenue for 1919, p. 173. The following explanation is given by the Commissioner, p. 51, why more was not withdrawn: "The high rates of tax on spirits, fermented liquors and wines which were provided in the bill subsequently enacted into law as the Revenue Act of 1918 [Act of February 24, 1919, 40 Stat. at L. 1057, chap. 18, Comp. Stat. § 6371¼a], prompted many dealers to make heavy purchases of these commodities prior to the passage of the act, and, as a consequence of this action on the part of the dealers as well as of the expansion of prohibition territory throughout the United States, the withdrawals from bonded warehouses materially declined after the passage of the act."

dent and of other executive officers are adduced; some of them antedating the enactment of the statute here in question. There are statements of the President to the effect that the war has ended [3] and peace has come; [4] that certain war agencies and activities should be discontinued; [5] that our enemies are impotent to renew hostilities; [6] and that the objects of the act here in question have been satisfied in the demobilization of the Army and Navy.[7] It is shown that many war-time activities have been suspended; that vast quantities of war materials have been disposed of; that trade with Germany has been resumed; and that the censorship of postal, telegraphic, and wire communications has been removed.[8] But we have also the fact that since these statements were made and these acts [160] were done, Congress, on October 28, 1919, passed over the President's veto the National Prohibition Act, which, in making further provision for the administration of the War-time Prohibition Act, treats the war as continuing and demobilization as incomplete; that the Senate, on November 19, 1919, refused to ratify the Treaty of Peace with Germany; [9] that, under the provisions of the Lever Act, the President resumed, on October 30, 1919, the control of the fuel supply which he had relinquished partly on January 31, 1919, and partly on February 20, 1919; [10] that he is still operating the railroads, of which control had been taken as a war measure; and that on November 18, 1919, he vetoed Senate Bill 641, because it diminished that control; [11] that, pursuant to the Act of March 4, 1919, chap. 125, 40 Stat. at L. 1348, he continues to control, by means of the Food Administration Grain Corporation, the supply of grain and wheat flour; that through the United States Sugar Equalization Board, Inc., he still regulates the price of sugar; that in his message to Congress on December 2, 1919, he urgently recommended the further extension for six months of the powers of the Food Administration; that as Commander in Chief he still keeps a part of the Army in enemy-occupied territory and another part in Siberia; and that he has refrained from issuing the proclamation declaring the termination of demobilization for which this act provides.

The present contention may be stated thus: That, notwithstanding the act was a proper exercise of the war power of Congress at the date of its approval, and contains its own period of limitation,—"until the conclusion of the present war and thereafter until the termination of demobilization,"—[161] the progress of events since that time had produced so great a change of conditions and there now is so clearly a want of necessity for conserving the man power of the nation, for increased efficiency in the production of arms, munitions, and supplies, that the prohibition of the sale of distilled spirits for beverage purposes can no longer be enforced, because it would be beyond the constitutional authority of Congress in the exercise of the war power to impose such a prohibition under present circumstances. Assuming that the implied power to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace (United States v. Anderson, 9 Wall. 56, 70, 19 L. ed. 615, 619; The Protector, 12 Wall. 700, 702, 20 L. ed. 463, 464; J. Ribas y Hijo v. United States, 194 U. S. 315, 323, 48 L. ed. 994, 996, 24 Sup. Ct. Rep. 727), but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in Stewart v. Kahn (Stewart v. Bloom) 11 Wall. 493, 507, 20 L. ed. 176, 179, "The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress."

[3] Address to Congress, Official U. S. Bulletin, November 11, 1918, p. 5.

[4] Thanksgiving Proclamation, Official U. S. Bulletin, November 18, 1918, p. 1.

[5] Address to Congress, December 2, 1918, Official U. S. Bulletin, December 2, 1918, p. 6.

[6] Armistice Commemoration Proclamation, November 11, 1919.

[7] Veto Message, October 27, 1919, Congressional Record, October 27, 1919, p. 8063.

[8] U. S. Official Bulletin, November 12, 1918, p. 3; November 22, 1918, p. 1; November 27, 1918, p. 7; December 12, 1918, p. 4; December 20, 1918, p. 4; December 30, 1918, p. 7; United States Bulletin, February 27, 1919, p. 6; May 8, 1919; May 12, 1919, p. 14; October 20, 1919, p. 17.

[9] Congressional Record, November 19, 1919, p. 9321.

[10] United States Bulletin, November 10, 1919, p. 9; U. S. Official Bulletin, January 18, 1919, p. 1.

[11] Congressional Record, November 19, 1919, p. 9323.

No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress. United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 544, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308; McCray v. United States, 195 U. S. 27, 53-59, 49 L. ed. 78, 94-97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Weber v. Freed, 239 U. S. 325, 330, 60 L. ed. 308, 310, 36 Sup. Ct. Rep. 131, Ann. Cas. 1916C, 317; Dakota Cent. Teleph. Co. v. South Dakota, 250 U. S. 163, 184, 63 L. ed. 910, 924, 4 A.L.R. 1623, P.U.R.1919D, 717, 39 Sup. Ct. Rep. 507. Nor may the court inquire into the wisdom of the legislation. M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605; Gibbons v. Ogden, 9 Wheat. 1, 197, 6 L. ed. 23, 70; Brushaber v. Union P. R. Co. 240 U. S. 1, 25, 60 L. ed. 493, 504, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Rast v. Van Deman & L. Co. 240 U. S. 342, 357, 60 L. ed. 679, 687, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455. Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a [162] power is not an argument against its existence. Lottery Case (Champion v. Ames) 188 U. S. 321, 363, 47 L. ed. 492, 504, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

That a statute valid when enacted may cease to have validity, owing to a change of circumstances, has been recognized with respect to state laws, in several rate cases. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 473, 57 L. ed. 1511, 1571, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 508, 57 L. ed. 1571, 1594, 33 Sup. Ct. Rep. 975; Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 268, 63 L. ed. 968, 976, 39 Sup. Ct. Rep. 454. That the doctrine is applicable to acts of Congress was conceded arguendo in Perrin v. United States, 232 U. S. 478, 486, 58 L. ed. 691, 695, 34 Sup. Ct. Rep. 387, and Johnson v. Gearlds, 234 U. S. 422, 446, 58 L. ed. 1383, 1393, 34 Sup. Ct. Rep. 794. In each of these cases Congress had prohibited the introduction of liquor into lands inhabited by Indians, without specified limit of time; in one case the prohibition was in terms perpetual; in the other it was to continue "until otherwise provided by Congress." In both cases it was contended that the constitutional power of Congress over the subject-matter necessarily was limited to what was reasonably essential to the protection of the Indians. In the Perrin Case it was contended (p. 482) that the power was transcended because the prohibition embraced territory greatly in excess of what the situation reasonably required, and because its operation was not confined to a designated period reasonable in duration, but apparently was intended to be perpetual. In Johnson v. Gearlds the contention was (p. 442) that a prohibition originally valid had become obsolete by reason of changes in the character of the territory included in it and the status of the Indians therein. In both cases the court, while assuming that since the power to impose a prohibition of this character was incident to the presence of the Indians and their status as wards of the government, and did not extend beyond what was reasonably essential to their protection, it followed that a prohibition valid in the beginning would become inoperative when, in regular course, the Indians affected were completely emancipated from Federal guardianship and control, [163] nevertheless held that the courts would not be justified in declaring that the restriction either was originally invalid or had become obsolete if any considerable number of Indians remained wards of the government within the prohibited territory. In each case the decision rested upon the ground that the question what was reasonably essential to the protection of the Indians was one primarily for the consideration of the lawmaking body; that Congress was invested with a wide discretion; and that its action, unless purely arbitrary, must be accepted and given full effect by the courts.

Conceding, then, for the purposes of the present case, that the question of the continued validity of the War Prohibition Act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that, on obvious grounds, every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress, in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Con-

gress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the Treaty of Peace had not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid.

Third: Was the act repealed by the adoption of the 18th Amendment? By the express terms of the [164] Amendment the prohibition thereby imposed becomes effective after one year from its ratification. Ratification was proclaimed on January 29, 1919 (40 Stat. at L. pt. 2, Appx.). The contention is that, as the Amendment became, on its adoption, an integral part of the Constitution, its implications are as binding as its language; that, in postponing the effective date of the prohibition, the Amendment impliedly guaranteed to manufacturers and dealers in intoxicating liquors a year of grace; and that not only was Congress prohibited thereby from enacting meanwhile new prohibitory legislation, but also that the then-existing restriction imposed by the War-time Prohibition Act was removed. See Narragansett Brewing Co. v. Baker & O'Shaunessy (Nov. 12, 1919; U. S. D. Ct. R. I.).

The 18th Amendment, with its implications, if any, is binding not only in times of peace, but in war. If there be found by implication a denial to Congress of the right to forbid before its effective date any prohibition of the liquor traffic, that denial must have been operative immediately upon the adoption of the Amendment, although at that time demobilization of the Army and the Navy was far from complete. If the Amendment effected such a denial of power, then it would have done so equally had hostilities continued flagrant or been renewed. Furthermore, the Amendment is binding alike upon the United States and the individual states. If it guarantees a year of immunity from interference by the Federal government with the liquor traffic, even to the extent of abrogating restrictions existing at the time of its adoption, it is difficult to see why the guaranty does not extend also to immunity from interference by the individual states, with like results also as to then-existing state legislation. The contention is clearly unsound.

Fourth: Did the prohibition imposed by the act expire by limitation before the commencement of these suits? The period therein prescribed is "until the conclusion of [165] the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." It is contended both that the war has been concluded and that the demobilization has terminated.

In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the Treaty of Peace or the proclamation of peace. J. Ribas y Hijo v. United States, 194 U. S. 315, 323, 48 L. ed. 994, 996, 24 Sup. Ct. Rep. 727; The Protector, 12 Wall. 700, 702, 20 L. ed. 463, 464; United States v. Anderson, 9 Wall. 56, 70, 19 L. ed. 615, 619. From the fact that other statutes concerning war activities contain each a specific provision for determining when it shall cease to be operative,[12] and from the alleged absence of [166] such a provision here, it is argued that the term "conclusion of the war" should not be given its ordinary legal meaning; that instead it should be construed as the time when actual hostilities ceased; or when the Treaty of Peace was signed at Versailles, on June 28, 1919, by the American and German representatives; or, more generally, when the actual war emergencies ceased by reason of our complete victory and the disarmament of the enemy, coupled with the demobilization of our Army and the closing of war activities; or when the declared purpose of the act of "conserving the man power of the nation, and to increase [167] efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy," shall have been fully satisfied. But there is nothing in the words used to justify such a construction. "Conclusion of the war" clearly did not mean cessation of hostilities; because the act was approved ten days after hostilities had ceased upon the signing of the armistice. Nor may we assume that Congress intended by the phrase to designate the date when the Treaty of Peace should be signed at Versailles or else-

[12] The provisions fixing the date of expiration of the several war acts are as follows:

(Aircraft Act, being chap. 16 of the Army Appropriation Act of July 9, 1918, chap. 143, 40 Stat. at L. 889.) "Within one year from the signing of a treaty of peace with the Imperial German Government."

(Department Reorganization Act of May 20, 1918, chap. 78, 40 Stat. at L. 556, Comp.

where by German and American representatives, since by the Constitution a treaty is only a proposal until approved by the Senate. Furthermore, to construe "conclusion of the war" as meaning the actual termination of war activities would leave wholly uncertain the date when the act would cease to be operative; whereas Congress evinced here, as in other war statutes, a clear purpose that the date of expiration should be definitely fixed. The reason why this was not directed to be done by a proclamation of peace is made clear by the use of the word "thereafter." It was expected that the "conclusion of the war" would precede the termination of demobilization. Congress, therefore, provided that the time when the act ceased to be operative should be fixed by the President's ascertaining and proclaiming the date when demobilization had terminated.

It is insisted that he has done so. The contention does violence to both the language and the evident purpose of the provision. The "date of which shall be determined and proclaimed by the President" is a phrase so definite as to leave no room for construction. This requirement cannot be satisfied by passing references in messages to Congress, nor by newspaper interviews with high officers of the Army or with officials of the War Department. When the President mentioned in his veto message the "demobilization of the Army and Navy" the words were doubtless used in a popular sense, [168] just as he had declared to Congress, on the occasion of the signing of the armistice: "The war thus comes to an end." If he had believed on October 28, 1919, that demobilization had, in an exact sense, terminated, he would doubtless have issued then a proclamation to that effect; for he had manifested a strong conviction that restriction upon the sale of liquor should end. Only by such proclamation could the purpose of Congress be attained, and the serious consequences attending uncertainty be obviated. But in fact demobilization had not terminated at

Stat. § 283a.) "That this act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the Treaty of Peace."

(Emergency Shipping Fund Act of June 15, 1917, chap. 29, 40 Stat. at L. 182, as amended by the Act of April 22, 1918, chap. 62, 40 Stat. at L. 535, and by the Act of November 4, 1918, chap. 201, 40 Stat. at L. 1020, Comp. Stat. § 3115¼d.) "All authority . . . shall cease six months after a final treaty of peace is proclaimed between this government and the German Empire."

(Charter Rate and Requisition Act of July 18, 1918, chap. 157, 40 Stat. at L. 913, Comp. Stat. § 3115¼fff.) "All power and authority . . . shall cease upon the proclamation of the final treaty of peace between the United States and the Imperial German Government."

(Railroad Control Act of March 21, 1918, chap. 25, 40 Stat. at L. 451, 458, Comp. Stat. §§ 3115¾a, 3115¾n.) ". . . . Federal control . . . shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation . . . of the exchange of ratifications of the Treaty of Peace."

(Food Control Act of August 10, 1917, chap. 53, 40 Stat. at L. 276, 283, Comp. Stat. §§ 3115¼e, 3115¼pp.) "Sec. 24. That the provisions of this act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President."

(Trading with the Enemy Act of October 6, 1917, chap. 106, 40 Stat. at L. 411, 412, Comp. Stat. §§ 3115½a, 3115½aa.) "The words 'end of the war,' as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the Treaty of Peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be 'the end of the war,' within the meaning of this act."

(Soldiers and Sailors' Civil Relief Act of March 8, 1918, chap. 20, 40 Stat. at L. 440, at 441 and 449, Comp. Stat. §§ 3078¼a, 3078¼aa, 3078¼s.) "(5) The term 'termination of war' as used in this act shall mean the termination of the present war by the Treaty of Peace as proclaimed by the President. . . . § 603. That this act shall remain in force until the termination of the war, and for six months thereafter."

(Saulsbury Resolution of May 31, 1918, chap. 90, 40 Stat. at L. 593.) "That until a treaty of peace shall have been definitely concluded between the United States and the Imperial German Government, unless in the meantime otherwise provided by Congress . . ."

(Wheat Price Guarantee Act of March 4, 1919, chap. 125, § 11, 40 Stat. at L. 1348, 1353, Comp. Stat. § 3115¼kk(11).) "That the provisions of this act shall cease to be in effect whenever the President shall find that the emergency growing out of the war with Germany has passed, and that the further execution of the provisions of this act is no longer necessary for its purposes, the date of which termination shall be ascertained and proclaimed by the President; but the date when this act shall cease to be in effect shall not be later than the first day of June, nineteen hundred and twenty."

the time of the veto of the Act of October 28, 1919, or at the time these suits were begun; and, for aught that appears, it has not yet terminated. The report of the Secretary of War, made to the President under date of November 11, 1919 (and transmitted to Congress on December 1), in describing the progress of demobilization, shows (p. 17) that during the preceding ten days (November 1–10) 2,018 officers and 10,266 enlisted men had been discharged; the rate of discharge being substantially the same as during the month of October —in which 8,690 officers and 33,000 enlisted men were discharged.

The War-time Prohibition Act being thus valid and still in force, the decree in Number 589 is reversed and the case is remanded to the District Court with directions to dismiss the bill; and the decree in Number 602 is affirmed.

No. 589. Reversed.

No. 602. Affirmed.

---

[169] W. A. SULLIVAN, Plff. in Err.,
v.
CITY OF SHREVEPORT.

(See S. C. Reporter's ed. 169–173.)

Courts — relation to municipal department of government.

1. Every intendment is to be made in favor of the lawfulness of the exercise of municipal power in making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.

[For other cases, see Courts, I. e, 5, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — police power — municipal regulation of street railways — prohibiting use of one-man cars.

2. A municipal ordinance, confessedly a valid exercise of the police power when adopted, under which each street car used in the city streets must be operated during designated hours by two persons, a motorman and a conductor, cannot be said to be so arbitrary and confiscatory as to deny due process of law when so applied as to prohibit the use on a line on which the travel is heavy at times, and which has at least one steep grade, of a new type of car still in the experimental stage, so equipped that it may plausibly be contended that if all the appliances work as it is intended that they shall, it may be operated at a reduced cost by one motorman, with a high degree of safety to the public in streets where the traffic is not heavy.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 2, in Digest Sup. Ct. 1908.]

[No. 89.]

Submitted November 17, 1919. Decided December 15, 1919.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the City Court of Shreveport, convicting a superintendent of a street railway company of violating an ordinance forbidding the use of one-man cars. Affirmed.

See same case below, 142 La. 573, 77 So. 286.

The facts are stated in the opinion.

Mr. **E. H. Randolph** submitted the cause for plaintiff in error:

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but subject to the supervision of the courts.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal

---

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On validity of ordinance requiring conductor on street car—see note to South Covington & C. Street R. Co. v. Berry, 15 L.R.A. 604.

Power of municipality to prohibit use of one-man street car.

Municipal ordinances requiring more

power, making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But, notwithstanding this general rule of the law, it is now thoroughly well settled that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a law-

---

than one man to operate a street car have generally been sustained under the police power. South Covington & C. Street R. Co. v. Berry, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026; State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076; State ex rel. Columbia Electric Street R. Light & P. Co. v. Sloan, 48 S. C. 21, 25 S. E. 898.

In South Covington & C. Street R. Co. v. Berry, supra, an ordinance requiring both a driver and a conductor to accompany every street car was held to be a proper exercise by a municipality of the police power. It appeared that the cars involved in this case passed through crowded thoroughfares and centers of crowded population; that persons were constantly getting on and off the cars, which were apt to be crowded, at least in the morning and evening, as persons go and return from their business.

The ordinance involved in State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076, was sustained under a general grant of the police power. There were, in addition to the general grant of police power to the municipality, two special grants: one granting to the municipality the power to prescribe the manner in which corporations or persons should exercise any privilege granted to them in the use of the streets; another conferring power to license and regulate vehicles used for the transportation of passengers and merchandise. The court states that so far as the special grants relate to the power to require more than one man in the operation of a street car, neither of the particular delegations of power added anything to the right to exercise the police power generally granted. It is stated further that, the question being one of the exercise of the police power, the only question remaining is whether the regulation is reasonable. The ordinance in question required the street car company to have an agent in addition to the driver to assist in the control of the car and passengers, and to prevent accidents and disturbances of the good order and security of the streets, and this ordinance was held, upon its face, not to be an unreasonable regulation. . .

Under certain grants of power to municipal corporations, the right of the municipality to enact such an ordinance has been denied. Brooklyn Crosstown R. Co. v. Brooklyn, 37 Hun, 413; Thornhill v. Cincinnati, 4 Ohio C. C. 354, 2 Ohio C. D. 592.

In Brooklyn Crosstown R. Co. v. Brooklyn, supra, the power of the common council to pass the ordinance was claimed to exist under the act consolidating the companies, which created the street railway company in this case, which act provided "that in the construction, maintenance and operation of said road said new company shall be subject to any and all laws or ordinances that have been or may be established and in force by the common council of the city of Brooklyn for the regulation of horse railroads generally." The power was also claimed to exist by virtue of a statute authorizing the common council to "regulate and license common carriers, carriers of passengers, etc. . . . The common council shall also fix an annual license fee not exceeding the sum of $20, for each street or horse car daily operated or used in said city. . . . Said license fees shall be taken in full satisfaction for the use of the streets or avenues, but the same shall not relieve said companies from any obligation now required by law to keep such streets and avenues or any part thereof in repair." The members of the court are not agreed as to the reason for the invalidity of the ordinance. Barnard, P. J., holds that the subjection of the street railway company in the construction, maintenance, and operation of its road to the laws and ordinances of the city is not a general subjection, and does

ful business or make contracts, or to use and enjoy property.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

Mr. James E. Smitherman submitted the cause for defendant in error. Messrs. B. F. Roberts and John F. Phillips were on the brief:

Power to regulate implies full power over the things to be regulated.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23.

Under the general police power municipal corporations have the right to require a certain number of servants on each car, as a driver and a conductor.

3 McQuillin, Mun. Corp. p. 2095.

Ordinances under the general police power may require a conductor and a driver on each car.

South Covington & C. Street R. Co.

not legalize the ordinance; and further, that since the statute conferred upon the city authority to regulate and license common carriers generally, and to fix an annual license fee for street railroad cars, it seems to have been the intention of the legislature not to delegate to the municipality the power to enact the ordinance in question. Pratt, J., is also of the opinion that, "in view of the fact that the statute gives to the trustees of horse railways the power to manage the affairs of railway companies 'and to regulate the manner in which passengers shall be transported,' it is quite clear that the indefinite power to 'license and regulate common carriers,' remaining in the city charter, does not warrant the passage of an ordinance regulating the manner of the interior facilities of a car, or necessitating the use of a large instead of a small car." Pratt, J., seems to have been of the opinion that the validity of the ordinance in question depended somewhat upon its reasonableness.

Statutory authority: "1. To prevent riots, gambling, noise, and disturbance, indecent or disorderly conduct or assemblages, and preserve the peace and good order, and protect the property of the municipal corporation and its inhabitants. . . . 3. To prevent injury or annoyance from anything dangerous, offensive, or unwholesome, and to cause any nuisance to be abated," does not confer authority upon a municipality to enact a penal ordinance making it an offense to operate a street car without having a conductor thereon in addition to a driver. Thornhill v. Cincinnati, supra.

Statutory authority "to regulate the use of carts, drays, wagons, hackney coaches, ... and every description of carriages, which may be kept for hire or livery stable purposes," does not confer authority upon the municipality to enact a penal ordinance making it an offense to run cars without both a driver and conductor. Ibid.

The duty of a street railway company which constructed its road under an ordinance providing that it was to be operated under the general street railroad ordinance of the city, one of the sections of which provided that no cars should be run without both a driver and conductor, to comply with the ordinance, cannot be enforced by a penal ordinance subjecting to punishment by fine or imprisonment for failure to comply with its provisions. Ibid.

A street railway company which at first operated double horse cars under a contract with the city which required it to employ careful, sober, and civil agents, conductors, and drivers to take charge of its cars, and which subjected it also to such regulations of the common council of the municipality as such council may, from time to time, deem necessary for the protection of the citizens of the municipality, cannot, when it has replaced such large cars with smaller one-horse cars, be required by the municipality to maintain a conductor in addition to the driver. Toronto v. Toronto Street R. Co. 15 Ont. App. Rep. 30. Patterson, J. A., states that nothing can turn upon the stipulation that the company shall at all times employ careful, sober, and civil agents, conductors, and drivers to take charge of its cars; that the only cars in use at the time of the drafting of the agreement being the large car which carried two men, the aim of the draftsman was evidently to require the employment of careful, sober, and civil men, and not to provide that any number of men should be employed. The right to impose such a duty upon the company is also denied under the provision that it shall operate its road subject to such regulations as the common council may deem necessary for the protection of the citizens of a municipality; Patterson, J. A., stating that the requirement in question was a direction to the company as to the mode in which it was to conduct its business,—a matter which, if the council can meddle with it at all, must be the subject of a joint agreement.

v. Berry, 93 Ky. 43, 15 L.R.A. 604, 40 Am. St. Rep. 161, 18 S. W. 1026; State, Trenton Horse R. Co., Prosecutor, v. Trenton, 53 N. J. L. 132, 11 L.R.A. 410, 20 Atl. 1076.

Requiring an agent in addition to a driver on each street car is reasonable.

State, Trenton Horse R. Co., Prosecutor, v. Trenton, supra.

Every reasonable intendment of ordinances should be looked for in order to give validity to an ordinance which is within the municipal power. Words signifying the will of the governing body should be given full effect, without regard to the niceties of diction.

28 Cyc. 352; 2 McQuillin, Mun. Corp. p. 1742.

The legislature has constitutional power to enable the council to legislate on matter within the scope of the charter, notwithstanding the Constitution has declared that legislative power shall be vested in a senate, house of representatives, and the governor.

Mayor v. Morgan, 7 Mart. (N. S.) 1, 18 Am. Dec. 232.

Railway companies with yards or terminals in cities of the state may, consistently with due process of law, be forbidden by a state statute to conduct switching operations across public crossings in cities of the first and second class with a switching crew of not less than one engineer, a fireman, a foreman, and three helpers, although the statute creates an exemption in favor of railways less than 100 miles in length, the crews of which may operate over the same identical crossings.

St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518, 60 L. ed. 776, 36 Sup. Ct. Rep. 443.

It will be necessary to show that a railway system, as a whole, would operate at a loss, and not merely that a certain line of the system was operating for less than cost, in order to plead that property is being taken without due process of law, or that the equal protection of the law is being denied.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes.

Walla Walla v. Walla Water Co. 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921.

It is not the province of the courts to take issue with the lawmakers as to the wisdom or necessity of a statute or ordinance enacted ostensibly in the exercise of the police power, unless the enactments have no real or reasonable relation to public safety, public health, or morals,—are abuses of the police power, under the pretense of promoting public safety, health, or morals.

Shreveport v. Sullivan, 142 La. 573, 77 So. 286.

[170] Mr. Justice **Clarke** delivered the opinion of the court:

In 1907 the city of Shreveport, Louisiana, passed an ordinance requiring that each street car used in its streets should be operated during designated hours by two persons, a conductor and a motorman, and providing penalties for its violation.

The company with street railway lines in the city complied with the requirement until in June, 1917, when it procured some cars equipped for operation by one man, and attempted to use them on its "Allendale line," with only a motorman in charge. Thereupon the plaintiff in error, hereinafter designated the defendant, who was superintendent of the railway company, was arrested for violation of the ordinance.

He defended by filing a motion to quash the affidavit for arrest, on the ground that the ordinance was unreasonable and arbitrary and that the enforcement of it would deprive the company of its property without due process of law and without compensation, in violation of the 14th Amendment to the Constitution of the United States.

The motion to quash was "referred to the merits," a full trial was had, the motion was overruled, and the defendant, found guilty, was sentenced to pay a fine. The judgment of the supreme court of Louisiana affirming this judgment is before us for review on writ of error.

The defense introduced evidence tending to show that the new type of car used was so equipped that it could be operated by one motorman with safety to the public as great as was secured by cars theretofore used when operated by two men. The car, designated in the record as "a one-man car," is described as so arranged that passengers enter and leave it only at the front end, where the motorman is placed. It is so equipped electrically that the motorman must re-

main in an assigned [171] position necessary for the discharge of his duties, and must perform "some conscious act" at all times when the car is in motion. If he fails in this "conscious act" the current is automatically cut off, the brakes are applied in emergency, the rail is sanded, and the door of the car is unlocked, and is so adjusted that opening it lowers the step for use. There is testimony tending to show economy in the use of such cars, not only in the saving of the wages of one man, but also in immunity from accident.

It is apparent from this description derived from the record that it presents for decision the question: Whether the Ordinance of 1907, confessedly a valid exercise of the police power when it was passed, was rendered arbitrary and invalid by the development of a car which it is claimed can be operated by one man with as much safety to the traveling public as, and with less cost than, was secured by the two-man car in use at the time the ordinance was passed, and which was contemplated by it.

It is not necessary to decide in this case whether a valid regulating ordinance can be rendered invalid by a change of conditions which renders it arbitrary and confiscatory (Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 269, 63 L. ed. 968, 39 Sup. Ct. Rep. 454; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 473, 57 L. ed. 1511, 1571, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Johnson v. Gearlds, 234 U. S. 422, 426, 58 L. ed. 1383, 1385, 34 Sup. Ct. Rep. 794; Perrin v. United States, 232 U. S. 478, 481, 58 L. ed. 691, 693, 34 Sup. Ct. Rep. 387; Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, 95, 97, P.U.R.1919C, 364, 121 N. E. 772; and Castle v. Mason, 91 Ohio St. 296, 303, 110 N. E. 463, Ann. Cas. 1917A, 164), for the claim that such a change of condition had arisen in the case is stoutly disputed by the city authorities.

While on the record before us it might be plausibly contended that when all the appliances on the "one-man car" work as it was intended they should, it could be operated with a high degree of safety in streets where the traffic is not heavy, yet there is evidence that, in the short period of the operation of such cars in Shreveport, [172] the brakes on one of them failed to operate on a descending grade, resulting in the car getting out of control under conditions which, except for good fortune, might have resulted in serious accident. A passenger testified to receiving slight injuries when entering a car, due to the premature closing of the door, and he attributed the accident to the presence of other persons between him and the motorman whose duty it was to close the door. It was in evidence that the line on which these cars were placed, while in general one of light travel, extended into the principal business section of a city of 40,000 inhabitants; that it had at least one steep grade in it, and that at times the travel was heavy and the cars crowded.

It is obvious, and not disputed, that such cars are better adapted to light than to heavy travel, for all passengers must enter and leave at one door, and one man must take fares, make change, issue transfers, answer questions, and also remain in position to start the car promptly. So occupied and placed, plainly this one man could not render such assistance as is often necessary to infirm or crippled or very young passengers, or to those encumbered with baggage or bundles, and it would not be difficult to suggest emergencies of storm or accident in which a second man might be of first importance to the safety and comfort of passengers.

These "one-man cars" at the time of trial were, as yet, experimental, and enough has been said to show that in each community the operation of street cars presents such special problems—due to the extent and character of the travel, to grades and other conditions—that, with peculiar appropriateness, they have been committed by the law primarily to the disposition of the local authorities, whose determination will not be disturbed by the courts, except in cases in which the power has been exercised in a manner clearly arbitrary and oppressive. The rule is, "that every [173] intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community." Dobbins v. Los Angeles, 195 U. S. 223, 235, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18. Since the record, as we have thus discussed it, fails to show a clear case of arbitrary conduct on the part of the local authorities, the judgment of the Supreme Court of Louisiana is affirmed.

HARDIN-WYANDOT LIGHTING COMPANY, Plff. in Err.,
v.
VILLAGE OF UPPER SANDUSKY.

(See S. C. Reporter's ed. 173–179.)

Constitutional law — impairing contract obligations — due process of law — police power — municipal regulation of electric company.

1. Any modification of the rights of an electric light and power company which it may suffer by the enactment, in the exercise of the police power, of a statute giving the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the probate court in case of disagreement with the company as to the mode of using the streets, does not constitute an impairing of the obligation of the company's contract with the state or municipality, and is not a taking of its property without due process of law.

[For other cases, see Constitutional Law, IV. b, 4; IV. c, 2; IV. g, 4, e, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — municipal regulation of electric company.

2. The obligation of a municipal electric light and power franchise covering public and private uses, granted when the applicable statute then in force gave the municipality a qualified control over the erection of electric light and power appliances in the streets, was not impaired by subsequent legislation giving the municipality exclusive control, under which the light and power company, having removed and dismantled its street lighting system upon the expiration of a street lighting contract, may be restrained from erecting any poles or wires in the street until the consent of the municipality shall have been obtained, without prejudice to the company's right to maintain, repair, or replace such poles and wires as it is then using for commercial lighting.

[For other cases, see Constitutional Law, 1435–1439; 1379–1383, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — decision on non-Federal ground — impairing contract obligation.

3. A decision of the highest court of a state is not reviewable in the Federal Supreme Court as presenting the question whether contract obligations were impaired by the effect given to a municipal ordinance repealing a street lighting and power franchise, where this contention was first made in the intermediate state appellate court, and no effect whatever was given to such ordinance, either by that court or by the state court of last resort, each court reaching the conclusion under review independently of and without reference to such ordinance.

[For other cases, see Appeal and Error, 1376–1392; 1465–1528, in Digest Sup. Ct. 1908.]

[No. 10.]

Argued October 13, 1919. Decided December 15, 1919.

IN ERROR to the Supreme Court of the State of Ohio to review a decree which affirmed a decree of the Court of Appeals of Wyandot County, in that state, which, reversing a decree of the Court of Common Pleas of that county, for the dismissal of a petition in a suit by a municipality to enjoin a light and power company from erecting additional poles, and to have its franchise forfeited and its equipment removed from the streets, enjoined such company from erecting poles, wires, or lamps in the

---

Note.—On privilege of using streets as a contract within the constitutional provision against impairing the obligation of contracts—see notes to Clarksburg Electric Light Co. v. Clarksburg, 50 L.R.A. 142, and Russell v. Sebastian, L.R.A.1918E, 892.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clark, 51 L. ed. U. S. 619.

Generally, as to what laws are void as impairing the obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to how and when cases must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

streets until municipal consent shall have been obtained. Affirmed.

See same case below, 93 Ohio St. 428, 113 N. E. 402.

The facts are stated in the opinion.

Mr. H. T. Mathers argued the cause, and, with Mr. Thomas M. Kirby, filed a brief for plaintiff in error:

The Act of April 21, 1896, which added the proviso to the former grant of power to electric light and power companies, impairs the contract rights of the plaintiff in error under the Ordinance of March 4, 1889.

3 Dill. Mun. Corp. §§ 1242, 1306, p. 2150; 1 Allen, Foot & Everett, Incorporated Cos. Operating under Municipal Franchise, p. 214; Little Falls Electric & Water Co. v. Little Falls, 102 Fed. 663; American Waterworks & Guarantee Co. v. Home Water Co. 115 Fed. 171; Cleveland City R. Co. v. Cleveland, 94 Fed. 385; Ashland Electric Power & Light Co. v. Ashland, 217 Fed. 158; Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 50 L.R.A. 142, 35 S. E. 994; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988; Rio Grande R. Co. v. Brownsville, 45 Tex. 88; London Mills v. Fairview-London Teleph. Circuit, 105 Ill. App. 146, affirmed in 208 Ill. 289, 70 N. E. 313; State, Hudson Teleph. Co., Prosecutor, v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; 4 McQuillin, Mun. Corp. § 1661; 3 Abbott, Mun. Corp. §§ 896, 919, 920; 2 Abbott, Mun. Corp. § 834; Pond, Public Utilities, § 133; 28 Cyc. 383, 890; Chicago v. Sheldon, 9 Wall. 50, 55, 19 L. ed. 594, 597; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; Coast-Line R. Co. v. Savannah, 30 Fed. 646; Citizens' Street R. Co. v. Memphis, 53 Fed. 715; Detroit Citizens' Street R. Co. v. Detroit, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628; Baltimore Trust & G. Co. v. Baltimore, 64 Fed. 153; Africa v. Knoxville, 70 Fed. 729; Birmingham & P. M. Street R. Co. v. Birmingham Street R. Co. 79 Ala. 465, 58 Am. Rep. 615; Parmelee v. Chicago, 60 Ill. 267; People v. Chicago West Div. R. Co. 18 Ill. App. 125; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; Williams v. Citizens' R. Co. 130 Ind. 71, 15 L.R.A. 64, 30 Am. St. Rep. 201, 29 N. E. 408; Hovelman v. Kansas City Horse R. Co. 79 Mo. 632; Kansas City v. Corrigan, 86 Mo. 67; New York v. Second Ave. R. Co. 32 N. Y. 261; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; Kaukauna Electric Light Co. v. Kaukauna, 114 Wis. 327, 89 N. W. 542.

The notion that a corporation which has, upon the strength of a permission to use streets, spent thousands of dollars in erecting its poles and stretching its wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment.

State, Hudson Teleph. Co., Prosecutor, v. Jersey City, 49 N. J. L. 30, 60 Am. Rep. 619, 8 Atl. 123.

Mr. W. R. Hare argued the cause and filed a brief for defendant in error.

Mr. Justice Clarke delivered the opinion of the court:

In 1889 the council of the village of Upper Sandusky, Ohio, enacted an ordinance, authorizing an electric light and power company, and its assigns, to use the streets of the village for the purpose of erecting and operating electric light wires for the distribution of electric light and power. The ordinance declared that "the privilege hereby granted" shall entitle the company "to manufacture, sell, and distribute light and power by means of electricity to the citizens of the village for public and private uses."

The grantee, accepting the franchise, constructed a generating plant, erected poles, wires, and lamps, and, until the year 1912, lighted the streets of the village and sold current to private consumers. In that year the plant and franchise were purchased by the plaintiff in error, hereinafter referred to as the Company, which continued to light the streets until the contract which its predecessor had with the village expired. Upon the expiration of that contract the parties entered upon negotiations for a new one; but, failing to agree, the Company, in October, 1913, removed all of its street lights and took down its poles and [175] wires used for such lighting, but continued its commercial business.

In about a year after the Company ceased to light the village streets this action was commenced by the filing of a petition by the village, which, averring the facts we have stated, further alleged that, prior to the removal of the street lighting appliances, the village had submitted to the Company a schedule of fair prices which it was able and willing to pay for street lighting, and which it

was willing to authorize the Company to charge for commercial lighting and for power, but this was rejected; that by dismantling its street lighting system the Company had rendered itself wholly unable to furnish any light whatever for the purpose of public lighting; that, without the consent of the village, it was threatening to place new poles and wires in the streets "to further advance its private interests;" that it had forfeited all rights in the streets, and that it was not possible for the village and Company to agree upon terms for future lighting.

The prayer was that the Company be enjoined from erecting additional poles, that its franchise be declared forfeited, and that it be required to remove all of its equipment from the public streets.

The trial court dismissed the petition, but, on appeal, the court of appeals enjoined the Company from erecting poles, wires, or lamps in the streets "until the consent of said village shall have been obtained." This decree was affirmed by the supreme court of Ohio in the judgment we are reviewing.

In its opinion the supreme court held that there was no bill of exceptions or properly authenticated finding of facts before it, and that therefore the case must be decided upon the assumption that all of the allegations of the petition were sustained by the evidence; that at the time the Ordinance of 1889 was passed and accepted, the applicable state statute provided that the "mode" of use of [176] the streets shall be such as shall be agreed upon between the municipal authorities of the village and the Company, but, if they cannot agree, the probate court of the county shall direct what the mode of use shall be (Rev. Stat. 1880, § 3471a; 84 Ohio Laws, 7; and Rev. Stat. § 3461); and that, by an act of the legislature passed in 1896, seven years after the date of the village ordinance, the state law was amended into the form which continued to the time of trial, providing that "in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating and power purposes through any street, etc., without the consent of such municipality." 92 Ohio Laws, 204.

This amended law of 1896 is made the basis of the only contention in the case which is sufficiently substantial for special notice; viz., that by it the obligation was impaired of the contract which the Company had with the state and village, arising from its acceptance of the Ordinance of 1889, and that it was thereby deprived of its property without due process of law.

As we have seen, when the Ordinance of 1889 was passed, the statute then in force provided that the "mode" in which the streets could be used for electric lighting and power appliances must be agreed upon between the village and the Company; but that, if they failed to agree, it must be determined by the probate court; and the amendment, now claimed to be unconstitutional, consisted simply in giving to the municipality the exclusive control over the erection of any such appliances in the streets, instead of the prior qualified control. In this case the original "mode" of use was determined by agreement without action by the probate court.

The prayer of the petition was that, because of the dismantling of the street lighting plant and of its refusal to [177] agree to reasonable rates for the future, all rights of the Company in the streets should be declared forfeited, and that it should be ordered to remove from them all of its constructions; but the decree of the court of appeals, affirmed by the supreme court, went to the extent, only, of restraining the Company from erecting any poles and wires in the streets "until the consent of the village shall have been obtained." There was nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting when the case was commenced, and that this omission was of deliberate purpose appears from .the fact that both courts held that the state statutes in force at the time the grant became effective, and the form of the proceeding, were such that a decree annulling such rights as the Company had then retained in the streets could not properly be entered in the cause. On this point the supreme court said:

"In this posture of the case, while, in view of the statutory provisions which were in force at the inception of the enterprise, the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law." [93 Ohio St. 442, 113 N. E. 402.]

From this state of the record we conclude that the state supreme court did not intend to deal with the right of the company to maintain, repair, or replace such poles and wires as it was using for commercial lighting when the case was commenced, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction "until the consent of said village shall have been obtained;" and, so restrained, its judgment will be affirmed, based, as it is, upon the Statute of 1896, which the court [178] holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the state.

This act was a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the state, and all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the probate court in case of disagreement with the company as to the "mode" of using the streets.

We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power, and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation. Any modification of its rights which the company may suffer from this law, passed in a reasonable exercise of the police power, does not constitute an impairing of the obligation of its contract with the state or village, and is not a taking of its property without due process of law within the meaning of the constitutional prohibition. Northern P. R. Co. v. Puget Sound & W. H. R. Co. 250 U. S. 332, 63 L. ed. 1013, P.U.R.1919D, 728, 39 Sup. Ct. Rep. 474, and cases cited.

Of the contention that if an ordinance passed in 1915 by the village, repealing the Ordinance of 1889, were given effect, it would result in impairing the obligation of the contract, it is enough to say that it first appears in a supplemental answer filed in the court of appeals, and the case, as we have seen, was disposed of on the assumption that all of the allegations of the petition were sustained by the evidence. No effect whatever was given to that ordinance, either by the court of appeals or by the supreme [179] court, but each reached the conclusion we are reviewing independently of and without reference to it. Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 639, 56 L. ed. 924, 928, 32 Sup. Ct. Rep. 577; Long Sault Development Co. v. Call, 242 U. S. 272, 277, 61 L. ed. 294, 299, 37 Sup. Ct. Rep. 79.

It results that, since the change of law complained of did not impair any Federal constitutional right of the plaintiff in error, the judgment of the Supreme Court of Ohio, restrained to the scope of its opinion, as we have interpreted it, must be affirmed.

Mr. Justice **Day** did not participate in the discussion or decision of this case.

GODCHAUX COMPANY, Incorporated, Plff. in Err.,
v.
ALBERT ESTOPINAL, Jr., Sheriff of the Parish of St. Bernard, and the Board of Drainage Commissioners of the Bayou Terre Aux Bœufs Drainage District.

(See S. C. Reporter's ed. 179-181.)

Error to state court — Federal question.

1. Since the amendment of September 6, 1916, to the Judicial Code, § 237, a writ of error to a state court lies only where there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or where there was drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of their validity.

Error to state court — Federal question — how raised — rehearing.

2. To give the Federal Supreme Court jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been specially set up there at the proper time and in the

---

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts

proper manner, and if first presented in a petition for rehearing to the state court of last resort, it comes too late, unless the court actually entertains the petition and passes upon the point.

[For other cases, see Appeal and Error, 1249–1270, 1292–1310, in Digest Sup. Ct. 1908.]

[No. 101.]

Argued November 17 and 18, 1919. Decided December 22, 1919.

IN ERROR to the Supreme Court of the State of Louisiana to review a decree which affirmed a decree of the District Court for the Parish of St. Bernard, in that state, dismissing the petition in a suit to enjoin the collection of a drainage tax. Dismissed for want of jurisdiction.

See same case below, 142 La. 812, 77 So. 640.

The facts are stated in the opinion.

Mr. **R. C. Milling** argued the cause, and, with Mr. R. E. Milling, filed a brief for plaintiff in error.

Mr. **William Winans Wall** argued the cause, and, with Mr. N. H. Nunez, filed a brief for defendants in error.

Mr. Justice **McReynolds** delivered the opinion of the court:

By petition filed in the district court, St. Bernard parish, plaintiff in error sought to restrain collection of an acreage tax assessed against its lands not susceptible of gravity drainage. Invalidity of the tax was alleged upon the ground that no statute of Louisiana authorized it, and also because its enforcement would produce practical confiscation and take property without due process of law, contrary to the 14th Amendment. Answering, defendant in error asked dismissal of the petition, claiming the tax was properly assessed, and also that an amendment to article 281 of the Louisiana Constitution, adopted November, 1914, deprived the court of jurisdiction to entertain the contest. The trial court exercised jurisdiction, sustained the tax, and dismissed the petition. Upon a broad appeal, the supreme court, after declaring that the constitutional amendment deprived the courts of the state of jurisdiction over the controversy, affirmed the judgment of the trial court. 142 La. 812, 77 So. 640.

The record fails to disclose that plaintiff in error at any time or in any way challenged the validity of the state constitutional amendment because of conflict with the Federal Constitution until it applied for a rehearing in the supreme court. That application was refused without more. Here the sole error assigned is predicated upon such supposed conflict; and, unless that point was properly raised below, a writ of error cannot bring the cause before us.

Such a writ only lies to review "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in [181] question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." Judicial Code, § 237, Act September 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 412.

The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the

---

can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

When Federal question is raised in time to sustain appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

petition and passes upon the point. Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 240, 60 L. ed. 622, 36 Sup. Ct. Rep. 274; Missouri P. R. Co. v. Taber, 244 U. S. 200, 61 L. ed. 1082, 37 Sup. Ct. Rep. 522.

The writ of error is dismissed.

The CHIEF JUSTICE concurs in the result, solely on the ground that, as the court below exerted jurisdiction and decided the cause,—by the judgment to which the writ of error is directed,—the contention that a Federal right was violated by the refusal of the court to take jurisdiction is too unsubstantial and frivolous to give rise to a Federal question.

---

[182] J. H. BRANSON, Sheriff and Collector of Crawford County, and J. J. Cravens, W. B. Smith, and R. F. Hamer, Commissioners of Road Improvement District No. 2, Crawford County, Arkansas, Appts.,

v.

R. F. BUSH, Receiver of the Property of St. Louis, Iron Mountain, & Southern Railway Company.

(See S. C. Reporter's ed. 182–192.)

Constitutional law — equal protection of the laws — assessment for public improvement — railway franchise.

1. The consideration by assessing officers, conformably to state law, of the franchises of a railway company, when assessing for a public improvement the real estate of a railway company within the taxing district, does not, without more, justify invalidating the tax as a denial of the equal protection of the laws, on the theory that the franchises of the railway company were included as a separate personal-property value in the real property assessment, thus taxing the railway property at a higher rate than other real property in the district.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — assessment for public improvement — lands benefited.

2. The legislative determination as to what lands within a local improvement district will be benefited by an improvement is conclusive upon the owners and the courts, and can be assailed, under U. S. Const., 14th Amend., only where the legislative action is arbitrary, wholly unwarranted, a flagrant abuse, and, by reason of its arbitrary character, a confiscation of particular property.

[For other cases, see Constitutional Law, IV. b, 6, c, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — public improvement — assessment for benefits.

3. The declaration by the legislature that the real property of a railway company within a road improvement district will be benefited by the construction of a contemplated road improvement in such district cannot be said to be so arbitrary, capricious, or confiscatory as to invalidate under U. S. Const., 14th Amend., an assessment for benefits against such real property of the railway company, where there is evidence that the improved road, by making more accessible a village terminus where the railway company in question had the only line, and by developing the adjacent country, would increase the company's business and would divert business from a place where there was a competing railroad, and that before the road was completed a large gas-producing district was discovered not far from the improved road, which was tributary to it.

[For other cases, see Constitutional Law, IV. b, 6, c, in Digest Sup. Ct. 1908.]

[No. 82.]

Argued November 14, 1919. Decided December 22, 1919.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the District Court for the Western District of Arkansas, refusing to enjoin an assessment of real property of a railway company for a road improvement. Reversed, and decree of District Court affirmed.

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to tax or assessment for public improvement on highway—see note to Graham v. Detroit, 44 L.R.A.(N.S.) 836.

On liability of railroad right of way to assessment for local improvement—see notes to Georgia R. & Bkg. Co. v. Decatur, 40 L.R.A.(N.S.) 935; Heman Constr. Co. v. Wabash R. Co. 12 L.R.A. (N.S.) 112; and Chicago, M. & St. P. R. Co. v. Milwaukee, 28 L.R.A. 249.

On necessity of special benefit to sustain assessment for local improvements—see notes to Re Madera Irrig. Dist. Bonds, 14 L.R.A. 755, and Myles Salt Co. v. Iberia & St. M. Drainage Dist. L.R.A.1918E, 190.

See same case below, 160 C. C. A. 387, 248 Fed. 377.

The facts are stated in the opinion.

Mr. **George B. Rose** argued the cause, and, with Messrs. W. E. Hemingway, D. H. Cantrell, and J. F. Loughborough, filed a brief for appellants:

In matters of local improvements this court is loath to interfere with the public policy of the respective states.

French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

Testimony can have no probative force when it is in direct conflict with the conceded or physical facts, and to believe it would involve an absurdity in reason and common experience.

Waters-Pierce Oil Co. v. Knisel, 79 Ark. 608, 96 S. W. 342.

A highway is an improvement justifying a local assessment against a railroad.

St. Louis & S. F. R. Co. v. Ft. Smith, & V. B. Bridge Dist. 113 Ark. 493, 168 S. W. 1066; Missouri P. R. Co. v. Conway County Bridge Dist. 134 Ark. 292, 204 S. W. 630; Oates v. Cypress Creek Drainage Dist. 135 Ark. 149, 205 S. W. 293; Missouri P. R. Co. v. Monroe County Road Improv. Dist. 137 Ark. 568, 209 S. W. 729.

A legislative assessment must stand unless demonstrably wrong.

Union Transit Refrigerator Co. v. Kentucky, 199 U. S. 203, 50 L. ed. 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Coffman v. St. Francis Drainage Dist. 83 Ark. 60, 103 S. W. 179; Moore v. Long Prairie Levee Dist. 98 Ark. 116, 135 S. W. 819; St. Louis Southwestern R. Co. v. Red River Levee Dist. 81 Ark. 562, 99 S. W. 843; Board of Improvement v. Southwestern Gas & E. Co. 121 Ark. 105, 180 S. W. 764; Fellows v. McHaney, 113 Ark. 364, 168 S. W. 1099.

Of course, if it could be shown to a certainty that particular property would be required to bear more than its share of the burden, this would be a violation of the 14th Amendment.

Myles Salt Co. v. Iberia & St. Mary Drainage Dist. 239 U. S. 478, 60 L. ed. 392, L.R.A.1918E, 190, 36 Sup. Ct. Rep. 204; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254.

The assessment may be ad valorem.

Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; Houck v. Little River Drainage Dist. 239 U. S. 255, 60 L. ed. 266, 36 Sup. Ct. Rep. 58; St. Louis Southwestern R. Co. v. Red River Levee Dist. 81 Ark. 562, 99 S. W. 843; Board of Improvement v. Southwestern Gas & E. Co. 121 Ark. 105, 180 S. W. 764; St. Louis Southwestern R. Co. v. Grayson, 72 Ark. 119, 78 S. W. 777; Porter v. Waterman, 77 Ark. 384, 91 S. W. 754; Crawford County Levee Dist. v. Crawford County Bank, 108 Ark. 421, 158 S. W. 149; Moore v. Long Prairie Levee Dist. 98 Ark. 116, 135 S. W. 819.

Taxation is at best an approximation, and perfect equality, however desirable, is neither demanded nor expected.

Cass Farm Co. v. Detroit, 181 U. S. 396, 398, 45 L. ed. 914, 916, 21 Sup. Ct. Rep. 644.

The railroad is estopped to contest the assessment.

Tulare Irrig. Dist. v. Shepard, 185 U. S. 1, 46 L. ed. 773, 22 Sup. Ct. Rep. 531; Shepard v. Barron, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

In determining the value of the several parts of the railroad, the only fair method is to apportion the value of the franchise amongst them, as is provided in the Arkansas statute.

State R. Tax Cases, 92 U. S. 608, 23 L. ed. 671.

Mr. **Thomas B. Pryor** argued the cause, and, with Mr. Edward J. White, filed a brief for appellee:

All the property that is included within the district, under the terms of this act, are lands and railroad rights-of-way; nothing else can be included or taxed.

Watkins v. Wassell, 20 Ark. 410; Little Rock & Ft. S. R. Co. v. Clifton, 38 Ark. 205; New Mexico v. United States Trust Co. 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128; Improvement Dist. v. Cotter, 71 Ark. 561, 76 S. W. 552; Watkins v. Griffith, 59 Ark. 357, 27 S. W. 234; 2 Dill. Mun. Corp. § 769.

There is clearly no evidence to support an assessment of benefits against the property of the railroad company under this act.

Rector v. Board of Improvement, 50 Ark. 116, 6 S. W. 519; Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707; Kansas City, P. & G. R. Co. v. Waterworks Improv. Dist. 68 Ark. 376, 59 S. W. 248; Ahern v. Board of Improv. Dist. 69 Ark. 68, 61 S. W. 575; Stiewel v. Fencing Dist. 71 Ark. 17, 70 S. W. 308, 71 S. W. 247; Kirst v. Street Improv. Dist. 86 Ark. 1, 109 S. W. 526; Shibley v. Ft. Smith & V. B. Dist. 96 Ark. 410, 132 S. W. 444; Alexander v. Crawford County Levee Dist. 97 Ark.

322, 134 S. W. 618; Board of Improvement v. Pollard, 98 Ark. 543, 136 S. W. 957; Norwood v. Baker, 172 U. S. 269, 278, 284, 43 L. ed. 443, 447, 449, 19 Sup. Ct. Rep. 187.

The franchise of a railroad cannot be assessed for local improvements.

Ft. Smith Light & Traction Co. v. McDonough, 119 Ark. 254, 177 S. W. 926; Board of Improvement v. Southwestern Gas & E. Co. 121 Ark. 114, 180 S. W. 764; Snetzer v. Gregg, 129 Ark. 546, L.R.A.1917F, 999, 196 S. W. 925; Chatham County v. Seaboard Air Line R. Co. 133 N. C. 216, 45 S. E. 566.

A local assessment may not be made against railroads for a highway improvement.

Snetzer v. Gregg, 129 Ark. 546, L.R.A. 1917F, 999, 196 S. W. 925; New York, N. H. & H. R. Co. v. Port Chester, 149 App. Div. 893, 134 N. Y. Supp. 883; Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 398, 99 N. E. 638; Kankakee v. Illinois C. R. Co. 263 Ill. 589, 105 N. E. 733; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466.

Power arbitrarily exerted, imposing a burden without a compensating advantage of any kind, amounts to confiscation and violates the due process clause of the 14th Amendment; such a result is accomplished by the action of a local administrative body in including land within a drainage district, where such inclusion is palpably arbitrary, it not being for the purpose of benefiting such land directly, but for the purpose of obtaining revenue therefrom.

Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, L.R.A.1918E, 190, 36 Sup. Ct. Rep. 204. See also Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254; Taylor, Due Process of Law, §§ 263, 264; Hancock v. Muskogee, 250 U. S. 454, 63 L. ed. 1081, 39 Sup. Ct. Rep. 528.

The assessment is discriminatory.

Union Tank Line Co. v. Wright, 249 U. S. 275, 63 L. ed. 602, 39 Sup. Ct. Rep. 276.

Regardless of the method adopted, whether it be upon an ad valorem basis or any other basis, there is a limitation as far as local improvements are concerned; the imposition must be based upon special benefits, the tax must not exceed the special benefit derived, and the imposition of the tax must be uniform and free from any unjust discrimination.

Myles Salt Co. v. Iberia & St. M. Drainage Dist. supra; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254; Mudd v. St. Francis Drainage Dist. 117 Ark. 30, 173 S. W. 825; Mullins v. Little Rock, 131 Ark. 59, L.R.A.1918B, 461, 198 S. W. 262; 2 Page & J. Taxn. by Assessment, § 665.

No estoppel in pais can be created except by conduct which the person setting up the estoppel has the right to rely upon and does in fact rely and act upon.

Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865.

The Arkansas act impairs the obligation of a contract.

7 R. C. L. 70; Arkansas Stave Co. v. State, 94 Ark. 27, 27 L.R.A.(N.S.) 255, 140 Am. St. Rep. 103, 125 S. W. 1001; Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; Shelby County v. Union & Planters' Bank, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; 6 R. C. L. § 51; State ex rel. Atty. Gen. v. Sayre, 142 Ala. 641, 39 So. 240, 4 Ann. Cas. 656; Norvell v. State, 143 Ala. 561, 39 So. 357; Uniontown v. State, 145 Ala. 471, 39 So. 814, 8 Ann. Cas. 320; Hatfield v. Garnett, 45 Okla. 438, 146 Pac. 24.

The act violates the due process of law provision in the 14th Amendment.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; Taylor, Due Process of Law, § 133; Harmon v. Bolley, — Ind. —, 2 A.L.R. 609, 120 N. E. 33; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Greene v. Louisville & N. R. Co. 244 U. S. 522, 554, 61 L. ed. 1291, 1309, 37 Sup. Ct. Rep. 683, Ann. Cas. 1917E, 97; Corn Products Ref. Co. v. Eddy, 249 U. S. 427, 63 L. ed. 689, 39 Sup. Ct. Rep. 325; Lane v. Vick, 3 How. 464, 11 L. ed. 681; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Northern C. R. Co. v. Maryland, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct.

Rep. 73; Wright v. Nagel, 101 U. S. 791, 25 L. ed. 921; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; Shelby County v. Union & Planters' Bank, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571.

Mr. Justice Clarke delivered the opinion of the court:

By act of the general assembly, the state of Arkansas created "Crawford County Road Improvement District No. 2," a body corporate, and prescribed its boundaries. Special and Private Acts of Arkansas, 1911, p. 642.

To pay the cost of the road improvement contemplated, the act provided that it should be made a charge upon all of the real property, railroads, and tramroads in the District. Bonds were sold and the road completed before this suit was commenced to enjoin the collection of taxes charged against the property of the railway company, of which the appellee, hereinafter designated the Company, was receiver. The tax objected to was imposed upon the assessed value of the main track, sidetracks, rolling stock, buildings, and material of the Company apportioned to the Road District under a state law for the valuation of railroad property, and in the bill it is alleged to be invalid because the assessment conflicts with many provisions of the Constitutions of the United States and of Arkansas. The rate was the same for all real property in the district.

The district court permanently enjoined the tax to the extent that it was imposed on personal property,—the rolling stock and materials of the company. From this part of the decree no appeal was taken, and thereafter all questions as to the invalidity of the assessment because including rolling stock and materials disappeared from the case. But, for want of equity, the bill was dismissed so [184] far as applicable to the real estate "designated in the bill as main track, sidetrack, and buildings." On appeal by the Company from this part of the decree, the circuit court of appeals reversed the decree of the district court and enjoined the collection of the tax on the real estate on two grounds:

(1) Because the including of the franchise and other intangible property of the Company in the assessment results in "a higher rate of taxation" on the property of the Railway Company than on the other property in the District; and

(2) Because the evidence fails to show that the Company would derive any benefit from the improvement of the road.

In this court the plaintiffs in error, hereinafter referred to as the Road District, assign as errors these two holdings of the circuit court of appeals, and we shall consider them in the order stated.

All property of the Railway Company in the state was assessed by a state tax commission under an act, the validity of which is not assailed, providing:

"The franchises (other than the right to be a corporation) of all railroads . . . are declared to be property for the purpose of taxation, and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations." Acts of Arkansas, 1911, p. 233, § 2.

The act also required the commission to "determine the total value of the entire property of the corporation, tangible and intangible;" that the buildings and sidetracks should be assessed as real estate in the town or district where located, but that the main track, also to be assessed as real estate, should be apportioned among the several towns and districts through which the road ran according to the "actual mileage in each town or district."

[185] The circuit court of appeals did not hold either the Railroad Valuation or the District Road Improvement Law unconstitutional, both being types of laws often upheld by this court (State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122, and Houck v. Little River Drainage Dist. 239 U. S. 254, 60 L. ed. 266, 36 Sup. Ct. Rep. 58), but the first ground of its decision was, only, that the assessment of the main track under the former law, as applied to the case of taxation by benefits provided for by the latter, resulted in unequal taxation to an extent amounting to a denial of the equal protection of the laws.

The court was carried to its conclusion by this process: The act creating the Road District, and the general law applicable to local assessments in proportion to benefits, both required that only real estate should be assessed to pay for the improvement here involved; only the real estate of the other property owners of the District was assessed, and therefore, when the franchises, personalty, of

the Railroad Company were "considered" in making the assessment complained of, the Company was taxed a "higher rate," a greater amount, than other property owners, and by such discrimination was denied the equal protection of the laws.

It is argued by the Road District that this conclusion is erroneous, for the reasons following:

The assessment law, which we have quoted, provides that the franchises of railroad companies ("other than the right to be a corporation") "shall be considered" by officials when assessing their property.

It is to be noted that this law does not provide for the assessment of the franchises of railroad companies separately as personal, or intangible, property, as the laws of some states require, but only declares that they are "property" which "shall be *considered* by assessing officers when assessing the property of such corporations," and they are not valued separately in the [186] assessment complained of, as it is itemized in the bill of complaint.

It is not easy to define just what is meant by the "franchise" of a railroad company "other than the right to be a corporation," and the record does not attempt a definition. Morgan v. Louisiana, 93 U. S. 217, 223, 23 L. ed. 860, 861. The record is also silent as to what, if any, value was placed upon the franchises of the Company here involved by the state tax commission, and as to what extent, if at all, they were "considered" in arriving at the assessment objected to, and therefore, it is contended that the conclusion of the circuit court of appeals that personal-property value was included in the assessment of the real estate of the District has no foundation on which to rest, other than the assumption that the tax commission conformed to the law and "considered" the franchises when assessing the real estate, and that this necessarily resulted in fact, if not in form, in such inclusion,—an unusually meager basis, surely, for invalidating a tax of the familiar character of this before us.

If, however, the distinction sometimes taken between the "essential properties of corporate existence" and the franchises of a corporation (Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 619, 28 L. ed. 837, 841, 5 Sup. Ct. Rep. 299) be considered substantial enough to be of practical value, and if it be assumed that the distinction was applied by the state commission in making the assessment here involved, this would result, not in adding personal-property value to the value of the real estate of the Company in the District, but simply in determining what the value of the real property was,—its right of way, tracks, and buildings,—having regard to the use which it made of it as an instrumentality for earning money in the conduct of railroad operations. This, at most, is no more than giving to the real property a value greater as a part of a railroad unit and a going concern [187] than it would have if considered only as a quantity of land, buildings, and tracks.

This is the method of assessing railroad property often approved by this court, specifically in Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 445, 38 L. ed. 1041, 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122, saying:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another."

And long experience has confirmed the statement by Mr. Justice Miller in State Railroad Tax Cases, 92 U. S. 575, 608, 23 L. ed. 669, 671, that "it may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." And see Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57, in which, also, the contention is disposed of that the railroad track should be valued by the same officials and on the same basis of acreage as farm lands adjacent to it.

Thus, the assessment complained of

was made under valid laws and in a manner approved and customary in arriving at the value of that part of railroad tracks [188] situate in a state, county, or district. So far as this record shows, the assessment modified by the decree of the district court, not appealed from, is not a composite of real and personal-property values, but is the ascertained value of the real estate—the tracks and buildings—of the Company within the taxing district, enhanced, no doubt, by the special use made of it, but still its value as a part of the railroad unit, resulting from the inherent nature of the business in which it is employed, —a value which will not be resolved into its constituent elements for the purpose of defeating contribution to a public improvement. No attempt was made to prove fraudulent or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employees of the Company that the improvement of the road would not benefit the railroad property, and, if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality, resulting from a valid classification of railroad property for taxation purposes, which does not fall within the scope of the 14th Amendment, which "was not intended to compel the states to adopt an iron rule of equal taxation." Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533. And see French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Cass Farm Co. v. Detroit, 181 U. S. 396, 398, 45 L. ed. 914, 916, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624.

Thus, the basis for assuming that the franchises of the railroad company were added as a separate personal-property value to the assessment of the real property of the company becomes, upon this record, much too unsubstantial to justify invalidating the tax involved if it be otherwise valid, and the first assignment of error must therefore be sustained.

But the holding of the circuit court of appeals that [189] "the evidence fails to show that the railroad company derives any benefit from the road" is also assigned as error.

In the act of the general assembly creating this Road District it is provided:

"Section 5. It is ascertained and hereby declared that all real property within said District, including railroads and tramroads, will be benefited by the building of the said highway more than the cost thereof as apportioned in the county assessment of each piece of property within the District for this and the succeeding years, and the cost thereof is made a charge upon such real property superior to all other mortgages and liens except the liens for the ordinary taxes, and for improvement districts heretofore organized; . . ." Special & Private Acts of Arkansas, 1911, 642, 645.

Where, in laws creating districts for local improvements and taxation, there is such a legislative declaration as this, as to what lands within the district will be benefited by the improvement, the law with respect to the extent to which such determination may be reviewed by the courts is so well settled, and has so lately been re-examined and restated by this court, that extended discussion of the subject is not justified.

In Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921,—a decision often cited and approved,—it is decided that if the proposed improvement is one which the state had authority to make and pay for by assessments on property benefited, the legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited by it; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard on the question whether their lands have been benefited or not.

The subject was carefully re-examined and the law [190] restated in cases so recent as Phillip Wagner v. Leser, 239 U. S. 207, 60 L. ed. 230, 36 Sup. Ct. Rep. 66, and Houck v. Little River Drainage Dist. 239 U. S. 254, 60 L. ed. 266, 36 Sup. Ct. Rep. 58, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the 14th Amendment only where the legislative action is "arbitrary, wholly unwarranted," "a flagrant abuse, and by reason of its arbitrary character a confiscation of particular property." And see Withnell v. Ruecking Constr. Co. 249 U. S. 63, 69, 63 L. ed. 479, 39

Sup. Ct. Rep. 200; Hancock v. Muskogee, 250 U. S. 454, 457, 63 L. ed. 1081, 1083, 39 Sup. Ct. Rep. 528; Embree v. Kansas City & L. B. Road Dist. 240 U. S. 242, 250, 60 L. ed. 624, 628, 36 Sup. Ct. Rep. 317.

The decisions relied upon by the Company (Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, L.R.A.1918E, 190, 36 Sup. Ct. Rep. 204; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, 60 L. ed. 523, 36 Sup. Ct. Rep. 254) are not in conflict with the rule, but plainly fall within, and are illustrations of, the qualification of it.

An application of this rule to the case before us renders not difficult the decision of the second assignment of error.

The road to be improved was "a little less than 3½ miles in length," and extended from Alma, a considerable village, on the north, southerly to an east and west road which had its western terminus at the city of Van Buren, 8 miles west of the junction of the two roads. It was the principal road to and from Alma, the travel on it being greater than on all the other roads which served that village combined. In wet seasons the road was practically impassable for wagons, sometimes for three or four months together. People living south of the east and west road, who made Van Buren their trading point in wet weather, after the road was improved traded exclusively at Alma, it being 4½ miles nearer for many of them. The railway of the appellee was the only [191] one at Alma, but at Van Buren there was a competing road, with a line 250 miles shorter than that of the appellee to St. Louis, the chief market for the staples of the region.

On the question of benefits which would come to the railroad property from the construction of the road, the appellee receiver called four witnesses, three of them engineers and one a superintendent of the company. Two of these were familiar with the location of the road and the other two testified that they knew of its location in a general way. All four testified in general terms that the road was not and never would be of any benefit to the railroad. It is significant that no traffic man was called, and that no evidence was introduced showing the extent of business done at Alma before and after the improvement of the road.

For the District, three witnesses were called, one a doctor, one a merchant, and one a long-time resident of the village of Alma. Each of these testified that, in his opinion, the road, by making the village of Alma more accessible, particularly in the wet seasons of the year, and by developing the adjacent country, would increase the business of the railway company, and would divert business from Van Buren, where there was a competing railroad, to Alma, where appellee had the only line. It was in evidence also that after the act was passed, but before the road was completed, a large gas-producing district was discovered not far south of the southern terminus of the improved road, which was tributary to it.

To this must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads.

This discussion of the record makes it clear that it is impossible to characterize as arbitrary, capricious, or confiscatory the action of the general assembly in declaring [192] that the property of the railroad company within the District would be benefited by the construction of the contemplated road improvement, but, on the contrary, it makes it apparent that the case is one so fully within the general rule that the holding of the circuit court of appeals that the railroad would not be benefited by the improvement cannot be sustained.

It results that the decree of the Circuit Court of Appeals must be reversed, and that of the District Court affirmed.

Reversed.

Mr. Justice **McReynolds** dissents.

CITY OF WINCHESTER et al., Appts.,
v.
WINCHESTER WATER WORKS COMPANY.

(See S. C. Reporter's ed. 192-198.)

Municipal corporations — powers — regulating rates.

1. Independently of a right to regulate and control the rates to be charged for pub-

---

Note.—As to establishment and regulation of municipal water supply—see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 33.

As to power of municipality, apart

lic service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority to do so, nor does such authority arise from the power to regulate the opening and use of streets, nor from a grant of the general right to control and regulate the right to erect works and lay pipes in the city streets.

[For other cases, see Municipal Corporations, II. f; Waters, III. b, in Digest Sup. Ct. 1908.]

Waters — municipal power to regulate rates.

2. No grant of municipal authority to fix water rates can be deduced from the provisions of Ky. Stat. § 3490, subsec. 25, that the board of council in cities of the fourth class may grant the right of way over the public streets to any railroad or street railroad company on such conditions as to it may seem proper, and shall have a supervising control over the use of the same, and may regulate the speed of cars and signals, and fares on street cars, and under like conditions and supervision may grant the necessary right of way to water companies, nor from other subsections of this section empowering the council to provide a water supply or to contract for that purpose, to protect the water supply system against damage or molestation, to make by-laws and ordinances to carry into effect the powers granted, and to do all things properly belonging to the police of incorporated cities.

[For other cases, see Waters, III. b, in Digest Sup. Ct. 1908.]

[No. 51.]

Argued October 24, 1919. Decided January 5, 1920.

APPEAL from the District Court of the United States for the Eastern District of Kentucky to review a decree enjoining the enforcement of a municipal ordinance fixing water rates. Affirmed.

The facts are stated in the opinion.

Mr. J. Smith Hays argued the cause, and, with Messrs. J. Smith Hays, Jr., John M. Stevenson, James F. Winn, and F. H. Haggard, filed a brief for appellants:

The city is clothed with authority to fix rates by the language of Kentucky Statutes, § 3490, subsection 25, and the other subsections show that it was the plain legislative intent to bestow such power.

Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82; 37 Cyc. 604.

The language of the court of appeals of Kentucky, cited by the district court, relative to charters of cities of the third and fourth class in Kentucky, is dictum.

United Fuel & Gas Co. v. Com. 159 Ky. 34, 166 S. W. 783.

Mr. Beverley R. Jouett argued the cause, and, with Messrs. James M. Benton and Stephen T. Davis, filed a brief for appellee:

The board of council of the city of Winchester had no authority on June 2, 1916, to pass the ordinance fixing the rates which water companies would be permitted to charge for water furnished the city and its citizens, because the legislature of Kentucky had not granted such authority to the city.

3 Dill. Mun. Corp. §§ 1325, 1389; 2 Lewis's Sutherland, Stat. Constr. § 493; Eikhoff v. Charter Commission, 176 Mich. 535, 142 N. W. 746; People ex rel. McCullough v. Deutsche Gemeinde, 249 Ill. 132, 94 N. E. 162; Wabash R. Co. v. United States, 101 C. C. A. 133, 178 Fed. 5, 21 Ann. Cas. 819; Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 N. E. 205; Jacksonville v. Southern Bell Teleph. & Teleg. Co. 57 Fla. 374, 49 So. 509; State ex rel. Garner v. Missouri & K. Teleph. Co. 189 Mo. 83, 88 S. W. 41; State ex rel. Wisconsin Teleph. Co. v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Re Pryor, 55 Kan. 724, 29 L.R.A. 398, 49 Am. St. Rep. 280, 41 Pac. 958; Lewisville Natural Gas Co. v. State, 135 Ind. 49, 21 L.R.A. 734, 34 N. E. 702; Bluefield Waterworks & Improv. Co. v. Bluefield, 69 W. Va. 1, 33 L.R.A.(N.S.) 759, 70 S. E. 772; Schroeder v. Scranton Gas & Water Co. 20 Pa. Super. Ct. 255; St. Louis v. Bell Teleph. Co. 96 Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; Mills v. Chicago, 127 Fed. 731; United Fuel & Gas Co. v. Com. 159 Ky. 34, 166 S. W. 783; Cumberland Teleph. & Teleg. Co. v. Memphis, 119 C. C. A. 73, 200 Fed. 657.

Mr. Justice **Day** delivered the opinion of the court:

The Winchester Water Works Company filed its bill in the United States district court for the eastern district of Kentucky, seeking to enjoin the enforcement of an ordinance establishing maximum rates for water to be furnished the

from contract, to regulate the rates to be charged by public service corporation—see notes to Bluefield Waterworks & Improv. Co. v. Bluefield, 33 L.R.A. (N.S.) 759, and St. Marys v. Hope Natural Gas Co. 43 L.R.A.(N.S.) 994.

city for public use and to the people thereof for private use. By the bill and amended bill it was charged that the city had no authority to pass or enforce an ordinance fixing such rates, because (1) no power had been granted to the city so to do by the legislature of Kentucky; (2) because the rates established were so low as to be confiscatory in their character, and, consequently, the ordinance was violative of rights secured to the company by the 14th Amendment to the Federal Constitution. An answer was filed, and the court decided the case and made a final decree in favor of the company upon the ground that, under the laws of Kentucky, the city had no authority to pass or enforce an ordinance fixing rates. The court found it unnecessary to pass upon the question of the confiscatory character of the rates. The bill invoked jurisdiction upon a constitutional ground, and the case was brought here by direct appeal.

It appears that the company had a contract with the city, which expired in 1916, and thereafter the ordinance in controversy was passed. That a city has no power to regulate rates of this character unless it has legislative authority so to do is established, and does not seem to be disputed by the appellant. "Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate the rates to be charged by water, lighting, or [194] other public service corporations in the absence of express or plain legislative authority to do so." 3 Dill. Mun. Corp. 5th ed. § 1325. Nor does such authority arise from the power to regulate the opening and use of streets, nor a grant of the general right to control and regulate the right to erect works and lay pipes in the streets of the city. State ex rel. Garner v. Missouri & K. Teleph. Co. 189 Mo. 83, 88 S. W. 41; Jacksonville v. Southern Bell Teleph. Co. 57 Fla. 374, 49 So. 509; Lewisville Natural Gas Co. v. State, 135 Ind. 49, 21 L.R.A. 734, 34 N. E. 702; Mills v. Chicago, 127 Fed. 731; State ex rel. Wisconsin v. Cheyboygan, 111 Wis. 23, 86 N. W. 657.

Bearing this general principle in mind, we come to examine the sections of the laws of Kentucky which, it is insisted, give the authority to fix water rates. The appellant insists that this power is expressly conferred in subsection 25 of § 3490 of the Kentucky Statutes, which reads as follows: "The board of council may grant the right of way over the public streets or public grounds of the city to any railroad company or street railroad company, on such conditions as to them may seem proper, and shall have a supervising control over the use of the same, and regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant the right of way that may be necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies; and may compel any railroad company to erect and maintain gates at any or all street crossings, and to prevent railways from blocking or obstructing the streets or public ways of the city, and to fix penalties for the violation of these provisions: provided, etc."

Other subsections claimed to be applicable are given in the margin.[1]

[195] Examining subsection 25, we are unable to discover any grant of authority to fix the rates for water consumption. It is therein first provided that the council may grant the right of way over the public streets to any rail-

[1] Kentucky Statutes:

"3490. The board of council, in addition to other powers herein granted, shall have power within the city:

"(8) To provide the city with water, or erect, purchase or lease waterworks and maintain same, or to make all necessary contracts with any person or corporation for such purposes; to erect hydrants, cisterns, fire plugs and pumps in the streets within or beyond the limits of the city.

"(30) The board of council shall have power, by ordinance, to prescribe the punishment, by fine, not exceeding $100, or imprisonment not exceeding sixty days, of any person who shall molest, damage or interfere with any system of waterworks laid in said city, or the pipes and mains, hydrants, or any part thereof, and shall have power to punish by ordinance and impose the same penalty as for damaging or molesting any other public property, and may, subject to the rules of any water company which may establish such system, select persons who shall have the right to open, tap, or make connection with such pipes or mains in the streets, alleys, or public ways of said city.

"(33) Said city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all of the powers herein granted for the government of the city, and to do all things properly belonging to the police of incorporated cities. Said board of council may change the boundary line of any ward or wards of any city now divided into wards, or hereafter divided into wards, under the provision of this act, not less than sixty days previous to any November election."

road or street railroad company on such conditions as to the council may seem proper, and shall have a supervising control over the use of the same, and the council is given the right to regulate the speed of cars and signals and fare on street cars, and under like conditions and supervision, the council may grant the right of way to water companies among others. This language is certainly very far from that express authority to regulate rates, which is essential in order to enable municipalities so to do. The power to grant a right of way to water companies is specifically granted, and this under like conditions and supervision already provided as to railroad and street [196] railroad companies. This is the full measure of the grant of authority to deal with water companies. The right to regulate fares is in the same sentence which grants authority to deal with water companies, and is specifically limited to fares on street cars.

Nor do we find in other subsections of this section any provision from which the right to fix the rates of water companies can be inferentially deduced.

Counsel call to our attention but one case from Kentucky, whose court of last resort is final authority upon the construction of the statutes, and that is United Fuel & Gas Co. v. Com. 159 Ky. 34, 166 S. W. 783. There the United Fuel & Gas Company held a franchise from a city in Kentucky under an ordinance providing that the grantee of the franchise should furnish for public and private use for the city and its inhabitants natural and artificial gas at a reasonable price not exceeding in any event $1 per 1,000 cubic feet, and that the grantee, in delivering gas, should not discriminate against the consumers in the city. The company proposed to sell gas to the inhabitants of the city at 20 cents per thousand feet if they would sign a contract for five years, but it charged persons who did not sign such a contract 25 cents a thousand feet. The city council passed an ordinance providing that a gas company should not charge one citizen more than another, and imposed a fine for violation of the ordinance. The city was of the fifth class, and was given authority to make "all other local police, sanitary, and other regulations, not conflicting with the general laws." The court held that the act for the government of this city of the fifth class must be read in connection with the statutes conferring power on larger cities, and that, thus construed, there was no grant of authority to the city to impose a fine such as the one in question in the absence of legislative authority so to do. The section from Dillon on Municipal Corporations, [197] stating that the authority of a municipality to regulate rates to be charged by public service corporations is limited to cases in which express or plain legislative authority has been given, was quoted with approval. Cases from other states in which the principle has been approved were also cited.

It is true that this case is not precisely in point, but it contains a recognition by the court of appeals of Kentucky of the accepted principle that the right to fix rates must be granted to municipal corporations by a plain expression of legislative authority. It is said, however, that our decision in Owensboro v. Owensboro Waterworks Co. 191 U. S. 358, 48 L. ed. 217, 24 Sup. Ct. Rep. 82, holds a contrary view. So far as apposite, that case dealt with the power of a city of the third class to fix rates for water consumers. As to cities of that class, § 3290 of the Kentucky Statutes specifically provides authority to provide the city and inhabitants thereof with water, light, etc., service by contract or by works of its own, and to make regulations for the management thereof, and to fix and regulate the price to consumers and customers. Dealing with that section, and the authority conferred upon cities of the third class, this court said: "The purpose of § 3290 was to provide the inhabitants of cities of the third class with the services mentioned, —water, light, power, heat, and telephone. They could be provided by the cities directly, or they could be provided by private persons; but whatever way provided, the power was given to regulate the management and fix the rates of the services, and this was but the endowment of a common governmental power."

This language was used in regard to the authority given in express terms to fix rates. It was said of such authority that it was but the endowment of a common governmental power. This is undoubtedly true. But it is equally certain that the governmental power rests with the state, and must be conferred upon the municipality [198] in an unmistakable way. We find nothing in the Owensboro Case which at all conflicts with the construction which we have given to § 3490, applicable to cities of

the fourth class, to which the city of Winchester belongs.

Finding no error in the judgment of the District Court, the same is affirmed.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appt.,
v.
UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 198-209.)

Postoffice — compensation for carrying mails — empty mail bags.

1. There is nothing to prevent Congress, when fixing compensation for the carriage of the mails, from directing, as it did in the Act of May 27, 1908, that the empty mail bags shall be withdrawn from the mails and be transported by freight or express, the effect of which is to reduce the compensation for carrying the mails by excluding the weight of the empty bags in determining the average weight of the mails as the basis of fixing compensation.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying the mails — empty mail bags — land-grant railroads.

2. Congress, by directing, as it did in the Act of May 27, 1908, that empty mail bags be withdrawn from the mails and be transported by freight or express, thereby brought such bags when carried by freight on a land-grant-aided railway within the provision of the Land-Grant Acts that all property and troops of the United States shall be transported at the railway company's expense, although by a wholly separate provision it was declared that the mails should be transported over the railway company's lines at such prices as Congress might direct, and the price was later fixed by Congress at 80 per cent of the compensation that would otherwise have been received.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

[No. 71.]

Argued November 12, 1919. Decided January 5, 1920.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a railway company for compensation for the carriage of empty mail bags. Affirmed.

See same case below, 53 Ct. Cl. 45.

The facts are stated in the opinion.

Mr. **Benjamin Carter** argued the cause and filed a brief for appellant:

The words in the land-grant statutes, relating to passenger and freight transportation, which define the subject of transportation free of charge, or at less rates than those established by the ordinary tariffs, are to be construed strictly.

United States v. Union P. R. Co. 249 U. S. 354, 63 L. ed. 643, 39 Sup. Ct. Rep. 294; Alabama G. S. R. Co. v. United States, 49 Ct. Cl. 522; Chicago, M. & St. P. R. Co. v. United States, 53 Ct. Cl. 627.

When a statute, not clear upon its face, is to be interpreted, courts will consult the legislative reports and debates for expressions or indications of the legislature's intention.

St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754; Tap Line Cases (United States v. Louisiana & P. R. Co.), 234 U. S. 1, 27, 58 L. ed. 1185, 1195, 34 Sup. Ct. Rep. 741; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

A statute, although in clear terms, is not to be interpreted in a way to produce results manifestly unjust or absurd.

Hawaii v. Mankichi, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 638, 23 L. ed. 995, 996, 13 Mor. Min. Rep. 204; United States v. Kirby, 7 Wall. 482, 19 L. ed. 278.

Assistant Attorney General **Frierson** argued the cause and filed a brief for appellee:

Congress has the undoubted right to designate what shall be carried in the mails and what shall be excluded from them.

Ex parte Jackson, 96 U. S. 727, 732, 24 L. ed. 877, 879; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789.

Mr. Justice **Day** delivered the opinion of the court:

This case presents questions arising upon a suit brought by the railway company in the court of claims to recover compensation for the carriage of mail bags under facts found in the court of claims in the record sent up for our consideration. These facts are: That the St. Louis, Iron Mountain, & Southern Railway Company, a corporation organized under the laws of the state of Missouri, operated a line of railway between

Tower Grove, Missouri, and Texarkana, in Arkansas. So much of the railway line as lies between Poplar Bluff, Missouri, and Texarkana, Arkansas, was aided in its construction by a grant of land from the United States by the Act of February 9, 1853 (10 Stat. at L. 155, chap. 59), and by the Act of July 28, 1866 (14 Stat. at L. 338, chap. 300).

The 4th section of the Act of February 9, 1853, provides:

"The said railroad and branches shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

The 1st section of the Act of July 28, 1866, with respect to said railway, provides:

"All property and troops of the United States shall at all times be transported over said railroad and branches at the cost, charge, and expense of the company or corporation owning or operating said road and branches respectively, when so required by the government of the United States."

February 4, 1910, the Postoffice Department transmitted to the claimant company a distance circular which [203] relates to mail transportation; the same was duly filled out and certified and returned to the Postoffice Department. Between the 17th of February and the 1st day of June, 1910, the Postoffice Department made the quadrennial weighing of mail in the weighing division which included the railway company's lines. Before this weighing of the mails, Congress passed the Act of May 27, 1908 (35 Stat. at L. 412, chap. 206), making appropriations for the Postoffice Department, which provides: "The Postmaster General shall require, when in freightable lots and whenever practicable, the withdrawal from the mails of all postal cards, stamped envelops, newspaper wrappers, empty mail bags, furniture, equipment and other supplies for the postal service, except postage stamps, in the respective weighing divisions of the country, immediately preceding the weighing period in said divisions, and thereafter said postal cards, stamped envelops, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the postal service, except postage stamps, shall be transmitted by either freight or express."

Subsequent to the passage of the Act of May 27, 1908, the Postoffice Appropriation Acts provided for specific sums for the payment of expressage on postal cards, stamped envelops, newspaper wrappers, and empty mail bags, and they carried similar provisions as to the withdrawal of said articles from the mails preceding weighing periods.

Before the weighing of the mails of the railway company the Postmaster General, acting under authority of the provisions of the Act of 1908, withdrew from the mail the empty mail bags, and the same were thereafter transported by freight over claimant's line of railway, and the weights were not included in estimating the weight of the mail carried during the contract term beginning July 1, 1910.

The findings give the number of pounds of empty mail [204] bags withdrawn from the mails during the weighing season of 1910, and sent by freight to St. Louis from Texarkana, Arkansas, and Little Rock, Arkansas, and show that if these empty bags had not been so withdrawn and the weight thereof had been included with the weight of the mails, upon which compensation was based, the claimant would have received $15,296.82 more than it did receive for service performed between July 1, 1910, and February 1, 1912.

During the period from July 1, 1910, to and including January 31, 1912, a total of 1,452,271 pounds of empty mail bags was transported over the railroad of the claimant in freight trains from Texarkana, Arkansas, to St. Louis, Missouri, for which service the claimant submitted bills at the published tariff rate against the United States amounting in the aggregate to $14,043.17. In making settlement of these charges the Auditor for the Postoffice Department made a deduction for the entire charge for the services performed from Texarkana, Arkansas, to Poplar Bluff, Missouri, amounting to $8,251.45.

The 6th section of the Act of 1853 provides: "The United States mail shall at all times be transported on the said road and branches, under the direction of the Postoffice Department, at such price as Congress may by law direct."

And the 13th section of the Act of July 12, 1876 (19 Stat. at L. 78, chap. 179, Comp. Stat. § 7485, 8 Fed. Stat. Anno. 2d ed. p. 199), provides: "That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be trans-

ported over their road at such price as Congress should by law direct shall receive only 80 per centum of the compensation authorized by this act."

The findings further state that ever since the passage of said last-mentioned act it has been the custom and practice of the Postoffice Department to pay all the railroads [205] whose construction was aided by grants of land from the United States 80 per centum of the rate of compensation paid to non-land-aided roads for carrying the mails.

Claimant presented its bill for the transportation of said freight at the full commercial rate provided by the duly published and approved tariffs. In making settlement therefor, the Postmaster General made deduction of the entire charge between Texarkana, Arkansas, and Poplar Bluff, Missouri, and refused to pay anything therefor, on the ground that the railway company was obliged by the provisions of the Acts of 1853 and 1866 to transport said empty mail bags without cost or expense to the United States.

Upon these findings the court of claims decided against the claimant, and dismissed its petition. 53 Ct. Cl. 45.

Two questions are presented, which are thus stated in the opinion of the court of claims:

"(1) Could the empty mail bags be lawfully withdrawn from the mails merely for the purpose of reducing claimant's compensation for mail transportation service?

"(2) And assuming that said empty mail bags were lawfully withdrawn from the mails and shipped by freight, were they 'property' of the United States within the purview of the Land Grant Acts of 1853 and 1866?"

As to the first question there can be little difficulty. There was nothing in any law or contract of the government which required it to permit the weighing of empty sacks or containers as part of the mail in determining the compensation to be paid for carrying the same. While, generally speaking, a bag or container in which letters or other mailable matter is carried is part of the mail, and collectively the containers might be considered as part of the mail essential to carry the mailable matter from one place to another, nevertheless there was nothing to prevent Congress, in fixing compensation for the carriage of the mails, to expressly withdraw therefrom the empty [206] mail bags, and this it did by the Act of May 27, 1908, above quoted.

For the purposes of fixing compensation in the weighing of the mail Congress directed that the weight of the empty bags should be withheld in determining the average weight of the mails as the basis of fixing compensation. We agree with the court of claims that such action violated no contractual or other right of the claimant.

Concerning the other question presented there is perhaps more difficulty. By the 6th section of the Act of 1853 it was directed that the United States mail should be transported over the claimant's road at such prices as Congress may by law direct, and by the 13th section of the Act of July 12, 1876, railroads aided by grants of land made by Congress on condition that Congress should fix the basis of compensation for transportation of mails over its lines should receive 80 per centum of the compensation provided for in the act. These acts make specific reference to the amounts to be paid for the transportation of the mails. The payment provided in them is for the transportation of the mails, which, it may be conceded, might include with the mail-matter the bags in which the same was carried. However, by the Act of May 27, 1908, the Congress has classified empty mail bags with furniture and equipment and other supplies for the postal service, to be transported by freight or express. Congress thus undertook to make a separate provision covering the carrying of empty mail containers after they had served their purpose of inclosing the mail-matter during transportation.

It is insisted that the return of the empty mail bags is but part of the transportation of the mail. But certainly Congress might provide that empty mail bags should be differently treated than those used in the actual transportation of mailable matter. None will dispute that forwarding mail bags from their place of manufacture to [207] different points in the country for use would not constitute transportation of mail. We see no reason why Congress may not regard empty mail bags, being returned for further use, as no longer a part of the mails. Congress authorized contracts for the transportation of the mail, but, by the Act of May 27, 1908, it withdrew empty mail bags from mail transportation and directed that they be sent by freight or express. How, then, was such transpor-

tation to be compensated? Ordinarily the applicable freight or express rates would control. But the acts of Congress which provided that property of the United States should be transported at the expense of the company were in full force and effect. It is said that in the report and action upon the legislation which took empty mail bags from carriage as part of the mails and directed the carriage by freight or express there is no intimation that the result of such legislation would have the effect of obtaining free transportation under the Land Grant Acts, and that no such requirement is made in the act itself. But Congress must be presumed to have known of its former legislation in the Acts of 1853 and 1866, and to have passed the new laws in view of the provisions of the legislation already enacted. These statutes must be construed together and effect given to all of them. Under the earlier acts this railroad, in consideration of benefits received, was bound, when required, to transport troops and property of the United States free of charge.

We have here a question concerning the transportation of property of the United States. See Southern P. Co. v. United States, 237 U. S. 202, 204, 59 L. ed. 916, 917, 35 Sup. Ct. Rep. 573. The act of Congress providing for 50 per cent rates concerns only "army" transportation, and is not applicable to this case. See Act of June 30, 1882 (22 Stat. at L. 120, chap. 254; 1 Rev. Stat. Supp. pp. 375, 376). The empty mail bags were property, and belonged to the United States. When the government required their transportation by freight, the former legislation which accompanied [**208**] the grant of lands to this railway company controlled the terms of carriage.

We find no error in the judgment of the Court of Claims, which was also the conclusion of the Comptroller of the Treasury (17 Comp. Dec. 749).

Affirmed.

Mr. Justice **McReynolds**, dissenting:

Appellant's right to recover seems quite plain to me.

The Act of February 9, 1853, chap. 59, 10 Stat. at L. 155, granted lands afterwards used to aid in constructing appellant's lines. Section 4: ". . . The said railroad and branches shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." Section 6: "That the United States mail shall at all times be transported on the said road and branches, under the direction of the Postoffice Department, at such price as Congress may by law direct."

The Act of July 28, 1866, chap. 300, 14 Stat. at L. 338, among other things, revived and extended the Act of 1853. Section 1: ". . . And provided further, That all property and troops of the United States shall at all times be transported over said railroad and branches at the cost, charge, and expense of the company or corporation owning or operating said road and branches respectively, when so required by the government of the United States."

And thus it appears that one section of the statutes directs free transportation of "all property and troops of the United States," and a wholly different section requires transportation of the United States mail "under the direction of the Postoffice Department, at such price as Congress may by law direct."

Through the Postoffice Department, the United States [**209**] are engaged in handling the mails for pay. Their transportation is part of a well-defined business. In the orderly course and as an essential part of that business emptied sacks are constantly being returned for further use. They are property of the United States in a certain sense, whether full or empty; and they are elements of the mail whether going out or coming back.

A clear distinction between property of the United States and United States mail is preserved by the very language of the Land Grant Statutes; and, I think, Congress had no purpose—if, indeed, the power—to convert mail into property within the meaning of these statutes simply by directing carriage of the former in freight trains. The purpose was to secure transportation at less than former cost, and to such end Congress, in effect, commanded that emptied bags, a portion of the mails for which rapid movement is not essential, "shall be transmitted by either freight or express," and compensation made according to the ordinary rates. Under this interpretation, the railroad would suffer no oppressive burden and contemplated economies would be effectuated.

[210] UNITED STATES OF AMERICA, Plff. in Err.,
v.
STANDARD BREWERY, Incorporated. (No. 458.)

UNITED STATES OF AMERICA, Plff. in Err.,
v.
AMERICAN BREWING COMPANY. (No. 474.)

(See S. C. Reporter's ed. 210-220.)

Statutes — construction — general terms.

1. Where several words in a statute are followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.

[For other cases, see Statutes, II. f, in Digest Sup. Ct. 1908.]

War — war-time prohibition — manufacture of nonintoxicating beer.

2. The use of grains, cereals, fruit, or other food products in the manufacture and production of beer for beverage purposes, which, while containing as much as ½ of 1 per cent of alcohol by weight and volume, is not alleged to be intoxicating, was not prohibited by the provisions of the War-time Prohibition Act of November 21, 1918, that to conserve the nation's man power and to increase efficiency in the production of war essentials no grains, cereals, fruit, or other food products shall, after May 1, 1919, until the conclusion of the war and until demobilization is proclaimed by the President, be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. A different conclusion is not demanded because of Treasury Department rulings that all beer containing ½ of 1 per cent of alcohol is taxable, or of the determination of the Internal Revenue Department that a beverage containing that amount of alcohol is to be regarded as intoxicating within the intendment of the act.

Statutes — executive construction.

3. Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such law leaves untouched.

[For other cases, see Statutes, II. e, 2, in Digest Sup. Ct. 1908.]

Statutes — construction — favoring constitutionality.

4. A congressional enactment must be construed, if fairly possible, so as to avoid not only the conclusion that it was unconstitutional, but also grave doubts upon that score.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

Evidence — judicial notice — intoxicating character of liquor.

5. The Federal Supreme Court cannot say as a matter of law that a beverage containing not more than ½ of 1 per cent of alcohol is intoxicating.

[For other cases, see Evidence, I. e, in Digest Sup. Ct. 1908.]

[Nos. 458 and 474.]

Argued December 11, 1919. Decided January 5, 1920.

IN ERROR to the District Court of the United States for the District of Maryland to review a judgment sustaining a demurrer to an indictment charging a violation of the War-time Prohibition Act. Affirmed. Also

IN ERROR to the District Court of the United States for the Eastern District of Louisiana to review a judgment sustaining a demurrer to an indictment charging a violation of the War-time Prohibition Act. Affirmed.

See same case below, in No. 458, 260 Fed. 486.

The facts are stated in the opinion.

Solicitor General **King** and Assistant Attorney General **Frierson** argued the cause and filed a brief for the United States in No. 458:

Clearly the intention was to prohibit all beverages which are commonly known as beer. The courts of the various states have almost uniformly given this construction to similar language.

Note.—On construction of statute according to purpose for which it was passed—see note to United States v. Saunders, 22 L. ed. U. S. 736.

On popular and received import of words as furnishing rule of interpretation—see note to Maillard v. Lawrence, 14 L. ed. U. S. 925.

Generally, on construction of statute—see note to Blake v. National City Bank, 23 L. ed. U. S. 119.

On the question as to whether statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor—see notes to State v. Hemrich, L.R.A.1917B, 974; Ex parte Lockman, 46 L.R.A.(N.S.) 759; Bowling Green v. McMullen, 26 L.R.A.(N.S.) 895; and Luther v. State, 20 L.R.A. (N.S.) 1146.

As to what liquors are within statutory restrictions as to the sale of spirituous, vinous, fermented, and other intoxicating liquors—see note to Lemly v. State, 20 L.R.A. 645.

On judicial notice or inference as to spirituous, vinous, distilled, malt, fermented, or intoxicating quality of liquor from its name—see note to State v. Barr, 48 L.R.A.(N.S.) 302.

United States v. Cohn, 2 Ind. Terr. 492, 52 S. W. 38; State v. Ely, 22 S. D. 492, 118 N. W. 687, 18 Ann. Cas. 92; La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294; Fuller v. Jackson, 97 Miss. 253, 30 L.R.A.(N.S.) 1078, 52 So. 873; Purity Extract & Tonic Co. v. Lynch, 100 Miss. 650, 56 So. 316; Marks v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 867; Re Lockman, 18 Idaho, 469, 46 L.R.A.(N.S.) 759, 110 Pac. 253; Brown v. State, 17 Ariz. 314, 152 Pac. 578.

Messrs. Wayne B. Wheeler and Andrew Wilson filed a brief as amici curiæ:

The War Prohibition Act prohibits beer and wine containing 2¾ per cent alcohol by weight, and 3 3/10 per cent alcohol by volume, regardless of their intoxicating qualities.

United States v. Cohn, 2 Ind. Terr. 474, 52 S. W. 38; La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294; State v. Walder, 83 Ohio St. 68, 93 N. E. 531; State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Ely, 22 S. D. 487, 118 N. W. 687, 18 Ann. Cas. 92.

Similar statutes enacted by Congress and state legislatures have been construed to include all beer and wine, without reference to their intoxicating quality.

United States v. Cohn, supra; La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294; State v. Williams, 11 S. D. 64, 75 N. W. 815.

Mr. **William L. Marbury** argued the cause, and, with Messrs. William L. Rawls and Randolph Barton, Jr., filed a brief for the Standard Brewery:

Congress only intended to deal with malt and vinous liquors, by whatever name they might be called, when they met the two conditions specified, viz.: when they were intoxicating and when they were manufactured for beverage purposes. The language used is so clear that it is scarcely capable of any elucidation. The interpretation which is here placed upon it is that which the mind naturally gives it, without any effort, and the one which a critical examination of the text of the statute confirms.

Jacob Hoffman Brewing Co. v. McElligott, — C. C. A. —, 259 Fed. 525; United States v. American Brewing Co. (U. S. Dist. E. Dist. La.); United States v. Ranier Brewing Co. 259 Fed. 359; United States v. Baumgartner, 259 Fed. 722; United States v. Petts, 260 Fed. 663; United States v. Henley Brewing Co. (U. S. Dist. Ct. R. I.); United States v. Mohr (U. S. Dist. Ct. Wis.); United States v. Porto Rico Brewing Co. (U. S. Dist. Ct. Porto Rico); United States v. Blatz Brewing Co. (U. S. Dist. E. Dist. Wis.); United States v. Chase, 135 U. S. 255, 34 L. ed. 117, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649; United States v. Loftis, 12 Fed. 671; United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222; Potts v. United States, 51 C. C. A. 678, 114 Fed. 52; Gridley v. Northwestern Mut. L. Ins. Co. 14 Blatchf. 108, Fed. Cas. No. 5,808, affirmed in 100 U. S. 614, 25 L. ed. 746; Sinclair v. Phœnix Mut. L. Ins. Co. Fed. Cas. No. 12,896; Bowling Green v. McMullen, 134 Ky. 742, 26 L.R.A.(N.S.) 895, 122 S. W. 825; State v. Virgo, 14 N. D. 295, 103 N. W. 610; People v. Strickler, 25 Cal. App. 60, 142 Pac. 1123.

The indictment is insufficient to charge an offense under the act as properly construed.

Evans v. United States, 153 U. S. 584, 587, 38 L. ed. 830, 831, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Moore v. United States, 160 U. S. 274, 40 L. ed. 425, 16 Sup. Ct. Rep. 294; United States v. Carll, 105 U. S. 611, 613, 26 L. ed. 1135, 1136, 4 Am. Crim. Rep. 246; United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571.

Was the Act of November 21, 1918, capable of being constitutionally enforced on the 4th day of June, 1919?

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score.

United States v. Jin Fuey Moy, 241 U. S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

Solicitor General **King** and Assistant Attorney General **Frierson** argued the cause and filed a brief for the United States in No. 474.

Mr. **Elihu Root** argued the cause, and, with Mr. William D. Guthrie, filed a brief for the American Brewing Company:

If any essential element of the alleged crime is omitted in an indictment, such omission cannot be supplied by intendment or implication.

Pettibone v. United States, 148 U. S.

197, 202, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; United States v. Hess, 124 U. S. 483, 486, 31 L. ed. 516, 517, 8 Sup. Ct. Rep. 571; Todd v. United States, 158 U. S. 278, 282, 39 L. ed. 982, 983, 15 Sup. Ct. Rep. 889.

The averments that the defendant "did unlawfully use certain grains," etc., and that that was "contrary to the form of the statute in such case made and provided," etc., are mere conclusions of the pleader, and not facts, and, therefore, are of no avail.

United States v. Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588, 593; Re Greene, 52 Fed. 111; United States v. Carney, 228 Fed. 165.

Since it is well-established law that where facts alleged are susceptible of two interpretations, one of which points to guilt and the other to innocence, a court of justice has no alternative, it must pronounce in favor of innocence, it follows that it must be presumed that the half per cent beer referred to in the indictment was nonintoxicating. Certainly the courts cannot judicially know what particular percentage of alcohol will render a given kind of beer intoxicating. Indeed, it would be far more reasonable to ask the court to take judicial cognizance of the indisputable fact that half of 1 per cent beer is not, as a matter of fact, intoxicating.

The Bothnea, 2 Wheat. 169, 177, 4 L. ed. 211, 213; Coffin v. United States, 156 U. S. 432, 39 L. ed. 481, 15 Sup. Ct. Rep. 394.

Effect must, if possible, be accorded to every word in the statute. Such a word as "other" cannot be treated as superfluous, void, or insignificant. Its use must be assumed, if possible, to indicate a definite purpose on the part of Congress.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 410, 58 L. ed. 658, 662, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337.

The mere fact that the words "beer" and "wine" do not serve any separate purpose that would not be comprehended within the phrase "intoxicating malt or vinous liquor" does not warrant the disregard of the word "other."

United States v. Bassett, 2 Story, 404, Fed. Cas. No. 14,539; United States v. Fisher, 2 Cranch, 358, 387, 2 L. ed. 304, 313.

Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous.

Hough v. Windus, L. R. 12 Q. B. Div. 229, 53 L. J. Q. B. N. S. 165, 50 L. T. N. S. 312, 32 Week. Rep. 452, 1 Morrell, 1.

The construction urged by the defendant in error is supported by the decisions of this court and numerous other courts.

United States v. Chase, 135 U. S. 255, 258, 259, 34 L. ed. 117–119, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649; United States v. United Verde Copper Co. 196 U. S. 207, 213, 49 L. ed. 449, 451, 25 Sup. Ct. Rep. 222; United States v. Loftis, 12 Fed. 673; United States v. Clark, 43 Fed. 574; United States v. Wilson, 58 Fed. 770; Potts v. United States, 51 C. C. A. 678, 114 Fed. 54; Pacific Rolling-Mill Co. v. Hamilton, 61 Fed. 477; Gridley v. Northwestern Mut. L. Ins. Co. 14 Blatchf. 107, Fed. Cas. No. 5,808, affirmed in 100 U. S. 614, 25 L. ed. 746; Sinclair v. Phœnix Mut. L. Ins. Co. Fed. Cas. No. 12,896; People v. Strickler, 25 Cal. App. 66, 142 Pac. 1123; State v. Virgo, 14 N. D. 295, 103 N. W. 610; Atty. Gen. v. Ayer, 148 Mass. 586, 20 N. E. 451; Ex parte Gray, — Tex. Crim. Rep. —, 83 S. W. 829; Alexander v. Greenup, 1 Munf. 144, 4 Am. Dec. 541; St. Paul v. Traeger, 25 Minn. 253, 33 Am. Rep. 462; Minnesota Mut. L. Ins. Co. v. Link, 230 Ill. 278, 82 N. E. 637; Bowling Green v. McMullen, 134 Ky. 742, 26 L.R.A.(N.S.) 895, 122 S. W. 825.

As a matter of ordinary construction, where several words are followed by a general expression, as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.

Great Western R. Co. v. Swindon & C. R. Co. L. R. 9 App. Cas. 808, 53 L. J. Ch. N. S. 1075, 32 Week. Rep. 957.

The construction urged herein is not only according to the natural import of the language used and the subject-matter being dealt with by Congress, but it avoids the unjust discrimination between nonintoxicating beverages which must otherwise ensue.

Hawaii v. Mankichi, 190 U. S. 197, 214, 47 L. ed. 1016, 1021, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465.

If, for the practical enforcement of the law, it was necessary to bar all subterfuges, it does not, as did the statute involved in Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 204, 57 L. ed. 184, 188, 33 Sup. Ct. Rep. 44, prohibit

all malt liquors, but only such of them as are intoxicating.

Recourse to legislation in pari materia as an aid to construction is, of course, permissible.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 306, 309, 55 L. ed. 738, 745, 747, 31 Sup. Ct. Rep. 578; Lawrence v. Allen, 7 How. 785, 793, 12 L. ed. 914, 917; Smith v. People, 47 N. Y. 339; State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; Rex v. Palmer, 1 Leach, C. L. 355; Rohrer v. Hastings Brewing Co. 83 Neb. 116, 119 N. W. 27, 17 Ann. Cas. 998.

Legislative history may properly be referred to in order to shed light upon the intent of Congress.

Blake v. National City Banks, 23 Wall. 307, 23 L. ed. 119.

A congressional report upon proposed legislation may be referred to by the courts as an aid in determining the proper construction of a statute.

Caminetti v. United States, 242 U. S. 470, 490, 61 L. ed. 442, 455, L.R.A.1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168; United States v. St. Paul, M. & M. R. Co. 247 U. S. 310, 62 L. ed. 1130, 38 Sup. Ct. Rep. 525.

When a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular.

United States v. Bashaw, 1 C. C. A. 653, 4 U. S. App. 360, 50 Fed. 753; United States v. Southern P. Co. 230 Fed. 270.

Administrative fiat cannot convert into crimes conduct which Congress had never denounced as illegal.

Waite v. Macy, 246 U. S. 606, 608, 62 L. ed. 892, 894, 38 Sup. Ct. Rep. 395, Ann. Cas. 1918E, 1, affirming 140 C. C. A. 45, 224 Fed. 362; United States v. Morehead, 243 U. S. 607, 614, 61 L. ed. 926, 930, 37 Sup. Ct. Rep. 458; United States v. George, 228 U. S. 14, 22, 57 L. ed. 712, 715, 33 Sup. Ct. Rep. 412; United States v. United Verde Copper Co. 196 U. S. 207, 215, 49 L. ed. 449, 452, 25 Sup. Ct. Rep. 222; United States v. San Jacinto Tin Co. 125 U. S. 273, 307, 31 L. ed. 747, 759, 8 Sup. Ct. Rep. 850; Morrill v. Jones, 106 U. S. 466, 467, 27 L. ed. 267, 268, 1 Sup. Ct. Rep. 423; United States v. Williamson, 207 U. S. 425, 461, 52 L. ed. 278, 296, 28 Sup. Ct. Rep. 163; United States v. 200 Barrels of Whiskey, 95 U. S. 571, 576, 24 L. ed. 491, 492; Muir v. Louisville & N. R. Co. 247 Fed. 895; Bruce v. United States, 120 C. C. A. 370, 202 Fed. 103; United States v. 11,150 Pounds of Butter, 115 C. C. A. 463, 195 Fed. 663, 188 Fed. 160; Leecy v. United States, 111 C. C. A. 254, 190 Fed. 292; St. Louis Merchants' Bridge Terminal R. Co. v. United States, 110 C. C. A. 63, 188 Fed. 195.

Nothing could be more far-fetched than the reasoning which assumes that because Congress may have used one definition for the purposes of certain particular acts relating to the taxation of fermented, not intoxicating, liquors, which acts are not referred to in or made a part of the Act of November 21, 1918, it must be presumed to intend the same test as to the operation of other laws not relating to the subject of taxation.

Macbeth & Co. v. Chislett [1910] A. C. 223, 79 L. J. K. B. N. S. 376, 102 L. T. N. S. 82, 26 Times L. R. 268, 54 Sol. Jo. 268, 47 Scot. L. R. 623, 17 Ann. Cas. 102.

The Act of Congress of November 21, 1918, should be strictly construed.

United States v. Salen, 235 U. S. 237, 59 L. ed. 210, 35 Sup. Ct. Rep. 51; Re Johnson, 224 Fed. 183; Sarlls v. United States, 152 U. S. 570, 574, 38 L. ed. 556, 557, 14 Sup. Ct. Rep. 720; United States v. Reese, 92 U. S. 214, 219, 23 L. ed. 563, 565; United States Condensed Milk Co. v. Smith, 116 App. Div. 19, 101 N. Y. Supp. 129; affirmed in 191 N. Y. 536, 84 N. E. 1122; 36 Cyc. 1179, 1180; Dickenson v. Fletcher, L. R. 9 C. P. 7, 43 L. J. Mag. Cas. N. S. 25, 29 L. T. N. S. 540; Re Cuno, L. R. 43 Ch. Div. 17.

The construction urged by the defendant in error herein has been sustained by the circuit court of appeals for the second circuit and ten district courts.

Jacob Hoffmann Brewing Co. v. McElligott, 259 Fed. 330, affirmed in — C. C. A. —, 259 Fed. 529; United States v. Standard Brewery, 260 Fed. 486; United States v. Petts, 260 Fed. 663; United States v. James Hanley Brewing Co. decided July 23, 1919; United States v. Ranier Brewing Co. 259 Fed. 360; United States v. Baumgartner, 259 Fed. 722; United States v. Mohr, decided Aug. 22, 1919; United States v. Porto Rico Brewing Co. decided Aug. 23, 1919; United States v. Valentine Blatz Brewing Co. decided Oct. 14, 1919.

Criminal statutes, whose prohibitions are, of course, directed to the public generally, and intended to guide and deter the plain man, speak the language of the common people. The ordinary

meaning must, therefore, be given the common terms employed in the act.

Sarlls v. United States, 152 U. S. 570, 574, 38 L. ed. 556, 557, 14 Sup. Ct. Rep. 720.

Intoxicating liquors are those liquors which are intended for use as, or capable of being used as, a beverage, and which contain alcohol in such proportion or per cent that when consumed in the quantity which may practically be drunk by an ordinary man, or in any quantity which the human stomach will ordinarily hold, will produce a condition commonly known as intoxication or drunkenness. Drunkenness or intoxication is a materially abnormal mental or physical condition, manifesting itself in the loss of the ordinary control of the mental faculties or bodily functions to an appreciable or material extent.

Intoxicating-Liquor Cases, 25 Kan. 768, 37 Am. Rep. 284; Board of Excise v. Taylor, 21 N. Y. 173; State v. Piche, 98 Me. 351, 56 Atl. 1052; Com. v. Blos, 116 Mass. 58; State v. May, 52 Kan. 53, 34 Pac. 407; Estes v. State, 13 Okla. Crim. Rep. 604, 4 A.L.R. 1135, 166 Pac. 77; Marks v. State, 159 Ala. 81, 133 Am. St. Rep. 20, 48 So. 864; State v. Virgo, 14 N. D. 293, 103 N. W. 610; Black's Law Dict. 2d ed. "Drunk;" Black, Intoxicating Liquors, § 2; 23 Cyc. 57; Decker v. State, 39 Tex. Crim. Rep. 20, 44 S. W. 845; Mason v. State, 1 Ga. App. 534, 58 S. E. 139; Taylor v. State, — Tex. Crim. Rep. —, 49 S. W. 589; United States v. Baumgartner, 259 Fed. 725; People v. Zeiger, 6 Park. Crim. Rep. 355; Blatz v. Rohrbach, 116 N. Y. 455, 6 L.R.A. 669, 22 N. E. 1049; James v. State, 49 Tex. Crim. Rep. 334, 91 S. W. 227; Heintz v. Le Page, 100 Me. 545, 62 Atl. 605; Joyce, Intoxicating Liquors, § 3; 1 Woollen & T. Intoxicating Liquors, § 6, p. 13; Sikes v. State, 116 Ga. 182, 42 S. E. 346; Lafler v. Fisher, 121 Mich. 60, 79 N. W. 934; St. Louis, I. M. & S. R. Co. v. Waters, 105 Ark. 619, 152 S. W. 137; Gard v. State, 15 Ohio C. C. N. S. 255; O'Connell v. State, 5 Ga. App. 234, 62 S. E. 1007; O'Donnell v. Com. 108 Va. 882, 62 S. E. 373; State v. Pierce, 65 Iowa, 85, 21 N. W. 195; Wadsworth v. Dunnam, 98 Ala. 610, 13 So. 597; Columbia L. Ins. Co. v. Tousey, 152 Ky. 447, 153 S. W. 767; State v. Nethken, 60 W. Va. 673, 55 S. E. 742.

Mr. Justice **Day** delivered the opinion of the court:

These causes are here under the Criminal Appeals Act, March 2, 1907 (34 Stat. at L. 1246, chap. 2564, Comp. Stat. § 1704, 6 Fed. Stat. Anno. 2d ed. p. 149), and require the construction of the so-called "War-time Prohibition [**215**] Act," of November 21, 1918 (chap. 212, 40 Stat. at L. 1045–1047, Comp. Stat. § 3115 11/12f).

In No. 458 the Standard Brewing Company was indicted for unlawfully using certain grains, cereals, fruit, and other food products on the 4th of June, 1919, in the manufacture and production of beer for beverage purposes which, it is charged, contained as much as ½ of 1 per cent of alcohol by both weight and volume. In No. 474 the American Brewing Company was indicted for the like use on the 26th day of June, 1919, of certain grains, cereals, and food products in the manufacture and production of beer containing a like percentage of alcohol.

In the indictment in No. 474 it was charged that at the time of the alleged offense the termination of demobilization had not been determined and proclaimed by the President.

In each case a demurrer was sustained by the district court.

Before considering the construction of that portion of the act involved in these cases it will be helpful to give a short history of the preceding legislation that led up to it. The Food Control Act of August 10, 1917 (40 Stat. at L. chap. 53, pp. 276, 282, Comp. Stat. § 3115½e, Fed. Stat. Anno. Supp. 1918, p. 181), authorized the President to prescribe and give public notice of limitations, regulations, or prohibitions respecting the use of foods, fruits, food materials, or feed, in the production of malt or vinous liquors for beverage purposes, including regulations for the reduction of the alcoholic content of any such malt or vinous liquor, in order to assure an adequate and continuous supply of food, and promote the national security and defense. Whenever notice should be given and remain unrevoked no person, after a reasonable time prescribed in such notice, could use any food, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license and in compliance with lawfully prescribed rules and regulations. Under the [**216**] authority thus conferred, the President issued various proclamations. On December 8, 1917 [40 Stat. at L. 84], he issued one forbidding the production of all malt liquor, except ale and porter, containing more than 2.75

per cent of alcohol by weight. On September 16, 1918 [40 Stat. at L. 204], he issued a second proclamation, prohibiting after December 1, 1918, the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contained alcohol. On January 30, 1919 [40 Stat. at L. 286], he issued a third proclamation which modified the others to the extent of permitting the use of grain in the manufacture of nonintoxicating beverages, it being recited therein that the prohibition of the use of grain in the manufacture of such beverages had been found no longer essential in order to assure an adequate and continuous supply of food. And on March 4, 1919 [40 Stat. at L. 293], he issued a fourth proclamation amending his proclamation of September 16, 1918, so as to prohibit the production only of intoxicating malt liquors for beverage purposes.

It thus appears that the President, acting under the Act of August 10, 1917, has reduced the prohibition of the use of food materials so that now it is limited to the manufacture of such liquors as are in fact intoxicating.

In the light of all this action we come to consider the proper construction of so much of the Act of November 21, 1918, as is here involved, which provides:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for [**217**] beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. Lake County v. Rollins, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 33, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; United States v. First Nat. Bank, 234 U. S. 245, 258, 58 L. ed. 1298, 1303, 34 Sup. Ct. Rep. 846; Caminetti v. United States, 242 U. S. 470, 485, 61 L. ed. 442, 452, L.R.A.1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168. Looking to the act, we find these are its declared purposes: (1) To conserve the man power of the nation; (2) to increase efficiency in the production of arms, munitions, ships, and food and clothing for the Army and Navy. To these ends it is made illegal to sell distilled spirits for beverage purposes or to remove the same from bond for such purposes except for export. And after May 1, 1919, until the conclusion of the war, and until demobilization is proclaimed by the President, no grains, cereals, fruit, or other food products are permitted to be used in the manufacture or production of [**218**] beer, wine, or other intoxicating malt or vinous liquors for beverage purposes.

The prohibitions extend to the use of food products for making "beer, wine, or other intoxicating malt or vinous liquors for beverage purposes." These provisions are of plain import and are aimed only at intoxicating beverages. It is elementary that all of the words used in a legislative act are to be given force and meaning (Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783); and of course the qualifying words "other intoxicating" in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them, or that it did so without intending that they should be given due force and effect. The government insists that the intention was to include beer and wine, whether intoxicating or not. If so, the use of this phraseology was

quite superfluous, and it would have been enough to have written the act without the qualifying words.

This court had occasion to deal with a question very similar in character in the case of the United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222, where an act permitted the use of timber on the public lands for building, agricultural, mining, and other domestic purposes, and held that we could not disregard the use of the word "other," notwithstanding the contention that it should be eliminated from the statute in order to ascertain the true meaning. So here, we think it clear that the framers of the statute intentionally used the phrase "other intoxicating" as relating to and defining the immediately preceding designation of beer and wine. "As a matter of ordinary construction, where several words are followed by a general expression as here, whicIf is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all." Lord Bramwell in Great Western R. Co. v. Swindon & C. Extension R. Co. L. R. 9 App. Cas. 787, 808.

[219] The declared purpose of Congress was to conserve the nation's man power and increase efficiency in producing war essentials; and it accordingly undertook to prohibit the manufacture of intoxicating liquors whose use might interfere with the consummation of that purpose. Other provisions of the act lend support to this view. The sale and withdrawal from bond of distilled spirits (always intoxicating) were declared unlawful after June 30th, 1919, —their manufacture had already been prohibited. The sale of beer, wine, and other intoxicating malt or vinous liquors was prohibited after the same date, and the importation of all such liquors and also of distilled liquors was made immediately unlawful. The President was empowered at once to establish zones about coal mines, manufactories, shipbuilding plants, etc., etc., and "to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones."

The fact that the Treasury Department may have declared taxable under many revenue acts all beer containing ½ of 1 per centum of alcohol is not important. Such rulings did not turn upon the intoxicating character of the liquid, but upon classification for taxation controlled by other considerations. A liquid may be designated as beer and subjected to taxation although clearly nonintoxicating. "The question whether a fermented malt liquor is intoxicating or nonintoxicating is immaterial under the Internal Revenue Laws, although it may be a very material question under the prohibitory laws of a state or under local ordinances." T. D. 804.

As to the insistence that the Internal Revenue Department has determined that a beverage containing ½ of 1 per cent of alcohol should be regarded as intoxicating within the intendment of the act before us, little need be said. Nothing in the act remits the determination of that question to the decision of the revenue officers of the government. While entitled to respect, [220] as such decisions are, they cannot enlarge the meaning of a statute enacted by Congress. Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. Waite v. Macy, 246 U. S. 606, 62 L. ed. 892, 38 Sup. Ct. Rep. 395; United States v. George, 228 U. S. 14, 22, 57 L. ed. 712, 715, 33 Sup. Ct. Rep. 412; United States v. United Verde Copper Co. 196 U. S. 207, 215, 49 L. ed. 449, 452, 25 Sup. Ct. Rep. 222.

Furthermore, we must remember, in considering an act of Congress, that a construction which might render it unconstitutional is to be avoided. We said in United States v. Jin Fuey Moy, 241 U. S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658: "A statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score." See also United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527. We held in Hamilton v. Kentucky Distilleries & Warehouse Co. decided December 15, 1919 [251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106], that the war power of Congress, as applied to the situation outlined in the opinion in that case, enabled it to prohibit the sale of intoxicating liquor for beverage purposes. But the question was neither made nor decided as to whether Congress could prohibit even in time of war the manufacture and sale of nonintoxicating beverages.

An indictment must charge each and every element of an offense. Evans v. United States, 153 U. S. 584, 587, 38 L. ed. 830, 831, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668. We cannot say, as a matter of law, that a beverage containing not more than ½ of 1 per cent of

alcohol is intoxicating, and as neither indictment so charges, it follows that the courts below in each of the cases correctly construed the act of Congress, and the judgments are affirmed.

---

[221] UNITED STATES, Petitioner,
v.
WILLIAM B. POLAND and Frederick William Low.

(See S. C. Reporter's ed. 221-228.)

Public lands — soldiers' additional homestead rights — single body.

1. The prohibition in the Act of March 3, 1903, extending the Homestead Laws to Alaska, that not more than 160 acres of land shall be entered in a single body by means of soldiers' additional homestead rights, may not be evaded by a mere resort to two entries by the same person for two tracts separately surveyed, but contiguous to the extent of having a common boundary ½ mile in length, each containing 160 acres or less.

[For other cases, see Public Lands, I. c, 9, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — suit to cancel patent — bona fide purchase.

2. The defense that defendant in a suit by the Federal government to cancel a patent for public lands as issued in violation of law is a bona fide purchaser is an affirmative one, which he must set up and establish.

[For other cases, see Evidence, II. c, in Digest Sup. Ct. 1908.]

[No. 29.]

Argued November 19, 1919. Decided January 5, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court of the United States for the Third Division of the District of Alaska, sustaining demurrers to and dismissing the bill in a suit by the United States to cancel a patent for public lands. Reversed.

See same case below, 145 C. C. A. 630, 231 Fed. 810.

The facts are stated in the opinion.

Assistant Attorney General **Nebeker** argued the cause, and, with Solicitor General King, filed a brief for petitioner.

Mr. **Ira Bronson** argued the cause, and, with Mr. H. B. Jones, filed a brief for respondents.

Mr. **George H. Patrick** also argued the cause for respondents.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit to cancel a patent issued to William B. Poland for 160 acres of land in Alaska, the gravamen of the complaint being that by this and another patent, both based upon soldiers' additional homestead rights, Poland acquired a single body of land for larger acreage than was permitted by the statute under which the patents were sought and issued. The defendants, who were the patentee and another claiming under him, separately demurred to the complaint, and the court sustained the demurrers and dismissed the suit. That decision was affirmed by the circuit court of appeals, one judge dissenting (145 C. C. A. 630, 231 Fed. 810), and the case is here on writ of certiorari.

Of course, it rested with Congress to determine whether, when, and with what restrictions, the General Land Laws should be extended to Alaska. For many years there was no affirmative action upon the subject. The first steps consisted of limited extensions of the laws relating to mining claims (Act of May 17, 1884) chap. 53, 23 Stat. at L. 24, § 8, Comp. Stat. § 5094, 1 Fed. Stat. Anno. 2d ed. p. 300), and townsites (Act of March 3, 1891, chap. 561, 26 [223] Stat. at L. 1095, § 11, Comp. Stat. § 5079, 1 Fed. Stat. Anno. 2d ed. p. 316), but with these we are not now concerned. The Homestead Laws were the next to receive attention. By the Act of May 14, 1898, chap. 299, 30 Stat. at L. 409, Comp. Stat. § 5083, 1 Fed. Stat. Anno. 2d ed. p. 330, they were extended to that district with the restrictions (a) that "no homestead" should exceed 80 acres in extent, and (b) that "no entry" should extend more than 80 rods along the shore of any navigable water, and along such shore a space of at least 80 rods should be reserved from entry between all such claims. And by the amendatory Act of March 3, 1903, chap. 1002, 32 Stat. at L. 1028, Comp. Stat. § 5046, 1 Fed. Stat. Anno. 2d ed. p. 326, the extension of the Homestead Laws was repeated and confirmed, but with the qualifications (a) that an *actual settler* intending to comply with the requirements in respect of continued residence, cultivation, etc., should be entitled to enter 320 acres or a less quantity, (b) that "no more than 160 acres shall be entered in any single body" by means of soldiers' additional homestead rights, and (c) that "no entry" should extend more than 160 rods along the shore of any navigable water, and along

such shore a space of at least 80 rods should be reserved from entry between all such claims. Further restrictions were imposed, but there is no present need for noticing them.

The controversy here is over the meaning and purpose of the provision that no more than 160 acres shall be entered in any single body by means of soldiers' additional homestead rights.

The material facts to be gathered from the complaint are these: Poland, who was the assignee of certain soldiers' additional homestead rights entitling their owner to enter and acquire in the aggregate 319.75 acres, wished to use them in entering and acquiring certain land in Alaska. The regular public surveys had not been extended to that locality, so he caused a special survey of the land to be made at his expense, as was permitted by applicable [224] regulations. 32 Land Dec. 424; 28 Land Dec. 149. By that survey the land, which was in a compact or single body, was divided into two tracts,—one of 159.75 acres, designated as survey No. 241, and the other of 160 acres, designated as survey No. 242. As surveyed, the north boundary of one tract was the south boundary of the other, and this was shown in the surveyor's return. On April 26, 1906, after the survey, he presented at the local land office two applications whereby he sought to make separate entries of the two tracts with his soldiers' additional rights,—some of the rights being used on one tract and the others on the other tract. The applications were approved and passed to entry and patent,—the patent for the 160 acres being issued a considerable period after the other.

In these circumstances the complaint charges that the 319.75 acres, although surveyed in the form of two tracts, were but a single body of land in the sense of the provision in question; that the land officers, in passing both applications to entry and patent, acted upon a misconception of the law and of their authority, and that in consequence the later patent, whereby Poland's acquisition was made to exceed 160 acres in a single body, was issued in violation of law, and should be canceled.

The complaint also contains an allegation that that patent was fraudulently procured in that, among the proofs presented to the land officers, was an affidavit falsely representing, in effect, that the two tracts were more than 80 rods apart, when in truth they were adjoining tracts. But this allegation must be put out of view, first, because the words of the affidavit as set forth in the complaint do not sustain the pleader's conclusion as to what was represented, and, second, because the complaint makes it certain that the application and other entry papers clearly disclosed that the two tracts were contiguous to the extent of having a common boundary ½ mile in length.

[225] In approaching the consideration of the provision whose meaning and purpose are in question it is well to recall what soldiers' additional homestead rights are and what use could be made of them outside Alaska when the provision was adopted. They are rights to enter and acquire unappropriated nonmineral public land without settlement, residence, improvement, or cultivation, and without payment of any purchase price. They are not personal to the original beneficiaries, but are transferable at will, and the number that may be assigned to the same person is not limited. A single right is always for less, and generally much less, than 160 acres, but rights aggregating many times that number of acres may be and often are held by a single assignee. When the provision was adopted there were almost no restrictions upon the use of such rights outside Alaska. Indeed, the only restriction of any moment was one, uniformly respected, preventing the inclusion of more than 160 acres in a single entry. But the number of such entries that might be made by the same person was not restricted, nor was there any limitation upon the amount of land in a single body that might be entered in that way. Thus, an assignee having rights aggregating 640 acres could use them in entering that amount of land in a compact body 1 mile square, if only he did so through four entries of 160 acres each. And, if he had rights the aggregate of which was sufficient, he could in a like way enter a body of land 3 miles square or even an entire township. See Rev. Stat. §§ 2289, 2304, 2306, Comp. Stat. §§ 4530, 4592, 4594, 8 Fed. Stat. Anno. 2d ed. pp. 543, 586, 588; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963; Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 243, 58 L. ed. 936, 941, 34 Sup. Ct. Rep. 507; Robinson v. Lundrigan, 227 U. S. 173, 178, 179, 57 L. ed. 468, 470, 471, 33 Sup. Ct. Rep. 255; 3 Land Dec. 472; Re Boyce, 29 Land Dec. 599; Re O'Keefe, 29 Land Dec. 643; 30 Land Dec. 285; 31 Land Dec. 441; Kiehlbauch v. Simero, 32 Land Dec. 418; Re Olsen,

33 Land Dec. 225; 45 Land Dec. 236, 3d par.; General Circular of 1904, pp. 11, 26-28.

With this understanding of the circumstances in which [226] the provision was incorporated into the Act of 1903, extending the Homestead Laws to Alaska, we think the meaning and purpose of the provision are manifest. It is in form a proviso and says "no more than 160 acres shall be entered in any single body" by means of soldiers' additional homestead rights. A purpose to prevent the use of these rights in entering a large acreage in a single body hardly could be more plainly expressed. There is nothing in the provision indicating that it is concerned merely with what may be taken by a single entry; and to construe it in that way would make it practically useless, for a large acreage in a single body still could be taken by merely resorting to two or more entries. Besides, the amount of land that could be taken by a single entry had long been limited to 160 acres, and of course to say that no greater amount should be taken in a single body by a single entry would add nothing to that limitation. But the provision does not speak of a single entry, but only of the amount that may be "entered in any single body;" and if it is to have any real effect it must be construed according to the natural import of its words; that is to say, as limiting the amount of land in a compact or single body that may be entered by means of soldiers' additional homestead rights, whether the entering be by one or several entries. We conclude, therefore, that the provision, while leaving one who holds several rights free to exercise all of them and to make as many entries as his rights will sustain, prohibits him from using them to enter and acquire more than 160 acres in a compact or single body.

The court in Alaska regarded the provision as sufficiently like that relating to the area of placer mining claims (Rev. Stat. §§ 2330, 2331, Comp. Stat. §§ 4629, 4630, 6 Fed. Stat. Anno. 2d ed. pp. 577, 579) to require that it be similarly construed. But we think there is a marked difference between the two provisions. That in the placer mining law says "no location" shall exceed a prescribed [227] area, and it means, as the statute otherwise shows, that no single location shall include more.

The circuit court of appeals was of opinion that "what the statute was seeking to protect was the shores of the navigable waters of Alaska, and not to prohibit the entry of a tract of more than 160 acres." In this the court apparently confused the present provision, which operates in the same way in all parts of Alaska, with another and wholly distinct provision, which relates only to entries along the shore. Their independence and the subjects to which they relate are best shown by quoting both in the order in which they appear in the statute, which we do:

And provided further "that no more than one hundred and sixty acres shall be entered in any single body by . . . soldier's additional homestead right."

Provided, "that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims."

There is in this case no question as to what distance along the shore an entry may extend, or as to what space shall be reserved between claims along the shore, but only a question as to whether making separate entries of lands which, in point of contiguity and compactness, constitute a single body of 319.75 acres, is in contravention of the provision first quoted, where both entries are by the same person and are based upon soldiers' additional homestead rights. That question we answer in the affirmative for the reasons before indicated.

It follows that, if the facts be as alleged in the complaint, the second patent was issued in violation of law, and the government is entitled to demand that it be canceled, unless, as is asserted in the brief for the defendants, one of them is a bona fide purchaser. The complaint does not show that he is such, and the rule is that this is an [228] affirmative defense which he must set up and establish. Wright-Blodgett Co. v. United States, 236 U. S. 397, 403, 59 L. ed. 637, 640, 35 Sup. Ct. Rep. 339: Great Northern R. Co. v. Hower, 236 U. S. 702, 710, 59 L. ed. 798, 802, 35 Sup. Ct. Rep. 465.

If the patent is canceled, Poland, or his assignee, will be free to exercise the rights with which the patent was obtained (see Re Cole, 6 Land Dec. 290, and Re Courtright, 6 Land Dec. 459), and also to ask repayment under the Act of June 16, 1880, chap. 244, 21 Stat. at L. 287, Comp. Stat. § 4595, 8 Fed. Stat. Anno. 2d ed. p. 601, of the fees and commissions paid to the land officers.

Decree reversed.

PRODUCERS TRANSPORTATION COMPANY, Plff. in Err.,
v.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al.

(See S. C. Reporter's ed. 228-232.)

Constitutional law — due process of law — rate regulation.

1. An oil pipe line constructed solely to carry oil for particular producers under strictly private contracts, and never devoted by its owner to public use, could not, by mere legislative fiat or by any regulating order of a state commission, be converted by a state into a public utility, nor its owner made a common carrier, since that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, 608-628, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — rate regulation.

2. A corporation which has voluntarily devoted its oil pipe line to the use of the public may, consistently with due process of law, be subjected by a state to the regulatory powers of a state commission over the rates and practices of public utilities.

[For other cases, see Constitutional Law, 608-628, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — rate regulations.

3. A common carrier cannot, by making contracts for future transportation or business, mortgaging its property or pledging its income, prevent or postpone the exertion by a state of the power to regulate the carrier's rates and practices, nor does the contract clause of the Federal Constitution interpose any obstacle to the exertion of such power.

[For other cases, see Constitutional Law, 1430-1434, in Digest Sup. Ct. 1908.]

[No. 219.]

Argued December 12, 1919. Decided January 5, 1920.

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed an order of the state Railroad Commission, requiring a corporation operating an oil pipe line to file its schedule of rates or charges and the rules and regulations under which the transportation is conducted. Affirmed.

See same case below, 176 Cal. 499, P.U.R.1918B, 518, 169 Pac. 59.

The facts are stated in the opinion.

Mr. **A. V. Andrews** argued the cause, and, with Messrs. Lewis W. Andrews, Thomas O. Toland, and Paul M. Gregg, filed a brief for plaintiff in error:

Has the state of California plenary power which authorizes it, by constitutional declaration or legislative enactment, to impress upon a person or corporation in fact engaged in a private business, the obligations and character of a public utility, and by its mere fiat change property actually devoted solely to private use so that it becomes impressed with a public character and burden, without the exercise of the right of eminent domain and without compensation?

Associated Oil Co. v. Railroad Commission, 176 Cal. 528, L.R.A.1918C, 849, P.U.R.1918B, 633, 169 Pac. 62; Ex parte Dickey, 144 Cal. 238, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; Pacific Teleph. & Teleg. Co. v. Eshleman, 166 Cal. 664, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 355, 53 L. ed. 1024, 1028, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 593, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The term "due process of law," as used in the Fifth and Fourteenth Amendments to the Constitution of the United States, undoubtedly means "by the law of the land."

Maxwell v. Dow, 176 U. S. 581, 595, 44 L. ed. 597, 602, 20 Sup. Ct. Rep. 448, 494; Dartmouth College v. Woodward, 4 Wheat. 518, 581, 4 L. ed. 629, 645; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930.

Under the term "due process of law," as found in the Constitutions of the several states, as well as in the Federal Constitution, it is uniformly provided that private property cannot be taken

---

Note.—As to pipe line companies as public utilities—see note to Associated Pipe Line Co. v. Railroad Commission, L.R.A.1918C, 855.

On effect of contract with patrons to preclude regulation of rates of public service corporations—see note to Pinney & B. Co. v. Los Angeles Gas & E. Corp. L.R.A.1915C, 282.

Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

for public use without just compensation.

Van Horne v. Dorrance, 2 Dall. 304, 315, 1 L. ed. 391, 396, Fed. Cas. No. 16,857; Tippecanoe County v. Lucas, 93 U. S. 108, 114, 23 L. ed. 822, 824; Monongahela Nav. Co. v. United States, 148 U. S. 312, 325, 37 L. ed. 463, 467, 13 Sup. Ct. Rep. 622; Holden v. Hardy, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116, 142, 51 L. ed. 399, 410, 27 Sup. Ct. Rep. 202; Orient Ins. Co. v. Daggs, 172 U. S. 557, 563, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281.

The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 593, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Cherokee Nation v. Southern Kansas R Co. 135 U. S. 641, 659, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; Scranton v. Wheeler, 179 U. S. 141, 153, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48.

The forms of law and the machinery of government, with all their reach and power, must, in their actual working, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 399, 38 L. ed. 1014, 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060.

Vested rights cannot be impaired.

6 Am. & Eng. Enc. Law, 2d ed. p. 955; Eastman v. Clackamas County, 32 Fed. 24; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Moore v. State, 43 N. J. L. 243, 39 Am. Rep. 558.

The word "impair" is defined as meaning, "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate."

Edwards v. Kearzey, 96 U. S. 595, 600, 24 L. ed. 793, 796; Ogden v. Saunders, 12 Wheat. 213, 316, 6 L. ed. 606, 641.

"Obligation" is defined to be "the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract."

Edwards v. Kearzey, supra; McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399.

Any laws affecting the obligation of contracts embrace alike those which affect its validity, construction, discharge, and enforcement.

Ibid.

Nothing could be more material to the obligation of a contract than the means of enforcing it.

Woodruff v. Trapnall, 10 How. 190, 13 L. ed. 383; White v. Hart, 13 Wall. 646, 653, 20 L. ed. 685, 688; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357.

The degree of impairment is immaterial so long as it is substantial, and if the value of the contract has been diminished, then the impairment is substantial.

Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; Farrington v. Tennessee, 95 U. S. 679, 683, 24 L. ed. 558, 559; Von Hoffman v. Quincy, 4 Wall. 535, 552, 18 L. ed. 403, 409; Walker v. Whitehead, 16 Wall. 314, 318, 21 L. ed. 357, 358.

If a contract was valid when made, a state can no more impair its obligation by a constitutional amendment than it can by an ordinary act of legislature.

Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 20 L. ed. 757.

Producers Transportation Company's lines never conveyed oil to or for the public, and the public has never had any interest therein.

Thayer v. California Development Co. 164 Cal. 126, 127, 128 Pac. 21; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 355, 53 L. ed. 1024, 1028, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222.

The findings of the courts below do not foreclose this court in this case.

Kansas City Southern R. Co v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 668, 56 L. ed. 604, 32 Sup. Ct. Rep. 389; Creswill v. Grand Lodge, K. P. 225 U. S. 261, 56 L. ed. 1080, 32 Sup. Ct. Rep. 822; Frank v. Mangum, 237 U. S. 347, 59 L. ed. 984, 35 Sup. Ct. Rep. 582.

Mr. Douglas Brookman argued the cause and filed a brief for defendants in error:

The assertion of the right to exercise the power of eminent domain has always been recognized as conclusive evidence that the corporation asserting the right has devoted its property to public use.

1 Wyman, Pub. Serv. Corp. § 214; State, Trenton & N. B. Turnp. Co., Prosecutors, v. American E. Commercial News Co. 43 N. J. L. 381.

This court will not be disposed to review the findings of fact, supported, as they are, by conclusive evidence.

Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 412, 57 L. ed. 1248, 1258, 33 Sup. Ct. Rep. 820; Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 288, 54 L. ed. 1042, 1043, 31 Sup. Ct. Rep. 14; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 222, 48 L. ed. 944, 948, 24 Sup. Ct. Rep. 632.

A state has the power to declare any business which is of public interest and concern to be a public utility and subject to regulation by the state, particularly when those conducting the business have devoted its property to public use; and the fact that the business is conducted through contracts does not preclude such regulation.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Burlington Twp. v. Beasley, 94 U. S. 310, 24 L. ed. 161; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

Regulation of companies engaged in transporting oil for compensation by means of pipe lines cannot be said to be unreasonable and unjustifiable when this court itself has upheld the regulation of such companies as common carriers by the Interstate Commerce Commission, in so far as interstate transportation is concerned.

Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956.

The fact that the business declared to be a public utility is conducted through contracts is immaterial as affecting the power of the state to subject the business to regulation.

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Union Dry Goods Co. v. Georgia Public Service Corp. 248 U. S. 372, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R. 1919C, 60, 39 Sup. Ct. Rep. 117.

The supreme court of California has already recognized the right of the Railroad Commission in prescribing rates for public utility service to alter the rate specified in contracts between the public utility and its patrons.

Limoneira Co. v. Railroad Commission, 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033; Southern P. Co. v. Spring Valley Water Co. 173 Cal. 291, L.R.A.1917E, 677, 159 Pac. 865.

Mr. Justice **Van Devanter** delivered the opinion of the court:

We here are concerned with a statute of California and an order made thereunder by the state Railroad Commission, both of which are said to be repugnant to the Constitution of the United States, and therefore invalid.

The statute declares that every private corporation or individual operating "any pipe line, or any part of any pipe line . . . for the transportation of crude oil . . . , directly or indirectly, to or for the public, for hire, . . . and which said pipe line . . . is constructed or maintained upon, along, over or under any public highway, and in favor of whom the right of eminent domain exists," shall be deemed a common carrier and subject to the provisions of a prior act investing the Railroad Commission with extensive powers over the rates and practices of those who operate public utilities. Stat. 1913, chap. 327; Stat. 1911, Ex. Sess. chap. 14.

The order of the Commission was made after notice and [**230**] a full hearing; is based upon a finding that the Producers Transportation Company, the plaintiff in error, has a pipe line from the San Joaquin oil fields to Port Harford, on the Pacific coast, whereby it transports crude oil for pay in such circumstances that the statute requires that it be regarded and dealt with as a common carrier; and directs the filing with the Commission of the company's schedule of rates or charges and the rules and regulations under which the transportation is conducted.

In the state court the company con-

tended that the evidence before the Commission, all of which was before the court, conclusively established that the pipe line was constructed solely to carry crude oil for particular producers from their wells to the seacoast under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to public use; and the company further contended that the statute, as applied to this pipe line, was repugnant to the due process of law clause of the 14th Amendment and the contract clause of § 10 of article 1 of the Constitution, and that the order of the Commission was void as offending against these clauses. The state court sustained both the statute and the order (176 Cal. 499, P.U.R.1918B, 518, 169 Pac. 59), and the company sued out this writ of error.

The company was organized under the laws of California in 1909 and its pipe line was put in operation in 1910. The statute in question took effect August 10, 1913, and the order was made December 31, 1914.

It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, [231] which no state can do consistently with the due process of law clause of the 14th Amendment. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 595, 59 L. ed. 735, 741, L.R.A.1917F, 1148, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Associated Oil Co. v. Railroad Commission, 176 Cal. 518, 523, 526, L.R.A.1918C, 849, P.U.R.1918B, 633, 169 Pac. 62. And see Munn v. Illinois, 94 U. S. 113, 126, 24 L. ed. 77, 84; Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 495, 49 L. ed. 1135, 1139, 25 Sup. Ct. Rep. 745; Weems S. B. Co. v. People's S. B. Co. 214 U. S. 345, 357, 53 L. ed. 1024, 1029, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; Chicago & N. W. R. Co. v. Ochs, 249 U. S. 416, 419, 420. 63 L. ed. 679, 682, 683, P.U.R. 1919D, 498, 39 Sup. Ct. Rep. 343. On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation. Munn v. Illinois, supra.

The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil, and it rested this conclusion upon the grounds, first, that one of the things which the company was authorized to do, if it so elected, as shown in its articles of incorporation, was "to establish and carry on . . . a general transportation business for the purpose of transporting . . . any of the oils . . . produced . . . by this corporation or any other person, firm, partnership, association, or corporation;" second, that in acquiring its right of way it resorted to an exercise of the power of eminent domain,—admissible only if the condemnation was for a "public use" (Code Civ. Proc. §§ 1237, 1238), and was by "an agent of the state" (Civ. Code, § 1001),—and in that proceeding asserted, and obtained a judgment reciting, that it was engaged in transporting oil by pipe line "as a common carrier for hire," and that the right of way was sought for "a public use;" and, third, that, looking [232] through the maze of contracts, agency agreements, and the like, under which the transportation was effected, subordinating form to substance, and having due regard to the agency's ready admission of new members and its exclusion of none, it was apparent that the company did in truth carry oil for all producers seeking its service; in other words, for the public. See Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956.

While some criticism is made of this conclusion and the grounds upon which it is rested, we are of opinion that the grounds have adequate support in the evidence and that they sustain the conclusion. True, one witness stated that "the pipe line was not laid upon the right of way which was obtained in the condemnation suit;" but, as his further testimony disclosed that he meant only that a part of the right of way so obtained was not used when the pipe line was laid, we think the state court rightly regarded the company as having ac-

quired some of its actual right of way by exercising the power of eminent domain as a common carrier. If it was a common carrier at the time of the condemnation suit, it is such now, for nothing has occurred in the meantime to change its status.

That some of the contracts before mentioned were entered into before the statute was adopted or the order made is not material. A common carrier cannot, by making contracts for future transportation, or by mortgaging its property or pledging its income, prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power. Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 162, 24 L. ed. 94, 95; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 482, 55 L. ed. 297, 303, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Union Dry Goods Co. v. Georgia Pub. Service Corp. 248 U. S. 372, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117.

Judgment affirmed.

---

[233] WILLIAM F. HAYS, Appt.,
v.
PORT OF SEATTLE, the State of Washington, et al.

(See S. C. Reporter's ed. 233-239.)

Pleading — jurisdictional averments — — Federal question.

1. Averments of a bill setting up alleged obligations of a contract between claimant and the state, and the contention that they were impaired by subsequent legislation, presented a controversy under the Federal Constitution and conferred jurisdiction (a sufficient amount being involved) upon a Federal district court irrespective of the citizenship of the parties.

[For other cases, see Pleading, 321-353, in Digest Sup. Ct. 1908.]

Error to district court — Federal question — impairing contract obligations.

2. The question whether the obligations of a contract with the state were impaired by subsequent state legislation is one which will warrant a direct writ of error from the Federal Supreme Court to a district court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — repudiating contract.

3. A statute that has the effect of violating or repudiating an incompleted contract previously made with the state does not impair the obligation of a contract. The obligation remains as before and forms the measure of the contractor's right to recover from the state the damages sustained.

[For other cases, see Constitutional Law, 1340-1342, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taking for public purpose — compensation — notice and hearing.

4. The property rights, if any, of one contracting with the state for the construction of a waterway, cannot be said to have been taken without due process of law by state legislation vacating a portion of such waterway and vesting title thereto in a municipal corporation, where there was adequate provision in the state law for assured payment without unreasonable delay of any compensation due such contractor on account of such taking.

[For other cases, see Constitutional Law, 616-673; Eminent Domain, VI. c, in Digest Sup. Ct. 1908.]

Pleading — what must be pleaded — laches.

5. Laches is a defense that, in the equity practice of the Federal courts, need not be set up by plea or answer. It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such, and if it be not excused, his laches may be taken advantage of either by demurrer or upon final hearing.

[For other cases, see Pleading, III. g, 1, in Digest Sup. Ct. 1908.]

[No. 70.]

Argued November 12, 1919. Decided January 5, 1920.

Note.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed. U. S. 894; and Berkman v. United States, 63 L. ed. U. S. 877.

Generally, as to what laws are void as impairing the obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

As to what is a public purpose which will justify the power of eminent domain—see notes to Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 2 L.R.A. 680; Barre R. Co. v. Montpelier & W. River R. Co. 4 L.R.A. 785; Searl v. School Dist. 33 L. ed. U. S. 740; and Sweet v. Rechel, 40 L. ed. U. S. 188.

On notice and hearing required, generally, to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

APPEAL from the District Court of the United States for the Western District of Washington to review a decree which dismissed a bill to enjoin the enforcement of a state statute vacating a portion of a waterway and vesting title thereto in a municipality. Affirmed.

See same case below, 226 Fed. 287.

The facts are stated in the opinion.

Mr. **William F. Hays**, in propria persona, argued the cause and filed a brief for appellant:

The state of Washington had power to enter into the contract involved in this suit, and it is valid.

Hays v. Hill, 23 Wash. 730, 63 Pac. 576; Hays v. Callvert, 36 Wash. 138, 78 Pac. 793; Allen v. Forrest, 8 Wash. 700, 24 L.R.A. 606, 36 Pac. 971; Scholpp v. Forrest, 11 Wash. 640, 40 Pac. 133; Missouri Valley Trust Co. v. Hofius, 20 Wash. 272, 55 Pac. 54.

The contract gave to appellant a vested property right in and to the said waterway from the time the contract was entered into and the approval of the bond guaranteeing for appellant its performance, and the record shows that appellant, without any duty on his part, express or implied, in order to safeguard his rights, as also the rights of the state under the contract, prosecuted, at great personal expense, two suits to the highest court of the state of Washington.

Hays v. Hill, and Hays v. Callvert, supra.

The right of appellant in and to the contract giving him the exclusive title to the earth contained in the waterway, for filling adjacent tidelands, has not been and cannot be successfully questioned. The statute enacted to vacate the waterway, and vest title thereto in the port of Seattle, is the taking of appellant's property without due process of law, and is void.

Taylor, Due Process of Law, chap. 11, §§ 216, 218–220.

The relation of the state to appellant under the contract is a continuing trust and the doctrine of laches is inapplicable.

7 Enc. U. S. Sup. Ct. Rep. 813, note 56.

Mr. **L. T. Turner** argued the cause, and, with Messrs. Harold Preston and O. B. Thorgrimson, filed a brief for appellees:

The question raised by appellant is now a moot one, and will not be considered by this court.

Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Kimball v. Kimball, 174 U. S. 158, 43 L. ed. 932, 19 Sup. Ct. Rep. 639; Washington Market Co. v. District of Columbia, 137 U. S. 62, 34 L. ed. 572, 11 Sup. Ct. Rep. 4; 2 Enc. Pl. & Pr. 344; Hice v. Orr, 16 Wash. 164, 47 Pac. 424; Barber Asphalt Paving Co. v. Hamilton, 80 Wash. 56, 141 Pac. 199.

The vacating of the waterway by the state merely constituted a breach of contract, and did not impair its obligation.

Lord v. Thomas, 64 N. Y. 107; Brown v. Colorado, 106 U. S. 98, 27 L. ed. 133, 1 Sup. Ct. Rep. 175; Caldwell v. Donaghey, 108 Ark. 60, 45 L.R.A.(N.S.) 721, 156 S. W. 839, Ann. Cas. 1915B, 133; Wright v. Columbus, H. V. & A. R. Co. 176 U. S. 481, 44 L. ed. 554, 20 Sup. Ct. Rep. 398.

Appellant has lost his rights under the contract through laches.

Brown v. Buena Vista County, 95 U. S. 157, 24 L. ed. 422; 16 Am. & Eng. Enc. Law, 356; Penn. Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; Keeling v. Pittsburg, V. & C. R. Co. 205 Pa. 31, 54 Atl. 485; Logansport v. Uhl, 99 Ind. 531, 50 Am. Rep. 109; Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 1.

[**234**] Mr. Justice **Pitney** delivered the opinion of the court:

Appellant filed his bill in equity for an injunction to restrain the enforcement of an act of the legislature of the state of Washington, approved March 11, 1913 (Sess. Laws, p. 195), entitled, "An Act Vacating a Portion of Smith's Cove Waterway, in the City of Seattle, and Vesting the Title of the Vacated Portion in the Port of Seattle," upon the ground (a) that it impaired the obligation of an existing contract between him and the state, in violation of § 10 of art. 1 of the Constitution of the United States; and (b) that it deprived him of property without due process of law, contrary to § 1 of the 14th Amendment. The district court, on final hearing, dismissed the bill (226 Fed. 287), and the case is brought here by direct appeal under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. p. 794], because of the constitutional questions.

The facts, shortly stated, are as follows: Under an act of the legislature approved March 9, 1893 (Sess. Laws, p. 241), which made provision for the excavation by private contract of waterways for the uses of navigation, com-

plainant and another party to whose rights he has succeeded obtained a contract with the state, acting by the commissioner of public lands, which was approved by the governor on March 7, 1896. It provided for the excavation by complainant of Smith's cove waterway, in Seattle harbor, extending from the outer harbor line through the intervening tidelands to the head of Smith's cove, the excavated material to be used for filling in and raising above high tide the adjacent tide and shore lands belonging to the state of Washington. For doing this he was to be entitled to compensation equivalent to the cost of the work, plus 15 per centum and interest, for which he was to have a lien upon the tide and shore lands so filled in. The state agreed to hold these lands subject to the operation of the contract pending its execution, and [235] subject to the ultimate lien of the contractor thereon, and that it would perform by its authorized agents all things required by the Act of 1893 to be performed by the state. The contract provided for and specified the character of the bulkheads and retaining walls to be used, reserving, however, to the commissioner of public lands, the right to modify these plans and specifications as to "shape, form, and character of material," as might appear necessary. The contract required complainant at his own cost to excavate also a waterway to extend from the north end of the Smith's cove waterway across the peninsula separating the cove from Salmon bay, such excavation to be made under the direction and in accordance with the plans of an engineer to be designated by the governor of the state or the Secretary of War of the United States, and when excavated to be owned, possessed, and controlled by the United States or by the state, free of cost to them, if the right of way and the privilege of excavating across the peninsula should be accorded to the contractor free of cost, or if fair compensation should be made to him therefor. Work was to be commenced within sixty days and completed within two years from the date of approval.

On May 4, 1896, complainant entered upon performance of the contract and commenced driving piles for the construction of a bulkhead. Almost immediately he was notified by the commissioner of public lands that the latter elected to exercise the right, as provided by the contract, to change the form of bulkhead. This had the effect of requiring a suspension of work until modified plans and specifications for the bulkheads should be prepared. Complainant did suspend the work, and it never was resumed thereafter. There were negotiations and correspondence between him and the commissioner of public lands looking to the preparation of the modified plans and specifications, but they resulted in nothing. [236] Each party seems to have insisted that it was the duty of the other to furnish them.

Complainant contends that he was at all times ready and prepared to carry out the contract on his part, but was prevented from doing so by acts and omissions of the state and its representatives, including the failure to furnish plans for the modified form of bulkhead and a failure to furnish complainant with a right of way across the peninsula between the head of Smith's cove and Salmon bay. Defendants contend that repeatedly, and in particular in the month of November, 1898, complainant was notified that his plans were wholly inadequate and would be insufficient for the purpose for which the retaining wall was designed; and that on the latter occasion he was notified to submit proper plans and specifications and to commence operations within ten days after their approval.

While the excavation project thus remained in suspense, and pursuant to an act authorizing establishment of port districts, approved March 14, 1911 (Sess. Laws, p. 412), the port of Seattle was established as a municipal corporation with territorial limits including Smith's cove waterway, Salmon bay, and the intervening peninsula. This act conferred extensive powers for the regulation, control, and improvement of the harbor and navigable and non-navigable waters within such district, in the interest of the public.

Thereafter, by the statute that is now under attack (Sess. Laws 1913, p. 195), it was enacted that the northerly part of the Smith's cove waterway should be vacated and the title thereto vested in the port of Seattle. Complainant was fully advised of this legislative measure, even prior to its enactment.

After it took effect, which was in June, 1913, the port commission took possession of the waterway, exercised control over it, and did a considerable amount of excavation, [237] filling, and bulkhead construction, having spent large sums of money therein between the taking effect of the act and November 14, 1914, when the bill of complaint was filed.

Coming to the questions raised upon the present appeal: The averments of the bill setting up the alleged obligations of complainant's contract with the state, and the contention that they were impaired by the Act of 1913, presented a controversy under the Constitution of the United States, and (a sufficient amount being involved) conferred jurisdiction upon the Federal court irrespective of the citizenship of the parties, and at the same time warranted a direct appeal to this court under § 238, Judicial Code. Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 508, 61 L. ed. 1280, 1285, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88.

The merits remain for determination.

Upon the first constitutional point, it is important to note the distinction between a statute that has the effect of violating or repudiating a contract previously made by the state and one that impairs its obligation. Had the legislature of Washington, pending performance or after complete performance by complainant, passed an act to alter materially the scope of his contract, to diminish his compensation, or to defeat his lien upon the filled lands, there would no doubt have been an attempted impairment of the obligation. The legislation in question had no such purpose or effect. It simply, after seventeen years of delay without substantial performance of the contract, provided that the project should be abandoned and title to the public lands turned over to the municipality. Supposing the contract had not been abandoned by complainant himself or terminated by his long delay, its obligation remained as before, and formed the measure of his right to recover from the state for the damages sustained. Brown v. Colorado, 106 U. S. 95, 98, 27 L. ed. 132, 133, 1 Sup. Ct. Rep. 175; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148–150, 45 L. ed. 788, 791–793, 21 Sup. Ct. Rep. 575; Dawson v. [**238**] Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 181, 49 L. ed. 713, 716, 25 Sup. Ct. Rep. 420; Lord v. Thomas, 64 N. Y. 107; Caldwell v. Donaghey, 108 Ark. 60, 64, 45 L.R.A.(N.S.) 721, 156 S. W. 839, Ann. Cas. 1915B, 133.

We deem it clear also that the Act of 1913 had not the effect of depriving complainant of property without due process of law, in contravention of the 14th Amendment. Assuming he had property rights and that they were taken, it clearly was done for a public purpose, and there was adequate provision for compensation in §§ 886–890, Rem. & Bal. Code of Washington, which entitle any person having a claim against the state to begin an action thereon in a designated court upon the mere giving of security for costs, whereupon service of the complaint is to be made upon the attorney general and secretary of state, the action is to proceed in all respects as other actions, with a right of appeal to the supreme court, and, in case of a final judgment against the state, a transcript of it is to be furnished to the auditor of state, who is required thereupon to "audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury." If his claim has not been barred by limitation of time, this statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking. Bragg v. Weaver, decided December 8, 1919 [251 U. S. 57, ante, 135, 40 Sup. Ct. Rep. 62].

The district court, besides finding complainant's case to be otherwise without merits, held in effect that he was barred from relief in equity by laches, because after the taking effect of the Act of 1913 he stood by for more than a year and permitted the port commission to enter upon extensive improvements and expend large moneys on the waterway and adjoining lands, before he began his suit. The only answer made to this is that the defense of laches was not pleaded. But in the equity practice of the courts [**239**] of the United States (excepted from the Conformity Act, see Rev. Stat. §§ 913, 914, Comp. Stat. §§ 1536, 1537, 6 Fed. Stat. Anno. 2d ed. pp. 18, 21) laches is a defense that need not be set up by plea or answer. It rests upon the long-established doctrine of courts of equity that their extraordinary relief will not be accorded to one who delays the assertion of his claim for an unreasonable length of time, especially where the delay has led to a change of conditions that would render it unjust to disturb them at his instance. It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such; and if it be not excused, his laches may be taken advantage of either by demurrer or upon final hearing. Maxwell v. Kennedy, 8 How. 210, 222, 12 L. ed. 1051, 1055; Badger v. Badger, 2 Wall. 87, 95, 17 L. ed. 836, 838; Marsh v. Whitmore, 21 Wall. 178,

185, 22 L. ed. 482, 485; Sullivan v. Portland & K. R. Co. 94 U. S. 806, 811, 24 L. ed. 324, 326; Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Landsdale v. Smith, 106 U. S. 391, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; Hammond v. Hopkins, 143 U. S. 224, 250, 36 L. ed. 134, 145, 12 Sup. Ct. Rep. 418; Galliher v. Cadwell, 145 U. S. 368, 371–373, 36 L. ed. 738–740, 12 Sup. Ct. Rep. 873; Hardt v. Heidweyer, 152 U. S. 547, 559, 38 L. ed. 548, 552, 14 Sup. Ct. Rep. 671; Abraham v. Ordway, 158 U. S. 416, 420, 39 L. ed. 1036, 1039, 15 Sup. Ct. Rep. 894; Willard v. Wood, 164 U. S. 502, 524, 41 L. ed. 531, 540, 17 Sup. Ct. Rep. 176; Penn. Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 696–698, 42 L. ed. 626, 630, 631, 18 Sup. Ct. Rep. 223.

Decree affirmed.

WILLIAM SCHALL, Jr., Carl Muller, Edmund Pavenstedt, and Frederick Muller-Schall, Petitioners,

v.

FREDERIC CAMORS et al., Trustees of the Bankrupt Estates of Albert Le More, Bankrupt, and of Edward E. Carriere, Bankrupt.

(See S. C. Reporter's ed. 239–255.)

Bankruptcy — provable debts — tort claims.

1. A claim for unliquidated damages arising out of a pure tort which neither constitutes a breach of an express contract nor results in any unjust enrichment of the tort-feasor that may form the basis of an implied contract is not made provable in bankruptcy by the provision of the Bankrupt Act of July 1, 1898, § 63*b*, that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate, since this provision does not add claims of purely tortious origin to the provable debts enumerated in paragraph *a* of such section, but provides a procedure for liquidating claims provable under that paragraph if not already liquidated.

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

Note.—On right to prove unliquidated claim for tort in bankruptcy—see note to Brown v. United Button Co. 8 L.R.A. (N.S.) 961.

On double proof of claim against estate of firm and individual partner—see note to Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391.

Bankruptcy — provable debts — tort claims.

2. The class of provable claims in bankruptcy, as set forth in the provisions of the Bankrupt Act of July 1, 1898, § 63, was not enlarged so as to include mere tort claims by anything in the amendment to § 17 made by the Act of February 5, 1903, confessedly designed to restrict the scope of a discharge in bankruptcy.

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

Bankruptcy — individual and partnership creditors.

3. No legal or equitable claim as against individual partners that might, by waiver of the tort or otherwise, be deemed to arise out of a tort done in the course of the partnership business for the benefit of the firm, and without benefit to the partners as individuals, can displace the equity of other creditors recognized in the Bankrupt Act of July 1, 1898, § 5, and put the claimants in a position of equality with others who were actual creditors of the individual partners, and of preference over other firm creditors.

[For other cases, see Bankruptcy, X. c, 1, in Digest Sup. Ct. 1908.]

[No. 84.]

Argued November 17, 1919. Decided January 5, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Louisiana, disallowing certain claims against the individual bankrupt members of a bankrupt partnership. Affirmed.

See same case below, — A.L.R. —, 162 C. C. A. 178, 250 Fed. 6.

The facts are stated in the opinion.

Mr. **Ralph S. Rounds** argued the cause, and, with Mr. Eugene Congleton, filed a brief for petitioners:

The petitioners' claim is provable against the individual partners on the ground that the fraud of the individual members of the firm made them liable in quasi contract or equitable debt; and against the firm in express contract or in quasi contract or equitable debt, because it received the proceeds of the frauds.

Ex parte Adamson, L. R. 8 Ch. Div. 807, 47 L. J. Bankr. N. S. 106, 38 L. T. N. S. 920, 26 Week. Rep. 892; Re Davison, L. R. 13 Q. B. Div. 50, 50 L. T. N. S. 635; Catts v. Phalen, 2 How. 376, 11 L. ed. 306; Burton v. Driggs, 20 Wall. 125, 22 L. ed. 299; Re E. J. Arnold & Co. 133 Fed. 789; Pom. Eq. Jur. 3d ed. § 1047; Stanhope v. Swafford, 77 Iowa, 594, 42 N. W. 450; First State Bank v.

McGaughe, 38 Tex. Civ. App. 495, 86 S. W. 55.

The claims filed by Muller, Schall, & Company, against the separate estates of Albert Le More and Edward E. Carriere are provable in bankruptcy as tort claims.

Friend v. Talcott, 228 U. S. 27, 57 L. ed. 718, 33 Sup. Ct. Rep. 505; Clarke v. Rogers, 228 U. S. 534, 57 L. ed. 953, 33 Sup. Ct. Rep. 587; Collier, Bankr. 9th ed. 853; Jackson v. Wauchula Mfg. & Timber Co. 144 C. C. A. 551, 230 Fed. 409; Williams, Bankr. Pr. 10th ed. 142.

If ambiguity exists, the heading of the statute may be considered in its interpretation.

United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 313; United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Smythe v. Fiske, 23 Wall. 374, 380, 23 L. ed. 47, 49; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Knowlton v. Moore, 178 U. S. 41, 65, 44 L. ed. 969, 978, 20 Sup. Ct. Rep. 747.

Reducing a claim to judgment does not in general alter its character or change the nature of the claim.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Kenney v. Supreme Lodge, L. O. M. 285 Ill. 188, 4 A.L.R. 964, 120 N. E. 631; Boynton v. Ball, 121 U. S. 457, 30 L. ed. 985, 7 Sup. Ct. Rep. 981.

A statute is capable of legislative as well as judicial construction, and legislative construction by amendment of a statute is persuasive upon the courts.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 308, 55 L. ed. 738, 746, 31 Sup. Ct. Rep. 578; Baker v. Swigart, 118 C. C. A. 313, 199 Fed. 867.

The cardinal rule of statutory construction is that all the words of a statute should be read together to determine its meaning. If the several sections of the statute relating to a particular subject, when read together, are harmonious, there is no room for construction by the courts, and, irrespective of what they may consider the best policy to be, they should give effect to the statute.

Thornley v. United States, 113 U. S. 310, 313, 28 L. ed. 999, 1000, 5 Sup. Ct. Rep. 491; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 33, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; Bend v. Hoyt, 13 Pet. 263, 272, 10 L. ed. 154, 158; Montclair Twp. v. Ramsdell, 107 U. S. 147, 152, 27 L. ed. 431, 432, 2 Sup. Ct. Rep. 391.

It is also a settled rule of statutory construction that prior acts may be resorted to, to solve, but not to create, an ambiguity.

Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155.

A construction which denies tort creditors the right to prove in bankruptcy, and denies the bankrupt a discharge from tort claims, is inequitable and unjust, and if the statute is ambiguous, should be avoided by the court.

Knowlton v. Moore, 178 U. S. 41, 65, 44 L. ed. 969, 978, 20 Sup. Ct. Rep. 747.

Claims for negligence and other tort claims against corporations which cannot avail themselves of the bankruptcy statutes, as railroads, etc., whose insolvent estates are administered in courts of equity, may be reduced to judgment after the filing of the bill and the appointment of a receiver, or liquidated in the insolvency proceedings, and may afterwards participate in the distribution of the insolvent estate with contract creditors.

Pennsylvania Steel Co. v. New York City R. Co. 165 Fed. 459; Veatch v. American Loan & T. Co. 25 C. C. A. 39, 49 U. S. App. 191, 79 Fed. 471; Atchison, T. & S. F. R. Co. v. Osborn, 78 C. C. A. 378, 148 Fed. 606.

If tort claims in general are not provable, and therefore not dischargeable under the provisions of the statute, further instances of the imperfect working of the statute, and, in fact, of the failure of its purpose, are presented.

Central Trust Co. v. Chicago Auditorium Asso. 240 U. S. 581, 591, 60 L. ed. 811, 815, L.R.A.1917B, 580, 36 Sup. Ct. Rep. 412.

The Bankruptcy Act of 1898 marked a departure from the legislative policy of the former bankruptcy laws to meet changed conditions.

Re Fife, 109 Fed. 880, 3 N. B. N. Rep. 835; Re McCauley, 101 Fed. 223; Tinker v. Colwell, 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. Rep. 505; Re Freche, 109 Fed. 620; Central Trust Co. v. Chicago Auditorium Asso. 240 U. S. 581, 60 L. ed. 811, L.R.A.1917B, 580, 36 Sup. Ct. Rep. 412.

The liability of Albert Le More and Edward E. Carriere being predicated upon their conscious, criminal participation in the frauds, it is immaterial whether the claims are presented as claims in tort for fraud, or as claims upon an implied or quasi contract or

equitable debt. In any event, the petitioners are entitled to prove their claims both against the firm estate and against the individual estates of the partners.

22 Am. & Eng. Enc. Law, 171; Lindley, Partn. 8th ed. 821; Black, Bankr. § 129; Re McCoy, 80 C. C. A. 60, 150 Fed. 106; Re Coe, 169 Fed. 1002, affirmed in 106 C. C. A. 181, 183 Fed. 745; Re Blackford, 35 App. Div. 330, 54 N. Y. Supp. 972; Re Baxter, 18 Nat. Bankr. Reg. 62, Fed. Cas. No. 1,119; Re Jordan, 2 Fed. 319; Re Parkers, 19 Q. B. Div. 84, 56 L. J. Q. B. N. S. 338, 57 L. T. N. S. 198, 39 Week. Rep. 566, 4 Morrell, 135; Re Peck, 206 N. Y. 55, 41 L.R.A.(N.S.) 1223, 99 N. E. 258, Ann. Cas. 1914A, 798; Re Pierson, 19 App. Div. 483, 46 N. Y. Supp. 557; McIntyre v. Kavanaugh, 242 U. S. 138, 61 L. ed. 205, 37 Sup. Ct. Rep. 38; City Nat. Bank v. National Park Bank, 32 Hun, 105; Terry v. Munger, 121 N. Y. 171, 8 L.R.A. 216, 18 Am. St. Rep. 803, 24 N. E. 272; Loveland, Bankr. 315; Russell v. McCall, 141 N. Y. 437, 38 Am. St. Rep. 807, 36 N. E. 498; Sadler v. Lee, 6 Beav. 324, 49 Eng. Reprint, 850, 12 L. J. Ch. N. S. 407, 7 Jur. 476; Re Vetterlein, 20 Fed. 109.

The English doctrine of election has been repudiated by the American cases.

Re Farnum, Fed. Cas. No. 4,674; Story, Partn. 3d ed. § 384, p. 609; Mead v. National Bank, 6 Blatchf. 180, Fed. Cas. No. 9,366; Re Bigelow, 3 Ben. 146, Fed. Cas. No. 1,397; Re Bradley, 2 Biss. 515, Fed. Cas. No. 1,772; Re Howard, 4 Nat. Bankr. Reg. 571, Fed. Cas. No. 6,750; Emery v. Canal Nat. Bank, 3 Cliff. 507, Fed. Cas. No. 4,446; Re Baxter, 18 Nat. Bankr. Reg. 62, Fed. Cas. No. 1,119; Re Jordan, 2 Fed. 319; Re Blackford, 35 App. Div. 330, 54 N. Y. Supp. 972.

There is an unbroken current of authority under the earlier Bankruptcy Acts, establishing that the substantive rights of creditors to make proof where a firm and its individual members are jointly and severally liable upon an express contract or in quasi contract is not affected or impaired by the provisions in the earlier acts corresponding to § 5f of the present Bankruptcy Act.

Re Farnum, Fed. Cas. No. 4,674; Mead v. National Bank, 6 Blatchf. 180, Fed. Cas. No. 9,366; Re Bigelow, 3 Ben. 146, Fed. Cas. No. 1,397; Re Bradley, 2 Biss. 515, Fed. Cas. No. 1,772; Re Howard, 4 Nat. Bankr. Reg. 571, Fed. Cas. No. 6,750; Emery v. Canal Nat. Bank, 3 Cliff. 507, Fed. Cas. No. 4,446; Re Baxter, 18 Nat. Bankr. Reg. 62, Fed. Cas. No. 1,119; Re Jordan, 2 Fed. 319.

It follows that the enactment of the same general rule in the Bankruptcy Act of 1898 justifies the conclusion that it was the legislative intent that the statute of 1898 should bear the same construction as the corresponding provisions of the earlier Bankruptcy Acts.

Farmers' & M. Nat. Bank v. Ridge Ave. Bank, 240 U. S. 498, 505, 60 L. ed. 767, 769, L.R.A.1917A, 135, 36 Sup. Ct. Rep. 461.

Indeed, this construction has had the sanction of this court.

Re McCoy, 80 C. C. A. 60, 150 Fed. 106; Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

Mr. **Monte M. Lemann** argued the cause, and, with Messrs. J. Blanc Monroe and D. B. H. Chaffe, filed a brief for respondents:

No basis can possibly be suggested for the raising of an implied or quasi contract in this case on the part of Le More or Carriere individually, since the transactions were entirely partnership transactions and the proceeds thereof inured entirely to the benefit of the partnership.

Keener, Quasi Contr. p. 160; Bigby v. United States, 188 U. S. 400, 409, 47 L. ed. 519, 524, 23 Sup. Ct. Rep. 468; Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391, 110 C. C. A. 409, 188 Fed. 611; Kyle v. Chester, 42 Mont. 522, 37 L.R.A.(N.S.) 230, 113 Pac. 749; Greer v. Newland, 70 Kan. 310, 70 L.R.A. 554, 109 Am. St. Rep. 424, 77 Pac. 98, 78 Pac. 835, 12 Am. & Eng. Enc. Law, 2d ed. 695, 696; Waiver of Tort, by Prof. Keener, 6 Harvard L. Rev. pp. 223, 269; Prof. Ames, in 2 Harvard L. Rev. p. 63; Langdell, Eq. Jur. pp. 38, 39.

Claims in tort of the sort here presented have never been provable under any of the Bankruptcy Acts enacted in this country; nor are they provable under the Bankruptcy Laws of England.

Dusar v. Murgatroyd, 1 Wash. C. C. 13, Fed. Cas. No. 4,199; Doggett v. Emerson, 1 Woodb. & M. 195, Fed. Cas. No. 3,962; Re Schwartz, 14 Blatchf. 196, Fed. Cas. No. 12,502; Re Lachemeyer, 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7,966; Black v. McClelland, 12 Nat. Bankr. Reg. 481, Fed. Cas. No. 1,462; Re Hennocksburgh, 6 Ben. 150, Fed. Cas. No. 6,367; Re Boston & F. Iron Works, 23 Fed. 880; Re Schuchardt, 8 Ben. 585, Fed. Cas. No. 12,483; Strang v. Bradner, 114 U. S.

555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1038; 2 Laws of England (Halsbury), p. 197; Ex parte Stone, 61 L. T. N. S. 83, 37 Week. Rep. 767, 6 Morrell, 158; Ex parte Baum, L. R. 9 Ch. 673, 44 L. J. Bankr. N. S. 25, 31 L. T. N. S. 12; Ex parte Brooke, L. R. 3 Ch. Div. 494, 25 Week. Rep. 261.

Claims in tort are not provable under the present Bankruptcy Act; § 63b adds nothing to the catalogue of provable claims contained in § 63a.

Re Hirschman, 2 N. B. N. Rep. 1123, 104 Fed. 70; Re Jorolemon-Oliver Co. 130 C. C. A. 217, 213 Fed. 625; Colman Co. v. Withoft, 115 C. C. A. 222, 195 Fed. 250; 6 Words & Phrases, 4,985; 3 Words & Phrases, 2d ed. 738; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 57, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Central Trust Co. v. Chicago Auditorium Asso. 240 U. S. 581, 60 L. ed. 811, L.R.A. 1917B, 580, 36 Sup. Ct. Rep. 412; Collier, Bankr. 11th ed. p. 973; Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; Re Southern Steel Co. 183 Fed. 498; Re Hirschman, 2 N. B. N. Rep. 1123, 104 Fed. 69; Re Filer, 125 Fed. 261; Pindel v. Holgate, 137 C. C. A. 158, 221 Fed. 349, Ann. Cas. 1916C, 983; Re Mullings Clothing Co. L.R.A.1918A, 539, 151 C. C. A. 134, 238 Fed. 67; Switzer v. Henking, 15 L.R.A. (N.S.) 1151, 86 C. C. A. 140, 158 Fed. 784; Moore v. Douglas, 144 C. C. A. 541, 230 Fed. 400; Re Roth, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 667; Re Crescent Lumber Co. 154 Fed. 724; Collier, Bankr. 11th ed. 1917, p. 976; Black, Bankr. 1914, § 514; Remington, Bankr. 3d ed. 1915, § 635; Brandenburg, Bankr. 1917 ed. § 570; Loveland, Bankr. 4th ed. 1912, p. 668; C. J. 1917, 307, 400.

The list of provable claims as enumerated in § 63a is not enlarged by the preceding § 17, either as that section was originally enacted or as it was amended in 1903.

United States v. Jackson, 75 C. C. A. 41, 143 Fed. 783; Re Rouse, H. & Co. 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; Sutherland, Stat. Constr. § 158; State, Bartlett, Prosecutor, v. Trenton, 38 N. J. L. 67; State ex rel. Lutfring v. Goetze, 22 Wis. 365; 26 Am. & Eng. Ency. Law, 2d ed. 618; Ware v. Hylton, 3 Dall. 199, 233, 1 L. ed. 568, 582; Alexander v. Alexandria, 5 Cranch, 1, 3 L. ed. 19; Williams v. Western & A. R. Co. 142 Ga. 696, 83 S. E. 525; Victoria v. British Columbia Electric R. Co. 15 B. C. 43; State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N. W. 224; 36 Cyc. 1128; Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; Peck v. Jenness, 7 How. 612, 12 L. ed. 841; Friend v. Talcott, 228 U. S. 27, 57 L. ed. 718, 33 Sup. Ct. Rep. 505; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265; Re United Button Co. 140 Fed. 495; Brown v. United Button Co. 8 L.R.A.(N.S.) 961, 79 C. C. A. 70, 149 Fed. 48, 9 Ann. Cas. 445; Re New York Tunnel Co. 86 C. C. A. 556, 159 Fed. 688; Re Southern Steel Co. 183 Fed. 498; Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391, 110 C. C. A. 409, 188 Fed. 611; Williams v. United States Fidelity & G. Co. 236 U. S. 549, 59 L. ed. 713, 35 Sup. Ct. Rep. 289; Central Trust Co. v. Chicago Auditorium Asso. 240 U. S. 581, 60 L. ed. 811, L.R.A. 1917B, 580, 36 Sup. Ct. Rep. 412; Kreitlein v. Ferger, 238 U. S. 21, 27, 59 L. ed. 1184, 1186, 35 Sup. Ct. Rep. 685; Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664.

The intention of Congress in amending § 17 was merely to renew the rule under the Act of 1867 by which claims originating in contract and thus provable would be excepted from a discharge, even though not reduced to judgment, if the contract had been procured by a fraudulent representation.

Black, Bankr. § 743; Loveland, Bankr. § 760; Collier, Bankr. 9th ed. 390.

If Congress had intended to extend the class of provable claims, the simplest, most direct, and most certain way would have been by amending § 63a.

Re Hirschman, 2 N. B. N. Rep. 1123, 104 Fed. 70.

No sufficient reason has been suggested to impute to Congress an intent to have a different rule of construction applied to the Act of 1898 from that which had been judicially applied to the similar provisions of the preceding Act of 1867.

Greenleaf v. Goodrich, 101 U. S. 278, 25 L. ed. 845; 2 Enc. U. S. Sup. Ct. Rep. p. 137; Farmers' & M. Nat. Bank v. Ridge Avenue Bank, 240 U. S. 498, 60 L. ed. 767, L.R.A.1917A, 135, 36 Sup. Ct. Rep. 461.

The transactions out of which the claims of Muller, Schall, & Company arose were entirely partnership transactions, and the claims are provable against the partnership estate alone;

double proof against the individual estates is not admissible.

Adams v. Deckers Valley Lumber Co. 120 C. C. A. 302, 202 Fed. 48; Re C. H. Kendrick & Co. 226 Fed. 980, 35 Am. Bankr. Rep. 628; Remington, Bankr. 3d ed. 2121; Re Stevens, 104 Fed. 323; Davis v. Turner, 56 C. C. A. 669, 120 Fed. 605; Hibberd v. McGill, 64 C. C. A. 158, 129 Fed. 590; Buckingham v. First Nat. Bank, 65 C. C. A. 498, 131 Fed. 192; Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176; Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391, 110 C. C. A. 409, 188 Fed. 611; Collier, Bankr. 10th ed. 1917, p. 197; United States v. Ames, 99 U. S. 35, 44-46, 25 L. ed. 295, 300, 301; Devost v. Twin State Gas & E. Co. 162 C. C. A. 419, 250 Fed. 352; Farmers' & M. Nat. Bank v. Ridge Ave. Bank, 240 U. S. 498, 60 L. ed. 767, L.R.A.1917A, 135, 36 Sup. Ct. Rep. 461.

It was the special object of the Bankruptcy Act to remove all purely technical circumstances in the administration of partnership and individual estates, and to permit claims to be handled as justice and equity required.

2 Fed. Stat. Anno. 2d ed. 590.

Mr. Justice **Pitney** delivered the opinion of the court:

The transactions out of which this controversy arose took place in the years 1913 and 1914. At that time Le More and Carriere carried on business as partners in the cities of New Orleans, Louisiana, and Mobile, Alabama. Afterwards, and in the month of May, 1914, upon an involuntary petition in bankruptcy, the firm and the individual members thereof were adjudged bankrupts in the United States district court for the eastern district of Louisiana, New Orleans division, and the present respondents were elected and qualified as trustees of both the partnership and the individual estates. The present [**247**] petitioners, constituting the firm of Muller, Schall, & Company, filed three proofs of claim, one against the partnership and one against each of the individual partners, all based upon the same transactions, which consisted of the purchase by claimants in the city of New York, through an agent of the bankrupt firm named Trippe, of certain bills of exchange and checks drawn by the firm upon London, Paris, and Antwerp, aggregating about $70,000, all of which were sold to petitioners for full value on the faith of certain fraudulent representations not necessary to be specified, and, at maturity, were presented for payment, dishonored, and protested, and notice thereof given to the firm. At the time of these transactions Le More was in Europe and Carriere in New Orleans, and neither of them participated in the particular transactions, although both were cognizant of them and responsible for the false representations. The particular drafts and checks were not signed or indorsed by either partner, and neither profited from their sale except through his interest in the firm. The transactions occurred in the ordinary course of the firm's business, except that they were fraudulent and the proceeds of the drafts and checks went to the credit of the firm and were used in the conduct of its business. Petitioners' claim against the partnership is based upon the drafts and checks as partnership obligations in contract, and also upon the damages sustained by reason of the fraudulent representations. The claims against the individual estates of the partners in terms demand only damages for the false representations, but are relied upon as showing also, by inference, an individual liability in quasi contract or equitable debt.

The trustees petitioned the district court that the latter claims should be expunged. After a hearing the referee in bankruptcy, for reasons expressed in an elaborate opinion, ordered that the claims against the individual [**248**] estates should be "expugned and disallowed," and the rights of claimants to participate in dividends in such estates denied. Upon review, the district court affirmed this order, and, upon appeal, its decree was affirmed by the circuit court of appeals, — A.L.R. —, 162 C. C. A. 178, 250 Fed. 6. A writ of certiorari brings the case here.

No question is made as to whether the referee's order, in wholly expunging the claims against the individual estates and denying to petitioners all participation therein, went too far, in view of the provision of § 5f of the Bankruptcy Act (July 1, 1898, chap. 541, 30 Stat. at L. 544, 548, Comp. Stat. § 9589, 1 Fed. Stat. Anno. 2d ed. p. 578), that "should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts." If the decision be sustained, petitioners nevertheless will be entitled, upon establishing their claim against the partnership, to participate as partnership creditors in any surplus that may remain of indi-

vidual assets after payment of individual debts. What was asserted and overruled was a right to double proof, establishing a separate and independent liability on the part of the individual partners that would give to the claimants, in addition to their participation in the partnership assets, a participation in the individual assets on equal terms with other individual creditors, and in preference to other partnership creditors.

The first and fundamental question is whether a claim for unliquidated damages, arising out of a pure tort which neither constitutes a breach of an express contract nor results in any unjust enrichment of the tort-feasor that may form the basis of an implied contract, is provable in bankruptcy. This question was passed upon by the referee and by the district court; it has been most elaborately argued pro and con in this court; its general importance in the administration of the Bankruptcy Act warranted a review of the case by certiorari; and hence it is [**249**] proper that we dispose of it, without regard to whether a like result might follow, upon the particular facts of the case, from a decision of any subordinate question.

Considering, therefore, the question stated: Among other definitions included in § 1 of the Bankruptcy Act is this: "(11) 'debt' shall include any debt, demand, or claim provable in bankruptcy." Section 63 runs as follows: "Debts which may be proved.—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied; . . .

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

In Dunbar v. Dunbar, 190 U. S. 340, 350, 47 L. ed. 1084, 1092, 23 Sup. Ct. Rep. 757, it was said: "This ¶ b, however, adds nothing to the class of debts which might be proved under ¶ a of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63a, to be liquidated as the court should direct." But in Crawford v. Burke, 195 U. S. 176, 187, 49 L. ed. 147, 151, 25 Sup. Ct. Rep. 9, the question whether the effect of ¶ b was to cause an unliquidated claim, susceptible of liquidation, but not literally embraced by ¶ a, to be provable in bankruptcy, was regarded as still open.

That clause b provides the procedure for liquidating claims provable under clause a if not already liquidated, especially those founded upon an open account or a contract express or implied, is entirely clear, and has been [**250**] recognized repeatedly in our decisions. Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 447, 448, 53 L. ed. 591, 593, 594, 29 Sup. Ct. Rep. 332; Central Trust Co. v. Chicago Auditorium Asso. 240 U. S. 581, 592, 60 L. ed. 811, 816, L.R.A.1917B, 580, 36 Sup. Ct. Rep. 412. Has it the further effect of admitting all unliquidated claims, including those of tortious origin?

Historically, bankruptcy laws, both in England and in this country, have dealt primarily and particularly with the concerns of traders. Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely ex delicto. Act of April 4, 1800, chap. 19, 2 Stat. at L. 19; Dusar v. Murgatroyd, 1 Wash. C. C. 13, Fed. Cas. No. 4,199; Act of August 19, 1841, chap. 9, 5 Stat. at L 440; Doggett v. Emerson, 1 Woodb. & M. 195, Fed. Cas. No. 3,962; Act of March 2, 1867, chap. 176, §§ 11 and 19, 14 Stat. at L. 517, 521, 525, U. S. Rev. Stat. §§ 5014, 5067; Black v. McClelland, Fed. Cas. No. 1,462; Re Schuchardt, 8 Ben. 585, Fed. Cas. No. 12,483; Re Boston & F. Iron Works, 23 Fed. 880.

Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its 63d section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures proposed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the first session of the 54th Congress. Having then failed of passage, it was submitted again in the second session of the 55th Congress as a substitute for a Senate bill; after dis-

agreeing votes of the two Houses, it went to conference, and as the result of a conference [251] report became law. It is significant that § 63, defining "debts which may be proved," remained unchanged from first to last, except for a slight and insignificant variance in clause (5) in the final print, the word "interests" having been substituted for "interest." House Rept. No. 1228, 54th Cong. 1st Sess. p. 39; House Rept. No. 65, 55th Cong. 2d Sess. p. 21; Senate Doc. No. 294, 55th Cong. 2d Sess. p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfils this function, and would have to receive a strained interpretation in order that it should include claims arising purely ex delicto. Such claims might easily have been mentioned if intended to be included. Upon every consideration, we are clear that claims based upon a mere tort are not provable. Where the tortious act constitutes at the same time a breach of contract, a different question may be raised, with which we have no present concern; and where, by means of the tort, the tort-feasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim quasi ex contractu. Crawford v. Burke, supra; Tindle v. Birkett, 205 U. S. 183, 186, 51 L. ed. 762, 764, 27 Sup. Ct. Rep. 493; Clarke v. Rogers, 106 C. C. A. 64, 183 Fed. 518, 521, 522, affirmed in 228 U. S. 534, 543, 57 L. ed. 953, 957, 33 Sup. Ct. Rep. 587.

Of course, §§ 63 and 17 are to be read together. The reference in the latter section to "provable debts," defined in the former, would be sufficient to show this. See Crawford v. Burke, 195 U. S. 176, 193, 49 L. ed. 147, 153, 25 Sup. Ct. Rep. 9; Tindle v. Birkett, 205 U. S. 183, 186, 51 L. ed. 762, 764, 27 Sup. Ct. Rep. 493; Friend v. Talcott, 228 U. S. 27, 39, 57 L. ed. 718, 723, 33 Sup. Ct. Rep. 505; Clarke v. Rogers, 228 U. S. 534, 548, 57 L. ed. 953, 959, 33 Sup. Ct. Rep. 587. It is petitioners' contention that § 17, as amended in 1903 (Act of February 5, 1903, chap. 487, § 5, 32 Stat. at L. 797, 798, Comp. Stat. § 9601), amounts to a legislative [252] construction admitting tort claims to proof. The section as it stood before, and the nature of the amendment, are set forth in the margin.[1] We are referred to the Committee's report (House Rept. No. 1698, 57th Cong. 1st Sess. pp. 3, 6) as indicating that, by the law as it stood, in the opinion of the Committee, claims created by fraud, but not reduced to judgment, were discharged; reference having been made to Re Rhutassel, 96 Fed. 597, and Re Lewensohn, 2 N. B. N. Rep. 381, 99 Fed. 73, affirmed in 44 C. C. A. 309, 104 Fed. 1006, as contradictory decisions upon the point. But neither the report of the Committee nor the language of the amendment gives the least suggestion of an intent to enlarge the description of provable claims as set forth in § 63. On the contrary, the purpose was to limit more [253] narrowly the effect of a discharge by enlarging the class of provable debts that were to be excepted from it. By the terms of the section, both before and after amendment, the scope of the exception was qualified by the fact that the discharge released the bankrupt only from "provable debts."

[1] Section as originally enacted (30 Stat. at L. 550, chap. 541, Comp. Stat. § 9601, 1 Fed. Stat. Anno. 2d ed. 708).

"Sec. 17. Debts not affected by a discharge.—(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) *are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another;* (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Amendment of 1903 (32 Stat. at L. 798, chap. 487, Comp. Stat. § 9601) inserted in the place of clause 2 the following:

"(2) *are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation.*"

NOTE: By a further amendment (Act of March 2, 1917, chap. 153, 39 Stat. at L. 999, Comp. Stat. § 9601) there was inserted after the word "female," instead of "or for criminal conversation," the following: "*or for breach of promise of marriage accompanied by seduction, or for criminal conversation.*"

And if the excepting clause as amended might seem to extend to some claims not otherwise provable, its own force must be deemed to be limited by referring to § 63 for the definition of provability. It is not admissible to give to this amendment, confessedly designed to restrict the scope of a discharge in bankruptcy, the effect of enlarging the class of provable claims.

Aside from § 17 or the amendment thereof, it has been held by the Federal courts generally that § 63 does not authorize the liquidation and proof of claims arising ex delicto and unaffected by contract, express or implied. Re Hirschman, 2 N. B. N. Rep. 1123, 104 Fed. 69–71; Re Yates, 114 Fed. 365, 367; Re Crescent Lumber Co. 154 Fed. 724, 727; Re Southern Steel Co. 183 Fed. 498.

And that the amendment of § 17 does not enlarge the class of provable claims enumerated in § 63 has been recognized in several well-considered decisions of the Federal courts, which have held, upon satisfactory grounds, that pure tort claims are not provable. Re United Button Co. 140 Fed. 495, 499, et seq.; s. c. on appeal, Brown v. United Button Co. 8 L.R.A.(N.S.) 961, 79 C. C. A. 70, 149 Fed. 48, 52, 53, 9 Ann. Cas. 445; Re New York Tunnel Co. 86 C. C. A. 556, 159 Fed. 688, 690. In Jackson v. Wauchula Mfg. & Timber Co. 144 C. C. A. 551, 230 Fed. 409, 411, and again in the present case (— A.L.R. —, 162 C. C. A. 178, 250 Fed. 7), the circuit court of appeals for the fifth circuit passed the question as unnecessary for the decision.

There is an argument ab inconvenienti, based upon the supposed danger that if tort claims be held not provable they may be preferred by failing debtors without redress [254] under § 60, a and b (30 Stat. at L. 562, chap. 541, amended February 5, 1903, chap. 487, § 13, 32 Stat. at L. 797, 799, amended June 25, 1910, chap. 412, § 11, 36 Stat. at L. 838, 842, Comp. Stat. § 9644, 1 Fed. Stat. Anno. 2d ed. p. 1026), held to apply only to provable claims (Richardson v. Shaw, 209 U. S. 365, 381, 52 L. ed. 835, 843, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; see also Clarke v. Rogers, 228 U. S. 534, 542, 57 L. ed. 953, 957, 33 Sup. Ct. Rep. 587). We are not much impressed. If there be danger of mischief here, other than such as may be reached under the provisions of § 67e or § 70e, respecting fraudulent conveyances and transfers (see Dean v. Davis, 242 U. S. 438, 444, 61 L. ed. 419, 421, 37 Sup. Ct. Rep. 130), the Congress may be trusted to supply the remedy by an appropriate amendment.

It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable in solido not only as partners, but individually; and that, irrespective of whether the claims are provable in tort for the fraud, they are provable and were properly proved both against the individual partners and against the firm as claims in quasi contract or equitable debt. But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubtless it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where, by reason of insolvency, it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give petitioners not only a right to share in the partnership assets on equal terms with other partnership creditors, but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. at L. 547, 548, chap. 541, Comp. Stat. § 9589, 1 Fed. Stat. Anno. 2d ed. p. 578) establishes on a firm basis the respective [255] equities of the individual and firm creditors.[2]

[2] "Sec. 5. Partners.— . . .

"(d) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

. . . . . .

"(f) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. . . .

"(g) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise. And since, in this case, the tort was done in the course of the partnership business, for the benefit of the firm and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors. Reynolds v. New York Trust Co. 39 L.R.A.(N.S.) 391, 110 C. C. A. 409, 188 Fed. 611, 619, 620.

Decree affirmed.

---

[256] MERGENTHALER LINOTYPE COMPANY, Plff. in Err.,
v.
SAMUEL W. DAVIS and W. B. Hayes.

(See S. C. Reporter's ed. 256–259.)

Error to state court — when judgment is that of highest state court.

1. A judgment of a Missouri court of appeals which reversed the judgment below after the state supreme court had, on certiorari, quashed a prior judgment of affirmance in the court of appeals, and had remanded the cause to that court for decision, is a judgment of the highest state court for purposes of a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1146–1167, 2616–2634, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — when raised too late.

2. A Federal question first raised on motion for rehearing in a state appellate court comes too late to serve as the basis of a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1292–1310, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — error or certiorari.

3. The assertion of a title, right, privilege, or immunity under the Federal Constitution may afford the basis for a writ of certiorari from the Federal Supreme Court to a state court, but it constitutes no ground for a writ of error.

[No. 192.]

Submitted on motion to dismiss December 8, 1919. Decided January 5, 1920.

IN ERROR to the Springfield Court of Appeals of the State of Missouri to review a judgment which, conformably to the mandate of the Supreme Court of the state, reversed a judgment of the Circuit Court of Buckner County in favor of plaintiff, a foreign corporation, in a suit for rentals under a lease of a machine. Dismissed for want of jurisdiction.

See same case below, in Supreme Court, 271 Mo. 475, 196 S. W. 1132; in Court of Appeals, — Mo. App. —, 202 S. W. 300.

The facts are stated in the opinion.

Note.—As to when judgment sought to be reviewed in Federal Supreme Court is that of highest state court—see note to Norfolk & S. Turnp. Co. v. Virginia, 56 L. ed. U. S. 1082.

As to when Federal question is raised in time to sustain appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884 and Kipley v. Illinois 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On certiorari to state courts—see notes to Andrews v. Virginian R. Co. 63 L. ed. U. S. 236; and Bruce v. Tobin, 62 L. ed. U. S. 123.

Mr. **Bradford Butler** submitted the cause for plaintiff in error:

Where the record shows that the constitutional question was treated by the state court as being involved in the case, and is distinctly passed upon by it, it will be held to be open to examination by the United States Supreme Court on writ of error.

Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, L.R.A.1918E, 190, 36 Sup. Ct. Rep. 204; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 Sup. Ct. Rep. 671; Miedrich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 Sup. Ct. Rep. 309; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Carlson v. Washington, 234 U. S. 103, 58 L. ed. 1,237, 34 Sup. Ct. Rep. 717; Grannis v. Ordean, 234 U. S. 385, 58 L. ed. 1363, 34 Sup. Ct. Rep. 779; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; Illinois C. R. Co. v. Kentucky, 218 U. S. 551, 54 L. ed. 1147, 31 Sup. Ct. Rep. 95; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Sweringen v. St. Louis, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Mallett v. North Carolina, 181 U. S. 590, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241.

The writ of error in this case was properly directed to the judgment of the Springfield court of appeals, as that was the only final judgment in the action, and under the Missouri Constitution, as construed by the Missouri supreme court, this was the judgment of the highest court of the state in which a determination in the matter could be had.

Mitchell v. Joplin Nat. Bank — Mo. —, 201 S. W. 903; Hawkins v. St. Louis & S. F. R. Co. — Mo. App. —, 202 S. W. 1060; State v. Chicago, M. & St. P. R. Co. 272 Mo. 520, 199 S. W. 121; Knapp Bros. Mfg. Co. v. Kansas City Stockyards Co. — Mo. —, 199 S. W. 168; Lewis v. New York L. Ins. Co. — Mo. —, 201 S. W. 851; Non-Royalty Shoe Co. v. Phœnix Assur. Co. — Mo. —, 210 S. W. 37; State v. Swift & Co. 270 Mo. 694, 195 S. W. 996; State v. Wild, — Mo. —, 190 S. W. 273; State v. Evertz, — Mo. —, 190 S. W. 287; Donoho v. Missouri P. R. Co. — Mo. —, 184 S. W. 1149; Schmohl v. Travelers' Ins. Co. — Mo. —, 197 S. W. 60; Curtis v. Sexton, 252 Mo. 221, 159 S. W. 512; State ex rel. Arel v. Farrington, 272 Mo. 157, 197 S. W. 912; State ex rel. Miles v. Ellison, 269 Mo. 151, 190 S. W. 274; Harrison v. Jackson County, — Mo. —, 187 S. W. 1183; Roeder v. Robertson, 202 Mo. 522, 100 S. W. 1086; Bruce v. Tobin, 245 U. S. 18, 62 L. ed. 123, 38 Sup. Ct. Rep. 7; Grays Harbor Logging Co. v. Coats-Fordney Logging Co. (Washington ex rel. Grays Harbor Logging Co. v. Superior Ct.), 243 U. S. 251, 61 L. ed. 702, 37 Sup. Ct. Rep. 295; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 56 L. ed. 1082, 32 Sup. Ct. Rep. 828; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Cornell S. B. Co. v. Phœnix Constr. Co. 233 U. S. 593, 58 L. ed. 1107, 34 Sup. Ct. Rep. 701.

Messrs. **Ernest A. Green** and **J. C. Sheppard** submitted the cause for defendants in error. Mr. A. L. Sheppard was on the brief:

This court is without jurisdiction to review the decision of the Springfield court of appeals of the state of Missouri upon a writ of error.

Philadelphia & R. Coal & I. Co. v. Gilbert, 245 U. S. 162, 62 L. ed. 221, 38 Sup. Ct. Rep. 58.

The assertion of a right, title, privilege, or immunity under the Federal Constitution must be specially set up or claimed in the state court in order to authorize a review in this court.

Eastern Bldg. & L. Asso. v. Welling, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix), 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; F. G. Oxley Stave Co. v. Butler

County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

Assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below.

Ansbro v. United States, 159 U. S. 695, 698, 40 L. ed. 310, 311, 16 Sup. Ct. Rep. 187; Muse v. Arlington Hotel Co. 168 U. S. 430, 435, 42 L. ed. 531, 532, 18 Sup. Ct. Rep. 109; Cornell v. Green, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969.

This court is without jurisdiction of this writ of error because certiorari would be the only proper method of reviewing this judgment, since there is no question involved in this case as to the constitutionality of a state statute.

Hartford L. Ins. Co. v. Johnson, 249 U. S. 490, 63 L. ed. 722, 39 Sup. Ct. Rep. 336.

The writ of error should be dismissed because not sued out from the highest court of the state of Missouri in which a final decision in this suit and matter was had.

Craycroft v. Atchison, T. & S. F. R. Co. 18 Mo. App. 487; State ex rel. Dugan v. Kansas City Ct. of Appeals, 105 Mo. 299, 16 S. W. 853; State ex rel. Mulholland v. Smith, 141 Mo. 1, 41 S. W. 906; Collins v. German American Mut. Life Asso. 85 Mo. App. 242; Woody v. St. Louis & S. F. R. Co. 173 Mo. 549, 73 S. W. 475; State ex rel. Kansas City Loan Guarantee Co. v. Smith, 176 Mo. 44, 75 S. W. 468; Lohmeyer v. St. Louis Cordage Co. 214 Mo. 685, 113 S. W. 1108; Kreyling v. O'Reilly, 97 Mo. App. 384, 71 S. W. 372; Hartzler v. Metropolitan Street R. Co. 218 Mo. 562, 117 S. W. 1124; State v. Metcalf, 65 Mo. App. 681; Kirkwood v. Meramec Highlands Co. 94 Mo. App. 637, 68 S. W. 761; Shewalter v. Missouri P. R. Co. 152 Mo. 544, 54 S. W. 224; Missouri, K. & T. R. Co. v. Smith, 154 Mo. 300, 55 S. W. 470; Harburg v. Arnold, 87 Mo. App. 326; Thompson v. Irwin, 76 Mo. App. 418; Sage v. Reeves, 17 Mo. App. 210; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 31, 60 L. ed. 510, 36 Sup. Ct. Rep. 234; Stratton v. Stratton, 239 U. S. 55, 60 L. ed. 142, 36 Sup. Ct. Rep. 26; Atlantic Coast Line R. Co. v. Mims, 242 U. S. 535, 61 L. ed. 479, 37 Sup. Ct. Rep. 188, 17 N. C. C. A. 349; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 53, 59 L. ed. 128, 35 Sup. Ct. Rep. 21.

[257] Mr. Justice **McReynolds** delivered the opinion of the court:

Dismissal of this writ is asked—first, because it does not run to a final judgment "in the highest court of the state in which a decision in the suit could be had," second, because there was not properly drawn in question below "the validity of a treaty or statute of, or an authority exercised under the United States," or "the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States." Judicial Code, § 237, Act September 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411; Coon v. Kennedy, 248 U. S. 457, 63 L. ed. 358, 39 Sup. Ct. Rep. 146; Godchaux Co. v. Estopinal, decided December 22, 1919 [251 U. S. 179, ante, 213, 40 Sup. Ct. Rep. 116].

The trial court, proceeding without jury, gave judgment for rentals due the Linotype Company under written lease of a machine, etc. The Springfield court of appeals affirmed that action. Thereupon the supreme court took jurisdiction by writ of certiorari, rendered an opinion, quashed the judgment of affirmance, and remanded the cause to the court of appeals for decision. 271 Mo. 475, 196 S. W. 1132.

Following the supreme court's opinion, the court of appeals ordered the judgment of the trial court "reversed, annulled, and for naught held and esteemed; that the said appellants be restored to all they have lost by reason of the said judgment; that the said appellants recover of the said respondent costs and charges herein expended, and have execution therefor." A motion there for rehearing having been overruled, without more, this writ of error was sued out.

The assignments of error here challenge the validity of §§ 3037–3040 and § 3342, Revised Statutes of Missouri 1909, because in conflict with the Federal Constitution. This claim was first set up in the court of appeals upon the motion for rehearing.

[258] The Missouri Constitution gives the supreme court "superintending control over the courts of appeals by *mandamus*, prohibition, and *certiorari*," and provides that "the last previous rulings of the supreme court on any question of law or equity shall,

in all cases, be controlling authority in said courts of appeals." In State ex rel. Atchison, T. & S. F. R. Co. v. Ellison, 268 Mo. 225, 238, 186 S. W. 1075, a proceeding upon a certiorari, the court declared: "We can undo what the court of appeals has done; . . . and we can send the record back to them to be heard anew by them, . . . but in the Kansas City court of appeals alone lies the jurisdiction to hear and to correctly and finally determine the case to which the instant proceeding is ancillary." See also State ex rel. Miles v. Ellison, 269 Mo. 151, 190 S. W. 274; Schmohl v. Travelers' Ins. Co. — Mo. —, 197 S. W. 60.

In the present cause, the supreme court said: "This is an original proceeding by certiorari. . . . It is urged by relator as his ground for quashal, that the opinion of the court of appeals is in conflict with the case of United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567. . . . If this decision be opposed to what we said, or the conclusion which we reached upon similar facts (if the facts are similar) in the Ramlose Case, we ought to quash the judgment of the court of appeals. This is the sole question to be determined."

Under the Missouri practice and circumstances here disclosed, we think the judgment of the Springfield court of appeals was final within the meaning of § 237, Judicial Code. No suggestion is made that further review by the supreme court could be had, as matter of discretion or otherwise.

The only ground mentioned in the assignments of error upon which this writ could be sustained is conflict between specified sections of the Missouri statutes relating to transactions by foreign corporations and the Federal Constitution. But this point came too late, being first [259] advanced below on the motion for rehearing. Godchaux Co. v. Estopinal, supra.

The claim that the lease contract was made in course of interstate commerce, and therefore not subject to state statutes, was insufficient to challenge the validity of the latter; at most it but asserted a "title, right, privilege, or immunity" under the Federal Constitution which might afford basis for certiorari, but constitutes no ground for writ of error from this court.

Dismissed.

SOUTHERN PACIFIC COMPANY, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California and Mary E. Butler and Albert Nelson Butler, a Minor, by Mary E. Butler, His Guardian ad Litem.

(See S. C. Reporter's ed. 259–263.)

Master and servant — employers' liability — when servant is engaged in interstate commerce.

1. Generally, when the applicability of the Federal Employers' Liability Act is uncertain, the character of the employment in relation to commerce may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it.

[For other cases, see Master and Servant, II. a, 2, b, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — when servant is engaged in interstate commerce — electric lineman.

2. The work of an electric lineman in wiping insulators on one of the main electric cables of an interstate railway carrier running from a power house to a reduction and transforming station, whence the current ran to the trolley wires and thence to the motors of the carrier's cars engaged in both intrastate and interstate commerce, is so directly and intimately connected with interstate transportation as to render a state workmen's compensation law inapplicable, where the lineman was killed as the result of an electric shock received while so engaged.

[For other cases, see Master and Servant, II. a, 2, b; Commerce, I. c, in Digest Sup. Ct. 1908.]

[No. 118.]

Submitted December 18, 1919. Decided January 5, 1920.

ON WRIT of Certiorari to the Supreme Court of the State of California to review a judgment which affirmed an award of the state Industrial Accident Commission. Reversed and remanded for further proceedings.

See same case below, 178 Cal. 20, 171 Pac. 1071.

The facts are stated in the opinion.

Note.—On the constitutionality, application, and effect of the Federal Employers' Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

Messrs. **Henley C. Booth** and **William F. Herrin** submitted the cause for petitioner:

The writ of certiorari was properly granted.

Philadelphia & R. Coal & I. Co. v. Gilbert, 245 U. S. 162, 62 L. ed. 221, 38 Sup. Ct. Rep. 58; Stadelman v. Miner, 246 U. S. 544, 62 L. ed. 875, 38 Sup. Ct. Rep. 359; Cave v. Missouri, 246 U. S. 650, 62 L. ed. 921, 38 Sup. Ct. Rep. 334; Northern P. R. Co. v. Solum, 247 U. S. 477, 481, 62 L. ed. 1221 1225, 38 Sup. Ct. Rep. 550; Ireland v. Woods, 246 U. S. 323-330, 62 L. ed. 745-750, 38 Sup. Ct. Rep. 319.

The instant case falls under the Federal Employers' Liability Act because deceased was doing the act for the purpose of furthering the work of interstate commerce (Louisville & N. R. Co. v. Parker, 242 U. S. 13, 14, 61 L. ed. 119, 120, 37 Sup. Ct. Rep. 4), and was engaged in keeping in usable condition an instrument then in use in such interstate transportation (Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556-560, 60 L. ed. 436-439, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188), and was keeping instrumentalities in a proper state of repair while used in interstate commerce, which service is so closely related to such commerce as to be in practice and legal contemplation a part of it (Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 149-151, 57 L. ed. 1127, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779).

All section men and track laborers, while working on or repairing any part of the track or switches used by a common carrier or railroad indiscriminately for both interstate and intrastate commerce, are employed in interstate commerce within the meaning of the Federal Employers' Liability Act.

New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; St. Joseph & G. I. R. Co. v. United States, 146 C. C. A. 397, 232 Fed. 349; Philadelphia, B. & W. R. Co. v. McConnell, 142 C. C. A. 555, 228 Fed. 263; Columbia & P. S. R. Co. v. Sauter, 139 C. C. A. 150, 223 Fed. 604; Lombardo v. Boston & M. R. Co. 223 Fed. 427; Tralich v. Chicago, M. & St. P. R. Co. 217 Fed. 675; San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

In Southern R. Co. v. McGuin, 153 C. C. A. 447, 240 Fed. 649, it is held that a section man who was working with a road engineer in setting stakes, with the view of improving a curve by a slight change in track, was employed in interstate commerce.

In St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, a clerk was held to be employed in interstate commerce when he was on his way through a railroad yard to meet an inbound interstate freight train, and to mark the cars so that the switching crew would know what to do with them when breaking up the train.

Messrs. **Christopher M. Bradley** and **Warren H. Pillsbury** submitted the cause for respondents:

The deceased employee was not engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188; reversing 214 N. Y. 413, 108 N. E. 644, Ann. Cas. 1916E, 467; Illinois C. R. Co. v. Cousins, 241 U. S. 641, 60 L. ed. 1216, 36 Sup. Ct. Rep. 446, reversing 126 Minn. 172, 148 N. W. 58, 6 N. C. C. A. 182; Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 61 L. ed. 1070, 37 Sup. Ct. Rep. 515, reversing 214 N. Y. 116, 107 N. E. 814; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918B, 54, 13 N. C. C. A. 1127; Baltimore & O. R. Co. v. Branson, 242 U. S. 623, 61 L. ed. 534, 37 Sup. Ct. Rep. 244, reversing 128 Md. 678, 98 Atl. 225; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Minneapolis & St. L. R. Co. v. Nash, 242 U. S. 619, 61 L. ed. 531, 37 Sup. Ct. Rep. 239; Raymond v. Chicago, M. & St. P. R. Co. 243 U. S. 43, 61 L. ed. 583, 37 Sup. Ct. Rep. 268; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Barker v. Kansas City, M. & O. R. Co. 94 Kan. 176, 146 Pac. 358; Giovio v. New York C. R. Co. 176 App. Div. 230, 162 N. Y. Supp. 1026; Zavitovsky v. Chicago, M. & St. P. R. Co. 161 Wis. 461, 154 N. W. 974, 14 N. C. C. A. 1004.

note; Gallagher v. New York C. R. Co. 180 App. Div. 88, 167 N. Y. Supp. 480; Kelly v. Pennsylvania R. Co. 151 C. C. A. 171, 238 Fed. 95.

Mr. Justice **McReynolds** delivered the opinion of the court:

William T. Butler, husband of respondent Mary E. Butler, was killed at Oakland, California, while employed by the Southern Pacific Company as an electric lineman. The supreme court of the state affirmed an award rendered by the California Industrial Commission against the company, and the cause is properly here by writ of certiorari.

The fatal accident, which occurred June 21, 1917, arose out of and happened in the course of deceased's employment. He "received an electric shock while wiping insulators, which caused him to fall from a steel power pole, producing injury which proximately caused his death." At that time the company, a common carrier by railroad, maintained a power house at Fruitvale, California, where it manufactured the electric current which moved its cars engaged in both interstate and intrastate commerce. From the generators this current passed along main lines or cables, through a reduction and transforming station, to the trolley wires, and thence to the motors. When he received the electric shock, deceased was engaged in work on one of the main lines necessary to keep it in serviceable condition. If such work was part of interstate commerce, the Workmen's Compensation Act of the state is inapplicable and the judgment below must be reversed. Otherwise, it must be affirmed. Employers' Liability Act, [263] April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; New York C. R. Co. v. Porter, 249 U. S. 168, 63 L. ed. 536, 39 Sup. Ct. Rep. 188.

Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 151, 57 L. ed. 1125, 1127, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, 60 L. ed. 436, 438, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188; New York C. R. Co. v. Porter, supra; Kinzell v. Chicago, M. & St. P. R. Co. 250 U. S. 130, 133, 63 L. ed. 893, 896, 39 Sup. Ct. Rep. 412.

Power is no less essential than tracks or bridges to the movement of cars. The accident under consideration occurred while deceased was wiping insulators actually supporting a wire which then carried electric power so intimately connected with the propulsion of cars that if it had been short-circuited through his body, they would have stopped instantly. Applying the suggested test, we think these circumstances suffice to show that his work was directly and immediately connected with interstate transportation, and an essential part of it.

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

Reversed and remanded.

Mr. Justice **Clarke** dissents.

---

[264] JACOB RUPPERT, a Corporation, Appt.,
v.
FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York.

(See S. C. Reporter's ed. 264–310.)

War — power of Congress — passing of war emergency — war-time prohibition.

1. The war emergency had not passed so as to invalidate as new legislation the provision of the Volstead Act of October 28, 1919, extending the prohibition of the Act of November 21, 1918, against the manufacture and sale of intoxicating liquors, to malt liquors, whether in fact intoxicating or not, with an alcoholic content of as much as ½ of 1 per cent of alcohol by volume.

Note.—For a discussion of police power, generally—see notes to State v Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sump-

War — power of Congress — war-time prohibition.

2. The implied war power of Congress over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectually prevent their sale.

States — relation to Federal government — police power.

3. When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend an exercise by a state of its police power.

[For other cases, see States, IV. d, in Digest Sup. Ct. 1908.]

War — power of Congress — war-time prohibition — nonintoxicating malt liquors.

4. Congress, in the exercise of the war power, could, in order to make effective the existing war-time prohibition against the manufacture and sale of intoxicating liquors, enact the provisions of the Volstead Act of October 28, 1919, extending such prohibition to malt liquors, whether in fact intoxicating or not, with alcoholic content of as much as ½ of 1 per cent of alcohol by volume.

Constitutional law — due process of law — war-time prohibition.

5. Congress could, consistently with the due process of law clause of U. S. Const., 5th Amend., make effective forthwith the provisions of the Volstead Act of October 28, 1919, extending the existing war-time prohibition against the manufacture and sale of intoxicating liquors to nonintoxicating malt liquors with alcoholic content of as much as ½ of 1 per cent by volume, without making any compensation to the owner of such liquors acquired before the passage of the act, and which before that time he could lawfully have sold.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 603.]

Argued November 20 and 21, 1919. Decided January 5, 1920.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree which dismissed the bill in a suit to enjoin the enforcement of the Volstead Act against nonintoxicating malt liquors. Affirmed.

The facts are stated in the opinion.

Messrs. **Elihu Root** and **William D. Guthrie** argued the cause, and, with Mr. William L. Marbury, filed a brief for appellant:

There can be no doubt that the war powers of the United States under the Federal Constitution are complete and sufficient for all war purposes, and comprehend the right to employ any appropriate means found necessary and proper for prosecuting a war, and plainly adapted to that end. Recent decisions of the courts have emphasized and illustrated the broad nature and scope of these powers.

Selective Draft Law Cases (Arver v. United States), 245 U. S. 366, 377, 62 L. ed. 352, 353, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 856; Northern P. R. Co. v. North Dakota, 250 U. S. 135, 149, 63 L. ed. 897, 903, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502; Salamandra Ins. Co. v. New York L. Ins. & T. Co. 254 Fed. 852.

The war powers of the United States, however, are clearly divided between Congress and the President. Whilst all legislative power in connection with war measures is vested exclusively in Congress, all executive power exercisable in connection with the waging or conducting of war is vested exclusively in the President by virtue, not only of his office as President, but of his powers as Commander in Chief of the Army and Navy of the United States.

Ex parte Milligan, 4 Wall. 2, 139, 18 L. ed. 281, 301.

Any incidental war power of prohibition, which would necessarily interfere with the liberties and property rights of the people of the United States and the governmental powers reserved to the several states, can be exercised only in cases of existing war emergency or military necessity. In other words, the rights of the states cannot be even temporarily violated unless a war emergency reasonably war-

---

tion, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutionality of statute prohibiting the manufacture of intoxicating liquor—see note to Schmitt v. Cook Brewing Co. 3 A.L.R. 285.

As to constitutional right to prohibit sale of intoxicating liquor—see note to State v. Durein, 15 L.R.A.(N.S.) 908.

On the question as to whether statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor—see notes to State v. Hemrich, L.R.A.1917B, 974; Ex parte Lockman, 46 L.R.A.(N.S.) 759; Bowling Green v. McMullen, 26 L.R.A.(N.S.) 895; and Luther v. State, 20 L.R.A. (N.S.) 1146.

rants such action. This follows from the very nature of our Federal system and the duty of Congress and the President not to violate the express reservations of powers to the states, embodied in the 10th Amendment to the Constitution of the United States, or the constitutional rights of the individual.

Hammer v. Dagenhart, 247 U. S. 251, 273, 276, 62 L. ed. 1101, 1106, 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Keller v. United States, 213 U. S. 138, 144, 53 L. ed. 737, 738, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; Kidd v. Pearson, 128 U. S. 1, 24, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L. ed. 579, 601; Houston v. Moore, 5 Wheat. 1, 48, 5 L. ed. 19, 30.

The rights and liberties guaranteed by the Constitution of the United States are not suspended and do not cease to be effective guaranties during a period of war, and are not subject to denial or curtailment by war measures, whether by the Congress or the President, unless an actual war emergency or military necessity so requires, and then only during the period of such war emergency or military necessity.

Mitchell v. Harmony, 13 How. 115, 149, 14 L. ed. 75, 90; Ex parte Milligan, 4 Wall. 2, 121, 18 L. ed. 281; 295; Raymond v. Thomas, 91 U. S. 712, 716, 23 L. ed. 434, 435.

It was undoubtedly the intention of the framers of the Constitution of the United States to vest in the President the broadest war powers, and to render him independent of Congress in respect of the exercise of those powers in the actual conduct of a war. They did not wish to permit a repetition of the interference by Congress which did so much to embarrass Washington as Commander in Chief during the Revolution.

Hamilton, Federalist (No. 74 Ford's ed. p. 496); 1 Kent, Com. 282; Story, Const. § 149; Pom. Const. Law §§ 703–714; Von Holst, Const. Law (Mason's translation), pp. 164, 192–195.

The existence of a war emergency must be the basis and warrant for the exercise of an implied war power which tends to deny the rights of an individual or a state, and the courts are not concluded by the mere declaration of Congress, whether express or implied, that such an emergency actually exists, or shall be presumed to continue for some indefinite period in the future.

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; Mitchell v. Harmony, 13 How. 115, 135, 14 L. ed. 75, 84; Raymond v. Thomas, 91 U. S. 712, 716, 23 L. ed. 434, 435; Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9,605; Re Egan, 5 Blatchf. 319, Fed. Cas. No. 4,303; McLaughlin v. Green, 50 Miss. 453; Johnson v. Jones, 44 Ill. 154, 92 Am. Dec. 159; Griffin v. Wilcox, 21 Ind. 370; State ex rel. Nance v. Brown, 71 W. Va. 524, 45 L.R.A.(N.S.) 996, 77 S. E. 243, Ann. Cas. 1914C, 1; United States v. Hicks, 256 Fed. 707; Legal Tender Cases, 12 Wall. 457, 540, 20 L. ed. 287, 308.

Congress is not the exclusive judge of the existence of a war emergency when exercising incidental war powers.

Hepburn v. Griswold, 8 Wall. 603, 617, 19 L. ed. 513, 524; M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

The constitutionality of any statute, whether criminal or not, must be determined as of the time and in the light of the circumstances existing when it is sought to be enforced against the individual. The time of actual incidence is always the test, since the effect upon the accused is alone the concern of the courts.

Castle v. Mason, 91 Ohio St. 303, 110 N. E. 463, Ann. Cas. 1917A, 164; Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 269, 63 L. ed. 968, 977, 39 Sup. Ct. Rep. 454; Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 473, 57 L. ed. 1511, 1571, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.), 230 U. S. 474, 508, 57 L. ed. 1571, 1594, 33 Sup. Ct. Rep. 975; Knoxville v. Knoxville Water Co. 212 U. S. 1, 18, 53 L. ed. 371, 382, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 54, 53 L. ed. 382, 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Municipal Gas Co. v. Public Service Commission, 225 N. Y. 95, P.U.R. 1919C, 364, 121 N. E. 772; Johnson v. Gearlds, 234 U. S. 422, 446, 58 L. ed. 1383, 1393, 34 Sup. Ct. Rep. 794; Perrin v. United States, 232 U. S. 478, 486, 58 L. ed. 691, 695, 34 Sup. Ct. Rep. 387.

The cases of Northern P. R. Co. v. North Dakota, 250 U. S. 135, 63 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502; Dakota Cent. Teleph. Co. v. South Dakota, 250 U. S. 163, 63 L. ed. 910, 4 A.L.R. 1623, P.U.R.1919D, 717, 39 Sup. Ct. Rep. 507; Burleson v. Dempcy, 250 U. S. 191, 63 L. ed. 929, 39 Sup. Ct.

Rep. 511; and Macleod v. New England Teleph. & Teleg. Co. 250 U. S. 195, 63 L. ed. 934, 39 Sup. Ct. Rep. 511, decided June 2, 1919, in no way sustain the proposition that any implied declaration by Congress would be conclusive as to the existence of a present necessity justifying the prohibition in question.

The case of Commercial Cable Co. v. Burleson, 255 Fed. 99 (reversed by this court because rendered moot by the voluntary act of the defendants, 250 U. S. 360, 63 L. ed. 1030, 39 Sup. Ct. Rep. 512), did not involve a question analogous to that now under consideration, but arose rather under the exercise of the powers of eminent domain. The joint resolution there in question was passed on July 16, 1918, at the height of the war, and it expressly delegated to the President the power, as Commander in Chief of the Army and Navy, to determine if and when an actual war emergency or necessity arose, and he so determined. The court was in effect asked to overrule the decision of the Commander in Chief. An analogous question would be presented in the case at bar if title I. of the National Prohibition Act had vested in the President the duty of ascertaining and determining the existence of a war emergency or necessity as a question of fact at the time the act was to be enforced, as did the joint resolution involved in the Commercial Cable Co. Case. And even then, if power had been so vested, it certainly could not be exercised arbitrarily. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

In view of the war powers and responsibilities of the President, and his express duty to inform Congress as to the state of the Union, it must be clear that it is especially fit and proper that he should determine officially as to the existence or continuance of a war emergency, and that, in the absence of other proof, his declarations as to this question of fact or actual state and condition should be deemed the best evidence and the most certain criteria. It involves a matter peculiarly within his knowledge and jurisdiction, and in such a matter the decision of the President, as Executive and Commander in Chief, ought to be accepted as conclusive, in the absence of any other proof or criteria.

Story, Const. § 1561; Martin v. Mott, 12 Wheat. 19, 6 L. ed. 537; Luther v. Borden, 7 How. 44, 12 L. ed. 599; Prize Cases, 2 Black, 635, 17 L. ed. 459; The Protector (Freeborn v. The Protector), 12 Wall. 700, 702, 20 L. ed. 463, 464.

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score.

United States v. Jin Fuey Moy, 241 U. S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 407, 53 L. ed. 836, 848, 29 Sup. Ct. Rep. 527.

It is a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that that expression is not limited to the last, but applies to all.

Great Western R. Co. v. Swindon & C. R. Co. L. R. 9 App. Cas. 808, 53 L. J. Ch. N. S. 1075, 32 Week. Rep. 957.

Effect must be given, if possible, to every word, clause, and sentence of a statute.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783.

The Act of Congress of October 28, 1919, is new and affirmative legislation, and the validity and effect thereof must therefore be determined as of the date of its passage.

Jaehne v. New York, 128 U. S. 189, 32 L. ed. 398, 9 Sup. Ct. Rep. 70; Cooley, Const. Lim. 7th ed. p. 137; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 332, 22 L. ed. 348, 350.

Congress may not ban nonintoxicants under the war power.

Hammer v. Dagenhart, 247 U. S. 251, 273, 276, 62 L. ed. 1101, 1106, 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724.

The Constitution merely confers upon Congress the right to exercise powers incidental to enumerated powers if necessary and proper; not the right to exercise powers incidental to implied incidental powers. Any other theory would strip the states of all their powers; for, if each implied incidental power breeds new powers by added implication, there is no point at which the process can be halted, but the result must in time be one consolidated government in place of our present Federal system.

7 Ford's Jefferson, p. 44; M'Culloch v. Maryland, 4 Wheat. 316, 411, 4 L. ed. 579, 602; 3 Hamilton's Works, Lodge's

ed. p. 192; 1 Congressional Debates, p. 1899; 22 Annals of Congress, p. 212; Rept. No. 1143, House of Rep. Feb. 26, 1919, pp. 7, 9.

In cases challenging the constitutionality of a statute, whether passed by Congress or by a state legislature, equity has jurisdiction to restrain defendant officers, who are charged by the law with its enforcement, where it appears that irreparable injury to business and property of a complainant is reasonably to be apprehended, even though some of the acts sought to be restrained are anticipated criminal proceedings. Jurisdiction over controversies similar to that now presented has been frequently sustained by this court.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; Ex parte Young, 209 U. S. 123, 155, 52 L. ed. 714, 727, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 166, 54 L. ed. 430, 431, 30 Sup. Ct. Rep. 286; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 56 L. ed. 570, 576, 32 Sup. Ct. Rep. 340; Truax v. Raich, 239 U. S. 33, 37, 60 L. ed. 131, 133, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Wilson v. New, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Municipal Gas Co. v. Public Service Commission, 225 N. Y. 101, P.U.R.1919C, 364, 121 N. E. 772.

According to a settled rule of statutory interpretation, effect must, if possible, be accorded to every word in a statute, and the word "other" cannot be treated as superfluous, void, or insignificant, but its use must be assumed to indicate a purpose on the part of Congress to qualify the words "beer" and "wine" immediately preceding, so that they should connote "intoxicating beer" and "intoxicating wine," respectively, and not "beer" and "wine" whether or not intoxicating.

Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 410, 58 L. ed. 658, 662, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337.

The mere fact that, under the appellant's interpretation, the words "beer" and "wine" would not serve any distinct and separate purpose that would not be comprehended within the phrase "intoxicating, malt, or vinous liquor," would not warrant the disregard of the word "other." The use of unnecessary words has long been quite common in statutes and even in Constitutions.

United States v. Bassett, 2 Story, 404, Fed. Cas. No. 14,539; United States v. Fisher, 2 Cranch, 358, 387, 2 L. ed. 304, 313.

The case of United States v. Chase, 135 U. S. 255, 34 L. ed. 117, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649, directly rules the point of statutory interpretation that, in such a form of phrasing as is now presented for interpretation, the word "other" must be interpreted as urged by the appellant.

See also United States v. Loftis, 12 Fed. 671; Grimm v. United States, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470; Andrews v. United States, 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798; United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222; Potts v. United States, 114 Fed. 52; Gridley v. Northwestern Mut. L. Ins. Co. 14 Blatchf. 108, Fed. Cas. No. 5,808, affirmed in 100 U. S. 614, 25 L. ed. 746; Sinclair v. Phœnix Mut. L. Ins. Co. Fed. Cas. No. 12,896; Bowling Green v. McMullen, 134 Ky. 742, 26 L.R.A.(N.S.) 895, 122 S. W. 823; State v. Virgo, 14 N. D. 295, 103 N. W. 610; People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121.

Assistant Attorney General **Frierson** and Solicitor General **King** argued the cause and filed a brief for appellees:

"Beer," without qualification, is plainly prohibited unless the word "intoxicating" is made to relate back and modify it. It will be insisted that this modifying result is accomplished under the rule ejusdem generis. But to make this application of that rule is to give it a meaning exactly the opposite of that which it has. The rule is that general words which follow an enumeration by words of a particular meaning are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. We have here an enumeration of beer and wine by words of a particular and specific meaning, followed by the general words "or other intoxicating malt or vinous liquors."

Under the rule referred to, the meaning of these general words may take color from the words used in the enumeration which they follow. But there is no rule of construction under which words of a particular and specific meaning, used in an enumeration, are to be given a different meaning by reason of general language following them, and intended to describe other articles or persons. Thus, the words "other intoxicating" may be given a meaning reflected by the preceding words "beer" and "wine," and may be held to mean intoxicating in the general sense, or to the extent that beer and wine are intoxicating or alcoholic. But certainly the word "beer" cannot be taken in an unusual or strained sense by reason of any general language describing other liquors intended to be included. The rule in question leads to the conclusion that any malt or vinous liquor which is intoxicating in the sense that beer and wine are intoxicating is prohibited; but it cannot be so applied as to exclude any beverage which would ordinarily be included under the word "beer." Clearly, the intention was to prohibit all beverages which are commonly known as beer. The courts of the various states have almost uniformly given this construction to similar language.

United States v. Cohn, 2 Ind. Terr. 492, 52 S. W. 38; State v. Ely, 22 S. D. 487, 118 N. W. 687, 18 Ann. Cas. 92; La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294; Fuller v. Jackson, 97 Miss. 237, 30 L.R.A.(N.S.) 1078, 52 So. 873; Purity Extract & Tonic Co. v. Lynch, 100 Miss. 650, 56 So. 316; Marks v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; Re Lockman, 18 Idaho, 465, 46 L.R.A.(N.S.) 759, 110 Pac. 253; Brown v. State, 17 Ariz. 314, 152 Pac. 578.

Mr. Justice **Brandeis** delivered the opinion of the court:

By the Act of August 10, 1917, chap. 53, § 15, 40 Stat. at L. 276, 282, Comp. Stat. §§ 3115¼e, 3115¼l, Fed. Stat. Anno. Supp. 1918, pp. 181, 188, a war measure known as the Lever Act, Congress prohibited the use after September 9, 1917, of food materials or feeds in the production of distilled spirits for beverage purposes, and authorized the President to limit or prohibit their use in the production of malt or vinous liquors for beverage purposes, so far as he might, from time to time, deem it essential to assure an adequate supply of food, or deem it helpful in promoting the national security or defense. Under the power so conferred the President, by proclamation of December 8, 1917 [40 Stat. at L. 84], prohibited the production after January 1, 1918, of any "malt liquors except ale and porter" containing more than 2.75 per centum of alcohol by weight. By proclamation of September 16, 1918 [40 Stat. at L. 204], the prohibition was extended to "malt liquors, including near-beer, for [279] beverage purposes, whether or not such malt liquors contain alcohol;" and by proclamation of March 4, 1919 [40 Stat. at L. 293], the prohibition was limited "to intoxicating malt liquors." Under § 2 of the act the duty of enforcing the above provisions was assigned to the Commissioner of Internal Revenue. This act contained no provision prohibiting the sale of intoxicating or other liquors.

On November 21, 1918, the so-called War-time Prohibition Act (chap. 212, 40 Stat. at L. 1045, Comp. Stat. § 3115½½ff) was approved. It provided that:

"After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruits, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. . . ."

On February 6, 1919, the Commissioner of Internal Revenue ruled (Treasury Decision, 2788) that a beverage containing as much as ½ of 1 per centum of alcohol by volume would be regarded as intoxicating within the intent of the Act of November 21, 1918; and that after May 1, 1919, persons would not be permitted to qualify as brewers, if the alcoholic content of their product equaled or exceeded that percentage. In so ruling the Commissioner adopted and applied to this prohibitory act the same classification of malt liquors which had been applied in administering the laws concerning the taxation of beer and other similar fermented liquors. [280] For since 1902 (Treasury Decision, 514)

fermented liquor containing as much as ½ of 1 per centum of alcohol had been treated as taxable under Revised Statutes, §§ 3339 and 3242, Comp. Stat. §§ 6143, 5965, and this classification was expressly adopted in the War Revenue Act of October 3, 1917, chap. 63, § 307, 40 Stat. at L. 311, Comp. Stat. 6144b, Fed. Stat. Anno. Supp. 1918, p. 300. The correctness of this construction of the act was promptly and earnestly controverted by the brewers, who insisted that Congress had intended to prohibit the production only of such beer or other malt liquors as were in fact intoxicating. The attempt was then made to remove the doubt by new legislation before May 1, 1919, when the act would by its terms become operative. On February 26 the House Committee on the Judiciary reported favorably an Amendment to H. R. 13,581, providing: "The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be construed to mean any liquors which contain in excess of ½ of 1 per centum of alcohol." The Sixty-fifth Congress ended on March 4 without acting on this bill; and the Sixty-sixth Congress did not convene in extra session until May 19. On June 30, the House Committee on the Judiciary reported substantially the same provision as § 1 of title I. of H. R. 6810; but it was not enacted until October 28, 1919, when, as the Volstead Act, it was passed over the President's veto.[a]

[281] Immediately after the passage of the Volstead Act, this suit was brought in the district court of the United States for the southern district of New York by Jacob Ruppert against Caffey, United States attorney, and McElligott, acting collector of internal revenue, to enjoin the enforcement as against the plaintiff of the penalties provided in the War-time Prohibition Act as amended by the Volstead Act. It was heard below on plaintiff's motion for a preliminary injunction and defendants' motion to dismiss; and having been dismissed, was brought here by direct appeal under § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. p. 794]. The bill alleged that plaintiff, the owner of a brewery and appurtenances, was on October 28, 1919, engaged in the manufacture of a beer containing more than ½ of 1 per centum of alcohol by volume and less than 2.75 per centum by weight, or 3.4 per centum by volume, and had then on hand a large quantity of such beer; and that this beer was not in fact intoxicating. Plaintiff contended (1) that the Act of November 21, 1918, had become void, or had expired by its own terms before the bill was filed; (2) that its prohibition by its terms was limited to beer which was in fact intoxicating; (3) that the Act of October 28, 1919, title I., § 1, which purported to extend the prohibition to the manufacture and sale of beer not in fact intoxicating, exceeded the war power of Congress; and that thereby violation of rights guaranteed to plaintiff by the 5th Amendment was threatened.

This case was heard and decided below with Dryfoos v. Edwards [251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106], and it was argued here on the same day with that case and Hamilton v. Kentucky Distilleries & Warehouse Co. decided December 15, 1919 [251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106]. For the reasons set forth in [282] the opinion in those cases, the Act of November 21, 1918, was and remained valid as against the plaintiff, and had not expired. For the same reason § 1 of title I. of the Act of October 28, 1919, was not invalid merely because it was new legislation. But it is insisted that this legislation is nevertheless void as against the plaintiff, because Congress could not, even under its full war powers, prohibit the manufacture and sale of nonintoxicants, and, at all events, could not, without making compensation, extend the prohibition to nonin-

NOTE (a):—

"The term 'War Prohibition Act' used in this act shall mean the provisions of any act or acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be hereafter construed to mean any other beverages which contain ½ of 1 per centum or more of alcohol by volume: Provided, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains less than ½ of 1 per centum of alcohol by volume, and is made as prescribed in § 37 of title II. of this act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the Commissioner may by regulation prescribe."

toxicating liquor acquired before the passage of the act. These objections require consideration.

First: May the plaintiff show as a basis for relief that the beer manufactured by it with alcoholic content not greater than 2.75 per centum in weight and 3.4 per centum in volume is not in fact intoxicating? The government insists that the fact alleged is immaterial since the passage of the Volstead Act, by which the prohibition of the manufacture and sale is extended to all beer and other malt liquor containing as much as ½ of 1 per centum of alcohol by volume.

If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the nation's efficiency in men, munitions, and supplies is as full and complete as the police power of the states to effectively enforce such prohibition in order to promote the health, safety, and morals of the community, it is clear that this provision of the Volstead Act is valid and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation and decisions of the highest courts of nearly all of the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly appears [283] that a liquor law, to be capable of effective enforcement, must, in the opinion of the legislatures and courts of the several states, be made to apply either to all liquors of the species enumerated, like beer, ale, or wine, regardless of the presence or degree of alcoholic content; or, if a more general description is used, such as distilled, rectified, spirituous, fermented, malt, or brewed liquors, to all liquors within that general description, "regardless of alcoholic content;" or to such of these liquors as contain [284] a named percentage of alcohol; and often several such standards are combined so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol.

A test often used to determine whether a beverage is to be deemed intoxicating within the meaning of the liquor law is whether it contains ½ of 1 per cent of alcohol by volume. A survey of the liquor laws of the states reveals that in sixteen states the test is either a list of enumerated beverages without regard to whether they contain any alcohol, or the

Note (b):—

Cases to this effect are Marks v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; Brown v. State, 17 Ariz. 314, 152 Pac. 578; Bradshaw v. State, 76 Ark. 562, 89 S. W. 1051; Seibert v. State, 121 Ark. 258, 180 S. W. 990; Re Lockman, 18 Idaho, 465, 46 L.R.A.(N.S.) 759, 110 Pac. 253; Hansberg v. State, 120 Ill. 21, 23, 60 Am. Rep. 549, 8 N. E. 857 (dictum); Kurz v. State, 79 Ind. 488; Sawyer v. Botti, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787; State v. Colvin, 127 Iowa, 632, 103 N. W. 968; State v. Miller, 92 Kan. 994, L.R.A.1917F, 238, 142 Pac. 979, Ann. Cas. 1916B, 365; State v. Trione, 97 Kan. 365, 155 Pac. 29; Com. v. McGrath, 185 Mass. 1, 69 N. E. 340; State v. Centennial Brewing Co. 55 Mont. 500, 179 Pac. 296; Luther v. State, 83 Neb. 455, 20 L.R.A.(N.S.) 1146, 120 N. W. 125; State v. Thornton, 63 N. H. 114; People v. Cox, 106 App. Div. 299, 94 N. Y. Supp. 526; People ex rel. Lanci v. O'Reilly, 129 App. Div. 522, 114 N. Y. Supp. 258; La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294; State v. Walder, 83 Ohio St. 68, 93 N. E. 531; State v. Fargo Bottling Works, 19 N. D. 397, 26 L.R.A. (N.S.) 872, 124 N. W. 387; State v. Ely, 22 S. D. 487, 118 N. W. 687, 18 Ann. Cas. 92; State v. Oliver, 26 W. Va. 422, 427, 53 Am. Rep. 79 (dictum); Pennell v. State, 141 Wis. 35, 123 N. W. 115; United States v. Cohn, 2 Ind. Terr. 474, 52 N. W. 38; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44, affirming 100 Miss. 650, 56 So. 316.

Contra:—Bowling Green v. McMullen, 134 Ky. 742, 26 L.R.A.(N.S.) 895, 122 S. W. 823; Reisenberg v. State, — Tex. Crim. Rep. —, 84 S. W. 585; State v. Olsen, 95 Minn. 104, 103 N. W. 727; Intoxicating-Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284; State v. Virgo, 14 N. D. 293, 103 N. W. 610; State v. Maroun, 128 La. 829, 55 So. 472; Howard v. Acme Brewing Co. 143 Ga. 1, 83 S. E. 1096, Ann. Cas. 1917A, 91.

In Kansas, the legislature overruled this decision by Laws of 1909, chap. 164, § 4, see State v. Trione, 97 Kan. 365, 155 Pac. 29; in Minnesota made the prohibition apply to all malt liquors containing as much as ½ of 1 per cent of alcohol by volume, Laws of 1919, chap. 455, p. 537; in North Dakota, by Laws of 1909, chap. 187, p. 277, see State v. Fargo Bottling Works Co. 19 N. D. 397, 26 L.R.A.(N.S.) 872, 124 N. W. 387, the prohibition applied to all liquors which retained "the alcoholic principle;" in Louisiana, Acts of 1914, Nos. 146, 211, operated to cut down the per cent of alcohol to 1.59; see State v. George, 136 La. 906, 67 So. 953. In Georgia, Acts of 1919, p. 931, changed the rule of Howard v. Acme Brewing Co. supra; see note (*d*) 4.

presence of any alcohol in a beverage, regardless of quantity;[c] in eighteen states

Note (*o*):—

1. Alabama:—Gen. Laws, Sp. Sess. 1907, No. 53, § 1, p. 71, made it unlawful to sell "any alcoholic, spirituous, vinous, or malt liquors, intoxicating beverages or bitters, or other liquors or beverages . . . which if drunk to excess will produce intoxication."

Marks v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 867, stated that "or other liquors or beverages which, if drunk to excess, will produce intoxication," did not modify or limit the prohibition of the liquors enumerated. Any unenumerated liquor, however, must be proved to be intoxicating if drunk to excess.

Gen. Laws 1919, Act 7, p. 6, in terms prohibits all liquors containing any alcohol.

2. Arizona:—Constitution, art. 23, § 1, prohibits "ardent spirits, ale, beer, wine, or intoxicating liquor, or liquors of whatever kind."

Brown v. State, 17 Ariz. 314, 152 Pac. 578, held that "beer" was prohibited whether or not it was intoxicating.

3. Arkansas:—Acts of 1917, Act 13, p. 41, as amended by Acts of 1919, Act 87, p. 75, prohibits "any alcoholic, vinous, malt, spirituous, or fermented liquors."

Seibert v. State, 121 Ark. 258, 180 S. W. 990, held that the enumerated liquors are prohibited whether they are intoxicating or not if they contained any alcohol.

An earlier act contained the words "or other intoxicating liquors" following "or fermented liquors." It was held in Bradshaw v. State, 76 Ark. 562, 89 S. W. 1051, that this clause did not modify the enumerated liquors, and that they were prohibited whether intoxicating or not.

4. Colorado:—Sess. Laws 1915, chap. 98, § 30—(prohibition)—as amended by Sess. Laws 1919, chap. 141, prohibits "intoxicating liquors . . . no matter how small the percentage of alcohol they may contain."

4½. Hawaii:—Rev. Laws 1915, § 2101 (License Law). "'Intoxicating liquors' . . . shall be held to include spirituous liquors, and any beverage in which may be found any percentage of distilled spirits, spirits, alcohol and alcoholic spirit as defined by the laws of the United States, and any sake, beer, lager beer, ale, porter and malt or fermented or distilled liquors."

5. Idaho:—Sess. Laws 1909, p. 18 (Local Option). "Spirituous, vinous, malt, and fermented liquors . . . and other drinks that may be used as a beverage and produce intoxication."

Re Lockman, 18 Idaho, 465, 46 L.R.A. (N.S.) 759, 110 Pac. 253, held that the enumerated liquors are within the act, whether or not they are intoxicating.

Constitutional Amendment of November 7, 1916 (Prohibition). Sess. Laws 1917, p. 528. The Enforcement Laws are cumulative, including Sess. Laws 1915, chap. 28; Sess. Laws 1915, chap. 11 (see § 23); Sess. Laws 1911, chap. 15; and Sess. Laws 1909, p. 18. Thus the definition and interpretation above are retained.

6. Iowa:—Rev. Code (1897-1915) § 2382. Prohibits "any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever."

State v. Certain Intoxicating Liquors, 76 Iowa, 243, 2 L.R.A. 408, 41 N. W. 6 (1888) and State v. Colvin, 127 Iowa, 632, 103 N. W. 968 (1905); Sawyer v. Botti, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787 (1910), held that liquor containing any alcohol whatever is prohibited.

7. Kansas:—Laws of 1881, chap. 128, § 1 (Gen. Stat. 1915, § 5498). Prohibits "any spirituous, malt, vinous, fermented, or other intoxicating liquors."

Intoxicating-Liquor Cases, 25 Kan. 751, 37 Am. Rep. 284, held that in every case the question of the intoxicating quality of the beverage must go to the jury.

Laws of 1909, chap. 164, § 4 (Gen. Stat. 1915, § 5501), amended the Act of 1881 as follows: "All liquors mentioned in § 1 of this act shall be construed and held to be intoxicating within the meaning of this act."

State v. Miller, 92 Kan. 994, L.R.A.1917F, 238, 142 Pac. 979, Ann. Cas. 1916B, 365; State v. Trione, supra, declared that the former case is no longer the law, and that the mere presence of the liquors mentioned makes the substance intoxicating for purposes of the prohibition statutes.

See also Laws of 1917, chap. 215, 216, "Bone Dry Prohibition Law."

8. Maryland:—Laws of 1914, chap. 831, § 1, p. 1569 (Prohibition in Certain Counties), forbids "any spirituous, vinous, fermented, malt, or intoxicating liquors, or any mixture thereof containing alcohol for beverage purposes. . . ."

Laws of 1916, chap. 389, § 1, p. 786. Prohibits in a certain county "any kindred preparation or beverage, having the appearance or taste of lager beer . . . except those beverages that are labeled . . . stating that the beverage is free of alcohol."

See also Note *d* (9); and Note *h*. These citations are not exhaustive of the Maryland county prohibition statutes.

9. Michigan:—Public Acts 1919, No. 53, § 3, p. 81. "'Intoxicating liquors' . . . include any vinous, malt, brewed, fermented, or spirituous liquors . . . and all liquids . . . which contain any alcohol and are capable of being used as a beverage."

10. Mississippi:—Code of 1906, § 1746, as amended by Laws of 1908, chap. 115, p. 116 (Code 1917, § 2086). Prohibits the sale of "any vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks which if drank to excess will produce intoxication."

Fuller v. Jackson, 97 Miss. 237, 30 L.R.A. (N.S.) 1078, 52 So. 873; Purity Extract & Tonic Co. v. Lynch, 100 Miss. 650, 56 So. 316. All the enumerated drinks are prohibited whether they contain alcohol or are intoxicating or both or neither.

it [285] is the presence of as much as or more than ½ of 1 per cent of alcohol;[d]

Laws of 1918, chap. 189, § 1, p. 210. Prohibits "spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind."

11. New Mexico:—Stat. 1915, § 2874. "All persons who make for sale fermented liquors of any name or description from malt, wholly or in part, or from any substitute therefor, shall be considered brewers." Sec. 2937. "The words 'intoxicating liquors' . . . include all malt, vinous, and spirituous liquors."

Constitutional Amendment, proposed by legislature of 1917, Laws of 1917, p. 352, prohibits "ardent spirits, ale, beer, alcohol, wine, or liquor of any kind whatsoever containing alcohol."

12. New York:—Laws of 1897, chap. 312, § 2; and Laws of 1903, chap. 486, § 2, as amended by Laws of 1905, chap. 679, § 2, defining intoxicating liquors as "all distilled, or rectified spirits, wine, fermented, and malt liquors."

People v. Cox, 106 App. Div. 299, 94 N. Y. Supp. 526, held that Malt Rose, containing .74 per cent of alcohol and made from malt, was within the meaning of the act.

People ex rel. Lanci v. O'Reilly, 129 App. Div. 522, 114 N. Y. Supp. 258, affirmed in 194 N. Y. 592, 88 N. E. 1128, holds that beer comes within the act, whether intoxicating or not, and declares that an earlier line of cases holding that the intoxicating quality is always for the jury to decide are no longer applicable where liquors are named in the act.

Laws of 1917, chap. 624, § 2, p. 1835. City Local Option Law. Continues the definition.

13. Ohio:—Rev. Stat. 1906, § 4364–9, laid a tax on the business of "trafficking in spirituous, vinous, malt, or any intoxicating liquors."

La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 204, held that "Friedon Beer," a malt liquor containing .47 per cent of alcohol, and not intoxicating, was within the statute.

State v. Walder, 83 Ohio St. 68, 93 N. E. 531.

Laws of 1919, § 6212–15, p. 388 (Prohibition). ". . . 'liquor' and 'intoxicating liquors' include any distilled, malt, spirituous, vinous, fermented, or alcoholic liquor and also any alcoholic liquid . . . . which . . . capable of being used as a beverage."

14. South Dakota:—Sess. Laws of 1890, chap. 101, § 6, p. 229 (Prohibition), intoxicating liquors include "all spirituous, malt, vinous, fermented, or other intoxicating liquors, or mixtures . . . that will produce intoxication."

Rev. Pol. Code 1903, § 2834, requires a license to sell "any spirituous, vinous, malt, brewed, fermented, or other intoxicating liquors."

State v. Ely, 22 S. D. 487, 118 N. W. 687, 18 Ann. Cas. 92, held that the liquors named come within the act, whether or not they are intoxicating.

Rev. Code 1919, § 10,237. "'Intoxicating liquors' . . . include whisky, alcohol, brandy, gin, rum, wine, ale, beer, absinthe, cordials, hard or fermented cider, . . . and all distilled, spirituous, vinous, malt, brewed, and fermented liquors and every other liquid . . . containing alcohol . . . and is capable of being used as a beverage."

14½. United States:—Act of March 1, 1895, 28 Stat. at L. 697, § 8, chap. 145 (Indian Territory Prohibition), prohibits "any vinous, malt, or fermented liquors, or any other intoxicating drinks."

United States v. Cohn, 2 Ind. Terr. 474, 52 S. W. 38, held that the act prohibits all malt liquors whether or not they are intoxicating.

See also Act of February 14, 1917, 39 Stat. at L. 903, chap. 53, Comp. Stat. § 3643b, Fed. Stat. Anno. Supp. 1918, p. 51 (Alaska Prohibition); and Act of March 3, 1917, 39 Stat. at L. 1123, chap. 165, Comp. Stat. § 3421¼a (District of Columbia Prohibition), both of which prohibit "all malt liquors."

15. Washington:—Code 1912, title 267, § 45 (Local Option). "'Intoxicating liquor' . . . shall include whisky, brandy, rum, wine, ale, beer, or any spirituous, vinous, fermented, malt or any other liquor containing intoxicating properties . . . except preparations compounded by a registered pharmacist, the sale of which would not subject him to the payment of the special liquor tax required by the laws of the United States."

Sess. Laws of 1915, chap. 2, § 2 (Prohibition). "'Intoxicating liquors' shall include whisky, etc., (as above) and all liquids . . . which contain any alcohol, which are capable of being used as a beverage."

State v. Hemerich, 93 Wash. 439, L.R.A. 1917B, 962, 161 Pac. 79.

16. Wisconsin:—Gen. Stat. 1911, § 1565c (Local Option), "any spirituous, malt, ardent, or intoxicating liquors or drinks."

Pennell v. State, 141 Wis. 35, 123 N. W. 115, holds that the statute forbids fermented malt liquors containing alcohol, whether intoxicating or not.

See also Montana, Note (*g*) 2.

NOTE (*d*):—

1. Connecticut:—Public Acts 1919, chap. 241, p. 2917, defines intoxicating liquors, ". . . all beer manufactured from hops and malt or from hops and barley, and all beer on the receptacle containing which the laws of the United States require a revenue stamp to be affixed . . . [but it] . . . shall not include beverages which contain no alcohol, . . ."

2. Delaware:—Laws of 1917, chap. 10, p. 19 (Local Option Enforcement), defines as follows: . . . "all liquid mixtures . . . containing so much as ½ of 1 per cent of alcohol by volume shall be deemed liquors and shall be embraced in the word 'liquor' as hereinafter used in this act."

3. Florida:—Acts of Sp. Sess. 1918, chap. 7736, § 7, as amended by Acts of 1919, chap. 7890, defines intoxicating liquor, which it prohibits, as all beverages containing "½ of 1 per cent of alcohol or more by volume."

4. Georgia:—Acts of 1915, Sp. Sess. pp. 77, 79 (Park's Anno. Code, Supp. 1917, Penal Code, § 448 (b)), defines "prohibited liquors" as ". . . beer, . . . near-beer, . . . and . . . beverages containing ½ of 1 per cent of alcohol or more by volume."

5. Illinois:—Rev. Stat. 1874, chap. 43, § 1 ("Dram Shop Act"), defines a dram shop as a place "where spirituous or vinous or malt liquors are retailed . . . and intoxicating liquors shall be deemed to include all such liquors."

Hansberg v. State, 120 Ill. 21, 23, 60 Am. Rep. 549, 8 N. E. 857. Indictment for selling "intoxicating liquors." Proof of selling "beer." The court said: "No evidence whatever was offered or admitted for the purpose of explaining or showing what 'beer' was made of, or what its characteristics were, or whether it was malt, vinous, or intoxicating."

Laws of 1919, p. 931 (Search and Seizure Law). "'Intoxicating liquor' or 'liquors' shall include all distilled, spirituous, vinous, fermented or malt liquors which contain more than ½ of 1 per cent by volume of alcohol."

6. Indiana:—Rev. Stat. 1881, § 2094, "whoever . . . sells . . . any spirituous, vinous, malt, or other intoxicating liquors."

Kurz v. State, 79 Ind. 488, 490: "It devolves on the state, therefore, to prove that the beer sold was either a malt liquor, or that it was in fact an intoxicating liquor."

Laws of 1911, chap. 119, § 29 (Saloon Regulation Act). "The words 'intoxicating liquors' shall apply to any spirituous, vinous, or malt liquor, or to any intoxicating liquor whatever which is used . . . as a beverage and which contains more than ½ of 1 per cent of alcohol by volume."

Laws of 1917, chap. 4, § 2 (Prohibition Act). "The words 'intoxicating liquor,' as used in this act, shall be construed to mean all malt, vinous, or spirituous liquor containing so much as ½ of 1 per cent of alcohol by volume."

7. Maine:—Rev. Stat. 1916, chap. 127, § 21 (Prohibition Act), declares "wine, ale, porter, strong beer, lager beer, and all other malt liquors and cider when kept or deposited with intent to sell the same for tippling purposes. . . . are declared intoxicating within the meaning of this act."

State v. Frederickson, 101 Me. 37, 6 L.R.A. (N.S.) 186, 115 Am. St. Rep. 295, 63 Atl. 535, 8 Ann. Cas. 48, holds that cider comes within the act, whether or not it is in fact intoxicating.

State v. Piche, 98 Me. 348, 56 Atl. 1052, holds that in case of a liquor not enumerated, the jury must find the question of intoxicating quality.

Laws of 1919, chap. 235, § 21, prohibits "as well as any beverage containing a percentage of alcohol which by Federal enactment or by decision of the Supreme Court of the United States, now or hereafter declared, renders a beverage intoxicating."

8. Maryland:—Laws of 1917, Ex. Sess. chap. 13, § 1 (Prohibition in Prince George County). "Malt liquors shall be construed to embrace porter, ale, beer, and all malt or brewed drinks, whether intoxicating or not, containing as much as ½ of 1 per cent of alcohol by volume; and that the words 'intoxicating liquors' . . . shall . . . embrace both spirituous liquors and malt liquors and . . . all liquid mixtures, . . . containing so much as ½ of 1 per cent of alcohol by volume." See also Note *c* (3), and Note *h*.

9. Minnesota:—Gen. Stat. 1913, § 3188, and Gen. Stat. Supp. 1917, § 3161, provide that "the terms 'intoxicating liquor' and 'liquor' . . . shall include distilled, fermented, spirituous, vinous, and malt liquor."

State v. Gill, 89 Minn. 502, 95 N. W. 449, held that only those malt liquors which were intoxicating were within the meaning of the act.

Laws of 1919, chap. 455, p. 537 (Prohibition). "'Intoxicating liquor' and 'liquor' shall include and mean ethyl alcohol and any distilled, fermented, spirituous, vinous, or malt liquor or liquid of any kind potable as a beverage, whenever any of said liquors or liquids contain ½ of 1 per cent or more of alcohol by volume."

10. Missouri:—Rev. Stat. 1909, § 7243. "If a majority of the votes . . . shall be 'against the sale of intoxicating liquors,' it shall be unlawful for any person . . . (to sell) . . . any kind of intoxicating liquors or beverage containing alcohol in any quantity whatever."

State v. Gamma, 149 Mo. App. 694, 129 S. W. 734; State v. Burk, 151 Mo. App. 188, 131 S. W. 883; State v. Wills, 154 Mo. App 605, 136 S. W. 25.

Laws of 1919, chap. —, § 15. "The phrase 'intoxicating liquor' or 'intoxicating liquors' whenever used in this act shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented, or alcoholic liquors, all alcoholic liquids . . . which contain ½ of 1 per cent of alcohol by volume . . . ; Provided, however, that when the above-mentioned phrases . . . are defined in the laws of the United States, then such definition of Congress shall supersede and take the place of the definition . . . in this section."

11. Nebraska:—Cobbey's Compiled Stat. 1907, § 7161, forbids the sale of "malt, spirituous, or vinous liquors or any intoxicating drinks" without a license.

Luther v. State, 83 Neb. 455, 20 L.R.A. (N.S.) 1146, 120 N. W. 125, holds that all malt liquors fall within the meaning of the statute, whether or not they are intoxicating.

Laws of 1917, chap. 187, § 1 (Prohibition). "'Intoxicating liquors' . . . embrace all malt, fermented, vinous or spirituous liquors, wine, porter, beer, ale, or any

in six states, 1 per cent of alcohol; [e] in one state, the presence of the "alco-

intoxicating drink, . . . and all malt or brewed drinks, and all mixtures . . . which will produce intoxication, and in addition thereto, such liquors of a different character and not hereinbefore enumerated capable of use as a beverage containing over ½ of 1 per cent of alcohol by volume."

12. Nevada:—Laws of 1919, chap. 1, § 1 (Prohibition). "The words 'liquors' . . . shall embrace all malt, vinous, or spirituous liquors, wine, porter, ale, beer, or any other intoxicating drink . . . , and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act . . . and all beverages containing so much as ½ of 1 per cent of alcohol by volume, shall be deemed spirituous liquors."

State ex rel. Thatcher v. Reno Brewing Co. 42 Nev. 397, 178 Pac. 902.

13. Oklahoma:—Sess. Laws of 1913, chap. 26, § 6, and Sess. Laws of 1917, chap. 186 (Prohibition), both define intoxicating liquors as "spirituous, vinous, fermented or malt liquors . . . or any liquors which contain as much as ½ of 1 per cent of alcohol by volume."

Estes v. State, 13 Okla. Crim. Rep. 604, 4 A.L.R. 1135, 166 Pac. 77, held that the state, to secure conviction for violation of the act, must prove either that the liquor contained more than ½ of 1 per cent of alcohol or that it was in fact intoxicating.

14. Oregon:—Laws of 1905, chap. 2 (Local Option), used only the term "intoxicating liquors."

State v. Carmody, 50 Or. 1, 12 L.R.A. (N.S.) 828, 94 Pac. 446, 1081, held that the court will judicially recognize that "beer" is intoxicating in an indictment for selling "intoxicating liquors."

Laws of 1915, chap. 141, § 2, p. 151. "'Intoxicating liquors' . . . embrace all spirituous, malt, vinous, fermented, or other intoxicating liquors, and all mixtures . . . which contain in excess of ½ of 1 per cent of alcohol by volume shall be deemed to be embraced within the term independently of any other test of their intoxicating character."

15. Tennessee:—Acts of 1917, chap. 4, p. 6 (Anno. Code 1918, § 6798a34). Clubs, etc., may not have on their premises any liquor "containing more than ½ of 1 per cent of alcohol."

16. Utah:—Laws of 1911, chap. 106, § 2; Laws of 1913, chap. 81, § 2 (License Laws), "any spirituous, vinous, fermented or malt liquor that may be used as a beverage and produce intoxication."

Laws of 1917, chap. 2, § 2 (Prohibition). "'Liquors' . . . embrace all fermented, malt, vinous, or spirituous liquors, alcohol, wine, porter, ale, beer, absinthe or any other intoxicating drink . . . and all malt or brewed drinks; and all liquids . . . which will produce intoxication; . . . and all beverages containing in excess of ½ of 1 per cent of alcohol by volume."

17. Virginia:—Code of 1887, § 587 (Local Option), "any wine, spirituous or malt liquors, or any mixture thereof."

Savage v. Com. 84 Va. 582, and 619, 5 S. E. 563, 565, held that a sale of "ginger extract," in order to be illegal, requires the proof that the extract is intoxicating.

Acts of 1916, chap. 146, § 1, p. 216, "ardent spirits . . . embrace alcohol, brandy, whisky, rum, gin, wine, porter, ale, beer, all malt liquors, absinthe, and all compounds . . . ; and all beverages containing more than ½ of 1 per cent of alcohol by volume."

18. West Virginia:—Code, chap. 32, § 1, as amended by Acts of 1877, chap. 107, prohibits the sale of "spirituous liquors, wine, porter, ale, beer, or any drink of a like nature . . . and all mixtures . . . known as 'bitters' . . . which will produce intoxication . . . shall be deemed intoxicating liquors."

State v. Oliver, 26 W. Va. 422, 427, 53 Am. Rep. 79, in a dictum declares that beer is prohibited whether it is intoxicating beer or not.

Code of 1906, chap. 32, § 1, is substantially the same.

"State v. Henry, 74 W. Va. 72, 4 A.L.R. 1132, 81 S. E. 569, on indictment for selling 'intoxicating liquors' held that evidence of sale of 'bevo' containing 1.31 per cent of alcohol sufficient to sustain a conviction."

Acts of 1913, chap. 13, § 1. "'Liquors' . . . embrace all malt, vinous, spirituous or liquors, wine, porter, ale, beer, or any other intoxicating drink . . . ; and all malt or brewed drinks whether intoxicating or not shall be deemed malt liquors . . . and all beverages containing so much as ½ of 1 per cent of alcohol by volume."

NOTE (e):—

1. California:—Stat. 1911, chap. 351, § 21 (Local Option and License). "'Alcoholic liquors' . . . include spirituous, vinous and malt liquors, and any other liquor . . . which contains 1 per cent" of alcohol or more.

People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121, held that the clause "and any other liquor which shall contain 1 per cent of alcohol or more" modified the enumerated liquors, so that a malt liquor containing less than 1 per cent of alcohol, and not intoxicating, did not fall within the act.

2. Massachusetts:—Rev. Laws 1902, chap. 100, § 2 (Local Option and License). "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than 1 per cent of alcohol by volume . . . shall be deemed to be intoxicating."

Com. v. McGrath, 185 Mass. 1, 69 N. E. 340, held that cider fell within the act, whether it contained 1 per cent of alcohol or was intoxicating or neither.

Com. v. Blos, 116 Mass. 56, held that a liquor not enumerated in the statute is not prohibited unless it falls within the general definition, which is a question for the jury.

Supp. to Rev. Laws, 1908, chap. 100, § 1, retains the same definition.

3. New Hampshire:—Gen. Laws 1878,

holic principle;"[f] and in two states, 2 per cent of alcohol.[g] Thus in [286] forty-two of the forty-eight states—Maryland appears in two classes above—a malt liquor containing over 2 per cent of alcohol by weight or volume is

chap. 109, § 15, restricted the sale of "lager beer or other malt liquors."

State v. Thornton, 63 N. H. 114, held that all malt liquors come within the meaning of the act, whether or not they are intoxicating.

Supp. to Pub. Stat. and Sess. Laws 1901–1913, p. 7, defines intoxicating liquors as "all distilled liquors or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage . . . containing more than 1 per cent of alcohol by volume."

Laws of 1917, chap. 147, § 60 (Prohibition). "By the words spirit, liquor, spirituous liquor, intoxicating liquor . . . (is meant) . . . all distilled spirits or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage . . . containing more than 1 per cent of alcohol by volume."

4. South Carolina:—Rev. Stat. 1893, Crim. Stat. § 437; Code 1902, Crim. Code, § 555; Code 1912, Crim. Code, § 794, prohibit any spirituous, malt, vinous, fermented, brewed or other liquors and beverages, or any compound or mixture thereof which contains alcohol.

Acts of 1917, No. 94, prohibits "any spirituous, malt, vinous, fermented, brewed, or other liquors and beverages, or any compound or mixture thereof which contains alcohol in excess of 1 per cent."

5. Vermont:—Rev. Laws 1880, § 3800, prohibited the sale of cider at places of amusement.

State v. Spaulding, 61 Vt. 505, 17 Atl. 844, held that the prohibition covered all cider, whether intoxicating or not.

Laws of 1902, No. 90, § 1, p. 94 (Gen. Laws 1917, § 6452). "'Intoxicating liquors' . . . shall mean ale, porter, beer, lager beer, cider, all wines, and beverage which contains more than 1 per cent of alcohol by volume."

6. Wyoming:—Comp. Stat. 1910, § 2838. "Any person who shall sell . . . any liquors, either spirituous, vinous, fermented, or malt, without a license, etc."

Sess. Laws of 1919, chap. 25, § 2 (Prohibition). "'Intoxicating liquor' . . . include any distilled, malt, spirituous, vinous, fermented, or alcoholic liquor and all alcoholic liquids . . . capable of being used as a beverage, which shall contain more than 1 per cent of alcohol."

NOTE (*f*):—

North Dakota:—Rev. Code 1895, § 7598, contains a proviso to the effect that fermented and alcoholic liquors containing less than 2 per cent of alcohol by volume shall not be deemed to be intoxicating.

Laws of 1897, chap. 65, § 10. "Courts will take judicial notice that beer is a malt liquor and intoxicating."

State v. Currie, 8 N. D. 545, 80 N. W. 475 (1899), held that the statute meant that beer is to be presumed to be intoxicating until proved not to be so.

Rev. Code 1899, § 7598, prohibits "all spirituous, malt, vinous, fermented, or other intoxicating liquors or mixtures thereof . . . that produce intoxication, or any liquors sold as a beverage and which contain . . . methyl alcohol, amyl alcohol, etc."

State v. Virgo, 14 N. D. 293, 103 N. W. 610 (1905), held that the act only applied to such liquors as were in fact intoxicating.

Laws of 1909, chap. 187, p. 277. Intoxicating liquors include alcohol, brandy, rum, beer, ale, porter, wine, and hard cider, also all spirituous, malt, etc., liquors, which will produce intoxication in any degree; or any mixture of such or any kind of beverage whatsoever which, while preserving the alcoholic principle or any other intoxicating quality, may be used as a beverage and may become a substitute for the ordinary intoxicating beverages.

State v. Fargo Bottling Works Co. 19 N. D. 397, 26 L.R.A.(N.S.) 872, 124 N. W. 387, held that "Purity Malt," containing 1.75 per cent of alcohol, "preserved the alcoholic principle," and whether or not it was intoxicating, it might not lawfully be sold.

NOTE (*g*):—

1. Louisiana:—Shreveport Ice & Brewing Co. v. Brown, 128 La. 408, 54 So. 923, held that a statute regulating the sale of "spirituous and intoxicating liquors" includes only intoxicating liquors.

Acts of Extra Session, 1910, No. 171, defines "grog-shop" as a place where "intoxicating, spirituous, vinous, or malt liquors are sold" (and forbids them in prohibition territory).

State v. Maroun, 128 La. 829, 55 So. 472, held that the malt liquors must be intoxicating to be within the meaning of the statute.

Acts of 1914, No. 146, repeats a similar definition of grog-shop or blind tiger. Acts of 1914, No. 211, forbids the manufacture of near-beer with more than 1.59 per cent of alcohol by weight or 2 per cent by volume; and prohibits the sale of the near-beer thus made under the same roof where any other beverage is sold.

State v. George, 136 La. 906, 67 So. 953, seems to hold that this near-beer may be sold in prohibition territory where the "grog-shops" are not allowed.

2. Montana:—Laws of 1917, chap. 143, § 2. "'Intoxicating liquors' . . . include whisky, brandy, gin, rum, wine, ale, and spirituous, vinous, fermented, or malt liquors or liquid . . . which contain as much as 2 per cent of alcohol by volume and is capable of being used as a beverage."

State v. Centennial Brewing Co. 35 Mont. 500, 179 Pac. 296, holds specifically mentioned liquors prohibited regardless of alcoholic content.

deemed, for the purpose of regulation or prohibition, intoxicating as a [287] matter of law. Only one state has adopted a test as high as 2.75 per cent by weight or 3.4 per cent by volume.[h] Only two states permit the question of the intoxicating character of an enumerated liquor to be put in issue.[i] In [288] three other states the matter has not been made clear either by decision or legislation.[j] The decisions of the courts as well as the action of the legislatures make it clear—or, at least, furnish ground upon which Congress [289] reasonably might conclude—that a rigid classification of beverages is an essential of either effective regulation or effective prohibition of intoxicating liquors.[k]

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44, determined that state legislation of this character is valid, and set forth [290] with clearness the constitutional ground upon which it rests: "When a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make [291] its action effective. It does not follow that because a transaction separately considered is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a [292] purpose within the admitted power of the government. [P. 201.] . . . It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. [293] It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of

NOTE (*h*):—

Rhode Island:—Pub. Laws of 1887, chap. 634, § 2. "'Intoxicating liquors' . . . include wine, rum, or other strong, or malt liquors, or any liquor or mixture which shall contain more than 2 per cent by weight of alcohol," and this is not to be construed to permit the sale of liquors containing less than 2 per cent if intoxicating.

Public Laws 1919, chap. 1740, § 1 (amending Gen. Laws, chap. 123, § 1). "'Nonintoxicating beverages' as used in this act, includes and means all distilled or rectified spirits, wines, fermented and malt liquors which contain 1 per centum and not more than 4 per centum by weight of alcohol. . . .

"Sec. 2. No person shall manufacture or sell or suffer to be manufactured or sold, or keep or suffer to be kept on his premises or possessions or under his charge for the purposes of sale and delivery, any nonintoxicating beverages, unless as hereinafter provided. . . .

"Sec. 5. The electors of the several cities and towns . . . shall . . . cast their ballots for or against the granting of licenses for the sale of nonintoxicating beverages pursuant to this act. . . ."

Maryland:—Laws of 1918, chap. 219, p. 580 (prohibiting at night the sale of intoxicating liquors to be carried away from the place of sale). Expressly excludes from the operation of the act "malt liquors containing less than 4 per cent of alcohol by weight."

This provision, however, is not attempting to make a classification of intoxicating liquors. For laws of this state which do that, see Note *c* (7) and Note *d* (9).

NOTE (*i*):—

1. Kentucky:—Statutes of 1903, § 2554, as amended by Laws of 1906, chap. 21, forbids the sale in dry territory of "spirituous, vinous or malt liquors." Bowling Green v. McMullen, 134 Ky. 742, 26 L.R.A.(N.S.) 895, 122 S. W. 823, held that the liquors named must be intoxicating in fact to be forbidden by the act.

2. Texas:—Rev. Stat. 1895, art. 5060a, taxes the selling of "spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication."

Ex parte Gray, — Tex. Crim. Rep. —, 83 S. W. 828; Reisenberg v. State, — Tex. Crim. Rep. —, 84 S. W. 585, held that nonintoxicating malt beverages may be sold without a license.

Gen. Laws 1918, chap. 24 (Prohibition), uses the same terms as the older statute and is cumulative, so presumably it has the same meaning.

3. Louisiana:—See Note *f* (1). The test of 2 per cent applies only to near-beer. Presumably a vinous liquor must be proved intoxicating in fact under the decisions.

NOTE (*j*):—

1. New Jersey:—Laws of 1918, chap. 2, § 1 (Local Option). "The term 'intoxicating liquor' . . . shall mean any spirituous, vinous, malt, brewed, or any other intoxicating liquor."

No interpretations.

2. North Carolina:—Sp. Sess. 1908, chap. 71, § 1. Prohibits the sale of "any spirituous, vinous, fermented, or malt liquors, or intoxicating bitters."

Pub. Laws 1909, chap. 438, Schedule B, §§ 26 and 63, imposed a license tax on the sale of "near-beer or any drinks containing ½ of 1 per cent alcohol or more."

Parker v. Griffith, 151 N. C. 600, 66 S. E. 565; State v. Danenberg, 151 N. C. 718, 26 L.R.A.(N.S.) 890, 66 S. E. 301, held that the sale of near-beer containing 1½ per cent of alcohol was lawful.

3. Pennsylvania:—No definition.

NOTE (*k*):—

See Note *b*, supra.

beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor [294] to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise. [P. 204.] . . . The state, [295] within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent [296] beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power." P. 205.

[297] That the Federal government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the states, is obvious; and both this experience of the states and the need of the Federal government of legislation defining intoxicating liquors, as was done in the Volstead Act, was clearly set forth in the reports of the House Committee on the Judiciary in reporting the bill to the 65th Congress, 3d Session, Report 1143, February 26, 1919, and to the 66th Congress, 1st Session, Report 91, June 30, 1919. Furthermore, recent experience of the military forces had shown the necessity [298] of fixing a definite alcoholic test for the purpose of administering the limited prohibitory law included in the Selective Service Act of May 18, 1917, chap. 15, § 12, 40 Stat. at L. 76, 82, Comp. Stat. § 2019a.[l] And the Attorney General, calling attention specifically to the claim made in respect to the 2.75 per cent beer, had pointed out to Congress that definition of intoxicating liquor by fixed standards was essential to effective enforcement of the Prohibition Law.[m] It is therefore [299] clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition, and also that the definition provided by the Volstead Act was not an arbitrary one.

Plaintiff's argument is equivalent to saying that the war power of Congress to prohibit the manufacture and sale of intoxicating liquors does not extend to the adoption of such means to this end as in its judgment are necessary to the

NOTE (*l*):—
That statute made it "unlawful to sell any intoxicating liquor, including beer, ale or wine, to any officer or member of the military forces while in uniform." The Judge Advocate General having been applied to for an opinion concerning its administration advised that: In matters of military inquiry, the War Department regards a beverage that contains 1.4 per cent of alcohol as intoxicating liquor within the meaning of § 12 of the Selective Service Act of May 18, 1917, and the regulations of the President and the Secretary of War made thereunder; whether beverages are intoxicating liquors . . . in prosecution of civilians is a question for the civil courts. Opinions of Judge Advocate General, 250. Dec. 4, 1918—Digest of 1918, p. 360. See also Opinion of March 3, 1919—Digest of 1919, p. 289.

NOTE (*m*):—
Referring to the proposed definition: "I do not think the wisdom of such action on the part of Congress admits of doubt: It goes without saying, I think, that if a law merely prohibits intoxicating liquors and leaves to the jury in each case, from the evidence produced, to determine whether the liquor in question is, in fact, intoxicating or not, its efficient and uniform administration will be impossible. The term 'intoxicating' is too indefinite and uncertain to produce anything like uniform results in such trials. Of course, there are certain liquors so generally known to be intoxicating that any court would take judicial notice of this fact. But in the absence of a definition by Congress there will be innumerable beverages as to which the claim will be made that they do not contain enough alcohol to render them intoxicating. These contentions will produce endless confusion and uncertainty. These, I think, are substantially the reasons why Congress should itself provide a definition.

"The importance of this matter has been very much emphasized by our present efforts to enforce the War Prohibition Act. The claim is being made that beer containing as much as 2¾ per cent of alcohol is not intoxicating. And if this must be made a question of fact to be decided by each jury, but little in the way of practical results can be expected. I am, however, most earnestly insisting that, in view of the rulings for many years by the Internal Revenue Department, Congress meant when it used the word 'beer' a beverage of the class generally known as beer if it contained as much as ½ of 1 per cent of alcohol." Letter of Attorney General to Senator Morris Shepherd, July 23, 1919, read in Senate, September 5, 1919, 58 Congressional Record, 5185.

effective administration of the law. The contention appears to be, that since the power to prohibit the manufacture and sale of intoxicating liquors is not expressly granted to Congress, but is a power implied under § 8 of article 1 of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" powers expressly enumerated, the power to prohibit nonintoxicants would be merely an incident of the power to prohibit intoxicants; and that it cannot be held to exist, because one implied power may not be grafted upon another implied power. This argument is a mere matter of words. The police power of a state over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors, supported by a separate implied power to prohibit kindred nonintoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors. Likewise the implied [300] war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectually prevent their sale. Furthermore, as stated in Hamilton v. Kentucky Distilleries & Warehouse Co. [251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106], while discussing the implied power to prohibit the sale of intoxicating liquors: "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power."

The distinction sought to be made by plaintiff between the scope or incidents of an express power and those of an implied power has no basis in reason or authority. Thus, the Constitution confers upon Congress the express power "to establish postoffices and post roads" (art. 1, § 8, clause 7). From this is implied the power to acquire land for postoffices in the several states (Battle v. United States, 209 U. S. 36, 52 L. ed. 679, 28 Sup. Ct. Rep. 422); and as an incident of this implied power to acquire land, the further power is implied to take it by right of eminent domain (Kohl v. United States, 91 U. S. 367, 23 L. ed. 449). Likewise, the Constitution confers by clause 3 the express power "to regulate commerce among the several states;" but there is implied for this purpose also the power to grant to individuals franchises to construct and operate railroads from state to state (California v. Central P. R. Co. 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073). Incidental to this implied power to construct or authorize the construction of a railroad is the further implied power to regulate the relations of the railroad with its employees (Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 47, 56 L. ed. 327, 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875); to require safety appliances upon cars, even when used in intrastate commerce (Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822); and to regulate freight rates even to the extent of affecting intrastate rates (American Exp. Co. v. South Dakota, 244 U. S. 617, 61 L. ed. 1352, P.U.R.1917F, 45, 37 Sup. Ct. Rep. 656). Whether it be for purposes of national defense, or for the purpose [301] of establishing postoffices and post roads, or for the purpose of regulating commerce among the several states, Congress has the power "to make all laws necessary and proper for carrying into execution" the duty so reposed in the Federal government. While this is a government of enumerated powers, it has full attributes of sovereignty within the limits of those powers. Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900. Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the term "express and implied," the term "specific and general," had been used. For the power conferred by clause 18 of § 8 "to make all laws which shall be necessary and proper for carrying into execution" powers specifically enumerated is also an express power. Since Congress has power to increase war efficiency by prohibiting the liquor traffic, no reason appears why it should be denied the power to make its prohibition effective.

Second: Does the fact that title 1 of the Volstead Act took effect upon its passage render § 1 invalid as against the plaintiff? Prohibition of the manufacture of malt liquors with alcoholic content of ½ of 1 per cent or more is permissible only because, in the opinion of Congress, the war emergency demands it. If, in its opinion, the particular emergency demands the immediate dis-

continuance of the traffic, Congress must have the power to require such discontinuance. To limit the power of Congress so that it may require discontinuance only after the lapse of a reasonable time from the passage of the act would seriously restrict it in the exercise of the war powers. Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the law-making body. That the prohibition of the manufacture of nonintoxicating beer, if permissible at all, may be made to take effect immediately, follows necessarily from the principle acted upon in Mugler v. Kansas, 123 [302] U. S. 623, 669, 31 L. ed. 205, 213, 8 Sup. Ct. Rep. 273, since the incidents attending the exercise by Congress of the war power to prohibit the liquor traffic are the same as those that attend the states' prohibition under the police power. In the Mugler Case, also, the breweries were erected at a time when the state did not forbid the manufacture of malt liquors; and there it was alleged that the prohibition, which became effective almost immediately, would reduce the value of one of the breweries by three fourths and would render the other of little value. Here, as there, the loss resulting to the plaintiff from inability to use the property for brewery purposes is an incident of the peculiar nature of the property and of the war need which, we must assume, demanded that the discontinuance of use be immediate. Plaintiff cannot complain because a discontinuance later would have caused him a smaller loss. This, indeed, appears to be conceded so far as concerns the brewery and appurtenances. The objection on the ground that the prohibition takes effect immediately is confined to the prohibition of the sale of the beer on hand at the time of the passage of the act. But as to that also we cannot say that the action of Congress was unreasonable or arbitrary.

Plaintiff contends, however, that even if immediate prohibition of the sale of its nonintoxicating beer is within the war power, this can be legally effected only provided compensation is made; and it calls attention to the fact that in Barbour v. Georgia, 249 U. S. 454, 459, 63 L. ed. 704, 707, 39 Sup. Ct. Rep. 316, following some earlier cases, the question was reserved whether, under the police power, the states could prohibit the sale of liquor acquired before the enactment of the statute. It should, however, be noted that, among the judgments affirmed in the Mugler Case, was one for violation of the act by selling beer acquired before its enactment (see pp. 625, 627); and that it was assumed without discussion that the same rule applied to the brewery and its product (p. 669). But we are not required to determine here the limits [303] in this respect of the police power of the states; nor whether the principle is applicable here under which the Federal government has been declared to be free from liability to an owner "for private property injured or destroyed during the war, by operations of armies in the field, or by measures necessary to their safety and efficiency" (United States v. Pacific R. Co. 120 U. S. 227, 239, 30 L. ed. 634, 638, 7 Sup. Ct. Rep. 490); in analogy to that by which states are exempt from liability for the demolition of a house in the path of a conflagration, see Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; or for garbage of value taken, California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; or for unwholesome food of value destroyed. (North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276; Adams v. Milwaukee, 228 U. S. 572, 584, 57 L. ed. 971, 977, 33 Sup. Ct. Rep. 610) for the preservation of the public health. Here, as in Hamilton v. Kentucky Distilleries & Warehouse Co. supra, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.

It is urged that the act is particularly oppressive in respect to the beer on hand, because the plaintiff was engaged in manufacturing and selling a nonintoxicating beverage expressly authorized by the President in his Proclamation of December 8, 1917 [40 Stat. at L. 84], and prohibited by him later, only when conservation of all the food products of the country became necessary. The facts afford no basis on which to rest the claim of an equity in the plaintiff's favor. The specific permission from the President to manufacture 2.75 per cent beer was not on the ground that such beer was nonintoxicating; nor was it a declaration by him that this beer was in fact nonintoxicating. The permission extended to all "ale and porter," which.

everyone knows, are intoxicating liquors."[n] This permission to [304] make 2.75 per cent beer was withdrawn December 1, 1918, under proclamation of September 16, 1918 [40 Stat. at L. 204]; and no permission to manufacture specifically 2.75 per cent beer was ever thereafter given by the President. His later proclamation (March 4, 1919 [40 Stat. at L. 293]) merely limited the prohibition of the use of foodstuffs to use in the production of "intoxicating liquors." Whether 2.75 per cent beer was intoxicating was thus left by the President not only without a decision, but without even an intimation. The statement of plaintiff that the 2.75 per cent beer on hand was manufactured under permission of the President is wholly unfounded. It was not until July 1, 1919, when the War-time Prohibition Act of November 21, 1918 [40 Stat. at L. 1045, chap. 212] became operative in this respect that there was any prohibition of the sale of any liquors. So far as appears, all the beer which the plaintiff had on hand at the time of the passage of the Volstead Act was manufactured by the plaintiff long after the President had ceased to have any authority to forbid or to permit.

Decree affirmed.

Mr. Justice **McReynolds**, with whom concurred Mr. Justice **Day** and Mr. Justice **Van Devanter**, dissenting:

I cannot accept either the conclusion announced by the court or the reasons advanced to uphold it. The importance of the principles involved impels a dissent.

We are not now primarily concerned with the wisdom or validity of general legislation concerning liquors, nor with the intoxicating qualities of beer, nor with measures taken by a state under its inherent and wide general powers to provide for public safety and welfare. Our problem concerns the power of Congress and rights of the citizen after a declaration of war, but when active [305] hostilities have ended and demobilization has been completed.

The government freely admits, since the present cause stands upon motion to dismiss a bill which plainly alleges that the beer in question is nonintoxicating, we must accept that allegation as true and beyond controversy. In United States v. Standard Brewery, decided this day [251 U. S. 210, ante, 229, 40 Sup. Ct. Rep. 139], we rule in effect that for many months prior to the Volstead Act, passed October 28, 1919, no law of the United States forbade the production or sale of nonintoxicating malt liquors. And so the question for decision here distinctly presented is this: Did Congress have power on October 28, 1919, directly and instantly to prohibit the sale of a noninfoxicating beverage, theretofore lawfully produced and which until then could have been lawfully vended, without making any provision for compensation to the owner?

The Federal government has only those powers granted by the Constitution. The 18th Amendment not having become effective, it has no general power to prohibit the manufacture or sale of liquors. But by positive grant Congress has been empowered: "To declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of the land and naval forces," "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers;" and to these it is attempted to trace the asserted power to prohibit sale of complainant's beer. See, concerning implied powers, Cooley, Const. Law, 105; Story, Const. 4th ed. § 1243.

The argument runs: This court has held in Hamilton v. Kentucky Distilleries & Warehouse Co. (decided December 8th) [251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106], that under a power implied because necessary and proper to carry into execution the above-named powers relating to war, in October, 1919, Congress could prohibit the sale [306] of intoxicating liquors. In order to make such a prohibition effective the sale of nonintoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this nonintoxicant must be implied.

The query at once arises: If all this be true, why may not the second implied power engender a third, under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc., etc.? The mischievous consequences of such reason-

NOTE (n):—
Webster defines ale as: "An intoxicating liquor made from an infusion of malt by fermentation and the addition of a bitter, usually hops;" and porter as: "A malt liquor, of dark color and moderately bitter taste, possessing tonic and intoxicating qualities."

ing were long ago pointed out in Kidd v. Pearson, 128 U. S. 1, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, where, replying to a suggestion that under the expressly granted power to regulate commerce, Congress might control related matters, it was said:

"The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining,—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?"

For sixty years Ex parte Milligan, 4 Wall. 2, 120, 125, 18 L. ed. 281, 295, 297, has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights. The doctrines then clearly—I may add, courageously—announced conflict with the novel and hurtful theory now promulgated. A few pertinent quotations from the opinion will accentuate the gravity of the present ruling:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and [307] good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

. . . . . .

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged [308] at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus."

By considering the circumstances existing when the War-time Prohibition Act of November 21, 1918 [40 Stat. at L. 1045, chap. 212], was challenged, in order to reach the conclusion announced in Hamilton v. Kentucky Distilleries & Warehouse Co. supra, this court asserted its right to determine the relationship between such an enactment and the conduct of war; the decision there really turned upon an appreciation of the facts. And that the implied power to enact such a prohibitive statute does not spring from a mere technical state of war, but depends upon some existing necessity directly related to actual warfare, was recognized. Treating that opinion as though it asserted the exis-

tence of a general power delegated to Congress to prohibit intoxicants, certain cases which declare our inability to interfere with a state in the exercise of its police power (Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, etc., 53 L. ed. 75, 29 Sup. Ct. Rep. 10) are now cited, and it is said they afford authority for upholding the challenged statute. But those cases are essentially different from the present one, both as to facts and applicable principles; the power exercised by the states was inherent, ever present, limited only by the 14th Amendment, and there was no arbitrary application of it; the power of Congress recognized in Hamilton v. Kentucky Distilleries & Warehouse Co., and here relied upon, must be inferred from others expressly granted, and should be restricted, as it always has been heretofore, to actual necessities consequent upon war. It can only support a measure directly relating to such necessities, and only so long as the relationship continues. Whether these [309] essentials existed when a measure was enacted or challenged, presents a question for the courts; and, accordingly, we must come to this ultimate inquiry:—Can it be truthfully said, in view of the well-known facts existing on October 28, 1919, that general prohibition immediately after that day of the sale of nonintoxicating beer theretofore lawfully manufactured could afford any direct and appreciable aid in respect of the war declared against Germany and Austria?

What were the outstanding circumstances? During the nineteen months—April, 1917, to November, 1918—when active hostilities were being carried on, and for almost a year thereafter, Congress found no exigency requiring it to prohibit sales of nonintoxicating beers. The armistice was signed and actual hostilities terminated November 11, 1918. Our military and naval forces, with very few exceptions, had returned and demobilization had been completed. The production of war material and supplies had ceased long before and huge quantities of those on hand had been sold. The President had solemnly declared: "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." Also—"That the object of the war is attained." "The quiet of peace and tranquillity of settled hopes has descended upon us." July 10, 1919, he announced: "The war ended in November, eight months ago;" and in a message dated October 27, 1919, he declared that war emergencies which might have called for prohibition "have been satisfied in the demobilization of the Army and Navy." Food supplies were abundant, and there is no pretense that the enactment under consideration was intended to preserve them. Finally, the statute itself contains no declaration that prohibition of nonintoxicants was regarded as in any way essential to the proper conduct or conclusion of the war or to restoration of peace.

[310] Giving consideration to this state of affairs I can see no reasonable relationship between the war declared in 1917, or the demobilization following (both of which in essence if not by formal announcement terminated before October, 1919), or restoration of peace (whose quiet had already descended upon us), and destruction of the value of complainant's beverage, solemnly admitted in this record to be nonintoxicating, and which it manufactured, held, and desired to sell in strict compliance with the laws of New York. Nor can I discover any substantial ground for holding that such destruction could probably aid in an appreciable way the enforcement of any prohibition law then within the competency of Congress to enact. It is not enough merely to assert such a probability; it must arise from the facts.

Moreover, well-settled rights of the individual in harmless property and powers carefully reserved to the states ought not to be abridged or destroyed by mere argumentation based upon supposed analogies. The Constitution should be interpreted in view of the spirit which pervades it, and always with a steadfast purpose to give complete effect to every part according to the true intendment,—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore: "Nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." [5th Amend.] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." [10th Amend.]

Mr. Justice Clarke also dissents.

[311] WILLIAM DUHNE, Complainant,
v.
STATE OF NEW JERSEY et al.

(See S. C. Reporter's ed. 311-314.)

Supreme Court of the United States — original jurisdiction — suit by citizen of state against Federal officers.

1. The Federal Supreme Court may not entertain original jurisdiction of a suit brought by a citizen of a state against officers of the United States.

[For other cases, see Supreme Court of the United States, I. a, in Digest Sup. Ct. 1908.]

States — immunity from suit — Federal courts.

2. The judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state, without its consent.

[For other cases, see States, IX. b, 2, in Digest Sup. Ct. 1908.]

Supreme Court of the United States — original jurisdiction — suit against state.

3. A suit brought by a citizen against his own state without its consent is not drawn within the original jurisdiction of the Federal Supreme Court by the provision of U. S. Const. art. 3, § 2, clause 2, conferring original jurisdiction upon that court in all cases in which a state shall be a party, since this clause merely distributes into original and appellate jurisdiction, the jurisdiction previously conferred, and does not itself grant any new jurisdiction.

[For other cases, see Supreme Court of the United States, I. b, 4, in Digest Sup. Ct. 1908.]

[No. —, Original.]

Argued January 5, 1920. Decided January 12, 1920.

ON RULE to show cause why leave should not be granted to a citizen of New Jersey to file an original bill against Federal officers and the State of New Jersey, to enjoin the enforcement of the 18th Amendment to the Federal Constitution. Rule discharged.

Mr. **Everett V. Abbot** argued the cause, and, with Messrs. George W. Tucker, Benjamin Tuska, and Edward Hollander, filed a brief for complainant:

The state of New Jersey may be sued in this court as a sovereign entity.

Cunningham v. Macon & B. R. Co. 109 U. S. 446, 451, 27 L. ed. 992, 994, 3 Sup. Ct. Rep. 292, 609; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

Mr. **Thomas F. McCran**, Attorney General of New Jersey, argued the cause and filed a brief for the state of New Jersey:

The state of New Jersey cannot compulsorily be made a suitor in an original action in the Supreme Court of the United States, instituted by a citizen of said state.

Louisiana v. Texas, 176 U. S. 16, 44 L. ed. 353, 20 Sup. Ct. Rep. 251; California v. Southern P. Co. 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; Fitts v. McGhee, 172 U. S. 516-524, 43 L. ed. 535-539, 19 Sup. Ct. Rep. 269; Osborn v. Bank of United States, 9 Wheat. 846, 6 L. ed. 229.

Solicitor General **King** argued the cause, and, with Assistant Attorney General Frierson, filed a brief for defendants other than the state of New Jersey:

As to controversies between a state and citizens of other states, the 11th Amendment denies to the United States court jurisdiction where such suit is brought against the state as a defendant.

Hans v. Louisiana, 134 U. S. 1, 15, 33 L. ed. 842, 847, 10 Sup. Ct. Rep. 504.

The United States cannot be sued in any court except when it has consented thereto.

Stanley v. Schwalby, 162 U. S. 255, 269, 270, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754.

Memorandum opinion by Mr. Chief Justice **White**, by direction of the court:

The complainant, a citizen of New Jersey, asked leave to file an original bill against the Attorney General of the [313] United States, the Commissioner of Internal Revenue thereof, and the United States District Attorney for the

---

Note.—On suit against Federal officer or agent as suit against United States—see notes to Louisiana v. Garfield, 53 L. ed. U. S. 92, and Wells v. Roper, 62 L. ed. U. S. 756.

On suits against state officers as suits against a state—see notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727; Ex parte Young, 13 L.R.A.(N.S.) 932; Louisville & N. R. Co. v. Burr, 44 L.R.A.(N.S.) 189; and Beers v. Arkansas, 15 L. ed. U. S. 991.

Generally, on suits against a state—see notes to Hans v. Louisiana, 33 L. ed. U. S. 842; Beers v. Arkansas, 15 L. ed. U. S. 991; Carr v. State, 11 L.R.A. 370; and Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399.

District of New Jersey, as well as against the state of New Jersey. The bill sought an injunction restraining the United States officials named and the state of New Jersey, its officers and agents, from in any manner directly or indirectly enforcing the 18th Amendment to the Constitution of the United States, any law of Congress or statute of the state to the contrary, on the ground that that amendment was void from the beginning and formed no part of the Constitution.

Answering a rule to show cause why leave to file the bill should not be granted, if any there was, the defendants, including the state of New Jersey, denied the existence of jurisdiction to entertain the cause, and this is the first question for consideration.

So far as the controversy concerns the officials of the United States, it is obvious that the bill presents no question within the original jurisdiction of this court, and in effect that is not disputed, since in substance it is conceded that the bill would not present a case within our original jurisdiction if it were not for the presence of the state of New Jersey as a defendant. But it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 82, 10 Sup. Ct. Rep. 504; North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; California v. Southern P. Co. 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591; Fitts v. McGhee, 172 U. S. 516, 524, 43 L. ed. 535, 539, 19 Sup. Ct. Rep. 269.

It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of § 2, article 3, of the Constitution, confers original jurisdiction upon this court "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, . . ." In [314] other words the argument is that the effect of the clause referred to is to devest every state of an essential attribute of its sovereignty by subjecting it without its consent to be sued in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as creative of jurisdiction instead of confining it to its merely distributive significance according to the rule long since announced, as follows: "This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties, and those only." Louisiana v. Texas, 176 U. S. 1, 16, 44 L. ed. 347, 353, 20 Sup. Ct. Rep. 251. That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of Federal jurisdiction previously conferred, and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that the Federal jurisdiction does not embrace the power to entertain a suit brought against a state without its consent, the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no Federal judicial power is conferred.

As the want of jurisdiction to entertain the bill clearly results, it follows that the permission to file must be and it is denied, and our order is, rule discharged.

---

[315] WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,
v.
PETER BOEGLI.

(See S. C. Reporter's ed. 315-317.)

Commerce — conflicting state and Federal regulations — construction of Federal statute — reserved power of state.

1. A narrow construction need not, in order to preserve the reserved power of a state, be given to the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Com-

---

Note.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson,

merce, as well as placing them under the administrative control of the Interstate Commerce Commission.

[For other cases, see Commerce, I. c; III. o, in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — interstate telegrams — prompt delivery.

2. Congress has so far taken possession of the field by enacting the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, as to prevent a state from thereafter penalizing the negligent failure of a telegraph company to deliver promptly an interstate telegram in that state.

[For other cases, see Commerce, I. c; III. o, in Digest Sup. Ct. 1908.]

[No. 83.]

Submitted December 19, 1919. Decided January 12, 1920.

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Allen County in that state, imposing a penalty upon a telegraph company for failure promptly to deliver an interstate telegram. Reversed and remanded for further proceedings.

See same case below, — Ind. —, 115 N. E. 773.

The facts are stated in the opinion.

Messrs. **Rush Taggart** and **Francis Raymond Stark** submitted the cause for plaintiff in error:

The states are no longer free to administer their varying local policies with respect either (1) to the validity of the limitations of liability in the contract for the transmission of an interstate telegram, or (2) the elements of damage which are to be recognized apart from such contractual limitations; but, as to both such matters, they are bound, as are interstate carriers of goods and passengers, to recognize and apply the Federal rule.

Gardner v. Western U. Teleg. Co. 145 C. C. A. 399, 231 Fed. 405, 243 U. S. 644, 61 L. ed. 944, 37 Sup. Ct. Rep. 405; Williams v. Western U. Teleg. Co. 203 Fed. 140; Western U. Teleg. Co. v. Dant, 42 App. D. C. 398, L.R.A.1915B, 685, Ann. Cas. 1916A, 1132; Western U. Teleg. Co. v. Hawkins, — Ala. —, 73 So. 973; Western U. Teleg. Co. v. Compton, 114 Ark. 193, 169 S. W. 946; Western U. Teleg. Co. v. Johnson, 115 Ark. 564, 171 S. W. 859; Western U. Teleg. Co. v. Simpson, 117 Ark. 156, 174 S. W. 232; Western U. Teleg. Co. v. Holder, 117 Ark. 210, 174 S. W. 552; Western U. Teleg. Co. v. Culpepper, 120 Ark. 319, 179 S. W. 494; Western U. Teleg. Co. v. Petteway, 21 Ga. App. 725, 94 S. E. 1032; Bailey v. Western U. Teleg. Co. 97 Kan. 619, 156 Pac. 716, affirmed on rehearing, 99 Kan. 7, 160 Pac. 985; Kirsch v. Postal Teleg. Cable Co. 100 Kan. 250, 164 Pac. 267; Western U. Teleg. Co. v. Lee, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026, 15 N. C. C. A. 1; Haskell Implement & Seed Co. v. Postal Teleg. Cable Co. 114 Me. 277, 96 Atl. 219; Dettis v. Western U. Teleg. Co. 141 Minn. 361, 170 N. W. 334; Poor v. Western U. Teleg. Co. 196 Mo. App. 557, 196 S. W. 28; Diffenderffer v. Western U. Teleg. Co. 199 Mo. App. 48, 200 S. W. 706; Jacobs v. Western U. Teleg. Co. 196 Mo. App. 300, 196 S. W. 31; Kerns v. Western U. Teleg. Co. — Mo. App. —, 198 S. W. 1132; Meadows v. Postal Teleg. & Cable Co. 173 N. C. 240, 91 S. E. 1009; Bateman v. Western U. Teleg. Co. 174 N. C. 97, L.R.A.1918A, 803, 93 S. E. 467; Norris v. Western U. Teleg. Co. 174 N. C. 92, 93 S. E. 465; Askew v. Western U. Teleg. Co. 174 N. C. 261, 93 S. E. 773; Johnson v. Western U. Teleg. Co. 175 N. C. 588, 96 S. E. 36; Postal Teleg. Cable Co. v. Jones, 7 Ohio App. 90; Western U. Teleg. Co. v. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175; Western U. Teleg. Co. v. Orr, 60 Okla. 39, 158 Pac. 1139; Western U. Teleg. Co. v. Kaufman, — Okla. —, 162 Pac. 708; Strause Gas Iron Co. v. Western U. Teleg. Co. 23 Pa. Dist. R. 291, affirmed in 59 Pa. Super. Ct. 122; Hall v. West-

12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On state law affecting telegraphs as regulation of interstate commerce— see note to Western U. Teleg. Co. v. Commercial Mill. Co. 36 L.R.A.(N.S.) 220.

On power of states to impose burdens upon interstate telegraph and telephone companies—see note to Postal Teleg. Cable Co. v. Baltimore, 24 L.R.A. 161.

On validity of state statute imposing penalty for default or mistake in transmission or delivery of interstate telegram—see note to Western U. Teleg. Co. v. Crovo, 55 L. ed. U. S. 499.

ern U. Teleg. Co. 108 S. C. 502, 94 S. E. 370; Berg v. Western U. Teleg. Co. 110 S. C. 169, 96 S. E. 248; Western U. Teleg. Co. v. Schade, 137 Tenn. 214, 192 S. W. 924; Boyce v. Western U. Teleg. Co. 119 Va. 14, 89 S. E. 106; H. W. Williams & Sons v. Postal Teleg.-Cable Co. 122 Va. 675, 95 S. E. 436; Durre v. Western U. Teleg. Co. 165 Wis. 190, 161 N. W. 755.

With the exception of the judgment now under review, there has been no decision sustaining a state penalty statute as applied to an interstate message sent since the Act of 1910. The invalidity of such statutes, as applied to such messages, has been uniformly recognized by the state courts.

Western U. Teleg. Co. v. Bassett, 111 Miss. 468, 71 So. 750; Davis v. Western U. Teleg. Co. 198 Mo. App. 692, 202 S. W. 292; Taylor v. Western U. Teleg. Co. 199 Mo. App. 624, 204 S. W. 818; Leftridge v. Western U. Teleg. Co. 277 Mo. 90, 210 S. W. 18; Western U. Teleg. Co. v. Bilisoly, 116 Va. 562, 82 S. E. 91; Western U. Teleg. Co. v. First Nat. Bank, 116 Va. 1009, 83 S. E. 424; Western U. Teleg. Co. v. Bolling, 120 Va. 413, 91 S. E. 154, Ann. Cas. 1918C, 1036; Western U. Teleg. Co. v. Mahone, 120 Va. 422, 91 S. E. 157; Western U. Teleg. Co. v. Bowles, 124 Va. 730, 98 S. E. 645.

Mr. Arthur W. Parry submitted the cause for defendant in error:

The Indiana statute applies to interstate messages only where the act of negligence occurs within the state of Indiana, and in the entire absence of partiality or bad faith.

Western U. Teleg. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679; Western U. Teleg. Co. v. Braxtan, 165 Ind. 165, 74 N. E. 985; Western U. Teleg. Co. v. McClelland, 38 Ind. App. 578, 78 N. E. 672; Western U. Teleg. Co. v. Sefrit, 38 Ind. App. 565, 78 N. E. 638.

The state, in the exercise of its police power, has the right to impose penalties upon telegraph companies for the failure to deliver messages promptly within the limits of the state, even where the messages are sent from another state. Statutes like the Indiana statute are a valid exercise of the police power of the state, and affect interstate commerce in only an incidental sense, being an aid to it rather than a burden or regulation upon it, and as such will remain in full force and effect until such time as Congress may pass an act on the same subject in direct and positive conflict with the act of the state.

Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, 90 Ga. 254, 16 S. E. 83; Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; Western U. Teleg. Co. v. Carter, 156 Ind. 531, 60 N. E. 305; Western U. Teleg. Co. v. Gilkison, 46 Ind. App. 29; Western U. Teleg. Co. v. Lark, 95 Ga. 806, 23 S. E. 118; Western U. Teleg. Co. v. Howell, 95 Ga. 194, 30 L.R.A. 158, 5 Inters. Com. Rep. 516, 51 Am. St. Rep. 68, 22 S. E. 286; Western U. Teleg. Co. v. Tyler, 90 Va. 297, 4 Inters. Com. Rep. 481, 44 Am. St. Rep. 910, 18 S. E. 280; Western U. Teleg. Co. v. Hughes, 104 Va. 240, 51 S. E. 225; Western U. Teleg. Co. v. Reynolds, 100 Va. 459, 93 Am. St. Rep. 971, 41 S. E. 856; Western U. Teleg. Co. v. Powell, 94 Va. 268, 26 S. E. 828; Western U. Teleg. Co. v. Bright, 90 Va. 778, 20 S. E. 146; Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western U. Teleg. Co. v. Mellon, 100 Tenn. 429, 45 S. W. 443; Vermilye v. Postal Teleg. Cable Co. 205 Mass. 598, 30 L.R.A.(N.S.) 472, 91 N. E. 904, 207 Mass. 401, 93 N. E. 635; Connell v. Western U. Teleg. Co. 108 Mo. 459, 18 S. W. 883; Postal Teleg. Cable Co. v. Umstadter, 103 Va. 742, 50 S. E. 259, 2 Ann. Cas. 511.

The states have surrendered to the United States the right to regulate interstate commerce, but the states have retained the right, known as the police power, to pass laws for the protection and convenience of their citizens, even though such laws may incidentally affect interstate commerce. The United States, within its sphere, is sovereign; but each state, within its sphere, is equally sovereign. Therefore, a law enacted by Congress within its lawful power will not supersede an act of the state, enacted within its lawful power, unless the act of Congress covers the precise and particular subject-matter covered by the act of the state. It does not invalidate the state statute merely because the two relate to the same general subject.

Pittsburgh, C. C. & St. L. R. Co. v. State, 172 Ind. 147, 87 N. E. 1034, affirmed in 223 U. S. 713, 56 L. ed. 626, 32 Sup. Ct. Rep. 520; Pittsburgh C. C. & St. L. R. Co. v. State, 180 Ind. 245. L.R.A.1915D, 458, 102 N. E. 25; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Where the subject-matter of a statute is not of such a national character as to require uniform regulation or legislation, applicable to all states alike, the power of Congress is not exclusive, and a statute of a state, enacted in pursuance of its police power, will be permitted to stand until Congress sees fit to enter the particular field and actually legislate upon the precise subject-matter embraced by the terms of the state statute.

Pittsburgh C. C. & St. L. R. Co. v. State, 180 Ind. 245, L.R.A.1915D, 458, 102 N. E. 25; Missouri K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, affirming 202 Pa. 222, 63 L.R.A. 513, 97 Am. St. Rep. 713, 51 Atl. 990, 12 Am. Neg. Rep. 185; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 92; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Pittsburgh, C. C. & St. L. R. Co. v. Hartford City, 170 Ind. 674, 20 L.R.A.(N.S.) 461, 82 N. E. 787, 85 N. E. 362; Lasater v. St. Louis, I. M. & S. R. Co. 177 Mo. App. 534, 160 S. W. 818; Pennsylvania R. Co. v. Ewing, 241 Pa. 581, 49 L.R.A.(N.S.) 977, 88 Atl. 775, Ann. Cas. 1915B, 157.

Inaction by Congress upon subjects of a local nature or operation, unlike its inaction upon matters affecting all the states, and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that, until it sees fit to legislate upon the precise subject-matter embraced in the state statute, that subject-matter may be regulated by state authority.

Pittsburgh, C. C. & St. L. R. Co. v. State, 172 Ind. 147, 87 N. E. 1034, 223 U. S. 713, 56 L. ed. 626, 32 Sup. Ct. Rep. 520; Mobile County v. Kimball, 102 U. S. 691, 698, 26 L. ed. 238, 240; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Varnville Furniture Co. v. Charleston & W. C. R. Co. 98 S. C. 63, 79 S. E. 700.

A statute enacted in execution of a reserved power of a state is not to be regarded as inconsistent with an act of Congress passed in execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.

Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275.

The mere delegation to the Interstate Commerce Commission of power to pass regulations for the purpose mentioned in the act does not, of itself, supersede state statutes making regulations on the same subjects, and, until specific action by the Commission or Congress, they will remain in full force.

Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214.

The case of Western U. Teleg. Co. v. Bilisoly, 116 Va. 562, 82 S. E. 91, as well as the other cases cited by plaintiff in error, so far as they hold that the mere placing of telegraph companies under the supervision of the Interstate Commerce Commission has deprived the state of power to enforce penalties for negligence in delivering messages, are in direct conflict with, and are therefore in effect overruled by, the United States Supreme Court in the case of Missouri P. R. Co. v. Larabee Flour Mills Co. supra; and, so far as they hold that the Interstate Commerce Act, by entering the general field of regulation of telegraph companies and providing penalties for intentional discrimination, although admittedly not touching the precise subject of negligence in delivery of messages, has superseded the state statute as to that subject, the cases relied upon by the plaintiff in error are in direct conflict with, and, therefore, in effect are overruled by, the law as determined by the United States Supreme Court in the cases of:

Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Pittsburgh, C. C. & St. L. R. Co. v. State, 223 U. S. 713, 56 L. ed. 626, 32 Sup. Ct. Rep. 520; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Pennsylvania R. Co. v.

Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

Congress has not, by the amendment of June 18, 1910, to the Interstate Commerce Act, superseded state statutes providing a penalty against telegraph companies for negligence in delaying delivery of messages within the limits of the respective states.

Western U. Teleg. Co. v. Boegli, — Ind. —, 115 N. E. 773.

And it has also been held in carefully reasoned cases that the amendments to the Interstate Commerce Act have not so occupied the field of regulation of telegraph companies as to render void the statutes of the various states, providing that damages might be recovered for mental anguish caused by negligence in the delivery of telegrams, and the statutes which make void the customary stipulations by which a telegraph company seeks ostensibly to limit, but, in fact, to exempt itself from, its liability for negligence in the delivery of messages, but that such statutes still remain valid.

Western U. Teleg. Co. v. Bailey, 108 Tex. 427, 196 S. W. 516, — Tex. Civ. App. —, 171 S. W. 839,— Tex. Civ. App. —, 184 S. W. 519; Western U. Teleg. Co. v. Piper, — Tex. Civ. App. —, 191 S. W. 817; Dickerson v. Western U. Teleg. Co. 114 Miss. 115, 74 So. 779; Warren-Godwin Lumber Co. v. Postal Teleg.-Cable Co. 116 Miss. 660, 77 So. 601; Des Arc Oil Mill v. Western U. Teleg. Co. 132 Ark. 335, 6 A.L.R. 1081, 201 S. W. 273; Bowman & B. Co. v. Postal Teleg.-Cable Co. 290 Ill. 155, 124 N. E. 851.

Although the Interstate Commerce Act regulated railroads in considerable detail, it did not, prior to the Carmack Amendment in 1906, render invalid state statutes either imposing penalties on certain defaults of the railroad or rendering void limitations contained in bills of lading seeking to limit their liability. And the Carmack Amendment had that effect only because it specifically covered that exact subject.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

But the Carmack Amendment does not apply to telegraph companies.

Western U. Teleg. Co. v. Bailey, 108 Tex. 427, 196 S. W. 516.

Mr. Chief Justice White delivered the opinion of the court:

The telegraph company challenged the right to subject it to a penalty fixed by a law of Indiana for failure to deliver promptly in that state a telegram sent there from a point in Illinois, on the ground that the Act of Congress of June 18, 1910, amending the Act to Regulate Commerce (36 Stat. at L. 539, 545, chap. 309, Comp. Stat. § 8563) had deprived the state of all power in the premises. The court, conceding that if the act of Congress [316] dealt with the subject, the state statute would be inoperative, imposed the penalty on the ground that the Act of 1910 did not extend to that field. The correctness of this conclusion is the one controversy with which the arguments are concerned.

The proposition that the Act of 1910 must be narrowly construed so as to preserve the reserved power of the state over the subject in hand, although it is admitted that that power is in its nature Federal, and may be exercised by the state only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text, and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.

As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the court below erred, therefore, in imposing the penalty fixed by the state statute.

We do not pursue the subject further, since the effect of the Act of 1910 in taking possession of the field was recently determined in exact accordance with the conclusion we have just stated. Postal Teleg.-Cable Co. v. Warren-Godwin Lumber Co. 251 U. S. 27, ante, 118, 40

Sup. Ct. Rep. 69. That case, indeed, was concerned only with the operation, after the passage of the Act of 1910, of a state statute rendering illegal a clause of a contract for sending an interstate telegram limiting the amount of recovery under the conditions stated in case of an unrepeated message; but the [317] ruling that the effect of the Act of 1910 was to exclude the possibility thereafter of applying the state law was rested, not alone upon the special provisions of the Act of 1910, relating to unrepeated messages, but upon the necessary effect of the general provisions of that act, bringing telegraph companies under the control of the Interstate Commerce Act. The contention as to the continuance of state power here made is therefore adversely foreclosed. Indeed, in the previous case the principal authorities here relied upon to sustain the continued right to exert state power after the passage of the Act of 1910 were disapproved, and various decisions of state courts of last resort to the contrary, one or more dealing with the subject now in hand, were approvingly cited.

Reversed and remanded for further proceedings not inconsistent with this opinion.

BIRGE-FORBES COMPANY, Petitioner,
v.
CARL R. HEYE.

(See S. C. Reporter's ed. 317-325.)

War — alien enemies — remedies.

1. The existence of war did not make it improper for a circuit court of appeals to affirm, with a modification that the sum recovered be paid over to the Alien Property Custodian, a money judgment in favor of an alien enemy, recovered in the district court before war was declared, the collection of which was delayed by defendant's act in carrying the case up to the higher court.

[For other cases, see War, V. in Digest Sup. Ct. 1908.]

Appeal — following decision below — res judicata.

2. The Federal Supreme Court will not ordinarily disturb the decision of the trial court, made after both parties moved for a directed verdict, that a certain issue was determined in a former suit tried by the same judge.

[For other cases, see Appeal and Error, VIII. a, in Digest Sup. Ct. 1908.]

Judgment — res judicata — matters concluded.

3. A judgment for plaintiff in a suit to recover the amounts of certain arbitration awards which he had paid on defendant's account, though limited to sums which plaintiff had then paid, must be regarded as a conclusive adjudication as to the validity of the awards in a second suit to recover the sums paid by plaintiff, not embraced in the first judgment, where, in the first suit, the awards were dealt with as a whole, objections to them being general, and the objections were overruled, the court assuming that the awards were obligatory, but cutting down the amount to be recovered to the sum that had been paid.

[For other cases, see Judgment, III. j, 4, in Digest Sup. Ct. 1908.]

Deposition — of party.

4. The objection that the deposition of a party could not be taken, if valid at all, is not fairly open where there is no attempt to fish for information, and an agreement was made that "time notice and copy are hereby waived," and that "the officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived."

[For other cases, see Depositions, II. e, in Digest Sup. Ct. 1908.]

Depositions — return.

5. Depositions of foreign witnesses are not inadmissible because the mode of return did not follow strictly the state statute, in that the officer to whom the commission was directed did not put the depositions into the mail and certify on the envelop that he had done so, where the course was impossible, owing to war, and the officer did transmit the depositions in the only practicable way, giving them to an American consul, and having them transmitted to the Department of State, and then through the mail to the clerk of court,—the integrity of the depositions not being questioned.

[For other cases, see Depositions, III. e, in Digest Sup. Ct. 1908.]

Limitation of actions — foreign statute.

6. The six months' limitation prescribed by the German Civil Code, § 477, for claims for defect of quality, did not apply where the claims had been submitted to arbitration and passed upon.

Note.—On alien enemies as litigants—see notes to Taylor v. Albion Lumber Co. L.R.A.1918B, 189, and Krachanake v. Acme Mfg. Co. L.R.A.1918E, 809.

On effect of war on dealings between citizens of belligerent powers—see note to Scholefield v. Eichelberger, 8 L. ed. U. S. 793.

On effect of war on agency—see note to New York L. Ins. Co. v. Davis, 24 L. ed. U. S. 453.

On effect of war on contracts with alien enemies—see note to Zinc Corp. v. Hirsch, L.R.A.1917C, 662.

On effect of war on litigation pending at the time of its outbreak—see note to Watts, W. & Co. v. Unione Austriaca di Navigazione, 3 A.L.R. 327.

Evidence — presumptions — value — German mark.

7. In a suit by a German agent against his American principal to recover the amounts of certain arbitration awards which the former had paid on the latter's account, the value of the German mark in which such payments were made will be taken at par, in the absence of evidence that it had depreciated at the time of such payments.

[For other cases, see Evidence, II. k, 6, in Digest Sup. Ct. 1908.]

[No. 76.]

Argued November 13 and 14, 1919. Decided January 12, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed, with a modification that the sum recovered be paid over to the Alien Property Custodian, a money judgment of the District Court for the Eastern District of Texas in favor of an alien enemy, recovered before the war with Germany was declared. Affirmed.

See same case below, 160 C. C. A. 536, 248 Fed. 636.

The facts are stated in the opinion.

Mr. Henry O. Head argued the cause, and, with Mr. Jesse F. Holt, filed a brief for petitioner:

The circuit court of appeals erred in not sustaining plaintiff in error's motion to abate this suit and postpone the consideration thereof until the termination of the present war between the United States and the German Empire.

Hanger v. Abbott, 6 Wall. 532, 18 L. ed. 939; Bishop v. Jones, 28 Tex. 294; Plettenberg v. Kalmon, 241 Fed. 605; 1 C. J. 117; Howes v. Chester, 33 Ga. 89.

The court erred in admitting the depositions of Heye and Polletin.

Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 303, 48 L. ed. 989, 24 Sup. Ct. Rep. 700; Union P. R. Co. v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000; Ex parte Fiske, 113 U. S. 724, 28 L. ed. 1121, 5 Sup. Ct. Rep. 724; Frost v. Barber, 173 Fed. 847; Simkins Fed. Eq. Suit, 3d ed. 506; Pullman Co. v. Jordan, 134 C. C. A. 301, 218 Fed. 573; Garner v. Cutler, 28 Tex. 175; Laird v. Ivens, 45 Tex. 621; Barber v. Greer, 94 Tex. 584, 63 S. W. 1007; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 551, 52 L. ed. 327, 334, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658.

A judgment is res judicata in a second suit only as to matters that were directly presented and decided in the first; and is not res judicata as to matters which might have been decided, but were not in fact passed upon, no matter how conclusive the evidence may have been.

Russell v. Place, 94 U. S. 606, 24 L. ed. 214; Landon v. Clark, 137 C. C. A. 399, 221 Fed. 841; Re William S. Butler & Co. 125 C. C. A. 233, 207 Fed. 705; Smith v. Mosier, 169 Fed. 446; McAnally v. Haynie, — Tex. Civ. App. —, 42 S. W. 1049.

If it be held that the claims of the parties in whose favor the original awards were rendered were barred both as to the principal and the surety when defendant in error made the payment, was the circuit court of appeals correct in holding that defendant in error was not required to take advantage of the statute, but could make the payments and compel plaintiff in error to reimburse him?

Faires v. Cockerell, 88 Tex. 428, 28 L.R.A. 528, 31 S. W. 190, 639; 23 Cyc. 259; Wills v. Tyer, — Tex. Civ. App. —, 186 S. W. 862; Stone v. Hammell, 83 Cal. 547, 8 L.R.A. 425, 17 Am. St. Rep. 272, 23 Pac. 703; Glasscock v. Hamilton, 62 Tex. 143.

The burden is on the one who sues upon an obligation payable in a foreign currency to allege, and prove as a part of his case, the value of the foreign currency in the currency of the country where the trial is being had.

Kermott v. Ayer, 11 Mich. 181; Modawell v. Holmes, 40 Ala. 391; Feemester v. Ringo, 5 T. B. Mon. 336; Hogue v. Williamson, 85 Tex. 553, 20 L.R.A. 481, 34 Am. St. Rep. 823, 22 S. W. 580; 2 Whart. Ev. 3d ed. § 335; 13 Enc. Ev. 425; 23 Cyc. pp. 791, 792.

Mr. Robert M. Rowland argued the cause, and, with Mr. Newton Hance Lassiter, filed a brief for respondent:

The motion to suspend consideration of the case until the end of the war was properly overruled by the circuit court of appeals.

Hanger v. Abbott, 6 Wall. 532, 18 L. ed. 939; Owens v. Hanney, 9 Cranch, 180, 3 L. ed. 697; Howes v. Chester, 33 Ga. 89; Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142, 97 Am. Dec. 124; Buckley v. Lyttle, 10 Johns, 117.

In view of the agreements or waivers signed by counsel for the Birge-Forbes Company, under which the depositions of Heye and Polletin were taken, and in view of the fact that the company, by

its attorneys, propounded cross interrogatories to these witnesses without reserving any objections, and in view of the further fact that the manner of taking and returning these depositions was substantially regular, and wholly free from any suspicion of unfairness, the trial court properly refused to suppress the depositions, and properly allowed them to be used as evidence, and the circuit court of appeals committed no error in sustaining such action of the trial court.

Mechanics Bank v. Seton, 1 Pet. 299, 7 L. ed. 152; Shutte v. Thompson, 15 Wall. 151, 21 L. ed. 123; Buddicum v. Kirk, 3 Cranch, 293, 2 L. ed. 444; Rich v. Lambert, 12 How. 347, 13 L. ed. 1017; United States v. 50 Boxes & Packages of Lace, 92 Fed. 601; 4 C. J. 805: Missouri, O. & G. R. Co. v. Love, — Tex. Civ. App. —, 169 S. W. 922.

The judgment of May 23, 1913, fully established the validity of the Bremen awards as a whole, the undisputed amount of which awards was 312,749.30 German marks, the equivalent of which in American money was about $74,820.52. In the trial of the first case between Heye and the Birge-Forbes Company, which went to judgment May 23, 1913, all the arbitration awards for the cotton season of 1910–1911 were involved together, were in exactly the same category, had exactly the same status, were subjected to exactly the same attacks, and under the issues made were necessarily required to stand as a whole or fall as a whole. They stood as a whole, and the only reason for not then rendering judgment for the full amount of all the awards and interest thereon was that the suit was premature to the extent of the amount not actually paid by Heye at that time on the awards, he being held to be a surety or guarantor for the Birge-Forbes Company, and his cause of action not ripe until actual payment by him. Therefore, it being shown by the undisputed evidence that he had made partial payments, aggregating $36,610.90, he was given judgment for that amount (plus a small sum for other items not of interest here), and was denied a recovery for the rest until he should pay the rest.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Mason Lumber Co. v. Buchtel, 101 U. S. 633, 638, 25 L. ed. 1072, 1074; Johnson Steel Street R. Co. v. Wharton, 152 U. S. 253, 38 L. ed. 430, 14 Sup. Ct. Rep. 608; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 38 L. ed. 859, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205; Beloit v. Morgan, 7 Wall. 619, 19 L. ed. 205; Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330; Webster v. Mann, 56 Tex. 119, 42 Am. Rep. 688; 23 Cyc. 1288, 1294, 1295, 1306, 1322; Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564; Harshman v. County Ct. 122 U. S. 306, 30 L. ed. 1152, 7 Sup. Ct. Rep. 1171; New York L. Ins. Co. v. Bangs, 103 U. S. 780, 26 L. ed. 608; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; 2 Foster, Fed. Pr. 5th ed. p. 1556.

The court was well warranted in finding that the reclamation claims, which, when established by arbitration at Bremen, Heye became liable for as guarantor, and afterwards paid, were not barred by limitation at the time he paid them; and, moreover, such finding involved a matter of fact not reviewable on writ of error.

Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190; Hudson River Pulp & Paper Co. v. Warner & Co. 39 C. C. A. 452, 99 Fed. 187; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566; Coram v. Davis, 216 Mass. 448, 103 N. E. 1027; 4 C. J. 644-647, 843, 844; Copper River & N. W. R. Co. v. Phillips, 116 C. C. A. 148, 196 Fed. 328; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; 2 Foster, Fed. Pr. 5th ed. p. 1556; 2 Jones, Ev. §§ 390, 391; 3 Bouvier's, Law Dict. 3325; Sena v. American Turquoise Co. 220 U. S. 497, 55 L. ed. 559, 31 Sup. Ct. Rep. 488; Melton v. Pensacola Bank & T. Co. 111 C. C. A. 166, 190 Fed. 126.

Inasmuch as the court could take judicial notice of the value of a German mark, expressed in terms of American money, and inasmuch as the evidence on the trial showed without substantial dispute that such value was 23.8 cents, the court properly took such value as the basis for determining the amount of the verdict to be directed. Furthermore, defendant, by moving the court for a directed verdict in its favor, waived and surrendered any right to claim that there were issues that should go to the jury.

7 Enc. Ev. 906; Hogue v. Williamson, 85 Tex. 553, 20 L.R.A. 481, 34 Am. St. Rep. 823, 22 S. W. 580; 2 Foster, Fed. Pr. 5th ed. p. 1556; Sena v. American Turquoise Co. 220 U. S. 497, 55 L. ed. 559, 31 Sup. Ct. Rep. 488; Melton v. Pensacola Bank & T. Co. supra.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by Heye, a cotton broker in Bremen, against the petitioner, cotton exporter in Texas, to recover sums that Heye had to pay on its account. The payments were made upon cotton sold by Heye as the petitioner's agent, to different buyers, for alleged failure of the cotton to correspond to the description upon which the price was based. In pursuance of the contracts and the rules of the Bremen Cotton Exchange the claims of the buyers were submitted to arbitration, which resulted in awards against the plaintiff for a total of 312,749.30 German marks, alleged to be equal to about $74,820.52. Before the present suit was brought another one had been carried to judgment in the same district, in which that amount was claimed. At that time Heye had paid only $36,610.96 of the awards. The judge directed a verdict for the sum that the plaintiff had paid and another item not now in issue. Heye now has paid the whole, and brings this suit to recover the amount of the later payment not embraced in the former judgment. He prevailed in the district court, and the judgment was affirmed with a modification as to payment by the circuit court of appeals. 160 C. C. A. 536, 248 Fed. 636. The main question on the merits is whether the former judgment was conclusive as to the validity of the awards, but that upon which the certiorari was granted was a preliminary one, as is shown by the fact that certiorari was denied in the former suit. 234 U. S. 759, 58 L. ed. 1580, 34 Sup. Ct. Rep. 676. After the case had been [323] taken to the circuit court of appeals a motion was made to dismiss or suspend the suit on the ground that Heye had become an alien enemy by reason of the declaration of war between Germany and the United States. The circuit court of appeals, however, affirmed the judgment with the modification that it should be paid to the clerk of the trial court and by him turned over to the Alien Property Custodian, with further details not material here.

Upon the last-mentioned question, although it seemed proper that it should be set at rest, we can feel no doubt. The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. Such a case was disposed of without discussion by Chief Justice Marshall, speaking for the court in Owens v. Hanney, 9 Cranch, 180, 3 L. ed. 697; Kershaw v. Kelsey, 100 Mass. 561, 564, 97 Am. Dec. 124, 1 Am. Rep. 142. There is nothing "mysteriously noxious" (Coolidge v. Inglee, 13 Mass. 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. Hanger v. Abbott, 6 Wall. 532, 536, 18 L. ed. 939, 941; M'Connell v. Hector, 3 Bos. & P. 113, 114, 127 Eng. Reprint, 61, 6 Revised Rep. 724. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct. When the alien enemy is defendant, justice to him may require the suspension of the case. Watts, W. & Co. v. Unione Austriaca di Navigazione, 248 U. S. 9, 22, 63 L. ed. 100, 101, 3 A.L.R. 323, 39 Sup. Ct. Rep. 1.

On the merits the first question is whether the former judgment was conclusive as to the validity of the awards, assuming them to have been identified as the same that were sued upon in the former case. Taking merely the former declaration and judgment, it could not be said with certainty that some of the awards might not have been held invalid, and that the defendant h .d not satisfied the [324] whole obligation found to exist. But we have before us the fact that the court directed a verdict and the charge. From the latter, as also from the answer, apart from a general denial, it appears that the awards were dealt with as a whole, and that the objections to them were general. The objections were overruled, and the court assumed that the awards were obligatory, but cut down the amount to be recovered to the sum that had been paid. The case went to the circuit court of appeals, and the same things appear in the report of the case there. 128 C. C. A. 628, 212 Fed. 112. Certiorari denied in 234 U. S. 759, 58 L. ed. 1580, 34 Sup. Ct. Rep. 676. In the present case both parties moved the court to direct a verdict. Beuttell v. Magone, 157 U. S. 154, 157, 39 L. ed. 654, 655, 15 Sup. Ct. Rep. 566; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 210 U. S. 1, 8, 52 L. ed. 931, 936, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70. Taking that and the fact that the same judge seems to have presided

in both suits into account, we should be slow to disturb his decision that the issue was determined in the former one if we felt more doubt than we do. But we are satisfied the decision of the two courts below was right.

We shall deal summarily with two or three highly technical arguments urged against the affirmation of the judgment. One is that the depositions of Heye and a witness were not returned, as required by the Texas statute providing for taking them, with a suggestion that, as Heye was a party, his deposition could not be taken at all. As to the latter point it is to be noticed that it did not present an attempt to fish for information from the opposite party, and that an agreement was made that "time notice and copy are hereby waived," and that "the officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived." Whatever may be the general rule (as to which see Blood v. Morrin, 140 Fed. 918), we think that this objection is not fairly open. As to the mode of return not having followed strictly the Texas [325] statute, because the officer to whom the commission was directed did not put the depositions into the mail and certify on the envelops that he had done so, a sufficient answer is that that course was impossible, owing to the war, and that the officer did transmit the depositions in the only practicable way. He gave them to an American consul and had them transmitted to the Department of State, and then through the mail to the clerk. The integrity of the depositions is not questioned, the statute was complied with in substance, and justice is not to be defeated now by a matter of the barest form.

We see no error in the finding that § 477 of the German Civil Code did not bar the claim. Assuming the question to be open, the court was warranted in finding that a six months' limitation to claims for defect of quality did not apply where the claims had been submitted to arbitration and passed upon. The same is true with regard to the taking the value of the German mark at par in the absence of evidence that it had depreciated at the time of the plaintiff's payments. On the whole case our conclusion is that the judgment should be affirmed.

Judgment affirmed.

[326] NORTHERN PACIFIC RAILWAY COMPANY, Appt.,[1]
v.
UNITED STATES. (No. 109.)

SEABOARD AIR LINE RAILWAY, Appt.,
v.
UNITED STATES. (No. 132.)

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appt.,
v.
UNITED STATES. (No. 133.)

KANSAS CITY, MEXICO, & ORIENT RAILWAY COMPANY OF TEXAS, Appt.,
v.
UNITED STATES. (No 232.)

(See S. C. Reporter's ed. 326-342.)

Postoffice — compensation for carrying mails — weighing.

Railway companies carrying the mails after the Postmaster General had, by a readjustment order, directed that compensation be based upon a calculation of average weight, made by taking the whole number of days included in the weighing period as a divisor for obtaining the average weight per day, instead of the number of working or week days, as was the former practice, are bound by such order, either because the Postmaster General had the discretionary power to make the order, as is held by four justices, or because, as is held by two justices, the railway companies by their conduct in fact accepted the terms offered by the Postmaster General by transporting the mails and accepting the stated compensation.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

[Nos. 109, 132, 133, and 232.]

Argued December 17, 18, and 19, 1919. Decided January 12, 1920.

FOUR APPEALS from the Court of Claims to review judgments rejecting claims for increased compensation for carrying the mails. Affirmed.

See same case below, 53 Ct. Cl. 258.

The facts are stated in the opinion.

Mr. **Alexander Britton** argued the cause, and, with Messrs. C. W. Bunn and Evans Browne, filed a brief for appellant in No. 109.

[1] Reported by the Official Reporter under the title of "The Mail Divisor Cases."

Note.—On power of courts to interfere with rulings of Postoffice Department—see note to United States ex rel. Reinach v. Cortelyou, 12 L.R.A.(N.S.) 166.

Messrs. William R. Harr and Charles H. Bates filed a brief as amici curiæ on behalf of the El Paso & Southwestern Railroad Company et al.

Messrs. Abram R. Serven and Burt E. Barlow filed a brief as amici curiæ on behalf of the Chicago, Burlington, & Quincy Railroad Company.

Mr. **Benjamin Carter** argued the cause, and, with Mr. James F. Wright, filed a brief for appellant in No. 132.

Mr. L. T. Michener filed a brief as amicus curiæ for the Minneapolis, St. Paul, & Sault Sainte Marie Railway Company.

Mr. R. Stuart Knapp filed a brief in behalf of the Bellefonte Central Railroad Company.

Mr. **Frederic D. McKenney** argued the cause, and, with Mr. John Spalding Flannery, filed a brief for appellant in No. 133.

Mr. **F. Carter Pope** argued the cause and filed a brief for appellant in No. 232.

Solicitor General **King** and Mr. **La Rue Brown** argued the cause, and, with Mr. Joseph Stewart, filed a brief for the United States.

Solicitor General King, Messrs. Frank Davis, Jr., and J. Robert Anderson also filed a brief for the United States.

Mr. Justice **Holmes** announced the judgment of the court, and delivered the following opinion, concurred in by the CHIEF JUSTICE and Justices **Brandeis** and **Clarke**:

These are claims for compensation for carrying the mails above the amounts allowed and paid by the Postmaster General. The four cases are independent of one another, [**329**] but as the claims all depend for their validity upon a denial of the Postmaster General's power to pass a certain order, they may be considered together. They were rejected by the court of claims. The question, shortly stated, is this: The pay for carrying the mails is determined by the average weight carried. To ascertain this average the mails are weighed for a certain number of consecutive days, and for some time before 1907 the total weight was divided by the number of working days: if the number of days was thirty-five, it was divided by thirty; if one hundred and five, by ninety. But on June 7, 1907, the Postmaster General issued an order, No. 412, "that when the weight of mail is taken on railroad routes, the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." This, of course, diminishes the average weight, and therefore the pay of the railroads. They deny the authority of the Postmaster General to make the change, and sue for the additional sum that, under the old practice, they would have received.

The texts to be discussed begin with an Act of 1873, but it should be observed, as furnishing a background for that and the following statutes, that from the beginning of the government the Postmaster General, as the head of a great business enterprise, always has been intrusted, as he must be, with a wide discretion concerning what contracts he should make, with whom, and upon what terms. It is needless to go into the early statutes, or to do more than to refer to Rev. Stat. § 3999, Comp. Stat. § 7478, 8 Fed. Stat. Anno. 2d ed. p. 189, which authorizes him to make other arrangements if he cannot contract for the carriage of the mail upon a railway route at a compensation not exceeding the maximum rates then established, or for what he deems reasonable and fair. The limitations upon the power were in the interest of the business, the principal one being that the pay per mile per annum should not exceed certain rates. Act of June 8, 1872, chap. 335, § 211, 17 [**330**] Stat. at L. 283, 309, Comp. Stat. § 567, 3 Fed. Stat. Anno. 2d ed. p. 250, Rev. Stat. §§ 3998, 4002, Comp. Stat. § 7483, 8 Fed. Stat. Anno. 2d ed. p. 195. The language plainly showed and the decisions have established that the Postmaster General, if it seemed to him reasonable, could refuse to pay the maximum and insist upon some lesser rate as a condition of dealing with a road. Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 649, 56 L. ed. 1236, 1239, 32 Sup. Ct. Rep. 702.

The Act of March 3, 1873, chap. 231, 17 Stat. at L. 556, 558, Comp. Stat. § 7483, 8 Fed. Stat. Anno. 2d ed. p. 195, appropriates $500,000, or so much thereof as may be necessary, "for increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned." Then, after providing for due frequency and speed and suitable accommodations for route agents,—matters on which obviously the Postmaster General is the person to be satisfied,—it enacts that "the pay per mile per annum

shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars," etc., etc. So far it will be seen that, although the object is to permit an increase of compensation, still the discretion of the Postmaster General under the earlier acts remains, and that he could decline to pay the maximum rates, however ascertained, or any sum greater than he should deem reasonable. It is argued, to be sure, that the rates were fixed at the maximum, and the Act of July 12, 1876, chap. 179, 19 Stat. at L. 78, 79, Comp. Stat. § 7484, 8 Fed. Stat. Anno. 2d ed. p. 198, reducing the compensation "ten per centum per annum from the rates fixed and allowed," is thought to help the conclusion. But no argument can obscure the meaning of the words "shall not exceed." The rates were fixed and reduced in their maxima, but that was all that was done with regard to them. United States v. Atchison, T. & S. F. R. Co. 249 U. S. 451, 454, 63 L. ed. 703, 704, 39 Sup. Ct. Rep. 325. The question is whether, for any reason, the control over the compensation thus undeniably given to him [331] without imposing any downward limit as to the money rates is wholly withdrawn from his judgment in the preliminary stage of determining the basis to which the money rates are to be applied.

The next words of the statute are: "The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times," etc., "and the result to be stated and verified in such form and manner as the Postmaster General may direct." The pay, it will be remembered, was to be per mile per annum, and as it was not practicable to weigh all the mails throughout the year and so to find out the total actual weight of the mails and the exact number of miles that they were carried in the year, the result had to be arrived at approximately by finding the average weight carried on days assumed to resemble the other days of the 365. The average to be reached was not an average for the thirty days, but an average weight per day for the year. This interpretation is shown to be the understanding of Congress by the Act of July 12, 1876, chap. 179, 19 Stat. at L. 78, 79, Comp. Stat. § 7484, 8 Fed. Stat. Anno. 2d ed. p. 198, which reduces the compensation 10 per centum per annum from the rates fixed and allowed by the Act of 1873 "for the transportation of mails on the basis of the average weight." This must mean the average weight for the year concerned. Again, by the Act of March 3, 1905, chap. 1480, 33 Stat. at L. 1082, 1088, 8 Fed. Stat. Anno. 2d ed. p. 204, "the average weight [i. e., of course, the average weight for the year] shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety," etc., the increase in the number of days manifestly being for the purpose of more nearly hitting the average for the whole time. The statutes do not mention the divisor to be used in order to get the average desired. In 1873 mails were not carried on Sundays except over a comparatively small proportion of routes, and therefore six was the fairest single divisor. [332] Now, on the other hand, it is said that the mileage of the seven-day routes is much greater than that of the six days. Therefore now to weigh for Sundays as well as other days, and to divide by seven, is the fairest single rule that can be found.

But it is said that when an average is directed to be reached by weighing for, say, thirty working days, it is implied that you are to get the average by using the number of working days on which the mails were weighed as a divisor, that working days mean week days, and that if in fact Sundays are used as working days, the divisor is not affected because the statute only contemplated six for a week. But the supposed implication of the statute disappears when it is remembered that the average wanted is not the average for the weighing days only, but the average for the year. It is plain, too, that, whether "working days" be read to mean week days or the days on which work was done in fact, the statute contemplates the working days and the weighing days as identical, and therefore affords no ground for demanding the advantage of a dividend of seven and a divisor of six, which is what the railroads want.

Various makeweights are thrown in to help the construction desired by the roads, but they seem to us insufficient to change the result that is reached by reading the words. It is said that down to 1907 the Postoffice Department construed the Acts of 1873 and after as entitling the railroads to the maximum rates for full service as defined, and to the minimum divisors, and that this construction must be taken to have been adopted in silence, by the later stat-

utes. But the exercise of power in the way deemed just while the conditions stated to have existed in and after 1873 continued was not a construction, but the exercise of discretion in determining the amount of pay,—a discretion which, as we have seen, undeniably was given in the form of a right to regulate [333] rates, and which therefore there could be no reason for withholding, beyond the express words of the act, at the other end. It is true that in 1884 an Assistant Attorney General gave an opinion that any departure from the practice would defeat the intention of the law and cause no little embarrassment, and that thereafter an order made by a previous Postmaster for taking the number of weighing days as the divisor was revoked. But the letter of the Postmaster General thus answered merely stated what had been the practice as to the divisor, and asked whether it was in violation of law. It did not state that the Postoffice considered itself bound to follow that way. The order that was revoked only purported to affect seven-day routes, and is of little or no importance to the question before us now.

It is said that the rate was fixed by the Act of March 2, 1907, chap. 2513, 34 Stat. at L. 1205, 1212, Comp. Stat. § 7487, 8 Fed. Stat. Anno. 2d ed. p. 205, if not before, by a reduction to "five per centum less than the present rates" on certain routes. But as we have stated, we understand this to mean a reduction of the rates fixed by statute,—that is, the maximum rates. We do not understand it to refer to rates specifically allowed. It is not likely that Congress considered the latter in detail.

Finally, much is made of the fact that before the passage of the Act of March 3, 1905, and again before the passage of the Act of March 2, 1907, provisos were stricken out that in effect required the divisor to be the number of the weighing days. A similar thing happened before the passage of the act making appropriations for the fiscal year ending June 30, 1909. We do not go into the particulars of these matters, because whatever may have been said by individuals, the provisos might as well have been rejected for the purpose of leaving the choice between the two divisors to the judgment of the Postmaster General as for any other reason. On the other hand, we are not disposed to lay much stress on the fact [334] that the appropriations by Congress accepted the Postmaster General's estimates even when it had been notified that the railroads were dissatisfied with Order No. 412. The Act of March 3, 1875, chap. 128, 18 Stat. at L. 340, 341, Comp. Stat. §§ 7221, 7489, 8 Fed. Stat. Anno. 2d ed. pp. 52, 197, ordered the Postmaster General to have the weighing done thereafter by the employees of the Postoffice Department, and to "have the weights stated and verified to him by said employees under such instructions as he may consider just to the Postoffice Department and the railroad companies." Possibly this might be construed to recognize the power now in dispute, but this suggestion also we are content to leave on one side. We also leave unconsidered the great difficulties that the railroads encounter in the effort to show that their conduct did not amount to an acceptance of the Postmaster General's terms within the decision in New York, N. H. & H. R. Co. v. United States, Dec. 8, 1919, 251 U. S. 123, ante, 182, 40 Sup. Ct. Rep. 67. The construction of the statutes disposes of all the cases without the need of going into further details.

Judgments affirmed.

Mr. Justice **Day** and Mr. Justice **VanDevanter** dissent. Mr. Justice **McReynolds** took no part in the decision of the cases.

Mr. Justice **Pitney**, with whom concurred Mr. Justice **McKenna**:

I concur in the affirmance of the judgments of the court of claims in these cases, but upon grounds somewhat different from those expressed in the opinion of Mr. Justice Holmes.

All the claims arose under the law as it stood after the Act of March 2, 1907, chap. 2513, 34 Stat. at L. 1205, 1212, and before that of July 28, 1916, chap. 261, 39 Stat. at L. 412, 429, by which the carriage of mail matter by the railways was made compulsory. The act about which the principal [335] controversy turns is that of March 3, 1873, chap. 231, 17 Stat. at L. 556, 558, the disputed portion of which was carried into § 4002, U. S. Rev. Stat. Comp. Stat. § 7483, 8 Fed. Stat. Anno. 2d ed. p. 195. By it the Postmaster General was "authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned: . . . Second, That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two

hundred pounds, fifty dollars; . . . five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times . . . and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

In my opinion, the rates of pay per mile per annum were maximum rates, and the Postmaster General had a discretion to contract at less if the railroads agreed; but under § 210 of the Act of June 8, 1872, chap. 335, 17 Stat. at L. 283, 309, U. S. Rev. Stat. § 3997, he was under a duty to arrange the routes into classes according to the size of the mail, and the speed, frequency, and importance of the service, "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed."

But I think that in the clause "the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty," etc., the words *"successive working days,"* by proper interpretation, mean successive week days; and since the aggregate weight for the weighing period must be subjected to division in order to ascertain the [**336**] average weight per day, it naturally follows that the divisor should be the same number of "working days" (that is, week days) that are included in the period. The previous history of the mail service shows abundant reason for this, and for more than thirty years thereafter the provision was uniformly so construed by the Department. Upon a large number of the railway routes, mails were carried six days each week, none being carried on Sunday; while on other routes they were carried on every day in the week. The aggregate weight of mails carried was not affected by the frequency of the service, since the six-day routes carried the Sunday accumulations on Mondays. This explains why a certain number of "working days" (week days) was made the measure of the weighing period, and at the same time shows that the week-day divisor was necessary in order to deal equitably with both the six-day and the seven-day routes. From the passage of the Act of 1873 down to the promulgation of Order No. 412 in the year 1907, the practice of the Department was in accord with the above interpretation. It was explained in a communication from the Postmaster General to the Senate January 21, 1885, Senate Ex. Doc. No. 40, 48th Cong., 2d Sess., p. 68: "The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay. It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five, we should commit the absurdity of putting a [**337**] premium upon inefficiency; for evidently if the Sunday train were cut off, we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered. The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily, including Sunday."

The Act of March 3, 1905, chap. 1480, 33 Stat. at L. 1082, 1088, 8 Fed. Stat. Anno. 2d ed. p. 204, changed the minimum weighing period so as to require the inclusion of at least ninety, instead of thirty, successive working days, but made no other change. Under this act one hundred and five calendar days necessarily were included in the weighing period in order to take in ninety successive working days. In my opinion, this act, like that of 1873, by fair construction, required that the week-day divisor be employed. And so it was officially construed until 1907.

But while I regard this method of determining the average weight to have been prescribed, and not left to the discretion of the Postmaster General, still I think the statute in this respect was only directory, and not mandatory. Considering the provision in its relation to

the context and subject-matter, it will be seen to be but an aid to the making of fair contracts within the maximum rates allowed, and an aid to the Postmaster General in fixing the rate of compensation upon land-grant routes, and in so arranging routes that each railway company shall receive a proportionate and just rate of compensation according to the service performed. Hence, it seems to me that a failure strictly to comply with the prescribed method of ascertaining the average weight did not of itself render the action of the Postmaster General ultra vires and void.

[338] The principal controversy in the present cases is over his Order No. 412 (June 7, 1907), which provided "that when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." While I regard it as embodying an erroneous view of the statute, this is not sufficient, in my opinion, to vitiate a contract voluntarily made by a railway mail carrier, based upon a calculation of average weight made and known to have been made in conformity with the order. All the present claims originated after the promulgation of the order, and arose out of the carriage of mails under arrangements made with the Postmaster General after express notice of its provisions.

It is contended that although the Act of 1873 (U. S. Rev. Stat. § 4002, Comp. Stat. § 7483, 8 Fed. Stat. Anno. 2d ed. p. 195), in providing that the pay per mile per annum should "not exceed" the specified rates, conferred upon the Postmaster General a discretion to pay less rates, this was modified by the language of the Act of July 12, 1876, chap. 179, 19 Stat. at L. 78, 79, Comp. Stat. § 7484, 8 Fed. Stat. Anno. 2d ed. p. 198, which reduced the compensation 10 per centum from "*the rates fixed and allowed* . . . [by the Act of 1873] for the transportation of mails on the basis of the average weight;" by that of the Act of June 17, 1878, chap. 259, 20 Stat. at L. 140, 142, Comp. Stat. §§ 7548, 7486, 8 Fed. Stat. Anno. 2d ed. pp. 226, 199), where, however, the expression is: "By reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, *on the basis of the average weight fixed and allowed*," etc.; or by the provision of the Act of March 2, 1907, chap. 2513, 34 Stat. at L. 1205, 1212, Comp. Stat. § 7487, 8 Fed. Stat. Anno. 2d ed. p. 205, readjusting compensation on railroad routes carrying an average weight per day exceeding 5,000 pounds, "by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and *hereafter the rates on such routes shall be* as follows," etc. I am not convinced that these amendments, or any of them, had [339] the effect of impliedly repealing that part of the Act of 1873 (U. S. Rev. Stat. § 4002), "shall not exceed," etc., from which alone, in my view, the Postmaster General derived any serviceable discretion about readjusting the compensation.

Therefore, he still had liberty of action within the maximum rates prescribed. And the railroad companies, other than such as had been aided by grants of lands or otherwise, were free to carry the mails at rates offered, or refuse them, as they chose. Eastern R. Co. v. United States, 129 U. S. 391, 396, 32 L. ed. 730, 732, 9 Sup. Ct. Rep. 320; Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 650, 56 L. ed. 1236, 1239, 32 Sup. Ct. Rep. 702; Delaware, L. & W. R. Co. v. United States, 249 U. S. 385, 388, 63 L. ed. 659, 661, 39 Sup. Ct. Rep. 348; New York, N. H. & H. R. Co. v. United States, Dec. 8, 1919, 251 U. S. 123, ante, 182, 40 Sup. Ct. Rep. 67.

Furthermore, by § 212 of the Act of June 8, 1872, chap. 335, 17 Stat. at L. 283, 309, U. S. Rev. Stat. § 3999, Comp. Stat. § 7478, 8 Fed. Stat. Anno. 2d ed. p. 189, if, because of the refusal of the railway companies, the Postmaster General was unable to make contracts at a compensation "not exceeding the maximum rates," or for what he deemed a reasonable and fair compensation, he was at liberty to use other means of carriage.

From the findings of the court of claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Cl. 258, 308, 315, 318, 319) that the contracts arose not out of the Distance Circular in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order; but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad

company excepting it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No. 412, [340] as all the claimants had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers, specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. Had they refused to carry the mails on the terms proposed, he might have exercised his discretion as to the rate of pay per mile, so that instead of agreeing to give them, as he did, the maximum pay based on the average weight ascertained under Order No. 412, he might have acceded to their contention by employing the week-day divisor, but have carried into effect his own view as to the amount that ought to be allowed by reducing the rate of pay per mile. Or, as already shown, he might have refused to make the contracts and have proceeded under § 3999.

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the court of claims held (53 Ct. Cl. 258, 308, 313, 315, 318, 319).

Some of the routes of the Seaboard Air Line and of the Northern Pacific Railway Company were over lines that had been aided by government land grants, and hence [341] were subject to provisions of law summed up in § 214 of the Act of June 8, 1872 (U. S. Rev. Stat. § 4001, Comp. Stat. § 7482, 8 Fed. Stat. Anno. 2d ed. p. 194), by which they were obliged to "carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation." The Seaboard Air Line makes no point of this; but in behalf of the Northern Pacific it is contended that claimant, not being in the position of a free agent, ought not to be regarded as having voluntarily accepted the terms proposed by the Postmaster General. But the effect of the findings is that it did so accept; and this result cannot be overturned by raising an argument about the circumstances that went to make up the evidence upon which the findings were based; and the present contention amounts to no more than this.

Were it otherwise, nevertheless it appears that Congress had not provided the compensation for the land-grant routes, except that it had authorized and directed the Postmaster General to readjust all railway mail pay in the manner set forth in § 4002 and within the maxima prescribed therein and in the amendatory Acts of 1876, 1878, and 1907, above mentioned, and had provided by § 13 of the Act of July 12, 1876; chap. 179, 19 Stat. at L. 78, 82, "that railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act," besides other legislation concerning the land-grant routes that may be referred to, but need not be recited (Acts of March 2, 1907, chap. 2513, 34 Stat. at L. 1205, 1212; May 12, 1910, chap. 230, 36 Stat. at L. 355, 362; July 28, 1916, chap. 261, 39 Stat. at L. 412, 426). Assuming, therefore, that there was no contract affecting the land-grant lines of the Northern Pacific, their compensation must be at the rate fixed by the Postmaster General in the exercise [342] of the power and discretion conferred upon him by this legislation; and so long as he exercised this power and discretion reasonably, not fixing a noncompensatory rate or otherwise acting arbitrarily, the carrier was concluded by his action. There is no finding that he acted arbitrarily; on the contrary, he had, in support of Order 412, a considered opinion of the Attorney General under date September 27, 1907 (26 Ops. Atty. Gen. 390); and, so far as appears, he treated the land-grant routes like others, not reducing them below the 80 per centum contemplated by § 13 of the Act of 1876, or otherwise violating the

statutes. There is no finding nor any contention that the amounts allowed them were not compensatory; and, upon the whole, it seems to me that although he erred in failing to apply the week-day divisor to the weighings, this did not render the readjustment based thereon wholly void, or permit the carrier, after transporting the mails and accepting the stated compensation without further objection, afterwards to treat the readjustment orders as nullities.

Mr. Justice McKenna concurs in this opinion.

MARYLAND CASUALTY COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 342–355.)

Internal revenue — corporation excise tax — income tax — income received or accrued.

1. With respect to domestic corporations no change was intended by the use in the Income Tax Act of October 3, 1913, of the expression income "arising or accruing" instead of income "received," as used in the Corporation Excise Tax Act of August 5, 1909, and the tax should be levied under both acts upon the income "received" during the year.

[For other cases, see Internal Revenue, II. b, in Digest Sup. Ct. 1918 Supp.]

Internal revenue — corporation excise tax — income tax — insurance companies — gross income.

2. Insurance premiums collected by the local agents of an insurance company, but which, conformably to the agency contracts, were not transmitted to the company's treasurer within the calendar year, were nevertheless a part of the gross income of the company received by it during such year within the meaning of the Corporation Excise Tax Act of August 5, 1909, and the Income Tax Act of October 3, 1913.

[For other cases, see Internal Revenue, II. b, in Digest Sup. Ct. 1918 Supp.]

Internal revenue — corporation excise tax — income tax — insurance companies — deductions — loss claims reserve.

3. An insurance company's "loss claims reserve," intended to provide for liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed, is one required by law to be maintained, within the meaning of the provision in both the Corporation Excise Tax Law of August 5, 1909, and the Income Tax Act of October 3, 1913, that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net, income to be taxed, where a state insurance department, pursuant to statute, has, at all times since and including 1909, required the company to keep on hand, as a condition of doing business in that state "assets as reserves sufficient to cover outstanding losses."

[For other cases, see Internal Revenue, II. b, in Digest Sup. Ct. 1918 Supp.]

Internal revenue — corporation excise tax — income tax — insurance companies — deductions — reserves required by state insurance departments.

4. An insurance company's reserves required by rules or regulations of state insurance departments, promulgated in the exercise of an appropriate power conferred by statute, are "required by law," within the meaning of the provision in both the Corporation Excise Tax Act of August 5, 1909, and the Income Tax Act of October 3, 1913, that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net, income to be taxed.

[For other cases, see Internal Revenue, II. b, in Digest Sup. Ct. 1918 Supp.]

Internal revenue — corporation excise tax — income tax — insurance companies — deductions — reserves or assets.

5. Unpaid taxes, salaries, brokerage, and reinsurance due other companies at the end of each tax year may not be deducted from the gross income of an insurance company, under the provision either in the Corporation Excise Tax Act of August 5, 1909, or the Income Tax Act of October 3, 1913, that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net, income to be taxed, although various state insurance departments require that "assets as reserves" be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," where these departments in these expressions plainly used the word "reserves" in a nontechnical sense as equivalent to "assets."

[For other cases, see Internal Revenue, II. b, in Digest Sup. Ct. 1918 Supp.]

Insurance — what are reserves.

6. The term "reserve" or "reserves" in the law of insurance means in general a sum of money variously computed or estimated, which, with accretions from interest, is set aside, "reserved," as a fund with which to mature or liquidate either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued but contingent and indefinite as to amount or time of payment.

Internal revenue — corporation excise tax — income tax — insurance companies — gross income — released reserves.

7. A decrease in the amount of reserves required by law of an insurance company for the year 1913 from the amount re-

quired in 1912, unless clearly shown to be due to excessive reserves in prior years, or to some other cause by which the free assets of the company were increased during the year 1913, cannot be treated by the government as "released reserve" and charged to the company as income for 1913, taxable under the Corporation Excise Tax Act of August 5, 1909, and the Income Tax Act of October 3, 1913.

[For other cases, see Internal Revenue, II. b, in Digest Sup. Ct. 1918 Supp.]

Internal revenue — suit to recover back excessive tax — appeal to Commissioner — limitation.

8. The right to recover back excessive corporation excise tax payments is barred where the corporation failed to appeal to the Commissioner of Internal Revenue, as required by U. S. Rev. Stat. § 3226, and also failed to observe the requirement of § 3227, that suit be begun within two years after the cause of action accrued.

[For other cases, see Internal Revenue, VII.; Limitation of Actions, III. h, in Digest Sup. Ct. 1908.]

Internal revenue — suit to recover back excessive tax — appeal to Commissioner — limitation — amended return.

9. The filing by the government of amended returns for the assessment of an insurance company under the Corporation Excise Tax Act of August 5, 1909, cannot be said to constitute the beginning of new proceedings which so superseded the original returns as to release the company from its entire failure to observe the statutory requirement for review of the latter, where in each case the purpose and effect of such amended returns was to increase the payment which the company was required to make under the law, though in dealing with the same items the basis of computation was in some cases varied, and where the payments made on the original returns were credited on the amounts computed as due on the returns as amended.

[For other cases, see Internal Revenue, VII.; Limitation of Actions, III. h, in Digest Sup. Ct. 1908.]

[No. 73.]

Argued November 13, 1919. Decided January 12, 1920.

APPEAL from the Court of Claims to review a judgment allowing a recovery of a part of certain corporation excise and income taxes alleged to have been unlawfully collected. Modified, and, as modified, affirmed.

See same case below, 52 Ct. Cl. 201, 288, 53 Ct. Cl. 81.

The facts are stated in the opinion.

Mr. **Burt E. Barlow** argued the cause, and, with Mr. Abram R. Serven, filed a brief for appellant:

Income, in its ordinary sense, means that which comes in or is received, and necessarily means cash or its equivalent.

Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 214; United States v. Schillinger, 14 Blatchf. 71, Fed. Cas. No. 16,228; Re Murphy, 80 App. Div. 238, 80 N. Y. Supp. 533; 22 Cyc. 66.

All words used in statutes are modified by and vary according to the circumstances and time of use.

Towne v. Eisner, 245 U. S. 418–425, 62 L. ed. 372–376, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

Under the Act of 1909 only income received during the taxable year should be included in the income of the corporation for the taxable year.

Hays v. Gauley Mountain Coal Co. 247 U. S. 189–191, 62 L. ed. 1061–1063, 38 Sup. Ct. Rep. 470.

The term "income" has no broader meaning in the 1913 act than in that of 1909.

Southern P. Co. v. Lowe, 247 U. S. 330, 62 L. ed. 1142, 38 Sup. Ct. Rep. 540.

The relation between appellant and its agents is determined by the contract existing between it and its agents. The agent has no greater authority or larger powers than are provided in the contract of agency.

Parsons v. Armor, 3 Pet. 413, 7 L. ed. 724.

Payment to agent, as between principal and agent, is not receipt of payment by the principal.

Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 214; Crookson Bros. v. Furtado, Nov. 2 and Dec. 8, 1910, vol. 5, Great Britain Tax Cas. pp. 602–618.

Money in the hands of an agent for remittance to his principal is not subject to attachment, because it is not strictly the money of the principal until paid over by the agent to the principal.

Maxwell v. McGee, 12 Cush. 137.

The action of trover does not ordinarily lie in favor of a principal against an agent.

Vandelle v. Rohan, 36 Misc. 239, 73 N. Y. Supp. 285; Hazelton v. Locke, 104 Me. 164, 20 L.R.A.(N.S.) 35, 71 Atl. 661, 15 Ann. Cas. 1009.

A discharge in bankruptcy, secured by an agent who had in his hands funds for which an accounting was due to his principal, discharges the agent from all liability thereon.

Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576.

The popular or received import of words furnishes a general rule for the interpretation of public laws as well as of private and social transactions.

Maillard v. Lawrence, 16 How. 251, 14

L. ed. 925; Arthur v. Morrison, 96 U. S. 108–111, 24 L. ed. 764, 765; Greenleaf v. Goodrich, 101 U. S. 278–284, 25 L. ed. 845–847; Cadwalader v. Zeh, 151 U. S. 171–176, 38 L. ed. 115–117, 14 Sup. Ct. Rep. 288; Glover v. United States, 164 U. S. 294–297, 41 L. ed. 440, 441, 17 Sup. Ct. Rep. 95.

The legislature must be presumed to have intended to use language in its ordinary meaning, unless it would manifestly defeat the object of the provision.

Minor v. Mechanics Bank, 1 Pet. 46, 7 L. ed. 47.

The statute should be read according to the natural and obvious import of its language, without resorting to subtle and forced construction. For the purpose of either limiting or extending its operation, and when the language is plain, words or phrases should not be inserted so as to incorporate in the statute a new and distinct provision.

United States v. Temple, 105 U. S. 97, 26 L. ed. 967; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; United States v. Hill, 120 U. S. 169–180, 30 L. ed. 627–631, 7 Sup. Ct. Rep. 510; United States v. Lynch, 137 U. S. 280–285, 34 L. ed. 700–702, 11 Sup. Ct. Rep. 114; Houghton v. Payne, 194 U. S. 88–100, 48 L. ed. 888–891, 24 Sup. Ct. Rep. 590.

The term "reserve funds" should mean any fund held in reserve, as is the commonly accepted meaning of the term "reserve."

Dawson Life Ins. p. 183; Webster's Int. Dict. "Reserve;" Century, Dict. "Reserve."

Appellant was legally required to maintain reserves equal to its outstanding liabilities as a condition of its doing business in the state of New York. Further, in case appellant did not maintain such reserves, its license to continue business in the state of New York could be by the superintendent of insurance revoked, or, at the beginning of any year, the superintendent could refuse to issue it.

The power of the superintendent of insurance, under the New York statutes, to exercise his discretion in declining to issue a certificate of authority to transact business in the state of New York, has been decided affirmatively by the New York courts.

People ex rel. Hartford Life & A. Ins. Co. v. Fairman, 91 N. Y. 385, 12 Abb. N. C. 259; People ex rel. Equitable F. & M. Ins. Co. v. Fairman, 12 Abb. N. C. 269; Stern v. Metropolitan L. Ins. Co. 169 App. Div. 217, 154 N. Y. Supp. 472, 217 N. Y. 626, 111 N. E. 1101.

Inasmuch as the state courts of New York have decided that the New York legislature did not exceed its powers in authorizing the superintendent of insurance to exercise his discretion in granting insurance companies licenses to transact business in New York, such question is not an open one in this court, and this court will follow the decision of the New York court.

Dreyer v. Illinois, 187 U. S. 71–84, 47 L. ed. 79–85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253.

When appellant maintained its reserves by order of the insurance superintendent, it was by law required to do so, and in determining what were its net additions to reserve funds, appellant was by law required to include in its computation for any year all reserve funds which it was required to maintain by the superintendent of insurance.

Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383; United States v. Eaton, 144 U. S. 677–688, 36 L. ed. 591–594, 12 Sup. Ct. Rep. 764; United States v. Smith, 1 Sawy. 277, Fed. Cas. No. 16,341; Ralph v. United States, 11 Biss. 88, 9 Fed. 693; United States v. Hearing, 26 Fed. 744; United States v. Breen, 40 Fed. 402; United States v. Hardison, 135 Fed. 419; Van Gesner v. United States, 82 C. C. A. 180, 153 Fed. 46; United States v. Nelson, 199 Fed. 464; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; United States v. Smull, 236 U. S. 405, 59 L. ed. 641, 35 Sup. Ct. Rep. 349; United States v. Birdsall, 233 U. S. 224, 58 L. ed. 930, 34 Sup. Ct. Rep. 512; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; Re Kollock, 165 U. S. 526, 41 L. ed. 813, 17 Sup. Ct. Rep. 444; Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; United States v. Morehead, 243 U. S. 607–611, 61 L. ed. 926–929, 37 Sup. Ct. Rep. 458; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Stone v. Illinois C. R. Co. 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; Stone v. New Orleans & N. E. R. Co. 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152.

Appellant was entitled to deduct from gross income the net additions to reserve funds which the insurance department of the state of Wisconsin required it to maintain as a condition of its doing business in that state.

New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; McCoach v. Insurance Co. of N. A. 244 U. S. 585, 61 L. ed. 1333, 37 Sup. Ct. Rep. 709.

Only such tax can be laid as is specified in the taxing act, and only such property is subject to tax as is specifically set forth in the taxing act.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397–416, 48 L. ed. 496–503, 24 Sup. Ct. Rep. 376.

None of the Statutes of Limitations apply to the claims made by appellant in its suit for recovery for taxes illegally collected.

Stewart v. Barnes, 153 U. S. 456, 38 L. ed. 781, 14 Sup. Ct. Rep. 849; De Bary v. Dunne, 162 Fed. 961; Cheatham v. United States (Cheatham v. Norvelk) 92 U. S. 85, 23 L. ed. 561.

The Act of September 8, 1916, removed any bar that might have existed.

Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; Sage v. United States, 250 U. S. 33, 63 L. ed. 828, 39 Sup. Ct. Rep. 415; Dodge v. Brady, 240 U. S. 122–125, 60 L. ed. 560, 561, 36 Sup. Ct. Rep. 277.

Assistant Attorney General **Frierson** argued the cause and filed a brief for appellee:

Appellant can, in any event, recover only such specific sums as it has shown were illegally included in the amount which it was required to pay on the basis of the final assessment.

United States v. Rindskopf, 105 U. S. 418, 422, 26 L. ed. 1131, 1132.

In reporting the amount of premiums each year, appellant reported the amount of premiums written, and then deducted what it claimed was the amount uncollected at the end of the year. But it included in the deduction premiums collected but not reported by its agents, the amount of which does not appear. There are, therefore, no facts in the record upon which a judgment for any amount could rest.

Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 199; Crookston Bros. v. Furtado, 5 Great Britain Tax Cas. 602.

Mr. Justice **Clarke** delivered the opinion of the court:

Under warrant of the Act of Congress approved August 5, 1909 (36 Stat. at L. 11, 113, chap. 6), the government collected from the claimant, a corporation organized as an insurance company under the laws of Maryland, an excise tax for the years 1909, 1910, 1911, and 1912, and, under warrant of the Act of Congress of October 3, 1913 (38 Stat. at L. 114, 166, chap. 16, Comp. Stat. § 5291, 2 Fed. Stat. Anno. 2d ed. p. 724), it likewise collected an excise tax for the first two months of 1913, and an income tax for the remaining months of that year.

This suit, instituted in the court of claims, to recover portions of such payments claimed to have been unlawfully collected, is here for review upon appeal from the judgment of that court.

The claimant was engaged in casualty liability, fidelity, guaranty, and surety insurance, but the larger part of its business was employers' liability, accident, and, in the later of the years under consideration in this case, workmen's compensation insurance.

By process of elimination the essential questions of difference between the parties ultimately became three, viz.:

(1) Should claimant be charged, as a part of its gross income each year, with premiums collected by agents, but not transmitted by them to its treasurer within the year?

(2) May the amount of gross income of the claimant be reduced by the aggregate amount of the taxes, salaries, brokerage, and reinsurance unpaid at the end of each year, under the provisions in both the excise and income [345] tax laws allowing deductions of "net addition, if any, required by law to be made within the year to reserve funds?"

(3) Should the decrease in the amount of reserve funds required by law for the year 1913 from the amount required for 1912 be treated as "released reserve," and charged to the company as income for 1913?

Of these in the order stated:

First: Section 38 of the Excise Tax Act (36 Stat. at L. 112, chap. 6, 4 Fed. Stat. Anno. 2d ed. p. 260) provides that every corporation, organized under the laws of any state as an insurance company, "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business . . . equivalent to one per centum upon the entire net income . . . *received by it* from all sources during such year."

The Income Tax Act (38 Stat. at L. 172, chap. 16, 4 Fed. Stat. Anno. 2d ed. p. 245) provides (§ G, paragraph (a)) that the tax shall be levied upon the entire "net income *arising or accruing* from all sources during the preceding calendar year." But in paragraph (b), providing for deductions, gross income is described

as that *"received* within the year from all sources." So that, with respect to domestic corporations, it is clear enough that no change was intended by the use of the expression "arising or accruing," in the Income Tax Act, and that the tax should be levied under both acts upon the income "received" during the year. Southern P. Co. v. Lowe, 247 U. S. 330, 335, 62 L. ed. 1142, 1147, 38 Sup. Ct. Rep. 540.

The claimant did business in many states, through many agents, with whom it had uniform written contracts which allowed them to extend the time for payment of the premiums on policies, not to exceed thirty days from the date of policy, and required that on the fifth day of each calendar month they should pay or remit, in cash or its equivalent, the balance due claimant as shown by the last preceding monthly statement rendered to it.

[346] Under the provisions of such contracts obviously the agents were not required to remit premiums on policies written in November until the 5th of January of the next year, and on policies written in December, not until the following February.

Much the largest item of the gross income of the company was premiums collected on policies of various kinds. Omitting reference to earlier and tentative returns by the claimant and amendments by the government, it came about that claimant took the final position that the only premiums with which it could properly be charged as net income "received by it . . . during each year" were such as were collected and actually paid to its treasurer within the year. This involved omitting from gross income each year "premiums in course of collection by agents, not reported on December 31st," which varied in amount from $584,000 in one year to $1,020,000 in another. The amount, if deducted one year, might appear in the return of the claimant for the next year, but the rate might be different.

The government, on the other hand, contended that the claimant should return the full amount of premiums on policies written in each year, whether actually collected or not.

The court of claims refused to accept the construction of either of the parties, and held that the claimant should have returned, not all premiums written by it, but all which were actually received by it during the year, and that receipt by its agents was receipt by the company, within the meaning of the act of Congress.

The claimant contends that premiums paid to its agents, but not remitted to its treasurer, were not "received by it during the year," chiefly for the reason that while in possession of the agents the money could not be attached as the company's property (Maxwell v. McGee, 12 Cush. 137), and because money, while thus in [347] the possession of agents, was not subject to beneficial use by the claimant, and therefore cannot, with propriety, be said to have been received by it, within the meaning of the act.

On the other hand, it is conclusively argued: That payment of the premium to the agent discharged the obligation of the insured and called into effect the obligation of the insurer as fully as payment to the treasurer of the claimant could have done; that in the popular or generally accepted meaning of the words "received by it" (which must be given to them. Maillard v. Lawrence, 16 How. 251, 14 L. ed. 925), receipt by an agent is regarded as receipt by his principal; that, under their contract, collected premiums in possession of the agents of the claimant were subject to use by it in an important respect before they were transmitted to the treasurer of the company, for the agency contract provided that "the agent will pay on demand, out of any funds collected by him for account of premium, and not remitted to the company, such drafts as may be drawn on him by the company . . . for the purpose of settling claims, deducting the amount from the next succeeding monthly remittance;" and that only imperative language in the statute would justify a construction which would place it in the power of the claimant, by private contract with its agents, to shift payment of taxes from one taxing year into another.

The claimant withheld from its returns collections in the custody of its agents at the end of each year, and because in its amendments the government had included all premiums written in each year, whether or not collected, the court of claims, having reached the conclusion thus approved by us, allowed the claimant ninety days in which to show the amount of premiums received by it and its agents within each of the years in controversy, but the claimant failed to make such a showing, and thereupon the court treated the return of premiums [348] written as the correct one, and very properly, so far as this item is concerned, dismissed claimant's petition.

Second: In the same words the Excise and Income Tax Acts provide that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net, income to be taxed.

Finding its authority in this provision of the law, the claimant in all of its returns treated as "reserves," for the purpose of determining whether the aggregate amount of them each year was greater or less than in the preceding year, and of thereby arriving at the "net addition to reserve funds" which it was authorized to deduct from gross income, the following, among others, viz.: "Reserve for unearned premiums," "Special reserve for unpaid liability losses," and "Loss claims reserve." Unearned premium reserve and special reserve for unpaid liability losses are familiar types of insurance reserves, and the government, in its amended returns, allowed these two items, but rejected the third, "Loss claims reserve."

The court of claims, somewhat obscurely, held that the third item should also be allowed. This "loss claims reserve" was intended to provide for the liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed. The finding that the insurance department of Pennsylvania, pursuant to statute, has at all times since and including 1909 required claimant to keep on hand, as a condition of doing business in that state, "assets as reserves sufficient to cover outstanding losses," justifies the deduction of this reserve as one required by law to be maintained, and the holding that it should have been allowed for all of the years involved is approved.

[349] But the court of claims approved the action of the government in rejecting other claimed deductions of reserves for "unpaid taxes, salaries, brokerage, and reinsurance due other companies." The court gave as its reason for this conclusion that the "net addition, if any, required by law to be made within the year to reserve funds" which the act of Congress permitted to be deducted from gross income, was limited to reserves required by express statutory provision, and did not apply to reserves required by the rules and regulations of state insurance departments, when promulgated in the exercise of an appropriate power conferred by statute.

In this the court of claims fell into error. It is settled by many recent decisions of this court that a regulation by department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; United States v. Birdsall, 233 U. S. 223, 231, 58 L. ed. 930, 934, 34 Sup. Ct. Rep. 512; United States v. Smull, 236 U. S. 405, 409, 411, 59 L. ed. 641–643, 35 Sup. Ct. Rep. 349; United States v. Morehead, 243 U. S. 607, 61 L. ed. 926, 37 Sup. Ct. Rep. 458. The law is not different with respect to the rules and regulations of a department of a state government.

But it is contended by the claimant that it was required to provide "reserves" for the payment of the rejected items of liability: because the court of claims found that, pursuant to statutes, the insurance department of Pennsylvania required the company, as a condition of doing business in that state, to keep on hand "assets as reserves" sufficient to cover all claims against the company, "whether due or accrued;" because the department of New York required it to maintain "reserves sufficient to meet all of its accrued but unpaid indebtedness in each year;" and because the department of Wisconsin required it to carry "sufficient reserves to cover all of its outstanding liabilities."

[350] Whether this contention of the claimant can be justified or not depends upon the meaning which is to be given to the words "reserve funds" in the two acts of Congress we are considering.

The term "reserve" or "reserves" has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside, "reserved," as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

In this case, as we have seen, the term includes "unearned premium reserve" to meet future liabilities on policies,

"liability reserve" to satisfy claims, indefinite in amount and as to time of payment, but accrued on liability and workmen's compensation policies, and "reserve for loss claims" accrued on policies other than those provided for in the "liability reserve," but it has nowhere been held that "reserve," in this technical sense, must be maintained to provide for the ordinary running expenses of a business, definite in amount, and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance, and unpaid brokerage.

The requirements relied upon, of the insurance departments of New York, Pennsylvania, and Wisconsin, that "assets as reserves" must be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," in terms might include the rejected items we are considering; but plainly the departments, in these expressions, used the word "reserves" in a nontechnical sense as equivalent to "assets," as is illustrated by the Massachusetts requirement that each company shall "hold or reserve assets" for the payment of all claims and obligations. [351] The distinction between the "reserves" and general assets of a company is obvious and familiar, and runs through the statements of claimant and every other insurance company. That provision for the payment of ordinary expenses such as we are considering was not intended to be provided for and included in "reserve funds," as the term is used in the acts of Congress, is plain from the fact that the acts permit deductions for such charges from income if paid within the year, and the claimant was permitted in this case to deduct large sums for such ordinary expenses of the business,—specifically, large sums for taxes. The claimant did not regard any such charges as properly covered by "reserves," and did not so include them in its statement for 1909. In its 1910 return "unpaid taxes" and "salaries" first appear as "reserves," and in 1911 "brokerage" and "reinsurance" are added. This earlier, though it is now claimed to have been an uninstructed or inexpert, interpretation of the language of the acts, was nevertheless the candid and correct interpretation of it, and the judgment of the court of claims in this respect is approved.

Third: The year 1913 was the only one of those under consideration in which the aggregate amount of reserves which the claimant was required by law to keep fell below the amount so required for the preceding year. The government allowed only "unearned premium" and "unpaid liability loss" reserves to be considered in determining deductions. In 1913 the "unpaid liability loss reserve" decrease exceeded the "unearned premium reserve" increase by over $270,000, and this amount the government added to the gross income of the claimant for the year, calling it "released reserve" on the theory that the difference in the amount of the reserves for the two years released the decrease to the claimant so that it could use it for its general purposes, and therefore constituted free income for the year 1913, in which the decrease occurred.

[352] This theory of the government was accepted by the court of claims, and the addition to the gross income was approved.

The statute does not in terms dispose of the question thus presented.

Reserves, as we have seen, are funds set apart as a liability in the accounts of a company to provide for the payment or reinsurance of specific, contingent liabilities. They are held not only as security for the payment of claims, but also as funds from which payments are to be made. The amount "reserved" in any given year may be greater than is necessary for the required purposes, or it may be less than is necessary, but the fact that it is less in one year than in the preceding year does not necessarily show either that too much or too little was reserved for the former year, —it simply shows that the aggregate reserve requirement for the second year is less than for the first, and this may be due to various causes. If, in this case, it were due to an overestimate of reserves for 1912, with a resulting excessive deduction for that year from gross income, and if such excess was released to the general uses of the company and increased its free assets in 1913, to that extent it should very properly be treated as income in the year in which it became so available, for the reason that in that year, for the first time, it became free income, under the system for determining net income provided by the statute, and the fact that it came into the possession of the company in an earlier year in which it could be used only in a special manner, which permitted it to become nontaxable, would not prevent its being considered

as received in 1913 for the purposes of taxation, within the meaning of the act.

The findings of fact in this case, however, do not show that the diminution in the amount of required reserves was due to excessive reserves in prior years or to any other cause by which the free assets of the company were increased [353] in the year 1913, and the following finding of fact makes strongly against such a conclusion:

"The decrease in employers' liability loss reserve for 1913, designated as 'released reserve,' did not in any respect affect or change claimant's gross income or disbursements, as shown by the state insurance reports."

It would not be difficult to suggest conditions under which the statutory permit to deduct net additions to reserve funds would result in double deduction in favor of an insurance company, but such deductions can be restored to income again only where it is clearly shown that subsequent business conditions have released the amount of them to the free beneficial use of the company in a real, and not in a mere bookkeeping, sense. If this seemingly favorable treatment of insurance companies is to be otherwise corrected or changed, it is for Congress, and not for the courts, to amend the law.

Since the findings of fact before us do not make the clear showing, which must be required, that the statutory deduction of net reserves in prior years was restored to the free use of the claimant in 1913, it should not have been charged as income with the decrease in that year, and, on the record before us, the holding of the court of claims must be reversed.

There remains the question as to the Statute of Limitations.

The government concedes that the case is in time with respect to the amended returns, but claims that it is barred by Rev. Stat. §§ 3226–3228, Comp. Stat. §§ 5949–5951, 3 Fed. Stat. Anno. 2d ed. pp. 1034, 1037, with respect to taxes paid on the original returns for all of the years but 1913. The claimant made its original returns without protest except for the year 1909, and, without appeal to the Commissioner of Internal Revenue, voluntarily paid the taxes computed on them for each of the years. Payment was made for 1909 in June, 1910; for 1910 in June, 1911; for 1911 in June, 1912; for 1912 in June, 1913. No [354]claim for a refund of any of these payments was made until April 30, 1915, and then the claim was in general terms.

"For amounts paid by it in taxes which, through lack of information as to requirements of law, or by error in computation, it may have paid in excess of the amount legally due."

This claim was rejected subsequent to the institution of this suit, which was commenced on February 8, 1916.

This statement shows the right of the claimant plainly barred by its failure to appeal to the Commissioner of Internal Revenue, Rev. Stat. § 3226 [this is fundamental, King's County Sav. Inst. v. Blair, 116 U. S. 200, 29 L. ed. 657, 6 Sup. Ct. Rep. 353], and also by its failure to institute suit within two years after the cause of action accrued, Rev. Stat. § 3227.

The claimant contends that the amended returns filed by the Commissioner of Internal Revenue were not amendments or modifications of the original returns, but were based upon a different principle, and, within the scope of Cheatham v. United States (Cheatham v. Norvekl) 92 U. S. 85, 23 L. ed. 561, constituted new assessments from which appeals were taken in time.

But they are denominated "amended returns," and while, in dealing with the same items, the basis of computation was in some cases varied, in each case the purpose and effect of them was to increase the payment which the claimant was required to make under the law, and the payments made on the original returns were credited on the amounts computed as due on the returns as amended.

The inapplicability of Cheatham v. United States, supra, is obvious, and the contention that the filing of the amended returns constituted the beginning of new proceedings which so superseded the original returns as to release the claimant from its entire failure to observe the statutory requirement for review of the latter is so unfounded [355] that we cannot consent to enter upon a detailed discussion of it. This conclusion renders § 14 of the Act of Congress of September 8, 1916 (39 Stat. at L. 772, chap. 463, Comp. Stat. § 6336n, Fed. Stat. Anno. Supp. 1918, p. 335), inapplicable.

It results that the judgment of the Court of Claims is modified, and as so modified affirmed, and the case is remanded to that court for proceedings in accordance with this opinion.

EASTERN EXTENSION, AUSTRALASIA & CHINA TELEGRAPH COMPANY, Limited, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 355-366.)

Claims — against United States — implied contract — cable subsidies.

No contract, express or implied, on the part of the United States, justiciable in the court of claims, to pay the annual subsidies provided for in a Spanish concession for the construction and operation of submarine cables in the Philippine Islands, can be deduced from the use of such cables by the United States government at the reduced rate prescribed in such concession for official despatches, where this was the full rate demanded by the cable company, nor from the acceptance by subordinate officials of the Philippine government of the tax on receipts from messages computed as required by such concession, nor from a statement of account showing a balance favorable to the United States which was paid to and accepted by the treasurer of the Philippine government, which statement was prepared without suggestion of demand from the government of the United States, or even from the Philippine government, and in which, in order to give it the form of an account, the company was obliged to treat as unpaid, charges for tolls over the Hongkong-Manila cable, all of which had been paid by the United States government and accepted by the company.

[For other cases, see Claims, 105-127, in Digest Sup. Ct. 1908.]

[No. 357.]

Argued December 15, 1919. Decided January 12, 1920.

APPEAL from the Court of Claims to review the dismissal of a petition seeking to recover an annual cable subsidy from the United States. Affirmed.

The facts are stated in the opinion.

Mr. **Louis Marshall** argued the cause and filed a brief for appellant:

Under general principles of jurisprudence the facts as found create an obligation on the part of our government to the claimant to pay the subsidy provided for in the concession, it having availed itself of the general and special rights and privileges which have accrued to it under the terms of the concession.

Stewart v. Long Island R. Co. 102 N. Y. 607, 55 Am. Rep. 844, 8 N. E. 200; Walton v. Stafford, 14 App. Div. 312, 43 N. Y. Supp. 1049; Cameron v. Nash, 41 App. Div. 532, 58 N. Y. Supp. 643; Frank v. New York L. E. & W. R. Co. 122 N. Y. 197, 25 N. E. 332; Pollard v. Shaaffer, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239; Fennell v. Guffey, 155 Pa. 38, 25 Atl. 785; Burnett v. Lynch, 5 Barn. & C. 589, 108 Eng. Reprint, 220, 8 Dowl. & R. 368, 4 L. J. K. 274, 29 Revised Rep. 343; Astor v. Lent, 6 Bosw. 612; Schoellkopf v. Coatsworth, 55 App. Div. 331, 66 N. Y. Supp. 979, affirmed in 166 N. Y. 77, 59 N. E. 710; Greason v. Keteltas, 17 N. Y. 491; Cobb v. Hatfield, 46 N. Y. 536; Anderson v. Caldwell, 242 Mo. 207, 146 S. W. 444; Highway Comrs. v. Bloomington, 253 Ill. 164, 97 N. E. 284, Ann. Cas. 1913A, 471; United States v. Russell, 13 Wall. 623, 20 L. ed. 474; Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; United States v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; Coleman v. United States, 152 U. S. 99, 38 L. ed. 369, 14 Sup. Ct. Rep. 473; Cavaliere, "The Doctrine of Succession of a State by a State," Pisa, 1910, p. 135.

This case must be treated precisely as it would be if the questions now presented had arisen as between private individuals.

Rhode Island v. Massachusetts, 12 Pet. 737, 738, 9 L. ed. 1265, 1266; People v. Stephens, 71 N. Y. 549.

It has been held that even where a state has been induced to enter into a contract by fraud, if it nevertheless, with knowledge of the fraud, continues to take the benefits of the contract, it is not thereafter permitted to repudiate it, but is bound to perform its provisions: thus placing it, in this regard, on a parity with private individuals.

People v. Stephens, 71 N. Y. 527; Masson v. Bovet, 1 Denio, 69, 43 Am. Dec. 651; Vernol v. Vernol, 63 N. Y. 45; Mills v. Hoffman, 92 N. Y. 190; Baird v. New York, 96 N. Y. 589.

Assistant Attorney General **Davis** argued the cause, and, with Mr. W. F. Norris, filed a brief for appellee:

Appellant has failed to establish any implied contract on the part of the United States.

Wisconsin C. R. Co. v. United States, 164 U. S. 205, 41 L. ed. 404, 17 Sup. Ct. Rep. 45; United States v. Harmon, 147 U. S. 275, 37 L. ed. 167, 13 Sup. Ct. Rep. 327; Chorpenning v. United States, 94 U. S. 399, 24 L. ed. 127; Hooe v. United States, 218 U. S. 322, 54 L. ed. 1055, 31 Sup. Ct. Rep. 85; United States v. Buffalo Pitts Co. 234 U. S. 228, 58 L. ed. 1290, 34 Sup. Ct. Rep. 840; United States v. Doullut, 130 C. C. A. 243, 213 Fed. 729.

Mr. Justice **Clarke** delivered the opinion of the court:

The appellant, claimant, is the grantee from the government of Spain of three concessions to lay down and operate submarine cables. The first one, in 1879, was for the exclusive privilege, for forty years, of constructing and operating a cable between the island of Luzon and Hongkong. It was landed at Bolinao, on the northerly coast of Luzon, and despatches were transmitted to Manila and other places by government-owned land lines, which were subject to interruption. This concession required that official messages be transmitted free and be given precedence. In 1898 a second concession, supplemental to the first, empowered the claimant to extend its cable to Manila, and the term of the prior exclusive grant was extended twenty years, with the same priority for official despatches, but, with the provision that they were to be [**357**] transmitted free, only for the first ten years from the date of this second grant.

In 1897 a third concession, the one with which this case is chiefly concerned, authorized the claimant to lay down and operate three submarine cables, connecting the island of Luzon with three Visayas islands,—Panay, Negros, and Cebu. This grant required the claimant: to operate the cables for twenty years; to give precedence to official despatches and to charge for them at one half the rates charged for private messages; to pay a tax of 10 per cent on receipts in excess of expenses, not to exceed £6,000 per annum, an additional tax of "50 centimes of a franc" per word on telegrams transmitted, and a surtax of "5 centimes of a franc" per word on telegrams between the four islands named in the grant and others of the archipelago.

The government of Spain, on its part, agreed to pay the claimant, in equal monthly instalments, an annual subsidy of £4,500 during the term of the grant.

All of the cables were promptly laid down and put in use and those of the third grant are designated in the record as the "Visayas cables" and the grant as the "Visayas concession." This suit is to recover the amount of the subsidy provided for in the third concession, which had accrued when the petition was filed.

The United States denied all liability, and the judgment of the court of claims, dismissing the petition, is before us for review.

The case was here before on appeal and this court held (231 U. S. 326, 58 L. ed. 250, 34 Sup. Ct. Rep. 57) that the case as then stated in the petition was not within the jurisdiction of the court of claims, whether viewed as asserting an obligation growing directly out of the treaty with Spain or one imposed by principles of international law upon the United States as a consequence of the cession of the Islands by the treaty. The court, however, referring to certain general and indefinite [**358**] allegations in the petition, suggested that the implication might be drawn from them that there may have been action on the part of officials of the government of the United States since it had assumed sovereignty over the Islands, which, if properly pleaded and proved, would give rise to an implied contract with the claimant outside the treaty, which would be within the jurisdiction of the court of claims, and, to the end that the right to have such a claim adjudicated might be saved, if it really existed, the case was remanded for further proceedings in conformity with the opinion.

Doubtless inspired by the suggestion from the court, an amended petition was filed, in which claimant alleged with much detail, that the government of the United States had used the cables extensively for official messages, which had been given precedence and had been transmitted, as required by the terms of the two concessions, over the Hongkong cable free until 1908, and thereafter at one fourth of the regular rate, and over the Visayas cables at one half the rate charged for private despatches; that the claimant had paid and the government accepted the 10 per cent tax on receipts from messages, computed as required by the third concession; that since the American occupation the service over the Visayas cables had been extended and improved at large expense by arrangement with duly authorized officers of the government; and that in August, 1905, the claimant had paid and the government had accepted a balance due on an account stated in a form indicating an adoption of the terms of the concessions. By this course of conduct, it was averred, the United States "assumed and adopted" all of the obligations imposed on the government of Spain by the concessions, and agreed with the claimant to discharge and perform all of them, and especially agreed to pay the annual subsidy of £4,500, as required by art. 10 of the third concession.

[**359**] Trial by the court of claims resulted in findings of fact, as follows:

That the concessions were made to claimant as alleged and that all of the cables were completed and in use when the treaty with Spain was signed, December 10, 1898; that the government used the cables extensively for official despatches, which were given priority in transmission, but that this was in accordance with the International Telegraph Convention, as well as in compliance with the terms of the concessions; that the claimant charged the government for messages over the Visayas cables at one half the rate charged for private despatches, which is the rate prescribed by the third concession, but that it "has paid the full rates charged by the claimant for messages over any of the lines," and claimant had authority to make its own rates; and that it is not true that the claimant transmitted messages over the Hongkong cable free of charge: "The United States government has paid full established rates on the Hongkong-Manila cable."

It is further found that since December, 1901, the claimant has made claim to the subsidy in annual statements to the authorities of the Philippine government, in which the terms of the concession granting it were referred to, and in which the United States was charged with the amount of it then accrued. With respect to these, except as hereinafter noted, the court finds that whether any reply was made to them "does not appear from the record."

Much significance is attached by the claimant to the statement presented on June 11, 1905. The finding with respect to this is that on that date the claimant's representative forwarded to "the secretary of finance and justice," an officer of the Philippine government at Manila, a communication, with an attached statement, purporting to show the amount "due to the United States government in the Philippines on account of transmission [360] of all United States government traffic over the Manila-Hongkong cable, as per the concession granted to us for laying the same, up to and including December 31, 1904."

In this statement the government is credited (as if the amount had not been paid) with what it had paid for service over the Hongkong-Manila cable, laid under the first and second concessions, from August 21, 1898, to December 31, 1904, and it is charged with "Visayas subsidy," under the third concession, £4,500 per annum to December, 1904. Thus a balance was arrived at of £4,712.10.6 in favor of the United States, as to the disposal of which "I shall be glad to receive your instructions," wrote the representative of the claimant.

In reply to this the auditor of the government of the Philippine Islands, to whom it had been referred, wrote to claimant's representative at Manila, acknowledging receipt of his letter, in which it was stated, "There is due the *insular government* under your concession the sum of £4,712.10.6," and the auditor added: "It is respectfully requested that said amount be deposited with the Insular treasury as miscellaneous revenue." Payment was made and receipt given by the treasurer of the government of the Philippine Islands for the amount as "due government, as per statement of account rendered by Eastern Extension &c. Tel. Co. to Sec. Finance and Justice, June 5, 1911."

Each year after 1905 the claimant sent a statement to the "secretary of finance and justice" at Manila in the form following: "The United States government at Manila in account with the Eastern Extension Australasia & China Tel. Co., Limited. . . . Free transmission of American government telegrams over Hongkong-Manila section." Then follow credits for messages passing over the Hongkong-Manila cable, as if they had not been paid for, and a debit of the "Visayas [361] subsidy" accrued to the date of the statement. To these no reply appears to have been made.

It is expressly found that:

"Except the payment above referred to in 1905, the claimant has never paid anything into the treasury of the Philippine government. It does not appear that any part of said sum was paid into the Treasury of the United States. Nor has the claimant paid any sum to the United States government."

The only payment of the 10 per cent tax under the third concession was that made in 1905, £184.17.2, and the statement showing this balance in favor of the United States concluded:

"I therefore have the honor to request that the necessary permission be given to the treasurer to receive these amounts, now standing to the credit of the United States government in the Philippines."

Of its own motion the claimant, in 1899, made extensions of the Visayas cables at a considerable expense. But the finding with respect to this is:

"These extensions were carried out with the approval of the military au-

thorities in control of the Philippines at the time, and by the sanction of the United States government, but without prejudice to, and with the reservation of, all rights of the government of the United States."

The following is from the court's finding of fact No. IX.:

"Between the 10th day of December, 1898, and March, 1899, considerable correspondence was exchanged between the government of the United States and the claimant regarding the transmission of official telegrams over the Hongkong-Manila cable at reduced rates.

"On the 1st of March, 1899, the Secretary of War transmitted to the chairman of the claimant company a telegram, stating that the War Department 'accepts the courteous offer of your company to transmit messages [362] free between Hongkong and Manila, providing that this acceptance leaves in abeyance Spanish concession which is now under consideration.' On the following day claimant's reply was transmitted to the War Department, stating that the foregoing telegram had been received and the reservation therein noted, and that 'the company have pleasure in affording all possible facilities to the United States government in connection with the transmission of their telegrams.' On the 28th of March, 1899, a written communication was transmitted by the War Department to the duly authorized representative of the claimant company, to the effect that 'upon careful reconsideration of the subject it is deemed inadvisable for the Department to avail itself of your company's offer. I beg to state, therefore, that the Department will pay the established rates on official cable messages, and all accounts of this character presented to the United States will be paid.' This communication concluded with a renewal of thanks 'for the voluntary reduction in rates which your company has so courteously tendered.' The United States government has paid full established rates on Hongkong-Manila cable, and has paid the established rates on the Visayas cables on its messages."

Upon these findings of fact and upon principles and analogies derived from the law of private contract, the court must proceed to judgment. For it was determined by this court on the former appeal, that any right in the defendant derived directly from the treaty with Spain, or any obligation imposed upon the United States by principles of international law as a consequence of the cession of the Islands, would not be within the jurisdiction of the court of claims, and counsel for claimant, expressly disclaiming the assertion of any right under the Treaty of Paris of December 10, 1898 [30 Stat. at L. 1754], urge that the case be treated "exactly as it would be if it arose between two private citizens."

[363] So regarding the case. It is obvious that no express contract by the United States to adopt and be bound by the third or any of the concessions can be made out from the findings of fact, and it is equally clear that such an implied contract, using the words in any strict sense, cannot be derived from the findings, for it is plain that there is nothing in them tending to show that any official with power, express or implied, to commit that government to such a contract, ever intended to so commit it.

The contention of the claimant must be sustained, if at all, as a quasi contract,—as an obligation imposed by law independent of intention on the part of any officials to bind the government,—one which in equity and good conscience the government should discharge because of the conduct of its representatives in dealing with the subject-matter.

It is argued that the United States should be held to have assumed the burden of the concession because it derived benefits and advantages from the use of the cables.

These cables were in operation when the United States government assumed jurisdiction over the Islands. It extended a much more efficient governmental protection over the lines than they had before, but left the claimant in full ownership and control over them, with the power to determine rates for service. The government, to be sure, availed itself of the advantages of communication which the cables afforded, but for such service it paid the rates which the claimant demanded, and which it must be assumed were adequate. From such circumstances as these, very clearly, the law will not raise an obligation on the part of the government to assume the burden of the subsidy on the principle of undue enrichment or of advantage obtained. It used the cables as other customers used them, and from such a use, paid [364] for at the full rate demanded, no obligation can be derived by implication.

It is further contended that the terms and conditions of the concession should be imposed on the government because the officials of the Philippine government

accepted taxes computed as provided for by the third grant.

The finding of the court of claims is not that the Philippine government demanded or exacted the small amount of taxes that was paid, but that the claimant itself computed the amount in the manner which it thought was provided for in the concession and tendered payment, which, after repeated urging, was accepted by local officers of the Philippine government, so subordinate in character that it is impossible to consider them as empowered to commit the government of the United States to the large responsibilities now claimed to spring from their conduct.

The finding with respect to extension of the cables in 1899 excludes all suggestion of the assumption of any liability by the United States on account of the expenditure involved.

The form of the statement of account of December 31, 1904, showing a balance favorable to the United States, which was paid to and accepted by the treasurer of the Philippine government, and from which so much is claimed, is not impressive as creating the asserted liability.

Here again the claimant, without suggestion of demand from the government of the United States or even from the Philippine government, prepared a statement, and, in order to give it the form of an account, was obliged to treat as unpaid, charges for tolls over the Hongkong-Manila cable, all of which had been paid by the United States government and accepted by the claimant.

A separate government, sustained by its own revenues, has been maintained for the Philippine Islands ever since they were ceded to the United States. At first military, [**365**] it became a civil government on July 1, 1902, organized as provided for by an act of Congress (32 Stat. at L. p. 691, chap. 1369, Comp. Stat. § 3804, 7 Fed. Stat. Anno. 2d ed. p. 1133), with a governor general, and executive, legislative, and judicial departments, all subject to the supervision of the Secretary of War of the United States.

It is surprising that the claimant, when it desired to have these important concessions, with their large obligations, adopted by the government of the United States, did not make application for that purpose directly to that government or to its Secretary of War, or at least to the governor general or legislative department of the Philippine government, instead of relying for its adoption by implication, as it has done, chiefly upon the form in which the accounts were presented to the secretary of finance and justice of the Philippine government.

The action of a department head of the Philippine government (inconsistent with the position taken by the Secretary of War in 1899, with respect to the subject-matter) in accepting a voluntary payment of $23,000 cannot be made the sufficient basis for implying an obligation on the part of the government of the United States to pay a bonus of a total aggregate of almost $440,000.

If doubt could be entertained as to the correctness of this conclusion it would be disposed of by the fact that when the claimant, in March, 1899, tendered to the Secretary of War, so far as appears the only official of the United States with large powers, who considered the subject, the privilege of free transmission of messages over its Hongkong-Manila cable, as was provided for in the first concession, the offer was politely but firmly declined, with the statement that "the Department will pay the established rates on official cable messages and all accounts of this character presented to the United States will be paid"—a promise which the findings show that he and his successors in office have faithfully kept.

In the jurisdiction given to the court of claims Congress [**366**] has consented that contracts, express or implied, may be judicially enforced against the government of the United States. But such a liability can be created only by some officer of the government lawfully invested with power to make such contracts or to perform acts from which they may be lawfully implied. Langford v. United States, 101 U. S. 341, 345, 25 L. ed. 1010, 1012; United States v. Buffalo Pitts Co. 234 U. S. 228, 58 L. ed. 1290, 34 Sup. Ct. Rep. 840; Tempel v. United States, 248 U. S. 121, 63 L. ed. 162, 39 Sup. Ct. Rep. 56; Ball Engineering Co. v. J. G. White & Co. 250 U. S. 55, 63 L. ed. 840, 39 Sup. Ct. Rep. 393.

The foregoing discussion makes it palpably plain that no contract, express or implied, to pay the disputed subsidy, was made by any officer of the United States, and the judgment of the Court of Claims is therefore affirmed.

NAPA VALLEY ELECTRIC COMPANY, Appt.,
v.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al.

(See S. C. Reporter's ed. 366-373.)

Judgment — res judicata — denying review — decision on merits.

The denial by the California supreme court, without opinion, of the petition of a public service corporation for the review, conformably to the California Public Utilities Act, § 67, of an order of the state Railroad Commission, sought upon the ground that such order deprived the corporation of its constitutional rights, is the equivalent of a decision adverse to the claims asserted in such petition, and bars a subsequent suit by the corporation to enjoin the enforcement of such order on the same grounds.

[For other cases, see Judgment, III. j, in Digest Sup. Ct. 1908.]

[No. 401.]

Argued December 12, 1919. Decided January 19, 1920.

APPEAL from the District Court of the United States for the Northern District of California to review a decision dismissing the bill in a suit by a public service corporation to enjoin the enforcement of an order of the state Railroad Commission. Affirmed.

See same case below, P.U.R.1917E, 471, 257 Fed. 197.

The facts are stated in the opinion.

Mr. **D. L. Beard** argued the cause, and Mr. Milton T. U'Ren filed a brief for appellant:

The controversy is not res judicata.

Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; Montgomery, Fed. Proc.; Williams v. Bruffy, 102 U. S. 248, 26 L. ed. 135; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Detroit & M. R. Co. v. Michigan R. Commission, 235 U. S. 402, 59 L. ed. 288, 35 Sup. Ct. Rep. 126; 1 Freeman, Judgm. 4th ed. §§ 247, 260; 2 Black, Judgm. §§ 548, 693, 699, 703; Valentine v. Mahoney, 37 Cal. 389; Hughes v. Walker, 14 Or. 481, 13 Pac. 450; 1 Van Fleet, Former Adjudication, § 1; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; 23 Cyc. 1131, 1136, 1226, 1230; Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep. 134; Russell v. Place, 94 U. S. 606, 24 L. ed. 214.

The rights relied upon by plaintiff are rights guaranteed by the United States Constitution, and no decision of a state court can preclude the Federal court from enforcing those rights.

Mitchell v. Dakota Cent. Teleph. Co. 246 U. S. 396, 62 L. ed. 793, 38 Sup. Ct. Rep. 362; Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, — A.L.R. —, 38 Sup. Ct. Rep. 44; Foster, Fed. Pr. p. 66; Bank of Kentucky v. Stone, 88 Fed. 383, 174 U. S. 799, 43 L. ed. 1187, 19 Sup. Ct. Rep. 881; 12 Cyc. 389; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 62 Fed. 945; National Bank v. Brooklyn City, 14 Blatchf. 242, Fed. Cas. No. 10,039, 102 U. S. 14, 26 L. ed. 61; Jefferson Branch Bank v. Skelly, 1 Black, 437, 17 L. ed. 173; Sunset Teleph. & Teleg. Co. v. Pomona, 164 Fed. 561; Knapp v. Bullock Tractor Co. 242 Fed. 543; Orr v. Allen, 245 Fed. 486; Webb v. Southern R. Co. 160 C. C. A. 518, 248 Fed. 619; Detroit & M. R. Co. v. Michigan R. Commission, 235 U. S. 402, 59 L. ed. 288, 35 Sup. Ct. Rep. 126.

The orders of the Railroad Commission are not a proper exercise of the police power of the state, in that no rights of the public are affected thereby in any way.

Marin Water & P. Co. v. Sausalito, 168 Cal. 587, 143 Pac. 767; Beale & W. Railroad Rate Regulation, 2d ed. §§ 347, 842, 899; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; 33 Cyc. 48, note 53; Reeder, Validity of Rate Regulation, § 198; Atchison, T. & S. F. R. Co. v. Railroad Commission, 173 Cal. 577, 2 A.L.R. 975, P.U.R.1917B, 336, 160 Pac. 828; Allen v. Railroad Commission, 179 Cal. 68, 8 A.L.R. 249, P.U.R.1919A, 398, 175 Pac. 466.

Mr. **Douglas Brookman** argued the cause and filed a brief for appellees:

The validity of an order of the Railroad Commission in a proceeding fixing the rates of a public utility becomes a justiciable question from the moment

Note.—On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. Co. v. United States, 42 L. ed. U. S. 355.

the Railroad Commission acts finally on the petition for rehearing filed with it in such proceeding. At that moment the legislative act of rate fixing is complete, and resort may be had to either the Federal court or the state supreme court to test the validity of the rate-fixing order.

Pacific Teleph. & Teleg Co. v. Eshleman, 166 Cal. 640, 50 L.R.A.(N.S.) 652, 137 Pac. 1119, Ann. Cas. 1915C, 822; Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Bacon v. Rutland R. Co. 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Palermo Land & Water Co. v. Railroad Commission, P.U.R.1916B, 437, 227 Fed. 708.

The Napa Valley Electric Company having elected to present its cause to the supreme court of California, which court is competent to determine the matter, the company is precluded, under the doctrine of res judicata, from seeking a second adjudication of the same question in the Federal court.

Pacific Teleph. & Teleg. Co. v. Eshleman, supra; Detroit & M. R. Co. v. Michigan R. Commission, 203 Fed. 864; Detroit & M. R. Co. v. Michigan R. Commission, 235 U. S. 402, 59 L. ed. 288, 35 Sup. Ct. Rep. 126.

The fact that the supreme court of California made its order denying the petition of the Napa Valley Electric Company to review and reverse the order of the Railroad Commission, without setting the petition for hearing, does not preclude the application of the doctrine of res judicata.

Ghriest v. Railroad Commission, 170 Cal. 63, 148 Pac. 195; Mt. Konocti Light & P. Co. v. Thelen, 170 Cal. 468, P.U.R. 1915E, 291, 150 Pac. 359; E. Clemens Horst Co. v. Railroad Commission, 175 Cal. 660, P.U.R.1917F, 893, 166 Pac. 804; C. A. Hooper & Co. v. Railroad Commission, 175 Cal. 811, P.U.R.1917E, 997; 165 Pac. 689; Santa Monica v. Railroad Commission, 179 Cal. 467, P.U.R.1919C, 308, 177 Pac. 989; Williams v. Bruffy, 102 U. S. 248, 26 L. ed. 135; Chaffin v. Taylor, 114 U. S. 309, 29 L. ed. 198, 5 Sup. Ct. Rep. 924, 962; Hart Steel Co. v. Railroad Supply Co. 244 U. S. 294, 61 L. ed. 1148, 37 Sup. Ct. Rep. 506.

The Railroad Commission has power to fix the wholesale rates for public utility service, and can exercise the power irrespective of existing contracts specifying the rate for such service.

Pacific Teleph. & Teleg. Co. v. Eshleman, supra; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 413, 58 L. ed. 1011, 1022, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Brass v. North Dakota, 153 U. S. 391, 403, 38 L. ed. 757, 761, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Union Dry Goods Co. v. Georgia Pub. Service Corp. 248 U. S. 372, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R. 1919C, 60, 39 Sup. Ct. Rep. 117; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364; Limoneira Co. v. Railroad Commission, 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033; Southern P. Co. v. Spring Valley Water Co. 173 Cal. 291, L.R.A.1917E, 677, 159 Pac. 865.

Mr. Justice **McKenna** delivered the opinion of the court:

Appeal from decree of the district court, dismissing bill of appellant, herein called the Electric Company, upon motion of appellees, herein called the Commission.

The ground of the motion and the decree sustaining it was that it appeared from the averments of the bill that the controversy it stated was res judicata. The bill is long, but the grounds of it can be stated with fair brevity. The Electric Company is a California corporation and has been engaged for more than ten years in supplying electricity (called in the bill electric energy) for domestic use in the town of St. Helena and vicinity, and the Calistoga Electric Company, also a California corporation, has been for seven years a distributing agency of the Electric Company, and the latter is not, as to the Calistoga Company, a public utility. By virtue of certain circumstances the Electric Company entered into a contract with one E. L. Armstrong, by which it agreed not to extend its lines into Calistoga territory, and Armstrong agreed to buy from it all of the electricity to be sold by him for eighteen years. At that time the Electric Company, under the [368] laws of California, had a right to extend its lines and become a competitor of other companies or individuals.

September 14, 1911, the Calistoga Company became the successor in interest of Armstrong and to his rights and obligations under the contract with the Electric Company, and the Calistoga Company acknowledged the fact of such succession and continued to buy its electricity from the Electric Company at the rates set forth in the contract, until November 18, 1913, when it petitioned the Commission to set aside the contract and compel the Electric Company to ac-

cept other rates than those mentioned in the contract.

The Electric Company answered the petition, set up the contract, and alleged that any change in its rates would be a violation of § 10, article 1, of the Constitution of the United States, and the 14th Amendment thereto.

January 24, 1914, the Commission instituted an investigation on its own motion which, with the petition of the Calistoga Company, was consolidated. The petitions were heard together upon evidence and submitted.

The Commission subsequently made an order fixing rates much less than those of the contract.

June 20, 1914, the Electric Company filed a petition for rehearing, setting up its rights under the Constitution of the United States. A rehearing was denied.

May 1, 1914, the Electric Company and the Calistoga Company entered into an agreement fixing rates subject to the approval of the Commission, which the Calistoga Company agreed to secure. It did secure an informal approval of them and paid them until June 27, 1916.

The rates fixed by the Commission never became effective, and therefore the Electric Company did not petition for a review of them by the supreme court of the state, nor commence proceedings in any court of the United States to enjoin the order establishing them, or to have it set aside as null and void.

[**369**] June 27, 1916, the Calistoga Company again petitioned the Commission to establish other rates than those fixed in the agreement of that company with the Electric Company. The latter company filed a counter petition to have established the rates fixed in the contract of May 1, 1914 (reduced to writing September 15, 1914), and the petition and that of the Calistoga Company came on to be heard, and after evidence adduced the Commission, November 15, 1916, reduced the rates fixed in the written contract of September 15, 1914, and made the reduced rates effective December 20, 1916.

A rehearing was denied May 24, 1917, and on June 20, 1917, the Electric Company duly filed a petition in the supreme court of the state of California, praying that a writ of review issue commanding the Commission, on a day named, to certify to the court a full and complete record of the proceedings before it, the Commission, and that upon a return of the writ the orders and decisions of the Commission be reversed, vacated, and annulled upon the ground that they violated the company's rights under the Constitution of the United States, particularly under § 10, article 1, and under § 1 of article 14 of the Amendments thereto. The supreme court of California denied the "petition for writ of review, and refused to issue a writ of review, as prayed for in said petition."

On or about January 27, 1918, the California Light & Telephone Company became a party to the contracts between the Electric Company and the Calistoga Company by reason of conveyances from the latter company.

In the present bill it is alleged that the orders and decisions of the Commission were illegal, were in excess of its jurisdiction, and that the Electric Company has no adequate remedy at law, and prays a decree declaring the orders and decisions null and void, that they be enjoined of enforcement, or made the basis of suits against the company to enforce them.

[**370**] The Commission and other defendants moved to dismiss on the ground that it appeared from the allegations of the bill that "the subject-matter thereof was res judicata," and that there was no ground stated entitling the company to the relief prayed. The motion was granted, and to the decree adjudging a dismissal of the bill this writ of error is directed.

The district court (Judge Van Fleet) based its ruling upon the allegations of the bill that the Electric Company filed in the supreme court a petition for a review of the decision and order of the Commission and for their annulment, and that the supreme court denied the petition.

The Electric Company to the ruling of the court opposes the contention that the supreme court denied the company's "petition for a preliminary writ, and refused to even cause the record in the case, certified by the Commission, to be brought up," and therefore "simply refused to entertain jurisdiction of the controversy." And it is the further contention that the court could neither affirm nor set aside the orders of the Commission until the record was certified to it and the parties were before it, and after formal hearing in the matter.

The contention is based on § 67 of the Public Utilities Act of the state. The section is too long to quote. It is part of the procedure provided by the state for the execution of its policy in regard to the public utilities of the state, and affords a review of the action of the

Commission regulating them. It is quite circumstantial and explicit. It provides for a review of the action of the Commission by writ of certiorari or review from the supreme court of the state, which "shall direct the Commission to certify its record in the case to the court," the cause to "be heard on the record of the Commission as certified by it." No other evidence is to be received, and the review is confined to an inquiry "whether the Commission has regularly pursued its authority" or [371] whether its order or decision "violates any right of the petitioner under the Constitution of the United States or of the state of California." The findings and conclusions of the Commission on questions of fact are to be final. The Commission and the parties have the right of appearance, and upon the hearing the court "shall enter judgment either affirming or setting aside the order or decision of the Commission." The Civil Code of the state is made applicable so far as it is not inconsistent with the prescribed proceedings, and no court of the state except the supreme court to the extent specified shall have jurisdiction over any order or decision of the Commission except "that the writ of mandamus shall lie from the supreme court to the Commission in all proper cases."

These provisions, counsel insist, were not observed, and that therefore there was not and could not have been "an adjudication of the controversy" by the supreme court. There was nothing, it is insisted, but the Electric Company's petition before the court, and that none of the essential requirements of § 67 were observed. No writ of review was issued, —none certified by the Commission or returned, no return day fixed or hearing had on a certified record, no appearance of the parties, no order of the court affirming or setting aside of the Commission's order. In other words, the substance of the contention is that the court, instead of hearing, refused to hear; instead of adjudicating, refused to adjudicate; and that from this negation of action or decision there cannot be an assertion of action or decision with the estopping force of res judicata assigned to it by the district court.

Counsel, to sustain the position that he has assumed and contends for, insists upon a literal reading of the statute and a discussion of the elements of res judicata. We need not follow counsel into the latter. They are [372] familiar and necessarily cannot be put out of mind, and the insistence upon the literalism of the statute meets in resistance the common, and, at times, necessary, practice of courts to determine upon the face of a pleading what action should be taken upon it. The petition is not in the record. We may presume it was circumstantial in its exposition of the proceedings before the Commission and of the latter's decisions and orders, and exhibited and submitted to the court the questions it was authorized to entertain,—whether the Commission "pursued its authority, including a determination of whether the order or decision" violated "any right" of the company "under the Constitution of the United States or of the state of California."

Whether, upon such an exhibition of the proceedings and questions, the court was required to pursue the details of the section or decide upon the petition was a matter of the construction of the section and the procedure under it. And the supreme court has so decided. Ghriest v. Railroad Commission, 170 Cal. 63, 148 Pac. 195; Mt. Konocti Light & P. Co. v. Thelen, 170 Cal. 468, P.U.R. 1915E, 291, 150 Pac. 359; E. Clemens Horst Co. v. Railroad Commission, 175 Cal. 660, P.U.R.1917F, 893, 166 Pac. 804; C. A. Hooper & Co. v. Railroad Commission, 175 Cal. 811, P.U.R.1917E, 997, 165 Pac. 689. In those cases the applications for writs of certiorari were denied, which was tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the state of California. And so with the denial of the petition of the Electric Company,—it had like effect and was the exercise of the judicial powers of the court. And we repeat, to enable the invocation of such powers was the purpose of § 67, and they could be exercised upon the display in the petition of the proceedings before the Commission and of the grounds upon which they were assailed. And [373] we agree with the district court that "the denial of the petition was necessarily a final judicial determination, based on the identical rights" asserted in that court and repeated here. Williams v. Bruffy, 102 U. S. 248, 255, 26 L. ed. 135, 137. And further, to quote the district court, "Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact." Calaf y Fugural v. Calaf y Rivera, 232 U. S. 371, 58 L. ed. 642, 34 Sup. Ct. Rep. 411; Hart Steel Co. v. Railroad Supply Co. 244 U. S. 294, 299.

61 L. ed. 1148, 1153, 37 Sup. Ct. Rep. 506.

The court held, and we concur, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore the decree of the District Court is affirmed.

CHIPMAN, Limited, Plff. in Err.,
v.
THOMAS B. JEFFERY COMPANY.

(See S. C. Reporter's ed. 373-380.)

Writ and process — service on foreign corporation — designated agent — withdrawal from state.

The unrevoked designation by a foreign corporation, conformably to the New York statute, of an agent upon whom service may be made, does not give the corporation a constructive presence in the state, so as to render it amenable to service of process there after it has ceased to do business within the state, in an action based upon contracts made and to be performed outside the state, there being no allegation of performance within the state, nor that the causes of action arose out of acts or transactions within the state, although it is asserted that at all of the times of the duration of the contracts sued on and their breaches the corporation was doing business in the state, and at any time had the right to transact business therein, and that the contracts contemplated that they might be performed within the state.

[For other cases, see Writ and Process, III. c, 2, b, in Digest Sup. Ct. 1908.]

[No. 516.]

Submitted December 8, 1919. Decided January 19, 1920.

IN ERROR to the District Court of the United States for the Southern District of New York to review an order setting aside service of summons on a foreign corporation and dismissing the complaint for lack of jurisdiction of the person of the defendant. Affirmed.

See same case below, 260 Fed. 856.

The facts are stated in the opinion.

Note.—On service of process, in action not arising out of business transacted within the state, upon the agent of a foreign corporation, appointed pursuant to statute to receive service—see note to Bagdon v. Philadelphia & R. Coal & I. Co. L.R.A.1916F. 410.

Mr. **Daniel P. Hays** submitted the cause for plaintiff in error. Mr. Ralph Wolf was on the brief:

The defendant having filed an express consent that made service upon its designated agent the equivalent of personal service, no constitutional question is involved.

Pennsylvania F. Ins. Co. v. Gold Issue Min. & Mill. Co. 243 U. S. 93, 61 L. ed. 610, 37 Sup. Ct. Rep. 344; Gibbs v. Queen City Ins. Co. 63 N. Y. 114, 20 Am. Rep. 513; Cable v. United States L. Ins. Co. 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. Rep. 74; Lancaster v. Amsterdam Improv. Co. 140 N. Y. 588, 24 L.R.A. 322, 35 N. E. 964; Olcott v. Tioga R. Co. 20 N. Y. 210, 75 Am. Dec. 393; Wehrenberg v. New York, N. H. & H. R. Co. 124 App. Div. 205, 108 N. Y. Supp. 704; Bagdon v. Philadelphia & R. Coal & I. Co. 217 N. Y. 432, L.R.A. 1916F, 407, 111 N. E. 1075; Ann. Cas. 1918A, 389; Smolik v. Philadelphia & R. Coal & I. Co. 222 Fed. 148.

It is not open to argument that the supreme court of the state of New York has jurisdiction of an action by plaintiff, a domestic corporation, against the defendant, a foreign corporation, for a cause of action based on contract.

Tauza v. Susquehanna Coal Co. 220 N. Y. 268, 115 N. E. 915; Grant v. Cananea Consol. Copper Co. 189 N. Y. 241, 82 N. E. 191.

It is equally clear that the service of the summons upon the designated agent gave to the court jurisdiction over the person of the defendant.

Bagdon v. Philadelphia & R. Coal & I. Co. 217 N. Y. 432, L.R.A.1916F, 407, 111 N. E. 1075, Ann. Cas. 1918A, 389; Woodward v. Mutual Reserve L. Ins. Co. 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10; Johnston v. Mutual Reserve L. Ins. Co. 104 App. Div. 550, 93 N. Y. Supp. 1052; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Hill v. Empire State-Idaho Min. & Developing Co. 156 Fed. 797; Chehalis River Lumber & Shingle Co. v. Empire State Surety Co. 206 Fed. 559; Johnston v. Trade Ins. Co. 132 Mass. 432; Wilson v. Martin-Wilson Automatic Fire Alarm Co. 149 Mass. 27, 20 N. E. 318; Ben Franklin Ins. Co. v. Gillett, 54 Md. 212; Reeves v. Southern R. Co. 121 Ga. 561, 70 L.R.A. 513, 49 S. E. 674, 2 Ann. Cas. 207; Hawkins v. Fidelity & C. Co. 123 Ga. 722, 51 S. E. 724; Groel v. United Electric Co. 69 N. J. Eq. 397, 60 Atl. 822; Bishmiller v. Denver & R. G. R.

Co. 134 Minn. 261, 159 N. W. 272; Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611; State ex rel. Watkins v. North American Land & Timber Co. 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172; Patton v. Continental Casualty Co. 119 Tenn. 364, 104 S. W. 305; Grant v. Cananea Consol. Copper Co. 189 N. Y. 247, 82 N. E. 191.

By reason of its failure to revoke its certificate, it had a principal place of business, as well as an agent, within the state. This was sufficient to bring the corporation within the state, so as to render it amenable to process.

Tauza v. Susquehanna Coal Co. 220 N. Y. 259, 115 N. E. 915; Washington-Virginia R. Co. v. Real Estate Trust Co. 238 U. S. 185, 59 L. ed. 1262, 35 Sup. Ct. Rep. 818.

Messrs. **Philip B. Adams** and **Thomas M. Kearney** submitted the cause for defendant in error:

The prohibition contained in the statute emphasizes the construction that its whole subject-matter pertains only to business transacted within the state.

Penn Collieries Co. v. McKeever, 183 N. Y. 98, 2 L.R.A.(N.S.) 127, 75 N. E. 935.

The extraterritorial extension of the operation of this statute would read into it an addition that was foreign to the purpose of the legislature.

United States v. Kirby, 7 Wall. 482, 486, 19 L. ed. 278, 280.

A corporation, after it has ceased to do business within a state, may not be compelled to answer in the courts of that state a cause of action that had its origin and arose without that state.

Smolik v. Philadelphia & R. Coal & I. Co. 222 Fed. 151; Simon v. Southern R. Co. 236 U. S. 115, 130, 59 L. ed. 492, 500, 35 Sup. Ct. Rep. 255.

Mr. Justice **McKenna** delivered the opinion of the court:

Plaintiff in error was plaintiff in the courts below; defendant in error was defendant; and we shall refer to them respectively as plaintiff and defendant.

The action was brought in the supreme court of the state of New York and removed upon motion of the defendant to the district court of the United States for the southern district of New York. In the latter court defendant made a motion for an order vacating and setting aside the service of summons, and dismissing the complaint for lack of jurisdiction of the person of the defendant. The motion was granted and the case is here on the jurisdictional question only.

A brief summary of the grounds of action and the proceedings upon the motion to dismiss is all that is necessary. Plaintiff is a New York corporation, defendant one under the laws of Wisconsin, and a manufacturer and seller of motor cars known as the "Jeffrey" and "Rambler" and parts thereof, and motor trucks and parts thereof. By contracts, in writing, made in Wisconsin by the plaintiff and defendant, it was agreed that the former should have the sole right to sell the motor cars and parts [377] thereof (first cause of action) and the motor trucks and parts thereof (second cause of action) of defendant in Europe and certain other foreign places and to receive certain designated percentages. The contracts as to motor cars and their parts, and the trucks and their parts, provided that they (cars, trucks, and parts) should be sold and delivered to plaintiff (called in the contracts the "distributor") at Kenosha, Wisconsin, for sale at the designated places by plaintiff, defendant reserving the right to fill the orders of plaintiff (distributor) for the cars, trucks, and parts, from any of its, defendant's, depots in New York city. Cars and trucks purchased under the contracts to be paid for at Kenosha. Both contracts continued in effect to July 31, 1915.

There are allegations of performance of the contracts by plaintiff, their nonperformance by defendant, whereby plaintiff on one cause of action was entitled, it is alleged, to $280,000 and upon the other, $600,000. Judgment is prayed for their sum, to wit, $880,000.

The district court has certified three questions, but as the first includes the other two, we give it only, as it sufficiently presents the question at issue: "Whether in the service of summons as shown by the record herein upon Philip B. Adams, this court acquired jurisdiction of the person of the defendant."

Plaintiff contends for an affirmative answer and adduces the New York statute which requires of corporations not organized under the laws of New York, as a condition of doing business in the state, to file in the office of the secretary of state a stipulation designating "a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the state," and the person designated must consent, and the designation

"shall continue in force until revoked by an instrument in writing" designating some other person.

[378] Defendant complied with the requirements of the statute July 6, 1914, designating 21 Park Row, New York, as its place of business, and Philip B. Adams as its agent upon whom process might be served. The designation and appointment have not been revoked.

It is not denied, however, that defendant had removed from the state before service on Adams, and as we have stated, the contracts sued on made the place of their performance Kenosha, Wisconsin. But in emphasis of the requirement of the statute, it is urged that at all of the times of the duration of the contracts sued on and their breaches defendant was doing business in the state, and at any time had the right to transact business in the state. It is further urged that the contracts contemplated they might be performed within the state. There is no allegation of such performance, nor that the present causes of action arose out of acts or transactions within the state. The other circumstances of emphasis may be disregarded, as the validity of the service depends upon the statute, assuming it to be controlling; that is, whether, under its requirements, the unrevoked designation of Adams as an agent of defendant gave the latter constructive presence in the state. And making that assumption of the control of the statute, which we do in deference to counsel's contention, for light we must turn to New York decisions, and there is scarcely ambiguity in them, though the facts in none of them included an actual absence from the state of the corporation with which they, the cases, were concerned.

Bagdon v. Philadelphia & R. Coal & I. Co. 217 N. Y. 432, L.R.A.1916F, 407, 111 N. E. 1075, Ann. Cas. 1918A, 389, passed upon the effect of a cause of action arising out of the state, the corporation, however, doing business within the state, and having complied with the statute in regard to its place of business and the designation of an agent upon whom process could be served. But the court, throughout the opinion, with conscious solicitude [379] of the necessity of making the ground of its decision the fact that the corporation was doing business in the state, dwelt upon the fact, and distinguished thereby Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236, and Simon v. Southern R. Co. 236 U. S. 115, 59 L. ed. 492, 35 Sup. Ct. Rep. 255, in both of which the causes of action were based on transactions done outside of the states in which the suits were brought.

Tauza v. Susquehanna Coal Co. 220 N. Y. 259, 115 N. E. 915, is nearer in principle of decision than the case just commented upon. The question of the doing of business within the state by the coal company was in the case and was discussed. But the question was unconnected with a statutory designation of a place of business or of an agent to receive service of process. However, there was an implication of agency in the coal company's sales agent under other provisions of the Code of Civil Procedure of the state, and it was considered that the principle of Bagdon v. Philadelphia & R. Coal & I. Co. supra, applied. But the court went further and left no doubt of the ground of its decision. It said: "Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents," citing and deferring to St. Louis Southwestern R. Co. v. Alexander, 227 U. S. 218, 57 L. ed. 486, 33 Sup. Ct. Rep. 245, Ann. Cas. 1915B, 77. And further said: "The essential thing is that the corporation shall have come into the state." If prior cases have a different bent, they must be considered as overruled, as was recognized in Robert Dollar Co. v. Canadian Car & Foundry Co. 220 N. Y. 270, 277, 115 N. E. 711.

In resting the case on New York decisions we do not wish to be understood that the validity of such service as here involved would not be of Federal cognizance, whatever the decision of a state court, and refer to Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; St. Louis Southwestern R. Co. v. Alexander, supra; Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 61 L. ed. 710, 37 Sup. Ct. Rep. 280; Meisukas v. Greenough Red [380] Ash Coal Co. 244 U. S. 54, 61 L. ed. 987, 37 Sup. Ct. Rep. 593; People's Tobacco Co. v. American Tobacco Co. 246 U. S. 79, 62 L. ed. 587, 38 Sup. Ct. Rep. 223, Ann. Cas. 1918C, 537.

It follows that the District Court did not have jurisdiction of defendant, and its order and judgment dismissing the complaint are affirmed.

ROBERT F. STROUD, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 380-382.)

Appeal — harmless error — refusing challenge of juror for cause.

Any error in overruling defendant's challenge of a juror for cause in a homicide case could not have prejudiced the accused, where such juror was excluded on peremptory challenge, and the accused was allowed one more than the statutory number of peremptory challenges, and had other peremptory challenges which he might use after the ruling and challenge to this juror,—the record not disclosing that other than an impartial jury sat on the trial.

[For other cases, see Appeal and Error, VIII. m, 6, in Digest Sup. Ct. 1908.]

[No. 276.]

Petition for rehearing received January 5, 1920. Decided January 19, 1920.

PETITION for rehearing. Denied. See ante, 103.

Messrs. **Isaac B. Kimbrell** and **Martin J. O'Donnell** for plaintiff in error on petition for rehearing.

Memorandum opinion by direction of the court, by Mr. Justice **Day**:

In this proceeding on November 24, 1919, this court affirmed the judgment of the United States district court for the district of Kansas, rendered upon a verdict convicting the plaintiff in error of murder in the first degree.

A petition for rehearing has been presented. It has been considered, and we find occasion to notice only so [**381**] much thereof as refers to the refusal of the court below to sustain the plaintiff in error's challenge for cause as to the juror Williamson. The other grounds urged have been examined and found to be without merit.

Williamson was called as a juror, and, as we said in our former opinion, was challenged for cause by the plaintiff in error. This challenge was overruled, and the juror was then challenged peremptorily by the accused. The testimony of Williamson made it reasonably certain that, in the event of conviction for murder in the first degree, he would render no other verdict than one which required capital punishment. Granting that this challenge for cause should have been sustained, and that this ruling required the plaintiff in error to use one of his peremptory challenges to remove the juror from the panel, we held that the refusal to sustain the challenge was not prejudicial error, as the record disclosed that the defendant was allowed twenty-two peremptory challenges, when the law allowed but twenty.

In the petition for rehearing it is alleged that the record discloses that in fact the accused was allowed twenty peremptory challenges and no more, and this allegation is accompanied by an affidavit of counsel giving the names of twenty persons challenged peremptorily by the plaintiff in error, and stating that no other peremptory challenges were allowed to him at the trial. In this statement the counsel is mistaken. An examination of the original transcript, as also the printed transcript, shows that a juror, H. A. Shearer, was called and examined upon his voir dire (printed transcript, page 79) and later was peremptorily challenged by the plaintiff in error (printed transcript, page 143), and excused from the panel. H. A. Shearer's name does not appear upon the list of those as to whom peremptory challenges were made and sustained in plaintiff in error's behalf as given in the petition and affidavit for [**382**] a rehearing. It does appear in the transcript that plaintiff in error was allowed twenty-one peremptory challenges, and it follows that his right to exercise such challenges was not abridged to his prejudice by the failure to allow the single challenge for cause which, in our opinion, should have been sustained by the trial judge. Furthermore, the record shows that after the ruling and challenge as to Williamson, the plaintiff in error had other peremptory challenges which he might have used; and the record does not disclose that other than an impartial jury sat on the trial. See Spies v. Illinois, 123 U. S. 131, 168, 31 L. ed. 80, 86, 8 Sup. Ct. Rep. 21, 22, and cases cited.

It follows that the petition for rehearing must be denied.

So ordered.

Note.—As to challenges to jurors—see notes to Harrison v. United States, 41 L. ed. U. S. 104, and Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727.

MARY E. REX, Administratrix of James A. Ivie, Deceased, Appt.,
v.
UNITED STATES and the Ute Indians.

(See S. C. Reporter's ed. 382-384.)

Claims — for Indian depredations — reinstatement.

1. A claim for Indian depredations which was dismissed by the court of claims on the ground that the band committing the depredations was not in amity with the United States was not reinstated by the Act of January 11, 1915, amending the Act of March 3, 1891, so that in all claims for property of citizens or inhabitants of the United States taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States the alienage of the claimant will not be a defense, with a proviso that claims dismissed for want of proof of citizenship or alienage shall be reinstated.

[For other cases, see Claims, 145-163, in Digest Sup. Ct. 1908.]

Limitation of actions — claims against United States — Indian depredations.

2. Considered as a new claim, a suit brought since the amendment of January 11, 1915, to the Act of March 3, 1891, to recover for depredations committed by a hostile band from an Indian tribe in amity with the United States, is barred by the three years' limitation in the original act.

[Limitation of Actions, III. k, in Digest Sup. Ct. 1908.]

[No. 126.]

Argued January 13, 1920. Decided January 26, 1920.

APPEAL from the Court of Claims to review a judgment dismissing on demurrer the petition in a suit to recover for Indian depredations. Affirmed.

See same case below, 53 Ct. Cl. 320.

The facts are stated in the opinion.

Mr. **Harry Peyton** argued the cause and filed a brief for appellant.

Assistant Attorney General **Davis** argued the cause, and, with Mr. George T. Stormont, filed a brief for appellees.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from a judgment of the court of claims dismissing the appellant's petition upon demurrer. The claim is for depredations committed on June 10, 1866, by a band of the Ute tribe of Indians, known as Blackhawk's band. The Act of March 3, 1891, chap. 538, § 1, 26 Stat. at L. 851, gave jurisdiction to the court of claims over all claims for property of citizens taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States. See Rev. Stat. § 2156, Act of June 30, 1834, chap. 161, § 17, 4 Stat. at L. 729, 731, Comp. Stat. § 4159, 3 Fed. Stat. Anno. 2d ed. p. 816. The appellant's intestate filed his claim, but on June 13, 1898, the court of claims held that the Blackhawk band of Utes was not in amity with the United States, and dismissed the petition. The present petition relies upon the Act of January 11, 1915, chap. 7, 38 Stat. at L. 791, amending the first section of the Act of 1891 so that in all claims for property of citizens or inhabitants of the United States, taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States, etc., the alienage of the claimant shall not be a defense to said claims, with provisos to be mentioned. The present petition, filed September 21, 1917, alleges that the tribe of Utes was in amity with the United States.

The claimant contends that the amendment had two purposes,—not merely to give inhabitants the same rights as citizens, but also to admit claims for damage done by hostile bands from a tribe that maintained its amity, subject to a proviso that suit had been brought upon them [384] theretofore in the court of claims. It is said that claims of that nature that still were pending in the court have been awarded judgment under the new jurisdiction. Another proviso in the act is that claims that have been dismissed by the court for want of proof of citizenship or alienage shall be reinstated, and the petition prays that the former claim be consolidated with this suit, and that judgment be awarded upon the evidence filed in the former case. It is pointed out as an anomaly that the case of a neighbor of the intestate who suffered damage from the same band on the same day was reinstated and passed to judgment, his claim having been dismissed at an earlier date because he was not a citizen at the time.

But we are of opinion that the judgment of the court of claims was plainly right. The emphasis and primary intent, at least, of the Act of 1915, was to remove the defense of alienage. When it goes on by an express proviso to reinstate claims dismissed upon that ground, and says nothing as to the other class, it is impossible to extend the words. According to the claimant's necessary argument, Congress had claims for damage by hostile bands before its eyes. On the face of the act it had

before them also the matter of reinstatement. Yet it did not purport to reinstate claims of the present class. According to the claimant's account there was something for the act to operate on in the way of damage by hostile bands, and the words cannot be carried further than they go. The court of claims rightly held that the old claim was not reinstated, and that, considered as a new claim, the present suit was barred by the three years' limitation in the original act.

Judgment affirmed.

---

[385] SILVERTHORNE LUMBER COMPANY, Inc., and Frederick W. Silverthorne, Plffs. in Err.,
v.
UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 385–392.)

Search and seizure — use of evidence wrongfully obtained — compelling production of papers.

1. The knowledge gained by the Federal government's own wrong in seizing papers in violation of the owners' constitutional protection against unlawful searches and seizures cannot be used by the government in a criminal prosecution by serving subpœnas upon such owners to produce the original papers, which it had returned after copies had been made, and by obtaining a court order commanding compliance with such subpœnas.

[For other cases, see Search and Seizure; Evidence, VIII. in Digest Sup. Ct. 1908.]

Search and seizure — protection of corporation — compulsory production of papers.

2. The rights of a corporation against unlawful searches and seizures are to be protected, even if the same result might have been achieved in a lawful way, i. e., by an order for the production of its books and papers.

[For other cases, see Search and Seizure, in Digest Sup. Ct. 1908.]

[No. 358.]

Argued December 12, 1919. Decided January 26, 1920.

IN ERROR to the District Court of the United States for the Western District of New York to review a judgment imposing fine and imprisonment for a contempt of court. Reversed.

The facts are stated in the opinion.

Mr. William D. Guthrie argued the cause, and, with Messrs. Henry W. Killeen and James O. Moore, filed a brief for plaintiffs in error:

There is no longer any doubt that a corporation is protected by the guaranty of the 4th Amendment against unreasonable searches and seizures in as full a measure as any natural person.

Hale v. Henkel, 201 U. S. 43, 75, 76, 50 L. ed. 652, 665, 666, 26 Sup. Ct. Rep. 370; Re Tri-State Coal & Coke Co. 253 Fed. 605; United States v. McHie, 194 Fed. 898; United States v. McQuade, U. S. D. C. E. D. N. Y. Thomas, D. J. (not yet reported); Coastwise Lumber & Supply Co. v. United States, 259 Fed. 849; Re Pacific R. Commission, 32 Fed. 265.

The same considerations of fundamental policy which protect corporations in their property and guarantee them the equal protection of the laws, liberty and due process of law, operate to preserve them from the oppression and lawlessness that inhere in an illegal and unreasonable search and seizure of private papers and effects by a public official. An orderly constitutional government can require of its officers and grant to its citizens no less.

Veeder v. United States, — C. C. A. —, 252 Fed. 418, 246 U. S. 675, 62 L. ed. 933, 38 Sup. Ct. Rep. 428.

In the case at bar the officers who perpetrated the search of the Lumber Company's premises, and the seizure of its books, papers, and documents, were armed with no search warrant or other process which purported to authorize any of them to make any search or seizure whatever. They did not even hold an invalid search warrant. All that they had was a void subpœna duces tecum; and, under the color of that, they ransacked the company's premises and stripped it of all its books, papers, and documents, and carried them away. A subpœna duces tecum may never be served or executed in any such manner.

Hale v. Henkel, 201 U. S. 43, 80, 50

Note.—On admissibility against defendant of document or articles taken from him—see notes to Blacksburg v. Beam, L.R.A.1916E, 716; Weeks v. United States, L.R.A.1915B, 834; People v. Campbell, 34 L.R.A.(N.S.) 58; State v. Fuller, 8 L.R.A.(N.S.) 762; and State v. Edwards, 59 L.R.A. 465.

As to unreasonable search and seizure —see note to Levy v. Superior Ct. 29 L.R.A. 818.

On compulsory production of books and papers as unreasonable search and seizure—see note to Consolidated Rendering Co. v. Vermont, 52 L. ed. U. S. 327.

L. ed. 652, 667, 26 Sup. Ct. Rep. 370; Elting v. United States, 27 Ct. Cl. 164; Banks v. Connecticut R. & Lighting Co. 79 Conn. 118, 64 Atl. 14.

If this procedure is to be tolerated, it will in effect nullify the protection of the 4th Amendment and place a premium upon lawless and unconstitutional official conduct.

Brown v. Maryland, 12 Wheat. 419, 444, 6 L. ed. 678, 687; Cummings v. Missouri, 4 Wall. 277, 325, 329, 18 L. ed. 356, 363, 364; Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117; Flagg v. United States, 147 C. C. A. 367, 233 Fed. 481; Fitter v. United States, 169 C. C. A. 507, 258 Fed. 567; Re Tri-State Coal & Coke Co. 253 Fed. 605; United States v. Mounday, 208 Fed. 186; United States v. Wong Quong Wong, 94 Fed. 832; United States v. McQuade, E. D. N. Y. Thomas, D. J. (not reported); State v. Sheridan, 121 Iowa, 166, 96 N. W. 730; Coastwise Lumber & Supply Co. v. United States, — C. C. A. —, 259 Fed. 847.

Messrs. William D. Guthrie, Frederic D. McKenney, Myer Cohen, Henry W. Killeen, and James O. Moore also filed a brief for plaintiffs in error in opposition to the motion to dismiss or affirm.

Assistant Attorney General **Stewart** argued the cause, and, with Mr. W. C. Herron, filed a brief for defendant in error:

The terms of the subpœnas were not so broad as to constitute, for that reason alone, an unreasonable search and seizure.

Consolidated Rendering Co. v. Vermont. 207 U. S. 541, 553, 554, 52 L. ed. 327, 335, 336, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; Wheeler v. United States, 226 U. S. 478, 57 L. ed. 309, 33 Sup. Ct. Rep. 158.

The validity of an arrest or seizure of either persons or property is to be determined by the condition obtaining at the time objection to the arrest or seizure is made. If at that time the arrest or seizure is valid, the fact that a prior arrest or seizure, effective in bringing about the valid action, was entirely or partially illegal, is immaterial, and tenders a merely collateral issue.

Gelston v. Hoyt, 3 Wheat. 246, 310, 4 L. ed. 381, 397; Wood v. United States, 16 Pet. 342, 359, 10 L. ed. 987, 994; Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; Kelly v. Griffin, 241 U. S. 6, 60 L. ed. 861, 36 Sup. Ct. Rep. 487; People v. Adams, 176 N. Y. 358, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, 192 U. S. 585, 594–598, 48 L. ed. 575, 579, 580, 24 Sup. Ct. Rep. 372.

The Federal courts may, under the authority of U. S. Rev. Stat. § 716, Comp. Stat. § 1239, impound documents which they deem relevant testimony in a criminal case, no matter how they may have come into their possession.

Perlman Rim Corp. v. Firestone Tire & Rubber Co. 244 Fed. 304; Perlman v. United States, 247 U. S. 7, 62 L. ed. 950, 38 Sup. Ct. Rep. 417; United States v. Hart, 214 Fed. 655; Stroud v. United States, 251 U. S. 15, ante, 103, 40 Sup. Ct. Rep. 50; Kerrch v. United States, 96 C. C. A. 258, 171 Fed. 368; Johnson v. United States, 228 U. S. 457, 57 L. ed. 919, 47 L.R.A.(N.S.) 263, 33 Sup. Ct. Rep. 572; United States v. Wilson, 163 Fed. 338; New York C. & H. R. R. Co. v. United States, 91 C. C. A. 519, 165 Fed. 833; United States v. McHie, 196 Fed. 586; Re Rosenwasser Bros. 254 Fed. 171.

Certain decisions where a motion to return papers was granted or an impounding order refused can all, with one exception, be explained upon the ground that the papers in question would not have been admissible in evidence as against a claim of immunity under the 5th Amendment, and hence to bring them into or retain them in the custody of the court would have been an idle thing, serving no legitimate purpose. Such cases are: United States v. Mills, 185 Fed. 318; United States v. McHie, 194 Fed. 894; United States v. Mounday, 208 Fed. 186; United States v. Jones, 230 Fed. 262; United States v. Abrams, 230 Fed. 313; United States v. Friedburg, 233 Fed. 313; Veeder v. United States, — C. C. A. —, 252 Fed. 414; Re Marx, 255 Fed. 344. The one exception is the case of Re Tri-State Coal & Coke Co. 253 Fed. 605, where the court clearly overlooked the rule that a corporation cannot plead immunity from self-incrimination, and therefore the books, etc., in question, in so far as relevant, should have been retained by the court, irrespective of the invalidity of the search warrant.

Solicitor General King filed a brief in support of the motion to dismiss or affirm.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error brought to reverse a judgment of the district court, fining the Silverthorne Lumber Company $250 for contempt of court, and ordering Frederick W. Silverthorne to be imprisoned until he should purge himself of a similar contempt. The contempt in question was a refusal to obey subpœnas and an order of court to produce books and documents of the company before the grand jury, to be used in regard to alleged violation of the statutes of the United States by the said Silverthorne and his father. One ground of the refusal was that the order of the court infringed the rights of the parties under the 4th Amendment of the Constitution of the United States.

The facts are simple. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal, without a shadow of authority, went to the office of their company and made a clean sweep of all the books, papers, and documents found there. All the employees were taken or directed to go to the office of the district attorney of the United States, to which also the books, etc., were taken at once. An application was made as soon as might be to the district [**391**] court for a return of what thus had been taken unlawfully. It was opposed by the district attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by the district attorney to the approach of those concerned in the act by an invalid subpœna for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the government planned or at all events ratified the whole performance. Photographs and copies of material papers were made and a new indictment was framed, based upon the knowledge thus obtained. The district court ordered a return of the originals, but impounded the photographs and copies. Subpœnas to produce the originals then were served, and on the refusal of the plaintiffs in error to produce them the court made an order that the subpœnas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged. The government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was [**392**] unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed. The numerous decisions, like Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in Weeks v. United States, 232 U. S. 383, 394, 395, 58 L. ed. 652, 656, 657, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117. Whether some of those decisions have gone too far, or have given wrong reasons, it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactorily in Flagg v. United States, 147

C. C. A. 367, 233 Fed. 481, 483. In Linn v. United States, 163 C. C. A. 470, 251 Fed. 476, 480, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.

Judgment reversed.

The Chief Justice and Mr. Justice **Pitney** dissent.

---

[393] **CHARLES I. HENRY, Executor under the Will of Arthur T. Hendricks, Deceased, Appellant.**

v.

UNITED STATES.

(See S. C. Reporter's ed. 393-395.)

Federal succession tax — vested or contingent interest — refunding.

1. The interest of legatees in legacies paid over to them or to a trustee for them by the executor prior to July 1, 1902, although not demandable by them as of right until after that date, because the time for proving claims against the estate had not expired, had become absolutely vested in possession of such legatees prior to such date, within the meaning of the Act of June 27, 1902, providing for the refunding of taxes collected on contingent beneficial interests not vested prior to July 1, 1902, notwithstanding the remote possibility that the amounts so paid might have to be returned to the executor for payment of debts.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

Federal succession tax — vested or contingent interest — refunding.

2. The interest in a fund transferred from an estate to a trustee for ascertained persons was vested in possession although they had received no income from it prior to July 1, 1902, within the provision of the Act of June 27, 1902, for the refunding of taxes collected on a contingent beneficial interest not vested prior to such date.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

[No. 162.]

Argued January 21, 1920. Decided February 2, 1920.

APPEAL from the Court of Claims to review a judgment disallowing a claim for the refunding of taxes paid on legacies. Affirmed.

See same case below, 53 Ct. Cl. 641.

The facts are stated in the opinion.

Mr. **Simon Lyon** argued the cause, and, with Mr. R. B. H. Lyon, filed a brief for appellant:

No interest bequeathed by this will could be construed as having vested in absolute possession or enjoyment prior to July 1, 1902, but, to the contrary, they were all contingent and on that date refundable.

Robinson v. Adams, 30 Misc. 537, 63 N. Y. Supp. 817; Re Te Culver, 22 Misc. 217, 49 N. Y. Supp. 823; Re Underhill, 117 N. Y. 471, 22 N. E. 1120; Re Robertson, 51 App. Div. 117, 64 N. Y. Supp. 387; Re Hodgman, 140 N. Y. 430, 35 N. E. 660; Lang v. Stringer, 144 N. Y. 275, 39 N. E. 363; Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331; United States v. Jones, 236 U. S. 108, 59 L. ed. 489, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316; McCoach v. Pratt, 236 U. S. 562, 567, 59 L. ed. 720, 721, 35 Sup. Ct. Rep. 421; Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681; Uterhart v. United States, 240 U. S. 598, 60 L. ed. 819, 36 Sup. Ct. Rep. 417; Coleman v. United States, 250 U. S. 30, 63 L. ed. 826, 39 Sup. Ct. Rep. 414; Sage v. United States, 250 U. S. 33, 63 L. ed. 828, 39 Sup. Ct. Rep. 415; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59.

Solicitor General **King** argued the cause, and, with Mr. A. F. Myers, filed a brief for appellee:

The funds on which the taxes here in question have been assessed and collected were vested in possession or enjoyment prior to July 1, 1902.

Hyland v. Baxter, 98 N. Y. 610; Thorn v. Garner, 113 N. Y. 198, 21 N. E. 149; Re Butler, 1 Connoly, 58, 9 N. Y. Supp. 641; Re Underhill, 117 N. Y. 471, 22 N. E. 1120; Uterhart v. United States, 240 U. S. 598, 60 L. ed. 819, 36 Sup. Ct. Rep. 417; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; Carleton v. United States, 51 Ct. Cl. 60; Deford v. United States, 52 Ct. Cl. 225.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit to recover taxes paid under the Spanish War Revenue Act of June 13, 1898, chap. 448, §§ 29, 30, 30 Stat. at L. 448, 464, 465, repealed by the Act of April 12, 1902, chap. 500, § 7, 32 Stat. at L. 96, 97, the repeal to take effect on July 1, 1902. By the Act of June 27, 1902, chap. 1160, § 3, 32 Stat.

at L. 406, 4 Fed. Stat. Anno. 2d ed. p. 232, the Secretary of the Treasury was directed to refund taxes upon legacies collected upon contingent beneficial interests that should not have become vested before July 1, 1902, and this claim is made under the last-mentioned act. The claim was held by the court of [394] claims to be barred by the Statute of Limitations. In view of the decision in Sage v. United States, 250 U. S. 33, 63 L. ed. 828, 39 Sup. Ct. Rep. 415, it is admitted by the government that the judgment cannot be sustained on that ground, and therefore that matter need not be discussed; but it is contended that the judgment was right because the legacies taxed had become vested before July 1, 1902. Whether they had become vested within the meaning of the Refunding Act is the only question in the case.

The facts are these: Arthur Hendricks died domiciled in New York on March 5, 1902, and his will was proved on March 17, 1902. The claimant was executor and trustee under the will. By that instrument the sum of $50,000 was left to the claimant in trust for Florence Lester, for life, the remainder to go to the residue. The residue was left to the testator's five sisters. On July 1, 1902, the time for proving claims against the estate had not expired, but before that date the executor, having correctly estimated that a large sum would be left after all debts, paid over $135,780 to the five sisters in equal shares, and "established the trust fund" for Florence Lester; that is, as we understand the finding, transferred the sum of $50,000 to his separate account as trustee. The taxes in question were levied on these two amounts.

There is no doubt that if the claimant had retained the funds in his hands, as he had a legal right to do, the interest of the legatees would not have been vested in possession within the meaning of the statute, whatever the probabilities and however solvent the estate. United States v. Jones, 236 U. S. 106, 59 L. ed. 488, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316; McCoach v. Pratt, 236 U. S. 562, 59 L. ed. 720, 35 Sup. Ct. Rep. 421. He contends that the same is true if he saw fit to pay over legacies before the time came when they could be demanded as of right. We will assume that, if the estate had proved insufficient, the executor not only would have been responsible, but could have recovered such portion of his payments as was needed to pay debts. [395] Still the consequence asserted does not follow. There can be no question that the interest of the sisters was held in possession, and so was that of the trustee, although he happened to be the same person as the executor. The interest was vested also in each case. The law uses familiar legal expressions in their familiar legal sense, and the distinction between a contingent interest and a vested interest subject to be devested is familiar to the law. Gray, Perpetuities, § 108. The remote possibility that the funds in the hands of the legatees might have to be returned no more prevented their being vested in possession and taxable than the possibility that a life estate might end at any moment prevented one that began before July 1, 1902, being taxed at its full value as fixed by the mortuary tables. United States v. Fidelity Trust Co. 222 U. S. 158, 160, 56 L. ed. 137, 141, 32 Sup. Ct. Rep. 59. In that case it was contended that the life estate was contingent so far as not actually enjoyed.

It is argued with regard to the trust for Florence Lester that the case stands differently, because the life tenant received no income from it before July 1, 1902. But for the purposes of this act the interest in a fund transferred from an estate to a trustee for ascertained persons is vested in possession no less than when it is conveyed directly to them. See United States v. Fidelity Trust Co., supra.

Judgment affirmed.

---

[396] BROOKS-SCANLON COMPANY, Petitioner,

v.

RAILROAD COMMISSION OF LOUISIANA.

(See S. C. Reporter's ed. 396-400.)

Carriers — state regulation — compelling operation of railroad.

1. A corporation which, in connection with its sawmill and lumber business, has operated a railroad on which it has done a small business as a common carrier, cannot be compelled to continue the operation of the railroad after it has ceased to be profitable, merely because a profit would be de-

---

Note.—As to effect of fact that return as a whole is reasonable on right to require railroad to transport commodity for less than reasonable compensation—see note to Northern P. R. Co. v. North Dakota, L.R.A.1917F, 1158.

rived from the entire business, including the operation of the railroad.

[For other cases, see Carriers, III. in Digest Sup. Ct. 1908.]

Carriers — right to cease operation of road.

2. A corporation carrying on a sawmill and lumber business, which has granted to the public an interest in a railroad operated in connection with its business by doing a small business as a common carrier thereon, may withdraw its grant by discontinuing the use of the road when such use can be kept up only at a loss.

[For other cases, see Carriers, III. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compelling operation of railroad at a loss.

3. The operation at a loss of a railroad used in connection with a sawmill and lumber business on which a small amount of business as a common carrier has been done cannot be compelled by the court or state Railroad Commission on the ground that the owner had failed to petition the Commission for leave to discontinue the business of the railroad, as required by a local law, where the compulsory operation of the railroad would amount to a taking of property without due process of law.

[For other cases, see Constitutional Law, IV. b, 5, in Digest Sup. Ct. 1908.]

[No. 386.]

Argued January 6, 1920. Decided February 2, 1920.

ON WRIT of Certiorari to the Supreme Court of the State of Louisiana to review a judgment which reversed a judgment of the Twenty-second Judicial District of East Baton Rouge, holding void an order of the Louisiana Railroad Commission requiring the operation of a narrow-gauge railroad. Reversed.

See same case below, 144 La. 1086, P.U.R.1919E, 1, 81 So. 727.

The facts are stated in the opinion.

Messrs. **J. Blanc Monroe** and **Robert R. Reid** argued the cause, and, with Mr. **Monte M. Lemann**, filed a brief for petitioner:

A state railroad commission may not compel a railroad to operate at a loss.

Northern P. R. Co. v. North Dakota, 236 U. S. 595, 59 L. ed. 741, L.R.A. 1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Northern P. R. Co. v. Washington Territory, 142 U. S. 494, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Wilson v. New, 243 U. S. 335, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298; South Carolina ex rel. Cunningham v. Jack, 76 C. C. A. 165, 145 Fed. 286, 113 Fed. 823; Ohio & M. R. Co. v. People, 120 Ill. 200, 11 N. E. 347; Denver v. Denver Union Water Co. 246 U. S. 195, 62 L. ed. 662, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278; Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 391, 61 L. ed. 1219, 37 Sup. Ct. Rep. 602; Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 301, 53 L. ed. 1006, 29 Sup. Ct. Rep. 678; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 433, 57 L. ed. 1555, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1113, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869; Railroad Commission Cases, 116 U. S. 331, 29 L. ed. 644, 6 Sup. Ct. Rep. 334; Smythe v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Central Bank & T. Corp. v. Cleveland, — C. C. A. —, 252 Fed. 530; Iowa v. Old Colony Trust Co. L.R.A.1915A, 549, 131 C. C. A. 581, 215 Fed. 313; New York Trust Co. v. Portsmouth & E. Street R. Co. 192 Fed. 730; Amesbury v. Citizens' Electric Street R. Co. (Stiles v. Citizens' Electric Street R. Co.) 199 Mass. 400, 19 L.R.A.(N.S.) 865, 85 N. E. 419; Union Trust Co. v. Curtis, 182 Ind. 73, L.R.A.1915A, 699, 105 N. E. 562; Moore v. Lewisburg & R. Electric R. Co. 80 W. Va. 661, L.R.A. 1918A, 1028, 93 S. E. 762.

Mr. **Wylie M. Barrow** argued the cause, and, with Mr. A. V. Coco, Attorney General of Louisiana, filed a brief for respondent:

A corporation engaged in the operation of a common carrier railroad cannot dispose of its property and franchise without legislative authority.

York & M. Line R. Co. v. Winans, 17 How. 30, 15 L. ed. 27; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Earle v. Seattle, L. S. & E. R. Co. 56 Fed. 909; Indianapolis v. Consumers' Gas Trust Co. 75 C. C. A. 442, 144 Fed. 640; Georgia R. & Bkg. Co. v. Haas, 127 Ga. 187, 119 Am. St. Rep. 327, 56 S. E. 313, 9 Ann. Cas. 677; Kelley v. Forney, 80 Kan. 145, 101 Pac. 1020; Brunswick Gaslight Co. v. United Gas, Fuel, & Light Co. 85 Me. 532, 35 Am. St. Rep.

385, 27 Atl. 525; Richardson v. Sibley, 11 Allen, 65, 87 Am. Dec. 700; Middlesex R. Co. v. Boston & C. R. Co. 115 Mass. 347; Weld v. Gas & E. L. Comrs. 197 Mass. 556, 84 N. E. 101; Black v. Delaware & R. Canal Co. 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130; Turner v. Southern Power Co. 154 N. C. 131, 32 L.R.A.(N.S.) 848, 69 S. E. 767; Coe v. Columbus, P. & I. R. Co. 10 Ohio St. 372, 75 Am. Dec. 518; Susquehanna Canal Co. v. Bonham, 9 Watts & S. 27, 42 Am. Dec. 315; Naglee v. Alexandria & F. R. Co. 83 Va. 707, 5 Am. St. Rep. 308, 3 S. E. 369; Ricketts v. Chesapeake & O. R. Co. 33 W. Va. 433, 7 L.R.A. 354, 25 Am. St. Rep. 901, 10 S. E. 801.

The 14th Amendment is not violated by the order in controversy.

Chicago & N. W. R. Co. v. Ochs, 249 U. S. 416, 63 L. ed. 679, P.U.R.1919D, 498, 39 Sup. Ct. Rep. 343; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 302, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 26, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 278, 279, 54 L. ed. 472, 479, 480, 30 Sup. Ct. Rep. 330; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 529, 56 L. ed. 863, 870, 32 Sup. Ct. Rep. 535; Michigan C. R. Co. v. Michigan R. Commission, 236 U. S. 615, 631, 59 L. ed. 750, 756, P.U.R.1915C, 263, 35 Sup. Ct. Rep. 422; Chesapeake & O. R. Co. v. Public Service Commission, 242 U. S. 603, 61 L. ed. 520, 37 Sup. Ct. Rep. 234.

A railroad operated in Louisiana as a common carrier cannot be abandoned without the consent of the state.

York & M. Line R. Co. v. Winans, 17 How. 31, 15 L. ed. 27; Lake Erie & W. R. Co. v. State Public Utilities Commission, 249 U. S. 422, 63 L. ed. 684, P.U.R.1919D, 459, 39 Sup. Ct. Rep. 345; Eel River R. Co. v. State, 155 Ind. 456, 57 N. E. 396; St. Louis v. St. Louis Gaslight Co. 5 Mo. App. 530; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 399; James v. Western North Carolina R. Co. 121 N. C. 528, 46 L.R.A. 306, 28 S. E. 538; Russell v. Texas & P. R. Co. 68 Tex. 652, 5 S. W. 690; New York, N. H. & H. R. Co. v. Bridgeport Traction Co. 65 Conn. 423, 29 L.R.A. 367, 32 Atl. 953; Flint & P. M. R. Co. v. Rich, 91 Mich. 293, 51 N. W. 1001; State ex rel. Naylor v. Dodge City, M. & T. R. Co. 53 Kan. 377, 42 Am. St. Rep. 295, 36 Pac. 747; Railroad Commission v. Kansas City Southern R. Co. 111 La. 133, 35 So. 487; State ex rel. Tate v. Brooks-Scanlon Co. 143 La. 539, 78 So. 847; People ex rel. Walker v. Louisville & N. R. Co. 120 Ill. 48, 10 N. E. 657; New York & G. L. R. Co. v. State, 50 N. J. L. 303, 13 Atl. 1, affirmed in 53 N. J. L. 244, 23 Atl. 168; International & G. N. R. Co. v. Anderson County, 246 U. S. 424, 62 L. ed. 807, 38 Sup. Ct. Rep. 370.

A private corporation owning a common carrier railroad may be compelled to operate the railroad. The obligation to discharge that duty must be considered in connection with the business as a whole.

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; People v. Budd, 117 N. Y. 18, 5 L.R.A. 566, 15 Am. St. Rep. 472, 22 N. E. 676; Budd v. New York, 143 U. S. 547, 36 L. ed. 256, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 26, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 45 N. E. 824, 52 N. E. 292; Randolph County v. Post, 93 U. S. 507, 23 L. ed. 957; Westport Stone Co. v. Thomas, 175 Ind. 324, 35 L.R.A. 646, 94 N. E. 408; State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 676, 13 L.R.A. (N.S.) 320, 44 So. 213, 12 Ann. Cas. 359; Overcash v. Charlotte Electric R. Light & P. Co. 12 Ann. Cas. 1047, note; Talcott v. Pine Grove, 1 Flipp. 120, Fed. Cas. No. 13,735; Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 342, 5 Atl. 695; State ex rel. R. Comrs. v. Bullock, — Fla. —, 8 A.L.R. 232, P.U.R. 1920A, 406, 82 So. 866.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit by the Brooks-Scanlon Company, a Minnesota corporation organized to manufacture and deal in lumber and to carry on other incidental business, against the Railroad Commission of Louisiana. It seeks to set aside an order (Number 2228) of the Commission requiring the plaintiff, either directly or through arrangements made with the Kentwood & Eastern Railway Company,

to operate its narrow-gauge railroad between Kentwood and Hackley, in Louisiana, upon schedules and days to be approved by the Commission. The plaintiff alleges that the order cannot be complied with except at a loss of more than $1,500 a month, and that to compel compliance would deprive the plaintiff of its property without due process of law, contrary to the 14th Amendment of the Constitution of the United States, with other objections not necessary to be mentioned here. The defendant denies the plaintiff's allegations and in reconvention prays for an injunction against the tearing up or abandoning of the road, and for a mandate upholding the order. In the court of first instance a preliminary injunction was issued in favor of the Commission, but was dissolved upon bond. Subsequently a judgment was entered denying a motion of the Commission to set aside the order dissolving the injunction, and after a trial on the merits judgment was entered for the plaintiff, declaring the order void. The defendant appealed from both judgments to the supreme court of the state. That court reversed the decision below and reinstated the injunction granted on the defendant's prayer.

[**398**] It seems that the Banner Lumber Company, a Louisiana corporation, formerly owned timberlands, sawmills, and this narrow-gauge railroad. The road was primarily a logging road, but it may be assumed to have done business for third persons as a common carrier. The Banner Lumber Company sold the whole property to the Brooks-Scanlon Lumber Company on November 1, 1905, the stockholders of which obtained a charter for the railroad as the Kentwood & Eastern Railway Company on December 5 of the same year. In the interim it was managed by them with separate accounts. An oral lease of the road was made to the new company, and soon afterwards the Brooks-Scanlon Lumber Company transferred its property to the Brooks-Scanlon Company, the plaintiff in error. On the first of July, 1906, the Brooks-Scanlon Company made a written lease of the road to the railway company, and sold to it all the rolling stock and personal property used in connection with the road. Thereafter the road was run as before, doing a small business as a common carrier, but depending upon the carrying of logs and lumber to make it a profitable rather than a losing concern. In course of time the timber of the Brooks-Scanlon Company was cut and it terminated the lease to the railway company, which discontinued business on April 22, 1918, with the assent of the Railroad Commission, and sold its rolling stock. At that time the Commission, being advised that it had no power, did nothing more. But later, subsequent to a decision by the supreme court in May, it issued notice to the Brooks-Scanlon Company and the railway to show cause why the road should not be operated, gave a hearing, and issued the order complained of here. The supreme court, after saying that the two corporations were one under different names, stated that the only question left for determination was whether the plaintiff could be compelled by the Commission to operate [**399**] its railroad, and concluded that although the railroad showed a loss, the test of the plaintiff's rights was the net result of the whole enterprise,—the entire business of the corporation,—and on that ground made its decree.

We are of opinion that the test applied was wrong under the decisions of this court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to Northern P. R. Co. v. North Dakota, 236 U. S. 585, 595, 599, 600, 604, 59 L. ed. 735, 741, 743-745, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, and Norfolk & W. R. Co. v. West Virginia, 236 U. S. 605, 609, 614, 59 L. ed. 745, 747, 749, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a state, the state may require it to fulfil an obligation imposed by the charter, even though fulfilment in that particular may cause a loss. Missouri P. R. Co. v. Kansas, 216 U. S. 262, 276, 278, 54 L. ed. 472, 478, 479, 30 Sup. Ct. Rep. 330. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If

the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. Munn v. Illinois, 94 U. S. 113, 126, 24 L. ed. 77, 84. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.

While the decision below goes upon the ground that we have stated, it is thrown in at the end as a makeweight that the order of the Commission calls upon the plaintiff "to submit a new schedule for transportation which may be operated at much less expense to it than [400] the former schedule cost, and at a profit for plaintiff." This is merely the language of hope. We cannot take it to be a finding of fact, for we perceive nothing in the evidence that would warrant such a finding. The assumption upon which the court made its ruling was that the plaintiff's other business was successful enough to stand a loss on the road.

Finally a suggestion is made in argument that the decision rested also upon another ground that cannot be reconsidered here. At the end of the opinion it is stated that the plaintiff has not petitioned the Railroad Commission for leave to discontinue this business, and that until it has done so the courts are without jurisdiction of the matter. It is not impossible that this is an oversight, since it seems unlikely that after the Commission has called the plaintiff before it on the question, and, against its strenuous objection, has required it to go on, such an empty form can be required. But in any case it cannot be meant that the previous discussion, which occupies the whole body of the opinion, is superfluous and irrelevant to the result reached; nor can the words be taken literally, since the court proceeded to take jurisdiction and reinstated an injunction in favor of the defendant. Whatever may be the forms required by the local law, it cannot give the court or Commission power to do what the Constitution of the United States forbids, which is what the order and injunction attempt. Pennsylvania R. Co. v. Public Service Commission, November 10, 1919, 250 U. S. 566, 63 L. ed. 1142, P.U.R.1920A, 909, 40 Sup. Ct. Rep. 36.

Decree reversed.

[401] BOARD OF PUBLIC UTILITY COMMISSIONERS, Petitioners,
v.
YNCHAUSTI & COMPANY et al.

(See S. C. Reporter's ed. 401–407.)

Constitutional law — due process of law — taking property without compensation — regulating Philippine coastwise trade — free carriage of mails.

1. Neither the guaranty of the Philippine Bill of Rights of due process of law nor its prohibition against the taking of private property for public use without compensation can be said to have been violated by a Philippine law which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch, in view of the plenary power which the Philippine government had always possessed and exercised, and which was recognized in the Act of Congress of April 15, 1904, to limit the right to engage in the coastwise trade to those who agree to carry the mails free.

[For other cases, see Constitutional Law, IV. b, 4; IV. v, 7, a, in Digest Sup. Ct. 1908.]

Congress — constitutional limitations upon power — insular possessions.

2. The constitutional limitations of power which operate upon the authority of Congress when legislating for the United States are inapplicable and do not control Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power over territory not forming a part of the United States, because not incorporated therein.

[For other cases, see Territories, II. in Digest Sup. Ct. 1908.]

[No. 190.]

Argued January 27, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the Supreme Court of the Philippine Is-

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Generally, as to what constitutes a taking of private property for public use—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. R. Co. 18 L.R.A. 166; D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; and A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 42 L. ed. U. S. 853.

lands to review a judgment which reversed an order of the Board of Public Utility Commissioners directing compliance with a law which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch. Reversed.

The facts are stated in the opinion.

Mr. Chester J. Gerkin argued the cause and filed a brief for petitioners:

The respondents having applied for and accepted licenses authorizing them to operate vessels in the Philippine coastwise trade subject to the law requiring them to carry mail without charge, in consideration of privileges and benefits accorded them by the government in granting them the right to engage in said business, have no cause for complaint regarding the conditions prescribed and obligations voluntarily assumed.

International & G. N. R. Co. v. Anderson County, 246 U. S. 424, 433, 62 L. ed. 807, 816, 38 Sup. Ct. Rep. 370; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 117, 61 L. ed. 176, 186, 37 Sup. Ct. Rep. 58; Com. v. Interstate Consol. Street R. Co. 187 Mass. 436, 11 L.R.A.(N.S.) 973, 73 N. E. 530, 2 Ann. Cas. 419, affirmed in 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; 2 Wyman, Pub. Serv. Corp. p. 1151; Pullman Co. v. Kansas, 216 U. S. 56, 66, 67, 54 L. ed. 378, 385, 386, 30 Sup. Ct. Rep. 232; Hamilton v. Dillin, 21 Wall. 73, 91, 22 L. ed. 528, 532.

A change of sovereignty does not affect existing municipal law.

Vilas v. Manila, 220 U. S. 345, 55 L. ed. 491, 31 Sup. Ct. Rep. 416; Compañia General de Tabacos v. Alhambra Cigar & C. Mfg. Co. 249 U. S. 72, 75, 76, 63 L. ed. 484, 488, 489, 39 Sup. Ct. Rep. 224.

If the present city of Manila is in every legal sense the successor of the old, and as such entitled to the property and rights of the predecessor corporation (Vilas v. Manila, 220 U. S. 345, 361, 55 L. ed. 491, 497, 31 Sup. Ct. Rep. 416), the same is certainly true of the central government of the Philippine Islands (Philippine Islands v. Monte de Piedad, 35 Philippine, 728). A right of any validity before the cession is equally valid afterwards (Ely v. United States, 171 U. S. 220, 223, 43 L. ed. 142, 143, 18 Sup. Ct. Rep. 840).

Under Spanish law the seashore is the property of the state.

Ker v. Couden, 223 U. S. 268, 277, 56 L. ed. 432, 435, 32 Sup. Ct. Rep. 284.

The same legal doctrine obtains in this country.

Shively v. Bowlby, 152 U. S. 1, 11, 38 L. ed. 331, 336, 14 Sup. Ct. Rep. 548.

The government of the Philippine Islands possesses like plenary power over its coastwise trade as does Congress over the coastwise trade of the United States, —that is, complete control over this commerce. It may open and close ports to vessels at will; and may entirely exclude them from the privilege of carrying on this trade.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; The William Bagaley, 5 Wall. 377, 409, 18 L. ed. 583, 590.

As no limitation has been imposed upon it in the premises, the Philippine legislature has the same power as Congress over the Philippine coastwise trade. The constitutional inhibitions regarding the deprivation of property rights apply equally to both lawmaking bodies.

Alaska Pacific Fisheries v. Alaska, 149 C. C. A. 262, 236 Fed. 59; Ochoa v. Hernandez y Morales, 230 U. S. 139, 57 L. ed. 1427, 33 Sup. Ct. Rep. 1033.

With reference to the exercise of another governmental power (the deportation of aliens), this court in Tiaco v. Forbes, 228 U. S. 549, 57 L. ed. 960, 33 Sup. Ct. Rep. 585, held that, as Congress is not prevented by the Constitution, the Philippine government cannot be prevented by the Bill of Rights incorporated in the Act of July 1, 1902.

In enacting laws for the Philippines, Congress and the Philippine legislature, to which it has delegated general legislative power, are limited only by the provisions of the fundamental law; they have all the powers, both of national and of municipal government, since there can be no conflict with the reserved power of the states.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Wilson v. Shaw, 204 U. S. 24, 35, 51 L. ed. 351, 357, 27 Sup. Ct. Rep. 233.

The action of each and all of the coordinate departments of our government in dealing with the Philippine Islands clearly shows that it was not the intention to deprive the government of the latter of authority formerly exercised over its coastwise trade, or of the usual powers possessed by the Federal, state, and territorial governments respecting the granting of licenses to public service corporations.

Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942, 26 Sup. Ct. Rep. 561.

The carriage of the mails is a government monopoly in which no element of competition can enter; it is a function assumed and controlled by the state. There is no analogy between the transportation of mail and that of freight or passengers. The basis for the distinction made is obvious and fully justified. It has been held that a transportation company is not a common carrier in respect to such service when carrying mail—either as a duty imposed by a statute or under a contract with the government.

Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 65 L.R.A. 397, 54 C. C. A. 608, 117 Fed. 434; United States v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, L.R.A.1917C, 1103, 128 C. C. A. 496, 212 Fed. 43; Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 649, 56 L. ed. 1236, 1239, 32 Sup. Ct. Rep. 702.

Every political entity endowed with general governmental powers possesses authority to regulate the transaction of local business within its borders. The source of this authority is said to be the police power, which inheres in governments of all grades.

Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; Wiggins Ferry Co. v. East St. Louis, 102 Ill. 567; License Tax Cases, 5 Wall. 462, 470, 18 L. ed. 497, 500.

A license or franchise which authorizes its recipient to engage in a given business is in the nature of a special privilege, not a right common to all.

Gibbons v. Ogden, 9 Wheat. 1, 214, 6 L. ed. 23, 74.

A legitimate distinction exists between the granting of free service to the state and to private individuals.

Sutton v. New Jersey, 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; National Waterworks Co. v. School Dist. 4 McCrary, 198, 48 Fed. 523; New York Teleph. Co. v. Siegel-Cooper Co. 202 N. Y. 502, 36 L.R.A.(N.S.) 560, 96 N. E. 109; Belfast v. Belfast Water Co. 115 Me. 234, L.R.A. 1917B, 908, P.U.R.1917A, 313, 98 Atl. 738; Superior v. Douglas County Teleph. Co. 141 Wis. 363, 122 N. W. 1023; Boise City v. Artesian Hot & Cold Water Co. 4 Idaho, 351, 39 Pac. 562.

Every vessel employed in navigation must have a register and the protection of a flag.

White's Bank v. Smith (White's Bank v. The Robert Emmett) 7 Wall. 646, 655, 656, 19 L. ed. 211, 213.

The right to engage in the coastwise trade is everywhere treated as a valuable privilege.

Gibbons v. Ogden, 9 Wheat. 1, 232, 6 L. ed. 23, 78.

Long-continued legislative usage is of controlling weight upon the constitutionality of an act.

Rhode Island v. Massachusetts, 4 How. 591, 638, 11 L. ed. 1116, 1137; United States v. Midwest Oil Co. 236 U. S. 459, 472, 473, 59 L. ed. 673, 680, 681, 35 Sup. Ct. Rep. 309; Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; Great Northern R. Co. v. United States, 149 C. C. A. 485, 236 Fed. 433; Ling Su Fan v. United States, 218 U. S. 302, 54 L. ed. 1049, 30 L.R.A.(N.S.) 1176, 31 Sup. Ct. Rep. 21; Ibanez de Aldecoa y Palet v. Hongkong & S. Bkg. Corp. 246 U. S. 621, 626, 627, 62 L. ed. 907, 908, 38 Sup. Ct. Rep. 413.

The customs and usages of a community are proper factors for consideration in determining the constitutionality of legislation.

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 87, 52 L. ed. 111, 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; State v. Sutton, 83 N. J. L. 49, 84 Atl. 1059, affirmed in 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508.

He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right (Aikens v. Kingsbury, 247 U. S. 484, 489, 62 L. ed. 1226, 1229, 38 Sup. Ct. Rep. 558), and must bring himself within the class affected by the unconstitutional feature (Arkadelphia Mill. Co. v. St. Louis Southwestern R. Co. 249 U. S. 134, 149, 63 L. ed. 517, 526, P.U.R.1919C, 710, 39 Sup. Ct. Rep. 237).

The test for determining whether legislation is confiscatory is its effect upon the entire revenues of the utility concerned. It is not enough to show that no profit may come from a particular service.

New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122;

Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, 5 A.L.R. 1, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Com. v. Boston & N. Street R. Co. 212 Mass. 82, 98 N. E. 1075.

It is not even claimed that the respondents are not securing adequate returns from their business. And the matter of the different status of the government and the individual patron is one in which these carriers rightfully have no interest as long as they secure the requisite return upon their property.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 54, 53 L. ed. 382, 400, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Re Portland Water Dist. P.U.R.1917D, 915.

One cannot invoke to defeat a law an apprehension of what might be done under it, and which, if done, might not receive judicial approval.

Lehon v. Atlanta, 242 U. S. 53, 56, 61 L. ed. 145, 150, 37 Sup. Ct. Rep. 70.

The legislative branch is primarily invested with authority to determine what laws are in the public interest.

Dominion Hotel Co. v. Arizona, 249 U. S. 265, 268, 63 L. ed. 597, 598, 39 Sup. Ct. Rep. 273; Hebe Co. v. Shaw, 248 U. S. 297, 303, 63 L. ed. 255, 258, 39 Sup. Ct. Rep. 125; Tanner v. Little, 240 U. S. 369, 386, 60 L. ed. 691, 702, 36 Sup. Ct. Rep. 379.

Mr. **Edward S. Bailey** also argued the cause for petitioners.

Mr. **Alexander Britton** argued the cause, and, with Mr. Evans Browne, filed a brief for respondents:

The specific act and legislation in question, resulting in the taking of respondents' property, is null and void and of no effect, under the provisions of the Philippine Organic Act of July 1, 1902, as amended, containing a Bill of Rights for the Philippine Islands, forbidding the taking of private property for public use without just compensation.

Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Serra v. Mortiga, 204 U. S. 470, 51 L. ed. 571, 27 Sup. Ct. Rep. 343; Cariño v. Philippine Islands, 212 U. S. 449, 53 L. ed. 449, 29 Sup. Ct. Rep. 334; Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705; Railroad Commission Cases, 116 U. S. 331, 29 L. ed. 644, 6 Sup. Ct. Rep. 334, 388, 1191; Dow v. Beidelman, 125 U. S. 689, 31 L. ed. 841, 2 Inters. Com. Rep. 56. 8 Sup. Ct. Rep. 1028; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ex parte Gardner, 84 Kan. 264, 33 L.R.A.(N.S.) 956, 113 Pac. 1054; State v. Missouri, K. & T. R. Co. 272 Mo. 507, L.R.A.1915C, 778, 172 S. W. 35, Ann. Cas. 1916E, 949; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Elliott, Railroads, § 672; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 56 L. ed. 1236, 32 Sup. Ct. Rep. 702; Great Northern R. Co. v. United States, 149 C. C. A. 485, 236 Fed. 433; Lake Superior & M. R. Co. v. United States, 93 U. S. 442, 23 L. ed. 965; United States v. Union P. R. Co. 249 U. S. 354, 63 L. ed. 643, 39 Sup. Ct. Rep. 294; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 10 Ann. Cas. 1034; Sutton v. New Jersey, 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508.

The act in question gains no support or validity from the Spanish laws and customs prior to the assumption of sovereignty by the United States and the enactment by Congress of the Philippine Bill of Rights.

Kepner v. United States, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705; Tiaco v. Forbes, 228 U. S. 549, 57 L. ed. 960, 33 Sup. Ct. Rep. 585.

The legislation here in question is not aided by any alleged conduct or acquiescence on the part of respondents, nor are respondents foreclosed from contesting the invalidity of such legislation.

Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. ed. 176, 37 Sup. Ct. Rep. 58; International & G. N. R. Co. v. Anderson County, 246 U. S. 424, 62 L. ed. 807, 38 Sup. Ct. Rep. 370.

By reason of the act in question respondents are deprived of definite and unmistakable property rights, for which

they receive no compensation whatever.

Friend v. United States, 30 Ct. Cl. 94; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; Peabody v. United States, 43 Ct. Cl. 5; Spring Valley Waterworks v. San Francisco, 124 Fed. 574; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122; Puget Sound Traction, Light & P. Co. v. Reynolds, 244 U. S. 574, 61 L. ed. 1325, 5 A.L.R. 1, P.U.R. 1917F, 57, 37 Sup. Ct. Rep. 705; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Monongahela Nav. Co. v. United States, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 571, 9 L. ed. 773, 833; Isom v. Mississippi C. R. Co. 36 Miss. 300; Re Rugheimer, 36 Fed. 376; District of Columbia v. Prospect Hill Cemetery, 5 App. D. C. 497; Maryland & W. R. Co. v. Hiller, 8 App. D. C. 289.

[402] Mr. Chief Justice White delivered the opinion of the court:

Was error committed by the court below in deciding that the Philippine law, which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch, was void for repugnancy to the Philippine Bill of Rights, is the question which comes before us for decision as the result of the allowance of a writ of certiorari.

The issue will be clarified by a brief reference to the antecedents of the controversy. Under the Spanish law as enforced in the Philippine Islands before the American domination the duty of free carriage as stated existed. Upon the cession of the Islands to the United States and the establishment there of a military government, the existing condition of the subject was continued in force. It thus continued until the government passed into the hands of the Philippine Commission and was by that body specifically recognized and its further enforcement directed. Thus it prevailed without interruption until 1902, when the first act of Congress, providing a general system of civil government for the Islands, was passed, and it further remained operative until 1904, when Congress passed the act of that year, specifically dealing with the authority of the Philippine government to provide for the coastwise trade, as follows (Act of April 15, 1904, 33 Stat. at L. 181, chap. 1314):

"Until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Archipelago the government of the Philippine Islands is hereby authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago."

In fact, the continued operation of the obligation to [403] carry the mails free, which arose from engaging in the coastwise trade, it may be taken for granted, remained in force until 1916, since the obligation was recognized as being yet in existence and the duty to enforce it for the future was directed by article 310 of the Administrative Code of that year, in which Code were also stated the existing provisions as to the registry, licensing, etc., of Philippine vessels. That the requirement continued operative thereafter results from the further fact that it was re-expressed in § 658 of the Administrative Code of 1917, which Code was adopted to meet the exigencies created by the later Organic Act of the Philippine Islands, enacted by Congress August 29, 1916 (39 Stat. at L. 545, chap. 416, Comp. Stat. 3804a, Fed. Stat. Anno. Supp. 1918, p. 592).

We have not stopped to refer to the Spanish law, to the military orders, to the reports of civilian officials, and to the action of the Philippine Commission on the subject, as above stated, because the references to them were made below in Marginal Note A, which Mr. Justice Carson made a part of his dissenting opinion (— Philippine, —).

It is undoubted that during all this period vessels were permitted to engage in the coastwise trade only upon the issuance to and the acceptance by them of licenses the enjoyment of which depended upon the performance of the legal duty of the free carriage of the mails.

The respondents were in 1916 the owners of steam vessels of Philippine registry, licensed to engage in the coastwise trade upon the condition stated, and the controversy before us arose in consequence of a notice given by them to the Philippine director of posts that after a date designated they would no

longer comply with the duty to carry the mails free. That official sought its enforcement at the hands of the Board of Public Utility Commissioners. Before that board the respondents, the licensees, relied upon the assertion that the section of the Administrative Code imposing the duty of free mail carriage was in conflict with the provisions of the Philippine Bill of Rights, [404] guaranteeing due process and prohibiting the taking of private property for public use without just compensation. The board overruled the defense and awarded an order directing compliance with the law, and therefore prohibited the carrying out of the intention to discontinue. In reaching this conclusion the board held that its sole duty was to ascertain whether the law imposed the obligation to carry the mails free, and if it did, to enforce it without regard to the defense as to the repugnancy of the statute to the Bill of Rights, since that question was proper only to be disposed of by judicial action.

The supreme court, to which the controversy was taken, not differing as to the existence of the statutory duty, reversed the order on the ground that such duty could not be exacted consistently with the clauses of the Bill of Rights relied upon. No opinion stating the reasons for this conclusion was expressed, but a member of the court dissented and stated his reasons in an elaborate opinion.

It is impossible to conceive how either the guaranty by the Bill of Rights of due process, or its prohibition against the taking of private property for public use without compensation, can have the slightest application to the case if the Philippine government possessed the plenary power, under the sanction of Congress, to limit the right to engage in the coastwise trade to those who agree to carry the mails free. It must follow that the existence of such power is the real question which is required to be decided. In saying this we put out of view as obviously erroneous the contention that, even though the Bill of Rights applied and limited the authority of the government so as to prevent the exaction by law of the free carriage of the mails, that result is not applicable here, because, by accepting a license, the shipowners voluntarily assumed the obligation of free carriage. Southern P. Co. v. Denton, 146 U. S. 202, 207, 36 L. ed. 943, 945, 13 Sup. Ct. Rep. 44; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27-30, 54 L. ed. 355, 366, 367, 30 Sup. Ct. Rep. 190; Pullman Co. v. [405] Kansas, 216 U. S. 56, 70, 54 L. ed. 378, 387, 30 Sup. Ct. Rep. 232; Meyer v. Wells, F. & Co. 223 U. S. 298, 300, 301, 56 L. ed. 445, 447, 448, 32 Sup. Ct. Rep. 218; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 233, 234, 60 L. ed. 617, 619, 620, 36 Sup. Ct. Rep. 261; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 114, 62 L. ed. 1006, 1016, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438.

To what extent the Bill of Rights limits the authority of the government of the Philippine Islands over the subject of the free carriage of the mails is, then, the determinative factor. Beyond doubt Congress, in providing a Bill of Rights for those Islands, intended its provisions to have there the settled construction they have received in the United States. But it must be and is indisputable that when the provisions of such Bill come to be applied to governmental powers in the Philippine Islands, the result of their application must depend upon the nature and character of the powers conferred by Congress upon the government of the Islands. To illustrate: where a particular activity in the Philippine Islands is, as the result of power conferred by Congress, under governmental control to such an extent that the right to engage in it can be made by the Philippine government dependent upon the performance of a particular duty, it is obvious that the exaction of such a duty, as such prerequisite condition, can be neither a denial of due process nor a taking of property without compensation.

Coming to the proposition to which the case is therefore ultimately reduced, we see no reason to doubt that the Philippine government had the power to deal with the coastwise trade so as to permit its enjoyment only by those who were willing to comply with the condition as to free mail carriage; and therefore that no violation of individual right could have resulted from giving effect to such condition. We reach this conclusion because the possession and exercise of such power in the Islands before their cession to the United States, its exertion under the military government of the United States which followed the cession, and its continuance by every form of civil [406] government created by Congress for the Islands, compel to that view in the absence of any law expressly providing to

the contrary, or which, by reasonable implication, leads to that result.

Indeed, the conclusion that the power was possessed does not rest alone upon the general consideration stated, since it is additionally sustained by recalling the express provision of the Act of Congress of 1904, to which we have previously referred, giving authority for the registry of Philippine vessels, and recognizing the power of the government of the Philippine Islands to deal with the coastwise trade,—an authority which, as it contains no provision tending to the contrary, must be construed as applicable to and sanctioning the power which had been exerted from the very inception of the American domination, to provide as to that trade for the free carriage of the mails. In other words, in view of the power to impose the burden in question, exerted in the Philippine Islands from the beginning, and which was then being exerted under the authority of Congress, the conferring by Congress upon the Philippine government by the Act of 1904 of the authority to make regulations concerning such trade was a recognition of the right to make the regulation theretofore made, which was then in force, and which continued to be in force up to the time of the bringing of this suit, without disapproval or change by Congress.

When the authority which the Act of 1904 gave is borne in mind, it makes it clear that the mistake which underlies the entire argument as to the nonexistence of power here relied upon arises from the erroneous assumption that the constitutional limitations of power which operate upon the authority of Congress when legislating for the United States are applicable and are controlling upon Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power over territory not forming part of the United States, because not [407] incorporated therein. Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; Hawaii v. Mankichi, 190 U. S. 197, 220, 47 L. ed. 1016, 1023, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465; Dorr v. United States, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 Ann. Cas. 697; Dowdell v. United States, 221 U. S. 325, 332, 55 L. ed. 753, 757, 31 Sup. Ct. Rep. 590; Ocampo v. United States, 234 U. S. 91, 98, 58 L. ed. 1231, 1234, 34 Sup. Ct. Rep. 712.

The error which thus underlies the whole argument becomes more conspicuously manifest by recalling that Congress, in the Act of 1904, expressly provided that the authority which that act gave should exist only until Congress should otherwise provide; and, besides, that before the passage of that act, the Act of July 1, 1902, § 86 (32 Stat. at L. 691, 712, chap. 1369, Comp. Stat. § 3804, 7 Fed. Stat. Anno. 2d ed. pp. 1133, 1150), provided "that all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same."

Judgment reversed.

UNITED STATES, Plff. in Err.,
v.
JOSIAH V. THOMPSON.

(See S. C. Reporter's ed. 407–417.)

Appeal — review by government in criminal case — order quashing indictment.

1. A ruling taking the form of a grant of a motion to quash an indictment on the ground that the charges, having been submitted to a previous grand jury which failed to indict, were resubmitted to a later grand jury by the Federal district attorney without leave of court first obtained, is a "decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy," within the meaning of the Criminal Appeals Act

---

Note.—On appellate review by government in criminal case—see notes to United States v. Comyns, 63 L. ed. U. S. 287; United States v. New South Farm & Home Co. 60 L. ed. U. S. 890; and United States v. Stevenson, 54 L. ed. U. S. 153.

Right of grand jury to reconsider, or district attorney to resubmit, a charge that has once been acted upon by the grand jury and "not a true bill" found.

It is a generally accepted principle, in the absence of a contrary statutory rule, that the fact that a grand jury has once investigated an alleged offense and refused to indict therefor does not invalidate an indictment for the same offense, subsequently returned by the same or a subsequent grand jury. United States v. Martin, 50 Fed. 918; State v. Green, 111 Mo. 585, 20 S. W. 304; Fitch v. State, 18 S. C. L. (2 Nott. & M'C.) 558.

The fact that a grand jury which had voted not to find a bill against the accused, afterwards reconsidered its determination and voted to find the bill

of March 2, 1907, granting the government a right to review in a criminal case.
[For other cases, see Appeal and Error, I. c, in Digest Sup. Ct. 1908.]

Grand jury — powers — exhausting by failure to act.

2. The power and duty of the grand jury to investigate is original and complete, susceptible of exercise upon its own motion, and upon such knowledge as it may derive from any source which it may deem proper, and is not, therefore, dependent for its exertion upon the approval or disapproval of the court, and such power is continuous, and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.
[For other cases, see Grand Jury, in Digest Sup. Ct. 1908.]

District attorney — powers — presenting charges without leave of court.

3. The United States district attorney, in virtue of his official duty, and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court, and his duty to direct the attention of the grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges.
[For other cases, see District Attorney, III. in Digest Sup. Ct. 1908.]

---

without, so far as appears, any new evidence being presented, furnishes no ground for quashing the indictment. United States v. Simmons, 46 Fed. 65.

It is stated in Knott v. Sargent, 125 Mass. 95, that the mere return of "no bill" by the grand jury does not operate as a legal discharge of the accused, and does not necessarily import that the same or a subsequent grand jury may not find a bill upon the same complaint. It appears, however, in this case, that because of the absence of material witnesses, the charge against the accused was not acted upon, but was continued or postponed.

But it has been held that a grand jury which has returned a bill with the indorsement "not a true bill," of which finding a record is made, cannot have the bill returned to it for reconsideration, and by striking out the word "not" make of such bill a valid indictment. State v. Brown, 81 N. C. 568. It is stated in this case that in every such instance a new bill should be sent, and it is assumed that the grand jury has autnority to reconsider its action and return a new bill. In the subsequent case of State v. Harris, 91 N. C. 656, it is expressly held that after a bill has been "ignored" by a grand jury, a new bill may be sent for the same offense and before the same grand jury, and additional evidence laid before the grand jury to support it, upon which the grand jury may return a true bill. The holding in State v. Harris corresponds with an obiter statement in State v. Branch, 68 N. C. 186, 12 Am. Rep. 633. There is, however, the qualification in the statement of State v. Branch, that the state solicitor, upon a suggestion to the court that he has procured further evidence, may be allowed to send another bill to the same grand jury, charging the same offense, thus making the consent of the court necessary to a resubmission.

And see the Pennsylvania cases, infra.

In England it has been held that if the grand jury ignores a bill, it cannot find another bill against the same person, for the same offense, at the same assizes or sessions. Reg. v. Humphreys, Car. & M. 601; Reg. v. Austin, 4 Cox, C. C. 385. On the contrary, it has been held in that jurisdiction that a grand jury which has ignored a bill may find another for the same offense. Reg. v. Simmonite, 1 Cox, C. C. 30; Reg. v. Newton, 2 Moody & R. 503. The court in Reg. v. Simmonite states that though some inconvenience may arise by permitting a grand jury which has ignored one bill to find another for the same offense, there is no objection in principle to its being done; that it is clear another bill might be sent to another grand jury, and there is no reason why it should not be sent before the same.

By statute in some states a dismissal of a charge by the grand jury is a bar to any subsequent prosecution.

In Georgia the finding of "no bills" by grand juries at two several terms is a bar. The Code provision that two "no bills" shall be a "bar to another indictment unless they have been procured by the fraudulent conduct of the person charged, on proof of which or of newly discovered evidence the judge may allow a third bill to be presented, found, and prosecuted," does not entitle the person charged to an order that he be discharged from the offense or crime therein contained, and go hence without bail, since such an order would, perhaps, if granted, bar a third indictment, even under the conditions provided for. Christmas v. State, 53 Ga. 81.

The highest evidence of the action of the grand jury in such a matter is the return of a "no bill," entered upon the

District attorney — second presentation of charge to grand jury — leave of court.

4. A Federal district attorney may, without first obtaining leave of court, present to one grand jury charges which a previous grand jury has ignored.

[For other cases, see District Attorney, III. in Digest Sup. Ct. 1908.]

Federal courts — rules of procedure — criminal prosecution — state practice.

5. A state rule of law which forbids a district attorney, without first obtaining leave of court, to present to one grand jury charges which a previous grand jury has ignored, can have no application by virtue of U. S. Rev. Stat. § 722, to a prosecution in the Federal courts for a crime against the United States, committed within such state, in view of the existence of a controlling Federal rule which would be overthrown by applying the state rule.

[For other cases, see Courts, V. e, 8; VII. c, 21, in Digest Sup. Ct. 1908.]

[No. 250.]

Argued January 27 and 28, 1920. Decided March 1, 1920.

IN ERROR to the District Court of the United States for the Western District of Pennsylvania to review a judgment granting a motion to quash an indictment on the ground that the charges,

---

court's minutes; but in the absence of this degree of proof resort may be had to other competent testimony. Individual grand jurors having knowledge of the facts are competent witnesses to testify that a bill or presentment had been preferred, voted upon, and returned, "not proved." Elliott v. State, 1 Ga. App. 113, 57 S. E. 972.

A statute governing the resubmission of a charge to the same or another grand jury after a demurrer is sustained to an indictment, which provides that in case the next grand jury fails to find a new indictment, the accused shall be discharged, does not make the failure of the next grand jury to indict a bar to further prosecution; an indictment returned by the fourth succeeding grand jury is sufficient. Ex parte Job, 17 Nev. 184, 38 Pac. 699.

But an indictment returned by a grand jury after it had made a report of "no true bill" was held voidable in State v. Towers, 37 Nev. 94, 139 Pac. 776, Ann. Cas. 1916D, 269, although the charge was ordered resubmitted by the court.

The necessity of an order of court to authorize a consideration of an offense which had once been investigated and no indictment found has not been considered in many cases. The necessity of an order of court raises two questions: (1) The right of the grand jury on its own motion to consider an offense which has once been investigated and no indictment found; and (2) the right of the district or prosecuting attorney to again submit the matter for consideration.

A statute providing that the dismissal by a grand jury of a charge does not prevent it being again submitted to the grand jury as often as the court may direct, but without such direction it cannot again be submitted, does not, according to some courts, prevent the grand jury on its own motion considering a charge that has once been dismissed. This has been held where the grand jury which returned the indictment was the same jury which had previously dismissed the charge (Marshall v. State, 84 Ark. 88, 104 S. W. 934), and also where the indictment was returned by a grand jury subsequent to the jury which investigated and dismissed the charge (State v. Collis, 73 Iowa, 542, 35 N. W. 625; State v. Brown, 128 Iowa, 24, 102 N. W. 799).

The reasoning by which the courts have reached this conclusion is well expressed by the supreme court of Iowa, in State v. Collis, supra, in language which is approved by the supreme court of Arkansas in Marshall v. State, 84 Ark. 88, 104 S. W. 934, as follows: "The question in the case is whether the last clause of the section prohibits the grand jury from finding an indictment on a charge which has once been dismissed, but which has not been resubmitted to it by the court. We think it does not. The provision relates merely to the matter of the submission of such causes to the grand jury. After they have been once dismissed they can be resubmitted only by direction of the court; that is, the court can require the grand jury to again investigate the charge only by directing it to be resubmitted. But the power of the grand jury in the premises is not dependent upon the order or direction of the court; its powers and duties are prescribed by other provisions of statute." The Iowa court then refers to the duty of the grand jury to make diligent inquiry and prove presentment of all public offenses committed or triable within the county of which they have or can obtain legal evidence, and states that

having been submitted to a previous grand jury which failed to indict, were resubmitted to another grand jury by the Federal district attorney without leave of court first obtained. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. W. C. Herron argued the cause, and, with Assistant Attorney General Stewart and Solicitor General King, filed a brief for plaintiff in error:

The name given to a pleading does not determine its true character under the Act of March 2, 1907.

United States v. Barber, 219 U. S. 72, 78, 55 L. ed. 99, 101, 31 Sup. Ct. Rep 209.

Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law, and one judgment that he is free as matter of substantive law is as good as another.

United States v. Oppenheimer, 242 U. S. 85, 87, 61 L. ed. 161, 164, 3 A.L.R. 516, 37 Sup. Ct. Rep. 68.

---

this duty is in no wise qualified or limited by the section above referred to.

Neither the Iowa nor the Arkansas courts referred the limitation of power contained in the statute to a restriction of the authority of the district attorney. Unless the restriction was meant to apply to the district attorney, it is difficult to give the statute any effect at all. According to these decisions it is no restriction or limitation upon the authority of the grand jury, nor is it a limitation upon the authority of the court. Both the Iowa and Arkansas courts assume that the court has authority and power to submit the cause as often as it desires. Unless, therefore, as above stated, the limitation is upon the authority of the district attorney, the statute is rendered of no effect.

Not all courts agree with the above construction of such a statute. The Kentucky court in Sutton v. Com. 97 Ky. 308, 30 S. W. 661, expresses an obiter opinion contrary to the holding of the Iowa and Arkansas courts, under an identical statute.

In the Kentucky case a joint indictment had been returned against two persons; one of the persons moved to set aside the indictment upon the ground that although he was held by an examining court to answer to the charge before a stated grand jury, there had been two terms of court at which grand juries were summoned and impaneled before an indictment was found against him, and that there was no order of court submitting the charge to the grand jury that did find the indictment; this motion was sustained and the person discharged from custody. The other person indicted stood trial and the jury disagreed; subsequently he was convicted, and after this made a motion to set aside the indictment for the same reason the indictment of the person jointly charged with him was dismissed. The court states that the failure of the grand juries to find an indictment against the accused was equivalent to a direct refusal to indict, and that, as two terms of court had intervened before the indictment under which the appellant was convicted had been found, and it was then done without direction of the court, it should have been set aside upon proper motion, but that the appellant waived his right to have it set aside by standing trial.

Under a statutory provision that if the grand jurors shall not concur in finding an indictment or presentment, the charge shall be dismissed, "but such dismissal shall not prevent its being again submitted to a grand jury as often as the court shall direct," it is stated in State v. Young, 113 Minn. 96, 129 N. W. 148, Ann. Cas. 1912A, 163, that a report to the court of no indictment found, in a matter which had been regularly submitted to and considered by the grand jury, is a complete termination of the authority of the jury in respect to the particular charge so reported upon; that the matter of resubmission rests with the court. It was held in this case that a petition charging that the grand jury failed to give proper consideration to certain charges before them was not a contempt when filed after the final report of the grand jury, for the reason that its authority had then been terminated.

The court has authority under these statutes to refer the charge to a subsequent grand jury and issue a warrant for the arrest of the accused. Monroe v. Berry, 29 Ky. L. Rep. 602, 94 S. W. 38.

It has been held that the power of the court to permit charges again to be submitted to a grand jury should be sparingly and discriminatingly used; that a resubmission of such charges will not be ordered where the district attorney was of the opinion that the grand jury which dismissed the charges misun-

The grand jury is an independent body; charged merely with the duty of investigating and presenting all violations of law supposed to have happened within its jurisdiction.

1 Houldsworth, History of English Law, p. 148; Maitland, History of English Const. Law, pp. 211, 212; 1 Stephen, History of Crim. Law, pp. 253, 273, 274; Co. Litt. 126b; Hale, P. C. 1st Am. ed. 1847, p. 151; 2 Hawk. P. C. chap. 25, p. 299.

The fundamental power of the grand jury to make presentments or indictments in regard to alleged violations of law brought to their attention through proper channels not soiled by malice, bias, or mere suspicion is not subject to a power in the court of rejection of such presentments or indictments.

Shaftesbury's Case, 8 How. St. Tr. 771; State v. Fasset, 16 Conn. 467; Burr's Trial, Robertson's ed. pp. 172, 175; Com. v. Knapp, 9 Pick. 496, 20 Am. Dec. 491, 7 Am. St. Tr. 410; Hale v. Henkel, 201 U. S. 43, 59, 66, 50 L. ed. 652, 659, 662, 26 Sup. Ct. Rep. 370; Blair v. United States, 250 U. S. 273, 63 L. ed. 979, 39 Sup. Ct. Rep. 468.

The pendency of a prior indictment is

---

derstood the law, and that if the charge were again submitted, an indictment might be found, and where, so far as appears, the evidence against the persons against whom indictments were sought was fully brought to the attention of the grand jury. People v. Neidhart, 35 Misc. 191, 71 N. Y. Supp. 591.

There is very little authority upon the right of the district attorney to resubmit a bill. See State v. Branch, 68 N. C. 186, 12 Am. Rep. 633, supra. In Pennsylvania a bill once dismissed by a grand jury cannot be resubmitted to the same or a subsequent grand jury without leave of court. This proposition was established in Rowand v. Com. 82 Pa. 405 (see infra for facts. See cases infra in which leave of court was granted, and in which this was assumed to be necessary). But a subsequent prosecution may be begun as an original matter and submitted to a subsequent grand jury without leave of court first obtained. In such a case the indictment will not be quashed. The distinction between reconsidering a bill once dismissed and beginning a new prosecution is very clearly stated in Com. v. Snyder, 13 Pa. Dist. R. 27. In that case an indictment was returned by the grand jury ignored to a subsequent grand jury. On another complaint charging the defendant with what was alleged to be the same offense, an indictment was returned. A motion to quash the indictment was filed for the reason that the offense was the same as that contained in the charge which was ignored by the former grand jury, and that no special leave was granted for its presentment to the subsequent grand jury. The court states: "There seems to me to be quite a distinction between the sending of a bill based upon the same complaint, the second time, to the same grand jury, after it has been ignored by them, and an original prosecution for the same offense returned to another grand jury at another session. In the first instance the complaint is dead, unless the court sees fit to revive it by permitting the case to be again sent to the same or a subsequent grand jury. In the latter case the prosecutor makes a new complaint, and the case comes again into the court to be passed upon, the prosecutor being liable, however, to answer in an action for malicious prosecution, in case it is ascertained that he acted maliciously and without probable cause in making the second complaint." The court then refers to the difficulty of ascertaining whether the offenses charged in the two instances are the same, and states that for this reason the motion to quash should be refused; but adds that the decision is based upon the broader ground that the court has no right to quash an indictment brought under such circumstances, upon a new complaint, for any such reason.

In Com. v. Whitaker, 25 Pa. Co. Ct. 42, where the court refused to resubmit a bill which had once been dismissed by the grand jury, it is stated that the prosecutor, if he deems himself aggrieved, has his remedy by instituting a prosecution de novo.

The court has discretion to permit the district attorney to submit a new bill after the first indictment has been ignored. Com. v. Stoner, 70 Pa. Super. Ct. 365; Com. v. Leigh, 38 Phila. Leg. Int. 184. But the court will recommit a bill which has once been ignored only in urgent cases. Com. v. Whitaker, supra.

The court in Com. v. Allen, 14 Pa. Co. Ct. 546, refused, upon the application of private counsel, to recommit a bill which had been ignored by a previous grand jury where there was no allegation or proof that the bill was ignored in consequence of oversight, mistake, or fraud, or improper action on the part of the grand jury, the court stating that, under

not a good plea to a subsequent indictment for the same offense.

Withipole's Case, Cro. Car. 147, 79 Eng. Reprint, 730; Fost. C. L. 104, 106; 2 Hale, P. C. p. 239; 2 Hawk. P. C. chap. 34, p. 523; Reg. v. Goddard, 2 Ld. Raym. 920, 92 Eng. Reprint, 114; Rex v. Webb, 3 Burr. 1468, 97 Eng. Reprint, 931; Rex v. Wynn, 2 East, 226, 102 Eng. Reprint, 355; People ex rel. Barron v. Monroe, Oyer & Terminer, 20 Wend. 108; Com. v. Drew, 3 Cush. 282; Smith v. Com. 104 Pa. 341.

The pendency of such an indictment or of an information is not a good plea in bar to a subsequent information for the same offense.

Rex v. Purnell, 1 Wm. Bl. 37, 96 Eng. Reprint, 20; Rex v. Stratton, 1 Dougl. K. B. 239, 99 Eng. Reprint, 156; Rex v. Alexander, Archbold, Crim. Pl. 24th ed. pp. 149, 157; Reg. v. Mitchell, 3 Cox, C. C. 93, 6 St. Tr. N. S. 545.

The ignoring of an indictment by a grand jury is not a good plea to a subsequent information for the same offense.

Zenger's Case, 17 How. St. Tr. 675; 2 St. Tr. N. S. 945; Rex v. Green, 1 Ld. Kenyon, 379, 96 Eng. Reprint, 1028; Ex parte Moan, 65 Cal. 218, 3 Pac. 644; State v. Ross, 14 La. Ann. 367; State v. Vincent, 36 La. Ann. 770; State v. Whipple, 57 Vt. 639; State v. Roberts, 166 Ind. 590, 77 N. E. 1093; Hall v. State, 178 Ind. 448, 99 N. E. 733; Rex v. Philipps, 3 Burr, 1564, 97 Eng. Reprint, 983; United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750; Ex parte Wilson, 114 U. S. 417, 424, 425, 29 L. ed. 89, 91, 92, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; Weeks v. United States, L.R.A.1915B, 651, 132 C. C. A. 436, 216 Fed. 297, Ann. Cas. 1917C, 524, 22 Cyc. 261; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; United States v. Nagle, 17 Blatchf. 258, Fed. Cas. No. 15,852.

It is settled by the common law, as interpreted by the English courts, that a charge may be resubmitted to a subsequent grand jury after it has been ignored by a previous one.

4 Bl. Com. p. 305; 1 Chitty, Crim. Law, p. 325; Rex v. Killminster, 7 Car. & P. 228; Reg. v. Humphreys, Car. & M. 327; Reg. v. Newton, 2 Moody & R. 503; Reg. v. Simmonite, 1 Cox, C. C. 30; Reg. v. Austin, 4 Cox, C. C. 385; Archbold Cr. Pl. & Pr. 24th Eng. ed. 103; 9 Laws of England, Halsbury, p. 347.

The decisions in this country are, so far as we can discover, all to the same effect, in the absence of statute.

Fitch v. State, 11 S. C. L. (2 Nott. & M'C.) 558; Knott v. Sargent, 125 Mass. 95; Com. v. Woods, 10 Gray, 479; Christmas v. State, 53 Ga. 81; State v. Brown, 81 N. C. 568; State v. Harris, 91 N. C. 656; Ex parte Clarke, 54 Cal. 412; State v. Green, 111 Mo. 585, 20 S. W. 304; State v. Collis, 73 Iowa, 542, 35 N. W. 625; State v. Reinhart, 26 Or. 466, 38 Pac. 822; Marshall v. State, 84 Ark. 88, 104 S. W. 934; People v. Rosenthal, 197 N. Y. 400, 46 L.R.A. (N.S.) 31, 90 N. E. 991; Whiting v.

---

these circumstances, there is no such grave emergency or urgent public necessity as justifies the court in the action desired.

In Com. v. Priestly, 24 Pa. Co. Ct. 543, the court refused to resubmit a bill upon the motion of private counsel in the absence of any allegation of irregularity, oversight, mistake, or fraud.

As stated above, the Pennsylvania doctrine was established by the court in Rowan v. Com. supra. Relief was, however, denied to the accused in that case. Here charges were investigated by a grand jury which ignored the same, and ordered the county to pay costs. At a subsequent grand jury new bills, precisely like the former ones, based upon the same information, which were held to be substantially the same as returning the old ignored bills to be reconsidered by the new grand jury, were submitted and indictments found. Upon a motion to quash the indictments the trial court expressed grave doubt as to the legality of the proceeding, and emphatically condemned the practice which sustained it, but overruled the motion to quash. Upon appeal to the supreme court, that court states that "where a defendant has been once discharged on a return of 'ignoramus,' a new bill sent up without a fresh hearing and without the leave of the court should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency, or to provide for some urgent public need." But it is held that the trial court must be assumed to have approved the action of the district attorney; that, the defendant having been tried, convicted, and sentenced on the bills sent to the second grand jury, if there was a wrong, it was one which the trial court could alone redress, and that the supreme court was powerless to interpose.

State, 48 Ohio St. 230, 27 N. E. 96; Com. v. Snyder, 13 Pa. Dist. R. 27; United States v. Martin, 50 Fed. 918; United States v. Bopp, 232 Fed. 177; Burton v. United States, 202 U. S. 344, 380, 50 L. ed. 1057, 1070, 26 Sup. Ct. Rep. 688; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Blair v. United States, 250 U. S. 273, 63 L. ed. 979, 39 Sup. Ct. Rep. 468.

Mr. J. E. B. Cunningham argued the cause, and, with Messrs. R. M. Gibson and W. C. McKean, filed a brief for defendant in error:

The United States has no general right to prosecute the writ of error.

Byrne, Fed. Crim. Proc. 220, 222; United States v. Perrin, 131 U. S. 55, 33 L. ed. 88, 9 Sup. Ct. Rep. 681; United States v. Stevenson, 54 L. ed. U. S. 153, note; United States v. Dickinson, 213 U. S. 92, 53 L. ed. 711, 29 Sup. Ct. Rep. 485.

Where it does not appear that the decision or judgment of the court below turned upon any controverted construction of the statute, the Supreme Court is without jurisdiction under the first division or classification of the Criminal Appeals Act.

United States v. Carter, 231 U. S. 492, 58 L. ed. 330, 34 Sup. Ct. Rep. 173; United States v. Moist, 231 U. S. 701, 58 L. ed. 444, 34 Sup. Ct. Rep. 255; United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35.

The sufficiency of the indictment upon general principles of criminal law is not open for review in the Federal Supreme Court on the writ of error to a Federal district court, authorized on behalf of the government by the Act of March 2, 1907.

United States v. Mason, 213 U. S. 115, 53 L. ed. 725, 29 Sup. Ct. Rep. 480.

The essential nature of a plea in bar, such as a plea of the Statute of Limitations, is not changed by designating it a plea in abatement, and such designation does not defeat an appeal by the United States under this act.

Byrne, Fed. Crim. Proc. 223; United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209.

Dilatory pleas are such as delay the plaintiff's remedy, by questioning, not the cause of action, but the propriety of the suit, or the mode in which the remedy is sought.

2 Bouvier's Law Dict. 9th ed. p. 342.

Peremptory pleas are in bar of the action.

2 Bouvier's Law Dict. 9th ed. p. 340; Stephen, Pl. 63; 1 Chitty, Pl. 425; Lawes, Pl. 36.

A plea in abatement belongs to the dilatory class.

2 Bouvier's Law Dict. 9th ed. pp. 340, 341; Stephen Pl. 70, 71; Black's Law Dict. 2d ed. 903; 1 Standard Proc. p. 38.

Special pleas in bar are those which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged.

4 Bl. Com. 334.

The defendant's motion to quash the indictment was, strictly speaking, neither a plea in bar nor a plea in abatement.

Agnew v. United States, 165 U. S. 36, 41 L. ed. 624, 17 Sup. Ct. Rep. 235; United States v. Gale, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209; 12 Cyc. 348.

To now urge in the Supreme Court that defendant's motion was a special plea in bar—one that not only strikes down the present indictment, but as well destroys the action itself and bars all other and future indictments—is to abandon and reject the position taken in the trial court.

United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412.

Federal courts will follow and be governed by the practice of state courts in matters not otherwise provided for in Federal procedure, where the same is not inconsistent with the Constitution and laws of the United States. The order or judgment of the court below in quashing the indictment in question was entirely in keeping with the general rule of law, and particularly with the practice in such matters in the Pennsylvania courts, wherein the exercise of such supervisory power is recognized as a justifiable and proper act of judicial discretion.

United States v. Kilpatrick, 16 Fed. 765; United States v. Wells, 163 Fed. 313; Crowley v. United States, 194 U. S. 461, 48 L. ed. 1075, 24 Sup. Ct. Rep. 731; United States v. Clune, 62 Fed. 798; United States v. Mitchell, 136 Fed. 896; United States v. Eagan, 30 Fed. 608; Rowand v. Com. 82 Pa. 405; Com. v. Stoner, 70 Pa. Super. Ct. 365; Com. v. Allen, 14 Pa. Co. Ct. 546; Com. v. Whitaker, 25 Pa. Co. Ct. 42; Com. v. Priestly, 24 Pa. Co. Ct. 543; Joyce, Indictments, § 117; Wharton, Crim. Pl. & Pr. § 446; United States v. Martin, 50 Fed.

corporation as an alleged violator of the Sherman Anti-trust Act, should consider, not what the corporation had power to do or did, but what it now has power to do and is doing.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — under Anti-trust Act — expectation or realization.

2. The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — under Anti-trust Act — size of corporation — unexerted powers.

3. The mere size of a corporation, or the existence of unexerted power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — steel trust — intent — past practices — dissolution — public interest.

4. A holding corporation which by its formation united under one control competing companies in the steel industry, but which did not achieve monopoly, and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act,—especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

[No. 6.]

Argued March 9, 12, 13, and 14, 1917. Restored to docket May 21, 1917. Reargued October 7, 8, 9, and 10, 1919. Decided March 1, 1920.

APPEAL from the District Court of the United States for the District of New Jersey to review a decree dismissing the bill in a suit to dissolve the United States Steel Corporation and its subsidiaries. Affirmed.

See same case below, 223 Fed. 55.

The facts are stated in the opinion.

Assistant to the Attorney General **Todd**, Special Assistant to the Attorney General **Colton**, and Solicitor General **Davis**, argued the cause on original argument, and, with Attorney General Gregory and Mr. Robert Szold, filed a brief for appellant:

It has never been doubted that combinations of this type, embracing a dominant proportion of those engaged in a particular industry, and formed for the express purpose of suppressing competition between them, are combinations in restraint of trade.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 394, 49 L. ed. 518, 523, 25 Sup. Ct. Rep. 276; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 408, 55 L. ed. 502, 518, 31 Sup. Ct. Rep. 376.

Nor is it material, their purpose and effect being what they were, that the combinations here assailed were created in corporate form instead of by loose agreement.

United States v. American Tobacco Co. 221 U. S. 106, 176, 181, 55 L. ed. 663, 692, 694, 31 Sup. Ct. Rep. 632.

Indeed, where, as here, corporations simply exchange their plants and businesses for stock in a consolidated corporation, the resulting combination is in no respect different in principle from a combination in the form of trust which the statute specifically prohibits.

Northern Securities Co. v. United States, 193 U. S. 197, 326, 327, 48 L. ed. 679, 695, 696, 24 Sup. Ct. Rep. 436; United States v. Reading Co. 226 U. S. 324, 352–363, 57 L. ed. 243, 252–256, 33 Sup. Ct. Rep. 90, 183 Fed. 470; Patterson v. United States, 138 C. C. A. 123, 222 Fed. 619; Noyes, Intercorporate Relations, § 354; Eddy, Combinations, § 622.

No more powerful instrument of monopoly could be used, said Mr. Justice Holmes, in Swift & Co. v. United States, 196 U. S. 375, 402, 49 L. ed. 518, 527, 25 Sup. Ct. Rep. 276, than an advantage in the cost of transportation.

See also Standard Oil Co. v. United States, 221 U. S. 1, 42, 43, 76, 55 L. ed. 619, 638, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 393, 50 L. ed. 515, 522, 26 Sup. Ct. Rep. 272; United States v. Reading Co. 226 U. S. 324, 359, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 533, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873.

The purposes of illegal combinations are seldom capable of proof by direct testimony, but must be inferred from circumstances.

Eastern States Retail Lumber Dealers Asso. v. United States, 234 U. S. 600, 612, 58 L. ed. 1490, 1499, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; Reilley v. United States, 46 C. C. A. 25, 106 Fed. 896; United States v. Sacia, 2 Fed. 757; Reg. v. Murphy, 8 Car. & P. 297.

The union of so many previously independent business units, about 130, with such vast aggregate resources, $1,800,000,000, controlling so great a proportion of the entire industry, approximately half, with the next largest competitor controlling less than 6 per cent, are factors from which this court has repeatedly inferred the existence of a specific intent to suppress competition.

Standard Oil Co. v. United States, 221 U. S. 1, 75, 55 L. ed. 619, 650, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Terminal R. Asso. 224 U. S. 383, 394, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507; United States v. Reading, 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90; United States v. Patten, 226 U. S. 525, 543, 57 L. ed. 333, 341, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141.

The distinction between a mere purchase of a competing business and a combination of competing businesses, clothed in the form of purchases, is sharply drawn in Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572.

See also Noyes, Intercorporate Relations, § 354.

In three leading cases in this court the holding company, as a means of combining able competitors, has been adjudged illegal.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Temple Iron Co. v. United States, 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90, 183 Fed. 427.

A transaction which the law prohibits is not made lawful by an innocent motive or purpose.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 148, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276.

The intent to violate the law, implied from doing what the law prohibits, renders immaterial every other intent, purpose, or motive.

Bishop, New Crim. Law, § 343; Holmes, Common Law, p. 52.

A contract or combination, by its own inherent nature or effect, without more, may restrain trade within the purview of the statute.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 561, 43 L. ed. 259, 284, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 328, 331, 48 L. ed. 679, 696, 697, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 298, 49 L. ed. 739, 761, 764, 25 Sup. Ct. Rep. 493; United States v. American Tobacco Co. 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; Standard Oil Co. v. United States, 221 U. S. 1, 65, 55 L. ed. 619, 647, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; United States v. Union P. R. Co. 226 U. S. 61, 92, 93, 57 L. ed. 124, 135, 136, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep 90; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 623.

Congress rightly believed that the advantages of large business units, in so far as they are real and substantial, would inevitably assert themselves by normal growth. It closed the short cut to those advantages—monopolistic combination—because danger lies that way. If there is evil in this, it is accepted as less than that which may result from the unification of interest, and the power such unification gives.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 Sup. Ct. Rep. 379.

Competition is worth more to society than it costs.

corporation as an alleged violator of the Sherman Anti-trust Act, should consider, not what the corporation had power to do or did, but what it now has power to do and is doing.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — under Anti-trust Act — expectation or realization.

2. The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — under Anti-trust Act — size of corporation — unexerted powers.

3. The mere size of a corporation, or the existence of unexerted power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — steel trust — intent — past practices — dissolution — public interest.

4. A holding corporation which by its formation united under one control competing companies in the steel industry, but which did not achieve monopoly, and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act,—especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

[No. 6.]

Argued March 9, 12, 13, and 14, 1917. Restored to docket May 21, 1917. Reargued October 7, 8, 9, and 10, 1919. Decided March 1, 1920.

APPEAL from the District Court of the United States for the District of New Jersey to review a decree dismissing the bill in a suit to dissolve the United States Steel Corporation and its subsidiaries. Affirmed.

See same case below, 223 Fed. 55.

The facts are stated in the opinion.

Assistant to the Attorney General **Todd**, Special Assistant to the Attorney General **Colton**, and Solicitor General **Davis**, argued the cause on original argument, and, with Attorney General Gregory and Mr. Robert Szold, filed a brief for appellant:

It has never been doubted that combinations of this type, embracing a dominant proportion of those engaged in a particular industry, and formed for the express purpose of suppressing competition between them, are combinations in restraint of trade.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 394, 49 L. ed. 518, 523, 25 Sup. Ct. Rep. 276; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 408, 55 L. ed. 502, 518, 31 Sup. Ct. Rep. 376.

Nor is it material, their purpose and effect being what they were, that the combinations here assailed were created in corporate form instead of by loose agreement.

United States v. American Tobacco Co. 221 U. S. 106, 176, 181, 55 L. ed. 663, 692, 694, 31 Sup. Ct. Rep. 632.

Indeed, where, as here, corporations simply exchange their plants and businesses for stock in a consolidated corporation, the resulting combination is in no respect different in principle from a combination in the form of trust which the statute specifically prohibits.

Northern Securities Co. v. United States, 193 U. S. 197, 326, 327, 48 L. ed. 679, 695, 696, 24 Sup. Ct. Rep. 436; United States v. Reading Co. 226 U. S. 324, 352–363, 57 L. ed. 243, 252–256, 33 Sup. Ct. Rep. 90, 183 Fed. 470; Patterson v. United States, 138 C. C. A. 123, 222 Fed. 619; Noyes, Intercorporate Relations, § 354; Eddy, Combinations, § 622.

No more powerful instrument of monopoly could be used, said Mr. Justice Holmes, in Swift & Co. v. United States, 196 U. S. 375, 402, 49 L. ed. 518, 527, 25 Sup. Ct. Rep. 276, than an advantage in the cost of transportation.

See also Standard Oil Co. v. United States, 221 U. S. 1, 42, 43, 76, 55 L. ed. 619, 638, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 393, 50 L. ed. 515, 522, 26 Sup. Ct. Rep. 272; United States v. Reading Co. 226 U. S. 324, 359, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 533, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873.

The purposes of illegal combinations are seldom capable of proof by direct testimony, but must be inferred from circumstances.

Eastern States Retail Lumber Dealers Asso. v. United States, 234 U. S. 600, 612, 58 L. ed. 1490, 1499, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; Reilley v. United States, 46 C. C. A. 25, 106 Fed. 896; United States v. Sacia, 2 Fed. 757; Reg. v. Murphy, 8 Car. & P. 297.

The union of so many previously independent business units, about 130, with such vast aggregate resources, $1,800,000,000, controlling so great a proportion of the entire industry, approximately half, with the next largest competitor controlling less than 6 per cent, are factors from which this court has repeatedly inferred the existence of a specific intent to suppress competition.

Standard Oil Co. v. United States, 221 U. S. 1, 75, 55 L. ed. 619, 650, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Terminal R. Asso. 224 U. S. 383, 394, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507; United States v. Reading, 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90; United States v. Patten, 226 U. S. 525, 543, 57 L. ed. 333, 341, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141.

The distinction between a mere purchase of a competing business and a combination of competing businesses, clothed in the form of purchases, is sharply drawn in Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572.

See also Noyes, Intercorporate Relations, § 354.

In three leading cases in this court the holding company, as a means of combining able competitors, has been adjudged illegal.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Temple Iron Co. v. United States, 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90, 183 Fed. 427.

A transaction which the law prohibits is not made lawful by an innocent motive or purpose.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 148, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276.

The intent to violate the law, implied from doing what the law prohibits, renders immaterial every other intent, purpose, or motive.

Bishop, New Crim. Law, § 343; Holmes, Common Law, p. 52.

A contract or combination, by its own inherent nature or effect, without more, may restrain trade within the purview of the statute.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 561, 43 L. ed. 259, 284, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 328, 331, 48 L. ed. 679, 696, 697, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 298, 49 L. ed. 739, 761, 764, 25 Sup. Ct. Rep. 493; United States v. American Tobacco Co. 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; Standard Oil Co. v. United States, 221 U. S. 1, 65, 55 L. ed. 619, 647, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; United States v. Union P. R. Co. 226 U. S. 61, 92, 93, 57 L. ed. 124, 135, 136, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep 90; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 623.

Congress rightly believed that the advantages of large business units, in so far as they are real and substantial, would inevitably assert themselves by normal growth. It closed the short cut to those advantages—monopolistic combination—because danger lies that way. If there is evil in this, it is accepted as less than that which may result from the unification of interest, and the power such unification gives.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 Sup. Ct. Rep. 379.

Competition is worth more to society than it costs.

corporation as an alleged violator of the Sherman Anti-trust Act, should consider, not what the corporation had power to do or did, but what it now has power to do and is doing.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — under Anti-trust Act — expectation or realization.

2. The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — under Anti-trust Act — size of corporation — unexerted powers.

3. The mere size of a corporation, or the existence of unexerted power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Monopoly — steel trust — intent — past practices — dissolution — public interest.

4. A holding corporation which by its formation united under one control competing companies in the steel industry, but which did not achieve monopoly, and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act,—especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

[No. 6.]

Argued March 9, 12, 13, and 14, 1917. Restored to docket May 21, 1917. Reargued October 7, 8, 9, and 10, 1919. Decided March 1, 1920.

APPEAL from the District Court of the United States for the District of New Jersey to review a decree dismissing the bill in a suit to dissolve the United States Steel Corporation and its subsidiaries. Affirmed.

See same case below, 223 Fed. 55.

The facts are stated in the opinion.

Assistant to the Attorney General **Todd**, Special Assistant to the Attorney General **Colton**, and Solicitor General **Davis**, argued the cause on original argument, and, with Attorney General Gregory and Mr. Robert Szold, filed a brief for appellant:

It has never been doubted that combinations of this type, embracing a dominant proportion of those engaged in a particular industry, and formed for the express purpose of suppressing competition between them, are combinations in restraint of trade.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 394, 49 L. ed. 518, 523, 25 Sup. Ct. Rep. 276; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 408, 55 L. ed. 502, 518, 31 Sup. Ct. Rep. 376.

Nor is it material, their purpose and effect being what they were, that the combinations here assailed were created in corporate form instead of by loose agreement.

United States v. American Tobacco Co. 221 U. S. 106, 176, 181, 55 L. ed. 663, 692, 694, 31 Sup. Ct. Rep. 632.

Indeed, where, as here, corporations simply exchange their plants and businesses for stock in a consolidated corporation, the resulting combination is in no respect different in principle from a combination in the form of trust which the statute specifically prohibits.

Northern Securities Co. v. United States, 193 U. S. 197, 326, 327, 48 L. ed. 679, 695, 696, 24 Sup. Ct. Rep. 436; United States v. Reading Co. 226 U. S. 324, 352–363, 57 L. ed. 243, 252–256, 33 Sup. Ct. Rep. 90, 183 Fed. 470; Patterson v. United States, 138 C. C. A. 123, 222 Fed. 619; Noyes, Intercorporate Relations, § 354; Eddy, Combinations, § 622.

No more powerful instrument of monopoly could be used, said Mr. Justice Holmes, in Swift & Co. v. United States, 196 U. S. 375, 402, 49 L. ed. 518, 527, 25 Sup. Ct. Rep. 276, than an advantage in the cost of transportation.

See also Standard Oil Co. v. United States, 221 U. S. 1, 42, 43, 76, 55 L. ed. 619, 638, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 393, 50 L. ed. 515, 522, 26 Sup. Ct. Rep. 272; United States v. Reading Co. 226 U. S. 324, 359, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 533, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873.

The purposes of illegal combinations are seldom capable of proof by direct testimony, but must be inferred from circumstances.

Eastern States Retail Lumber Dealers Asso. v. United States, 234 U. S. 600, 612, 58 L. ed. 1490, 1499, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; Reilley v. United States, 46 C. C. A. 25, 106 Fed. 896; United States v. Sacia, 2 Fed. 757; Reg. v. Murphy, 8 Car. & P. 297.

The union of so many previously independent business units, about 130, with such vast aggregate resources, $1,800,000,000, controlling so great a proportion of the entire industry, approximately half, with the next largest competitor controlling less than 6 per cent, are factors from which this court has repeatedly inferred the existence of a specific intent to suppress competition.

Standard Oil Co. v. United States, 221 U. S. 1, 75, 55 L. ed. 619, 650, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Terminal R. Asso. 224 U. S. 383, 394, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507; United States v. Reading, 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90; United States v. Patten, 226 U. S. 525, 543, 57 L. ed. 333, 341, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141.

The distinction between a mere purchase of a competing business and a combination of competing businesses, clothed in the form of purchases, is sharply drawn in Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572.

See also Noyes, Intercorporate Relations, § 354.

In three leading cases in this court the holding company, as a means of combining able competitors, has been adjudged illegal.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Temple Iron Co. v. United States, 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90, 183 Fed. 427.

A transaction which the law prohibits is not made lawful by an innocent motive or purpose.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 148, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276.

The intent to violate the law, implied from doing what the law prohibits, renders immaterial every other intent, purpose, or motive.

Bishop, New Crim. Law, § 343; Holmes, Common Law, p. 52.

A contract or combination, by its own inherent nature or effect, without more, may restrain trade within the purview of the statute.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 561, 43 L. ed. 259, 284, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 234, 243, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 328, 331, 48 L. ed. 679, 696, 697, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 298, 49 L. ed. 739, 761, 764, 25 Sup. Ct. Rep. 493; United States v. American Tobacco Co. 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; Standard Oil Co. v. United States, 221 U. S. 1, 65, 55 L. ed. 619, 647, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; United States v. Union P. R. Co. 226 U. S. 61, 92, 93, 57 L. ed. 124, 135, 136, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep 90; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 623.

Congress rightly believed that the advantages of large business units, in so far as they are real and substantial, would inevitably assert themselves by normal growth. It closed the short cut to those advantages—monopolistic combination—because danger lies that way. If there is evil in this, it is accepted as less than that which may result from the unification of interest, and the power such unification gives.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 Sup. Ct. Rep. 379.

Competition is worth more to society than it costs.

Vegelahn v. Guntner, 167 Mass. 106, 35 L.R.A. 722, 44 N. E. 1077.

Furthermore, even if it would have been lawful for the many independent businesses combined through this holding company to unite to some extent to develop foreign trade (by joint selling agencies, for example), that cannot justify the complete and permanent suppression of competition between them in domestic trade.

United States v. Corn Products Ref. Co. 234 Fed. 1016; United States v. Union P. R. Co. 226 U. S. 61, 93, 57 L. ed. 124, 135, 33 Sup. Ct. Rep. 53.

In order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.

United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610.

The test of the legality of a combination is not its present effect upon prices, wages, etc., nor its present conduct toward the remaining competitors, but its effect upon competition. If its effect is unduly to restrict competition, then it is immaterial that, for the time being, the combination may exercise its power benevolently.

United States v. Union P. R. Co. 226 U. S. 61, 88, 57 L. ed. 124, 134, 33 Sup. Ct. Rep. 53; Northern Securities Co. v. United States, 193 U. S. 197, 327, 48 L. ed. 679, 696, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 238, 44 L. ed. 136, 146, 20 Sup. Ct. Rep. 96; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 324, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; Pearsall v. Great Northern R. Co. 161 U. S. 646, 676, 677, 40 L. ed. 838, 848, 849, 16 Sup. Ct. Rep. 705; United States v. Standard Oil Co. 173 Fed. 196; Atty. Gen. v. Great Northern R. Co. 29 L. J. Ch. N. S. 799, 6 Jur. N. S. 1006, 8 Week. Rep. 556; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859, affirming 237 Mo. 394, 141 S. W. 672.

Messrs. **Richard V. Lindabury, David A. Reed, and Cordenio A. Severance** argued the cause, and, with Mr. Raynal C. Bolling, filed a brief for appellees on original argument:

As to the meaning of the terms "monopolize" and "restraint of trade," as used in the Anti-trust Act, see 2 Hoar, Autobiography of Seventy Years, p. 364; United States v. Du Pont De Nemours, 188 Fed. 150; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 408, 32 L. ed. 979, 984, 9 Sup. Ct. Rep. 553; Northern Securities Co. v. United States, 193 U. S. 197, 337, 48 L. ed. 679, 700, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; United States v. Terminal R. Asso. 224 U. S. 383, 394, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780.

Competition depends not upon the manufacture of common products, but upon the extent of their sale in common territory.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

The mere combination of manufacturing concerns not in competition with each other is not a violation of the Anti-trust Act, no matter how large their percentage of the country's production may be.

United States v. Winslow, 227 U. S. 202, 217, 57 L. ed. 481, 485, 33 Sup. Ct. Rep. 253.

It cannot in reason be said that a combination of manufacturing concerns whose competition did not exceed that shown in this case, whose percentage of the production did not exceed 50.1, and whose acquisition of a raw material supply did not exceed its reasonable requirements, and did not approach to a monopoly, must necessarily have operated to restrain trade, or, in and of itself, must necessarily have amounted to a monopoly or an attempt at monopolization.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; United States v. Standard Oil Co. 173 Fed. 183, 221 U. S. 75, 55 L. ed. 650, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 164 Fed. 719, 221 U. S. 157, 55 L. ed. 685, 31 Sup. Ct. Rep. 632; United States v.

Reading Co. 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90.

If the corporation was organized for legitimate business purposes and without intent to monopolize, then, even if it had power to monopolize (which the evidence in this case shows it has not), still, the mere incidental acquisition of such power constitutes no threat or offense under the Anti-trust Act.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Terminal R. Asso. 224 U. S. 383, 56 L. ed. 810, 32 Sup. Ct. Rep. 507.

The law is not concerned with competition as such, but with the injury to the public resulting either from artificially stimulating or unduly limiting or suppressing competition. In other words, it was the intent of Congress in enacting the Anti-trust Act to require that business should be conducted along normal lines, with full opportunity for the play of competitive forces. When this situation exists, all of the public, whether producers, traders, or consumers, are protected. The evils legislated against may be brought about:

(a) By a voluntary combination embracing a sufficient number of otherwise competing concerns to enable the parties to the same to interrupt the usual operation of the law of supply and demand by controlling prices or production, thus unduly limiting or suppressing competition, as in United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; or

(b) By a combination which carries on what Mr. Justice Holmes, in his dissenting opinion in the Northern Securities Case, terms "the ferocious extreme of competition," through which rivals are kept out of business, and those already in are driven out; as in Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632,—the combination thus drawing to itself, by excluding others, a monopolistic power over prices and production, and in that way unduly limiting competition, and thus thwarting the usual operation of the law of supply and demand; or

(c) Through the enforcement of a boycott by a combination which is attended by the same results, as in W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 58 L. ed. 1490, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951.

Mr. **George Welwood Murray** also argued the cause on original argument, and filed a brief for defendants John D. Rockefeller and John D. Rockefeller, Jr.

Assistant to the Attorney General **Ames** and Special Assistant to the Attorney General **Colton** for appellant on reargument.

Messrs. **Richard V. Lindabury, David A. Reed, Cordenio A. Severance,** and **George Welwood Murray** for appellees.

Mr. Justice **McKenna** delivered the opinion of the court:

Suit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-trust Act [Act of July 2, 1890, 26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644].

It is prayed that it and they be dissolved because engaged in illegal restraint of trade and the exercise of monopoly.

Special charges of illegality and monopoly are made and special redresses and remedies are prayed; among others, that there be a prohibition of stock ownership and exercise [437] of rights under such ownership and that there shall be such orders and distribution of the stock and other properties as shall be in accordance with equity and good

conscience, and "shall effectuate the purpose of the Anti-trust Act." General relief is also prayed.

The Steel Corporation is a holding company only; the other companies are the operating ones, manufacturers in the iron and steel industry, twelve in number. There are, besides, other corporations and individuals more or less connected in the activities of the other defendants that are alleged to be instruments or accomplices in their activities and offendings; and that these activities and offendings (speaking in general terms) extend from 1901 to 1911, when the bill was filed, and have illustrative periods of significant and demonstrated illegality.

Issue is taken upon all these charges, and we see at a glance what detail of circumstances may be demanded, and we may find ourselves puzzled to compress them into an opinion that will not be of fatiguing prolixity.

The case was heard in the district court by four judges. They agreed that the bill should be dismissed; they disagreed as to the reasons for it. 223 Fed. 55. One opinion (written by Judge Buffington and concurred in by Judge McPherson) expressed the view that the Steel Corporation was not formed with the intention or purpose to monopolize or restrain trade, and did not have the motive or effect "to prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." The corporation, in the view of the opinion, was an evolution, a natural consummation of the tendencies of the industry on account of changing conditions,—practically a compulsion from "the metallurgical method of making steel and the physical method of handling it,"—this method, and the conditions consequent upon it, tending to combinations of capital and energies rather than diffusion in independent action. And the [438] concentration of powers (we are still representing the opinion) was only such as was deemed necessary, and immediately manifested itself in improved methods and products and in an increase of domestic and foreign trade. Indeed, an important purpose of the organization of the corporation was the building up of the export trade in steel and iron, which at that time was sporadic,—the mere dumping of the products upon foreign markets.

Not monopoly, therefore, was the purpose of the organization of the corporation, but concentration of efforts with resultant economies and benefits.

The tendency of the industry and the purpose of the corporation in yielding to it was expressed in comprehensive condensation by the word "integration," which signifies continuity in the processes of the industry from ore mines to the finished product.

All considerations deemed pertinent were expressed and their influence was attempted to be assigned; and, while conceding that the Steel Corporation, after its formation in times of financial disturbance, entered into informal agreements or understandings with its competitors to maintain prices, they terminated with their occasions, and, as they had ceased to exist, the court was not justified in dissolving the corporation.

The other opinion (by Judge Woolley, and concurred in by Judge Hunt, 223 Fed. 161) was, in some particulars, in antithesis to Judge Buffington's. The view was expressed that neither the Steel Corporation nor the preceding combinations, which were in a sense its antetypes, had the justification of industrial conditions, nor were they or it impelled by the necessity for integration, or compelled to unite in comprehensive enterprise because such had become a condition of success under the new order of things. On the contrary, that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning, and the corporation [439] became "a combination of combinations by which, directly or indirectly, approximately 180 independent concerns were brought under one business control," which, measured by the amount of production, extended to 80 per cent or 90 per cent of the entire output of the country, and that its purpose was to secure great profits, which were thought possible in the light of the history of its constituent combinations, and to accomplish permanently what those combinations had demonstrated could be accomplished temporarily, and thereby monopolize and restrain trade.[1]

[440] The organizers, however (we are still representing the opinion), un-

[1] As bearing upon the power obtained and what the corporation did, we give other citations from Judge Woolley's opinion, as follows:

"The ore reserves acquired by the corporation at and subsequent to its organization, the relation which such reserves bear to ore bodies then existing and subsequently discovered, and their bearing upon the question of monopoly of raw materials, are matters which have been discussed in the preceding opinion. and with

derestimated the opposing conditions, and at the very beginning the corporation, instead of relying upon its own power, sought and obtained the assistance and the co-operation of its competitors (the independent companies). In other words, the view was expressed that the testimony did "not show that the corporation, in and of itself, ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry." Its power was efficient only when in co-operation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called "the Gary dinners." The dinners were congregations of producers, and "were nothing but trade meetings," successors of the other means of associated action and control through such action. They were instituted first in "stress of panic," but their potency being demonstrated, they were afterwards called to control prices "in periods of industrial calm." "They were pools without penalties" and more efficient in stabilizing prices. But it was the further declaration that "when joint action was either refused or withdrawn, the corporation's prices were controlled by competition."

The corporation, it was said, did not at any time abuse the power or ascendancy it possessed. It resorted to none of the brutalities or tyrannies that the cases illustrate of [441] other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employees,—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors,—its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below those maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors. Indeed, it is said in many ways and illustrated that "instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning, sought and obtained the assistance of others." It combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not different from theirs, and was distinguished from "theirs only in the leadership it assumed in promulgating and perfecting the policy." This leadership it gave up, and it had ceased to offend against the law before this suit was

---

the reasoning as well as with the conclusion that the corporation has not a monopoly of the raw materials of the steel industry, I am in entire accord."

"Further inquiring whether the corporation inherently possesses monopolistic power, attention is next given to its proportion of the manufacture and sale of finished iron and steel products of the industry. Upon this subject there is a great volume of testimony, a detailed consideration of which in an opinion would be quite inexcusable. As a last analysis of this testimony, it is sufficient to say it shows that, large as was the corporation, and substantial as was its proportion of the business of the industry, the corporation was not able in the first ten years of its history to maintain its position in the increase of trade. During that period, its proportion of the domestic business decreased from 50.1 per cent to 40.9 per cent, and its increase of business during that period was but 40.6 per cent of its original volume. Its increase of business, measured by percentage, was exceeded by eight of its competitors, whose increase of business, likewise measured by percentage, ranged from 63 to 3779. This disparity in the increase of production indicates that the power of the corporation is not commensurate with its size, and that the size and the consequent power of the corporation are not sufficient to retard prosperous growth of efficient competitors."

"From the vast amount of testimony, it is conclusively shown that the Steel Corporation did not attempt to exert a power, if such it possessed, to oppress and destroy its competitors, and it is likewise disclosed by the history of the industry subsequent to the organization of the corporation that if it had made such an attempt it would have failed. It is also shown by the testimony that, acting independently and relying alone upon its power and wealth, great as they were, the corporation has never been able to dominate the steel industry by controlling the supply of raw materials, restraining production of finished products, or enhancing and maintaining the prices of either."

brought. It was hence concluded that it should be distinguished from its organizers, and that their intent and unsuccessful attempt should not be attributed to it; that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

This summary of the opinions, given necessarily in paraphrase, does not adequately represent their ability [442] and strength, but it has value as indicating the contentions of the parties, and the ultimate propositions to which the contentions are addressed. The opinions indicate that the evidence admits of different deductions as to the genesis of the corporation and the purpose of its organizers, but only of a single deduction as to the power it attained and could exercise. Both opinions were clear and confident that the power of the corporation never did and does not now reach to monopoly, and their review of the evidence, and our independent examination of it, enables us to elect between their respective estimates of it, and we concur in the main with that of Judges Woolley and Hunt. And we add no comment except, it may be, that they underestimated the influence of the tendency and movement to integration, the appreciation of the necessity or value of the continuity of manufacture from the ore to the finished product. And there was such a tendency, and though it cannot be asserted it had become a necessity, it had certainly become a facility of industrial progress. There was, therefore, much to urge it and give incentive to conduct that could accomplish it. From the nature and properties of the industry, the processes of production were something more than the stage and setting of the human activities. They determined to an extent those activities, furnished their motives, and gave test of their quality; not, of course, that the activities could get any immunity from size or resources or energies, whether exerted in integrated plants or diversified ones.

The contentions of the case, therefore, must be judged by the requirements of the law, not by accidental or adventitious circumstances. But what are such circumstances? We have seen that it was the view of the district court that size was such a circumstance and had no accusing or excusing influence. The contention of the government is to the contrary. Its assertion is that the size of the corporation, being the result of a "combination [443] of powerful and able competitors," had become "substantially dominant" in the industry, and illegal. And that this was determined. The companies combined, is the further assertion, had already reached a high degree of efficiency, and in their independence were factors in production and competition, ceased to be such when brought under the regulating control of the corporation, which, by uniting them, offended the law; and that the organizers of the corporation "had in mind the specific purposes of the restraint of trade and the enormous profits resulting from that restraint."

It is the contention of the corporation opposing those of the government and denying the illegal purposes charged against it, that the industry demanded qualities and an enterprise that lesser industries do not demand, and must have a corresponding latitude and facility. Indeed, it is insisted that the industry had practically, to quote the words of Judge Buffington, he quoting those of a witness, "'reached the limit or nearly at which economies from a metallurgical or mechanical standpoint could be made effective,'" and "'that instead, as was then the practice, of having one mill make ten or twenty or fifty products, the greatest economy would result from one mill making one product, and making that product continuously.'" In other words, that there was a necessity for integration and rescue from the old conditions,—from their improvidence and waste of effort,—and that in redress of the conditions the corporation was formed, its purpose and effect being "salvage, not monopoly," to quote the words of counsel. It was, is the insistence, the conception of ability, "a vision of a great business which should embrace all lines of steel and all processes of manufacture, from the ore to the finished product, and which, by reason of the economies thus to be effected and the diversity of products it would be able to offer, could successfully compete in all the markets of the world." [444] It is urged further that to the discernment of that great possibility was added a courage that dared attempt its accomplishment, and the conception and the courage made the formation of the corporation notable, but did not make it illegal.

We state the contentions; we do not have to discuss them, or review the arguments advanced for their acceptance or repulsion. That is done in the opinions of the district judges, and we may

well despair to supplement the force of their representation of the conditions antecedent to the formation of the corporation, and in what respect and extent its formation changed them. Of course, in that representation and its details there is guidance to decision, but they must be rightly estimated to judge of what they persuade. Our present purpose is not retrospect for itself, however instructive, but practical decision upon existing conditions, that we may not, by their disturbance, produce, or even risk, consequences of a concern that cannot now be computed. In other words, our consideration should be of not what the corporation had power to do or did, but what it has now power to do and is doing, and what judgment shall be now pronounced,—whether its dissolution, as the government prays, or the dismissal of the suit, as the corporation insists.

The alternatives are perplexing, involve conflicting considerations, which, regarded in isolation, have diverse tendencies. We have seen that the judges of the district court unanimously concurred in the view that the corporation did not achieve monopoly, and such is our deduction, and it is against monopoly that the statute is directed; not against an expectation of it, but against its realization; and it is certain that it was not realized. The opposing conditions were underestimated. The power attained was much greater than that possessed by any one competitor,—it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved, and [**445**] competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect. They were scattered through the years from 1901 (the year of the formation of the corporation) until 1911; but, after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no "dangerous probability" of their resumption, the test for which Swift & Co. v. United States, 196 U. S. 396, 49 L. ed. 524, 25 Sup. Ct. Rep. 276, is cited. It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood or were underestimated, and the case is not peculiar. And we may say in passing that the government cannot fear their resumption, for it did not avail itself of the offer of the district court to retain jurisdiction of the cause in order that, if illegal acts should be attempted, they could be restrained.

What, then, can now be urged against the corporation? Can comparisons in other regards be made with its competitors, and by such comparisons guilty or innocent existence be assigned it? It is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce.

It is true there is some testimony tending to show that the corporation had such power, but there was also testimony and a course of action tending strongly to the contrary. The conflict was by the judges of the district court unanimously resolved against the existence of that power, and in doing so they but gave effect to the greater weight of the evidence. It is certain that no such power [**446**] was exerted. On the contrary, the only attempt at a fixation of prices was, as already said, through an appeal to and confederation with competitors, and the record shows besides that when competition occurred it was not in pretense, and the corporation declined in productive powers,—the competitors growing either against or in consequence of the competition. If against the competition, we have an instance of movement against what the government insists was an irresistible force; if in consequence of competition, we have an illustration of the adage that "competition is the life of trade" and is not easily repressed. The power of monopoly in the corporation under either illustration is an untenable accusation.

We may pause here for a moment to notice illustrations of the government of the purpose of the corporation; instancing its acquisition after its formation of control over the Shelby Steel Tube Company, the Union Steel Company, and, subsequently, the Tennessee Company. There is dispute over the reasons for these acquisitions which we shall not detail. There is, however, an important circumstance in connection with that of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnest-

ness in the public welfare he would have approved of nothing that had even a tendency to its detriment. And he testified he was not deceived and that he believed that "the Tennessee Coal & Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it [**447**] would be a guaranty that there was value to it." Such being the emergency, it seems like an extreme accusation to say that the corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did illegality attach afterwards, and how? And what was the corporation to do with the property? Let it decay in desuetude, or develop its capabilities and resources? In the development, of course, there would be profit to the corporation, but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard them as violations of law.

From this digression we return to the consideration of the conduct of the corporation to its competitors. Besides the circumstances which we have mentioned, there are others of probative strength. The company's officers, and, as well, its competitors and customers, testified that its competition was genuine, direct, and vigorous, and was reflected in prices and production. No practical witness was produced by the government in opposition. Its contention is based on the size and asserted dominance of the corporation,—alleged power for evil, not the exertion of the power in evil. Or, as counsl put it, " a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors." Such composition and its resulting power constitute, in the view of the government, the offense against the law, and yet it is admitted "no competitor came forward and said he had to accept the Steel Corporation's prices." But this absence of complaint counsel urge against the corporation. Competitors, it is said, followed the corporation's prices because they made money by the imitation. Indeed, the imitation is urged as [**448**] an evidence of the corporation's power. "Universal imitation," counsel assert, is "an evidence of power." In this concord of action, the contention is, there is the sinister dominance of the corporation,—"its extensive control of the industry is such that the others [independent companies] follow." Counsel, however, admit that there was "occasionally" some competition, but reject the suggestion that it extended practically to a war between the corporation and the independents. Counsel say, "They [the corporation is made a plural] called a few—they called two hundred witnesses out of some forty thousand customers, and they expect with that customer evidence to overcome the whole train of price movement shown since the corporation was formed." And by "movement of prices," counsel explained, "as shown by the published prices . . . they were the ones that the competitors were maintaining all during the interval."

It would seem that "two hundred witnesses" would be fairly representative. Besides, the balance of the "forty thousand customers" was open to the government to draw upon. Not having done so, is it not permissible to infer that none would testify to the existence of the influence that the government asserts? At any rate, not one was called, but, instead, the opinion of an editor of a trade journal is adduced, and that of an author and teacher of economics whose philosophical deductions had, perhaps, fortification from experience as Deputy Commissioner of Corporations and as an employee in the Bureau of Corporations. His deduction was that when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation,—something more than a deduction equivocal of itself, even though the [**449**] facts it rests on or asserts were not contradicted. If the phenomena of production and prices were as easily resolved as the witness implied, much discussion and much literature have been wasted, and some of the problems that are now distracting the world would be given composing solution. Of course, competition affects prices, but it is only one among other influences, and

does not, more than they, register itself in definite and legible effect.

We magnify the testimony by its consideration. Against it competitors, dealers, and customers of the corporation testify in multitude that no adventitious interference was employed to either fix or maintain prices, and that they were constant or varied according to natural conditions. Can this testimony be minimized or dismissed by inferring that, as intimated, it is an evidence of power, not of weakness, and power exerted not only to suppress competition, but to compel testimony, is the necessary inference, shading into perjury to deny its exertion? The situation is indeed singular, and we may wonder at it,—wonder that the despotism of the corporation, so baneful to the world in the representation of the government, did not produce protesting victims.

But there are other paradoxes. The government does not hesitate to present contradictions, though only one can be true, such being, we were told in our school books, the "principle of contradiction." In one, competitors (the independents) are represented as oppressed by the superior power of the corporation; in the other, they are represented as ascending to opulence by imitating that power's prices, which they could not do if at disadvantage from the other conditions of competition; and yet confederated action is not asserted. If it were, this suit would take on another cast. The competitors would cease to be the victims of the corporation, and would become its accomplices. And there is no other alternative. The suggestion [**450**] that lurks in the government's contention that the acceptance of the corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind. The government, therefore, is reduced to the assertion that the size of the corporation, the power it may have, not the exertion of the power, is an abhorrence to the law; or, as the government says, "the combination embodied in the corporation unduly restrains competition by its *necessary effect* [the italics are the emphasis of the government], and therefore is unlawful regardless of purpose." "A wrongful purpose," the government adds, is "matter of aggravation." The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability,—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts, we may say, for it is the inevitable logic of the government's contention that competition must not only be free, but that it must not be pressed to the ascendancy of a competitor, for in ascendancy there is the menace of monopoly.

We have pointed out that there are several of the government's contentions which are difficult to represent or measure; and the one we are now considering, that is, the power is "unlawful regardless of purpose," is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. The regression is extreme, but [**451**] short of it the government cannot stop. The fallacy it conveys is manifest.

The corporation was formed in 1901; no act of aggression upon its competitors is charged against it; it confederated with them at times in offense against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it except its existence be such an act. This is urged, as we have seen, and that the interest of the public is involved, and that such interest is paramount to corporation or competitors. Granted,—though it is difficult to see how there can be restraint of trade when there is no restraint of competitors in the trade nor complaints by customers, —how can it be worked out of the situation and through what proposition of law? Of course it calls for nothing other than a right application of the law, and, to repeat what we have said above, shall we declare the law to be that size is an offense, even though it minds its own business, because what it does is imitated? The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not

compel competition, nor require all that is possible.

Admitting, however, that there is pertinent strength in the propositions of the government, and in connection with them, we recall the distinction we made in the Standard Oil Co. Case (221 U. S. 1, 77, 55 L. ed. 619, 652, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734) between acts done in violation of the statute and a condition brought about which, "in and of itself, is not only a continued attempt to monopolize, but also a monopolization." In such case, we declared, "the duty to enforce the statute" required "the application of broader and more controlling" remedies [452] than the other. And the remedies applied conformed to the declaration; there was prohibition of future acts and there was dissolution of "the combination found to exist in violation of the statute" in order to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained" had "brought" and would "continue to bring about."

Are the case and its precepts applicable here? The Steel Corporation by its formation united under one control competing companies, and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal, and became a "continually operating force," with the "possession of power unlawfully obtained."

But there are countervailing considerations. We have seen whatever there was of wrong intent could not be executed; whatever there was of evil effect was discontinued before this suit was brought, and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies, and equally clear in its direction that the courts of the nation shall prevent and restrain them (its language is "to prevent and restrain violations of" the act), but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions and do injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion—indeed, essential function—that makes its value in our jurisprudence,—value in this case as in others. We do not mean to say that the law is not its own measure, and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine; not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy. and in execution of both, and it is certainly a [453] matter for consideration that there was no legal attack on the corporation until 1911, ten years after its formation and the commencement of its career. We do not, however, speak of the delay simply as to its time, or say that there is estoppel in it because of its time, but on account of what was done during that time,—the many millions of dollars spent, the development made, and the enterprises undertaken; the investments by the public that have been invited and are not to be ignored. And what of the foreign trade that has been developed and exists? The government, with some inconsistency, it seems to us, would remove this from the decree of dissolution. Indeed, it is pointed out that under congressional legislation in the Webb Act the foreign trade of the corporation is reserved to it. And further, it is said, that the corporation has constructed a company called the Products Company which can be "very easily preserved as a medium through which the steel business might reach the balance of the world," and that in the decree of "dissolution that could be provided." This is supplemented by the suggestion that not only the Steel Corporation, "but other steel makers of the country, could function through an instrumentality created under the Webb Act."

The propositions and suggestions do not commend themselves. We do not see how the Steel Corporation can be such a beneficial instrumentality in the trade of the world and its beneficence be preserved, and yet be such an evil instrumentality in the trade of the United States that it must be destroyed. And by whom and how shall all the adjustments of preservation or destruction be made? How can the corporation be sustained and its power of control over its subsidiary companies be retained and exercised in the foreign trade and given up in the domestic trade? The government presents no solution of the problem. Counsel realize the difficulty and seem to think that its solution or its evasion is in the suggestion [454] that the Steel Corporation and "other steel makers could function through an instrumentality created under the Webb Act." But we are confronted with the necessity of immediate judicial action

under existing laws, not action under conceptions which may never be capable of legal execution. We must now decide, and we see no guide to decision in the propositions of the government.

The government, however, tentatively presents a proposition which has some tangibility. It submits that certain of the subsidiary companies are so mechanically equipped and so officially directed as to be released and remitted to independent action and individual interests and the competition to which such interests prompt, without any disturbance to business. The companies are enumerated. They are the Carnegie Steel Company (a combination of the old Carnegie Company, the National Steel Company, and the American Steel Company), the Federal Steel Company, the Tennessee Company, and the Union Steel Company (a combination of the Union Steel Company of Donora, Pennsylvania, Sharon Steel Company of Sharon, Pennsylvania, and Sharon Tin Plate Company). They are fully integrated, it is said, possess their own supplies, facilities of transportation and distribution. They are subject to the Steel Corporation is, in effect, the declaration, in nothing but its control of their prices. We may say parenthetically that they are defendants in the suit and charged as offenders, and we have the strange circumstance of violators of the law being urged to be used as expedients of the law.

But let us see what guide to a procedure of dissolution of the corporation and the dispersion as well of its subsidiary companies, for they are asserted to be illegal combinations, is prayed. And the fact must not be overlooked or underestimated. The prayer of the government calls for not only a disruption of present conditions, but the restoration of the conditions of twenty years ago; if [455] not literally, substantially. Is there guidance to this in the Standard Oil Co. Case and the American Tobacco Co. Case, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

The Standard Oil Company had its origin in 1882, and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that Judge Woolley described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. We have enumerated them, and this reference to them is enough. And of the practices, this court said, no disinterested mind could doubt that the purpose was "to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." It was further said that what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existence of the intent . . . and impelled the expansion of the New Jersey corporation." It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that case with this. The contrast is further emphasized by pointing out how, in the case of the New Jersey corporation, the original wrong was reflected in and manifested by the acts which followed the organization, as described by the court. It said: "The exercise of the power which resulted from that organization fortifies the foregoing conclusions [as to monopoly, etc.], since the [456] development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted, by which the country was divided into districts and the trade in each district in oil was turned over to the designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

The American Tobacco Co. Case has the same bad distinctions as the Standard Oil Co. Case. The illegality in which it was formed [there were two American Tobacco Companies, but we use the name as designating the new company, as representing the combinations of the suit] continued, indeed, progressed in intensity and defiance to

the moment of decree. And it is the intimation of the opinion, if not its direct assertion, that the formation of the company (the word "combination" is used) was preceded by the intimidation of a trade war, "inspired by one or more of the minds which brought about and became parties to that combination." In other words, the purpose of the combination was signaled to competitors, and the choice presented to them was submission or ruin,—to become parties to the illegal enterprise or be driven "out of the business." This was the purpose and the achievement, and the processes by which achieved, this court enumerated to be the formation of new companies, taking stock in others to "obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants, not to utilize them, but to close them; by constantly [457] recurring stipulations by which numbers of persons, whether manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future. In the American Tobacco Co. Case, therefore, as in the Standard Oil Co. Case, the court had to deal with a persistent and systematic lawbreaker, masquerading under legal forms, and which not only had to be stripped of its disguises, but arrested in its illegality. A decree of dissolution was the manifest instrumentality, and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the Standard Oil Co. Case furnishes no example for a decree in this.

In conclusion, we are unable to see that the public interest will be served by yielding to the contention of the government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be, serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

We think, therefore, that the decree of the District Court should be affirmed.

So ordered.

Mr. Justice **McReynolds** and Mr. Justice **Brandeis** took no part in the consideration or decision of the case.

Mr. Justice **Day**, dissenting:

This record seems to me to leave no fair room for a doubt that the defendants, the United States Steel Corporation and the several subsidiary corporations which make up that organization, were formed in violation of the Sherman Act [Act of July 2, 1890, 26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. 644]. I am unable to accept the conclusion [458] which directs a dismissal of the bill instead of following the well-settled practice, sanctioned by previous decisions of this court, requiring the dissolution of combinations made in direct violation of the law.

It appears to be thoroughly established that the formation of the corporations here under consideration constituted combinations between competitors, in violation of law, and intended to remove competition and to directly restrain trade. I agree with the conclusions of Judges Woolley and Hunt, expressed in the court below (223 Fed. 161 et seq.), that the combinations were not submissions to business conditions, but were designed to control them for illegal purposes, regardless of other consequences, and "were made upon a scale that was huge and in a manner that was wild," and "properties were assembled and combined with less regard to their importance as integral parts of an integrated whole than to the advantages expected from the elimination of the competition which theretofore existed between them." Those judges found that the constituent companies of the United States Steel Corporation, nine in number, were themselves combinations of steel manufacturers, and the effect of the organization of these combinations was to give a control over the industry at least equal to that theretofore possessed by the constituent companies and their subsidiaries. That the Steel Corporation was a combination of combinations by which, directly or indirectly, 180 independent concerns were brought under one control, and in the language of Judge Woolley (p. 167):

"Without referring to the great mass of figures which bears upon this aspect of the case, it is clear to me that combinations were created by acquiring competing producing concerns at figures not based upon their physical or business values, as independent and sepa-

rate producers, but upon their values in combination; that is, upon their values as manufacturing plants and business [459] concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combinations particularly related, measured by the amount of production, extended in some instances from 80 per cent to 95 per cent of the entire output of the country, resulting in the immediate increase in prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital.

"The immediate, as well as the normal, effect of such combinations, was in all instances a complete elimination of competition between the concerns absorbed, and a corresponding restraint of trade."

The enormous overcapitalization of companies and the appropriation of $100,000,000 in stock to promotion expenses were represented in the stock issues of the new organizations thus formed, and were the basis upon which large dividends have been declared from the profits of the business. This record shows that the power obtained by the corporation brought under its control large competing companies which were of themselves illegal combinations, and succeeded to their power; that some of the organizers of the Steel Corporation were parties to the preceding combinations, participated in their illegality, and, by uniting them under a common direction, intended to augment and perpetuate their power. It is the irresistible conclusion from these premises that great profits to be derived from unified control were the object of these organizations.

The contention must be rejected that the combination was an inevitable evolution of industrial tendencies compelling union of endeavor. Nothing could add to the vivid accuracy with which Judge Woolley, speaking for himself [460] and Judge Hunt, has stated the illegality of the organization, and its purpose to combine in one great corporation the previous combinations by a direct violation of the purposes and terms of the Sherman Act.

For many years, as the record discloses, this unlawful organization exerted its power to control and maintain prices by pools, associations, trade meetings, and as the result of discussion and agreements at the so-called "Gary dinners," where the assembled trade opponents secured co-operation and joint action through the machinery of special committees of competing concerns, and by prudent provision took into account the possibility of defection, and the means of controlling and perpetuating that industrial harmony which arose from the control and maintenance of prices.

It inevitably follows that the corporation violated the law in its formation and by its immediate practices. The power, thus obtained from the combination of resources almost unlimited in the aggregation of competing organizations, had within its control the domination of the trade, and the ability to fix prices and restrain the free flow of commerce upon a scale heretofore unapproached in the history of corporate organization in this country.

These facts established, as it seems to me they are by the record, it follows that if the Sherman Act is to be given efficacy, there must be a decree undoing, so far as is possible, that which has been achieved in open, notorious, and continued violation of its provisions.

I agree that the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital, and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legitimately goes with it, provided [461] no law has been transgressed in obtaining it. But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. To permit this would be to practically annul the Sherman Law by judicial decree. This principle has been so often declared by the decisions that it is only necessary to refer to some of them. It is the scope of such combinations, and their power to suppress and stifle competition and create or tend to create monopolies, which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade

in the channels of interstate commerce. Pearsall v. Great Northern R. Co. 161 U. S. 646, 676, 677, 40 L. ed. 838, 848, 849, 16 Sup. Ct. Rep. 705; Trans-Missouri Freight Asso. Case, 166 U. S. 290, 324, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; Northern Securities Case, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 238, 44 L. ed. 136, 146, 20 Sup. Ct. Rep. 96; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; Union Pacific R. Co. Case, 226 U. S. 61, 88, 57 L. ed. 124, 134, 33 Sup. Ct. Rep. 53. While it was not the purpose of the act to condemn normal and usual contracts to lawfully expand business and further legitimate trade, it did intend to effectively reach and control all conspiracies and combinations or contracts of whatever form which unduly restrain competition and unduly obstruct the natural course of trade, or which, from their nature or effect, have proved effectual to restrain interstate commerce. Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; Straus v. American Publishers' Asso. 231 U. S. 222, 58 L. ed. 192, L.R.A. 1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 58 L. ed. 1490, L.R.A. 1915A, 788, 34 Sup. Ct. Rep. 951.

This statute has been in force for nearly thirty years. It has been frequently before this court for consideration, and the nature and character of the relief to be granted [462] against combinations found guilty of violations of it have been the subject of much consideration. Its interpretation has become a part of the law itself, and if changes are to be made now in its construction or operation, it seems to me that the exertion of such authority rests with Congress, and not with the courts.

The 4th section is intended to give to courts of equity of the United States the power to effectively control and restrain violations of the act. In none of the cases which have been before the courts was the character of the relief to be granted, where organizations were found to be within the condemnation of the act, more thoroughly considered than in the Standard Oil and American Tobacco Co. Cases reported in 221 U. S. In the former case, considering the measure of relief to be granted in the case of a combination, certainly not more obnoxious to the Sherman Act than the court now finds the one under consideration to be, this court declared that it must be twofold in character (221 U. S. 78): "1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In the American Tobacco Co. Case the nature of the relief to be granted was again given consideration, and it was there concluded that the only effectual remedy was to dissolve the combination and the companies comprising it, and for that purpose the cause was remanded to the district court to hear the parties and determine a method of dissolution and of recreating from the elements composing it "a new condition which should be in honest harmony with, and not repugnant to, the law." In that [463] case the corporations dissolved had long been in existence, and the offending companies were organized years before the suit was brought and before the decree of dissolution was finally made. Such facts were considered no valid objection to the dissolution of these powerful organizations as the only effective means of enforcing the purposes of the Sherman Anti-trust Act. These cases have been frequently followed in this court, and in the lower Federal courts, in determining the nature of the relief to be granted, and I see no occasion to depart from them now.

As I understand the conclusions of the court affirming the decree directing dismissal of the bill, they amount to this: that these combinations, both the holding company and the subsidiaries which comprise it, although organized in plain violation and bold defiance of the provisions of the act, nevertheless are immune from a decree effectually ending the combinations and putting it out of their power to attain the unlawful purposes sought, because of some reasons of public policy requiring such conclusion. I know of no public policy which sanctions a violation of the law, nor of any

inconvenience to trade, domestic or foreign, which should have the effect of placing combinations, which have been able to thus organize one of the greatest industries of the country in defiance of law, in an impregnable position above the control of the law forbidding such combinations. Such a conclusion does violence to the policy which the law was intended to enforce, runs counter to the decisions of the court, and necessarily results in a practical nullification of the act itself.

There is no mistaking the terms of the act as they have hitherto been interpreted by this court. It was not intended to merely suppress unfair practices, but, as its history and terms amply show, it was intended to make it criminal to form combinations or engage in conspiracies or contracts in restraint of interstate trade. The remedy by injunction, at the instance of the Attorney General, was [464] given for the purpose of enabling the courts, as the statute states, to prohibit such conspiracies, combinations, and contracts, and this court, interpreting its provisions, has held that the proper enforcement of the act requires decrees to end combinations by dissolving them and restoring as far as possible the competitive conditions which the combinations have destroyed. I am unable to see force in the suggestion that public policy, or the assumed disastrous effect upon foreign trade of dissolving the unlawful combination, is sufficient to entitle it to immunity from the enforcement of the statute.

Nor can I yield assent to the proposition that this combination has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power. Its total assets on December 31, 1913, were in excess of $1,800,000,000; its outstanding capital stock was $868,583,600; its surplus $151,798,428. Its cash on hand ordinarily was $75,000,000; this sum alone exceeded the total capitalization of any of its competitors, and, with a single exception, the total capitalization and surplus of any one of them. That such an organization, thus fortified and equipped, could, if it saw fit, dominate the trade and control competition, would seem to be a business proposition too plain to require extended argument to support it. Its resources, strength, and comprehensive ownership of the means of production enable it to adopt measures to do again as it has done in the past; that is, to effectually dominate and control the steel business of the country. From the earliest decisions of this court it has been declared that it was the effective power of such organizations to control and restrain competition and the freedom of trade that Congress intended to limit and control. That the exercise of the power may be withheld, or exerted with forbearing benevolence, does not place such combinations beyond the authority of the statute which was intended to prohibit their formation, [465] and, when formed, to deprive them of the power unlawfully attained.

It is said that a complete monopolization of the steel business was never attained by the offending combinations. To insist upon such result would be beyond the requirements of the statute, and in most cases practically impossible. As we said in dealing with the packers' combination in Swift & Co. v. United States, 196 U. S. 396, 49 L. ed. 524, 25 Sup. Ct. Rep. 276: "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Com. v. Peaslee, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequent dangerous probability exist, this statute [Sherman Act] like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

It is affirmed that to grant the government's request for a remand to the district court for a decree of dissolution would not result in a change in the conditions of the steel trade. Such is not the theory of the Sherman Act. That act was framed in the belief that attempted or accomplished monopolization, or combinations which suppress free competition, were hurtful to the public interest, and that a restoration of competitive conditions would benefit the public. We have here a combination in control of one half of the steel business of the country. If the plan were followed, as in the American Tobacco Co. Case, of remanding the case to the district court, a decree might be framed restoring competitive conditions as far as practicable. See United States v. American Tobacco Co. 191 Fed. 371. In that case the subject of reconstruction so as to restore such conditions was elaborated and carefully [466] consid-

ered. In my judgment the principles there laid down, if followed now, would make a very material difference in the steel industry. Instead of one dominating corporation, with scattered competitors, there would be competitive conditions throughout the whole trade which would carry into effect the policy of the law.

It seems to me that if this act is to be given effect, the bill, under the findings of fact made by the court, should not be dismissed, and the cause should be remanded to the district court, where a plan of effective and final dissolution of the corporations should be enforced by a decree framed for that purpose.

Mr. Justice **Pitney** and Mr. Justice **Clarke** concur in this dissent.

PETER SCHAEFER, Plff. in Err.,
v.
UNITED STATES. (No. 270.)

PAUL VOGEL, Plff. in Err.,
v.
UNITED STATES. (No. 271.)

LOUIS WERNER, Plff. in Err.,
v.
UNITED STATES. (No. 272.)

MARTIN DARKOW, Plff. in Err.,
v.
UNITED STATES. (No. 273.)

HERMAN LEMKE, Plff. in Err.,
v.
UNITED STATES. (No. 274.)

(See S. C. Reporter's ed. 466–501.)

Jury — right to, in criminal case — several defendants — peremptory challenges.

1. The constitutional rights of several defendants tried jointly are not infringed by the requirement of a Federal statute that, in cases where there are several defendants, they shall be treated as a single party for the purpose of peremptory challenges.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — instructions — evidence — judicial notice.

2. No valid objection can be urged against that part of a charge to the jury, in a prosecution under the Espionage Act of June 15, 1917, for publishing and conspiring to publish false news despatches with intent to interfere with the military and naval success of the United States and promote the success of its enemies, to cause insubordination in the military or naval forces, and to obstruct the recruiting or enlistment service, in which the minds of the jurors were directed to the gist of the case, which was despatches received and then changed to express falsehood, to the detriment of the success of the United States, and they were told that, in passing upon the questions of the falsity of these publications and of whether the United States was at war, and any other questions which were, in like manner, a matter of public knowledge and of general information, they might call upon the fund of general information which was in their keeping.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

Constitutional law — freedom of speech and press — Espionage Act.

3. The freedom of speech and press guaranteed by the Federal Constitution was not violated by the provisions of the Espionage Act of June 15, 1917, under which convictions may be had for publishing in the German language, during the war with Germany, articles derisively contemptuous of the war activities of the United States, and intended to convey the idea that the war was not demanded by the people, was the result of the machinations of the executive power, and which in effect justified the German aggressions.

[For other cases, see Constitutional Law, IV. d, in Digest Sup. Ct. 1908.]

Evidence — sufficiency to support conviction — several counts in indictment.

4. The evidence introduced in a criminal case need not have been sufficient as to all the counts in the indictment in order to support a judgment upon a verdict of guilty, where the sentence imposed does

---

Note.—On right to trial by jury, generally—see notes to Justices of Supreme Court v. United States, 19 L. ed. U. S. 658; Eilenbecker v. District Ct. 33 L. ed. U. S. 801; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727; and Perego v. Dodge, 41 L. ed. U. S. 113.

As to challenges to jurors—see notes to Harrison v. United States, 41 L. ed. U. S. 104, and Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727.

On the right of jurors to act on their own knowledge—see notes to State v. Gaymon, 31 L.R.A. 489, and Solberg v. Robbins Lumber Co. 37 L.R.A.(N.S.) 790.

On constitutional freedom of speech and of the press—see note to Cowan v. Fairbrother, 32 L.R.A. 829.

As to validity of legislation directed against social or industrial propaganda deemed to be of a dangerous tendency—see note to State v. Moilen, 1 A.L.R. 336.

For a review of decisions under the Espionage Act of June 15, 1917,—see note to United States v. Krafft, L.R.A. 1918F, 410.

not exceed that which might lawfully have been imposed under any single count. It suffices that the evidence be sufficient to sustain any one of the counts.

[For other cases, see Evidence, XII. n; Trial, IX. b, in Digest Sup. Ct. 1908.]

[Nos. 270, 271, 272, 273, and 274.]

Argued October 21, 1919. Decided March 1, 1920.

FIVE WRITS of Error to the District Court of the United States for the Eastern District of Pennsylvania to review convictions under the Espionage Act. Judgments in Nos. 272, 273, and 274 affirmed; in Nos. 270 and 271 reversed and remanded for further proceedings.

See same case below, 254 Fed. 135.

The facts are stated in the opinion.

Mr. William A. Gray argued the cause and filed a brief for plaintiffs in error.

Mr. Henry John Nelson also argued the cause and filed a brief for plaintiffs in error Schaefer and Vogel.

Assistant Attorney General **Stewart** argued the cause, and, with Solicitor General King and Mr. W. C. Heron, filed a brief for defendant in error.

[468] Mr. Justice **McKenna** delivered the opinion of the court:

Indictment in nine counts under the Espionage Act [June 15, 1917, 40 Stat. at L. 217, chap. 30, Comp. Stat. § 10,212a, Fed. Stat. Anno. Supp. 1918, p. 120]. Preliminary to indicating the special offenses, we may say that the indictment charges that at the dates mentioned therein the Philadelphia Tageblatt and the Philadelphia Sonntagsblatt were newspapers printed and published in the German language in Philadelphia by the Philadelphia Tageblatt Association, a Pennsylvania corporation of which defendants were officers; Peter Schaefer being president, Vogel treasurer, Werner chief editor, Darkow managing editor, and Lemke business manager.

That on the dates mentioned in the indictment the United States was at war with the Imperial German Government, and the defendants "knowingly, wilfully, and unlawfully" "caused to be printed, published, and circulated in and through" one or other of those newspapers, false reports and statements of certain news items or despatches purporting to be from foreign places, or otherwise violated the Espionage Act through editorials or other published matter.

In count one the charge is that the intent was "to promote the success of the enemies of the United States; to wit, the said Imperial German Government."

In counts two, three, and four the charge is the obstruction of the "recruiting and enlistment service of the United States, to the injury of the United States."

In count five the purpose of publication is charged to be the making of false reports and statements with intent to promote the success of the enemies of the United States.

In counts six, seven, and eight there are charges of intent to like purpose.

Count nine charges a conspiracy entered into by defendants, to be executed through the agency of the two [469] newspapers, for the purpose (a) to make false reports and statements with intent to interfere with the military and naval operations and success of the United States and to promote the success of its enemies; (b) to cause insubordination, disloyalty, and mutiny in the military and naval forces of the United States; (c) to obstruct the recruiting and enlistment service of the United States. And there were specifications in support of the charges.

Demurrers were opposed to the indictment, which stated in detail the insufficiency of the indictment to constitute offenses. The demurrers were overruled, the court considering that the grounds of attack upon the indictment could be raised at the trial.

The defendants were then arraigned and pleaded not guilty, and, when called for trial, moved for a severance, urging as the reason that the courts had ruled that defendants, when tried jointly, must join in "their challenge to jurors." Counsel in effect said they contested the ruling, and considered the statute upon which it was based to be "in derogation of the individual's rights, guaranteed to him by the Constitution."

Other grounds for severance were urged, but the court denied the motion, and to the ruling each of the defendants excepted. In fortification of the motion for severance, at the selection of the jury, counsel, in succession for each defendant, challenged particular jurors peremptorily, expressing at the same time the acceptance by the other defendants of the challenged jurors. After ten such challenges had been

made, counsel interposed a peremptory challenge to other jurors in behalf of all of the defendants, stating as reasons that they "collectively" were not "bound by what their codefendants may have done with respect to any particular juror, and that, therefore, they are still within their rights." The court denied the challenge, ruling that, under the provisions of the act of Congress, "all the defendants will be deemed a single party, [470] and ten challenges having been exercised in the aggregate, the right of challenge is exhausted."

Defendants excepted and the trial proceeded, resulting in a verdict as follows: Schaefer and Vogel guilty on count nine only; Werner on counts one, two, four, and nine; Darkow on one, three, five, six, and nine; Lemke on count nine only.

Motions for arrest of judgment and for a new trial were made and overruled, and defendants were sentenced to various terms of imprisonment.

The case is here upon writ of error directly to the district court, as involving constitutional questions.

It is conceded that the constitutionality of the Espionage Act has been sustained (Sugarman v. United States, 249 U. S. 182, 63 L. ed. 550, 39 Sup. Ct. Rep. 191), but the constitutionality of the Act of March 3, 1911, chapter 231, § 287 [36 Stat. at L. 1166, Comp. Stat. § 1264, 5 Fed. Stat. Anno. 2d ed. p. 1078], by which several defendants may be treated as one party for the purpose of peremptory challenges, is attacked. Its constitutionality is established by Stilson v. United States, decided November 10, 1919, 250 U. S. 583, 63 L. ed. 1154, 40 Sup. Ct. Rep. 28.

The other assignments of error are: (1) The government failed to prove the charge of making false statements as the same was made in the indictment, and that therefore the court erred in refusing to instruct the jury to acquit upon the counts charging the offense. (2) "In passing upon the question of falsity of the despatches as published by appellants, and in passing upon any other questions which are a matter of public knowledge and general information," the court erred in instructing the jury that "they had a right to call upon the fund of knowledge which was in their keeping." (3) The court erred in refusing to instruct the jury to render a verdict of not guilty upon all of the counts in case of each of the defendants.

Assignments one and three may be considered together. They both depend upon an appreciation of the evidence, [471] although assignment one is more particular as to the offense charged. But neither can be discussed without a review of the evidence, and a detailed estimation of its strength, direct and inferential. That, however, is impossible, as the evidence occupies over three hundred pages of the record, and counsel have not given us an analysis or compendium of it, but have thrust upon us a transcript of the stenographer's notes of the trial which, counsel for the government aptly says, "presents" of the case "a picture of a certain sort, but it is a picture which is constantly out of focus, being either larger than the reality or smaller." However, we have accepted the labor it imposed, and have considered the parts of the evidence in their proper proportions and relation, and brought them to an intelligible focus, and are of opinion that the court rightfully refused the requested instructions except as to the defendants Schaefer and Vogel. As to them we do not think that there was substantial evidence to sustain the conviction. They were acquitted, we have seen, of all the individual and active offenses, and found guilty only on the ninth count—the charge of conspiracy.

The second assignment of error is somewhat confusedly expressed. It, however, presents an exception to the charge of the court as to what the jurors were entitled to consider as matters of public knowledge and general information. Counsel apparently urge against the charge that it submitted all the accusations of the indictment to the proof of the public knowledge and general information that the jurors possessed. The charge is not open to the contention, and, as discussion is precluded except through a consideration of the instructions in their entirety, we answer the contention by a simple declaration of dissent from it, based, however, we may say, on a consideration of the instructions as a whole, not in fragments, detached and isolated from their explanations and qualifications. Counsel at the trial attempted [472] to assign to the charge the generality they now assert, and it was rejected.

It is difficult to reach or consider the particulars of counsel's contention, the foundation of which seems to be that the indictment charged the falsification of the "despatches," and that, therefore, the government must prove the falsification of them. What counsel mean by

"falsification" is not easy to represent, they conceding there was proof that "the articles which were published differ from the articles in the papers from which they were copied," but contending that no evidence was offered of what was contained in the original despatches of which the publications purported to be copies. And again counsel say: "The falsity, as it has been called, which was proven against the defendants, was that the articles which were published differed from the articles in the papers from which they were copied." The charge and proof, therefore, were of alterations,—giving the "despatches" by a change or characterization a meaning that they did not originally bear,—a meaning that weakened the spirit of recruiting and destroyed or lessened that zeal and animation necessary or helpful to raise and operate our armies in the then pending war. And there could be no more powerful or effective instruments of evil than two German newspapers organized and conducted as these papers were organized and conducted.

Such being the situation, and the defendants having testified in their own behalf, and having opportunity of explanation of the changes they made of the articles which they copied, the court instructed the jury as follows: "In passing upon this question of falsity, and in passing upon this question of intent, and in passing upon, of course, the question of whether or not we are at war, you are permitted to use your general knowledge. I will withdraw the reference to the 'intent,' but in passing upon the question of the falsity of these publications, in passing upon the question [473] whether we are at war, and in passing upon any other questions which are in like manner a matter of public knowledge and of general information, you have the right to call upon the fund of general information which is in your keeping."

The criticism counsel make of the charge is that "without any proof whatsoever he [the judge] permitted them [the jury] to apply their general knowledge in determining whether the despatches published by the defendants contained false statements." Indeed, counsel go further, and insist that the charge gave to the jury an unlimited right to use any general information at their disposal in reaching their verdict. The charge itself refutes such sweeping characterization. Nor is it justified. The court said: "The real offense with which these defendants are charged is in putting out these false statements. They received them from a source. That source purported to be the report of a despatch, and the evidence in this case would seem to direct your minds in at least some of these instances, perhaps in many of them, to just where the report of the despatch appeared. They took that report as it came to them, and the charge is, in plain words, that they garbled it, sometimes by adding something to it and sometimes by leaving things out, and sometimes by a change of words. But the substantial thing which you are to pass upon is, was the report or statement that they put out false? Was it wilfully and knowingly false? Was it put out thus falsified with the intent to promote the success of the enemies of the United States?" In other words, the minds of the jurors were directed to the gist of the case, which was despatches received and then changed to express falsehood, to the detriment of the success of the United States, and the fact and effect of change the jurors might judge of from the testimony as presented, and "from the fund of information which was in" their "keeping." That is, from the fact of the source [474] from which the despatches were received, from the fact of war, and what was necessary for its spirited and effective conduct, and how far a false cast to the despatches received was depressing or detrimental to patriotic ardor. See Stilson v. United States, supra.

This disposes of the case on the exceptions which are argued. Exceptions one and two are specific and we have discussed them. Exception three is general and involves not only the points we have discussed and selected by counsel for discussion, but involves besides every other objection to the instructions and the sufficiency of the evidence, in all the aspects they can be viewed and estimated.

And as being within its comprehension we are confronted with a contention that the indictment and conviction are violative of the freedom of speech and of the press protected by the Constitution of the United States. The contention is a serious one, and, in its justification, it is urged that the power of Congress to interfere with the freedom of speech and of the press must be judged by an exercise of reason on the circumstances. Therefore, in justice to the tribunal be-

low, indeed, to ourselves, we must give attention to the contention.

It is not very susceptible of measurement. It is difficult to separate, in view of the contentions that are made, a judgment of the law from a judgment of conviction under the law, and keep free from confusing considerations. Free speech is not an absolute right, and when it or any right becomes wrong by excess is somewhat elusive of definition. However, some admissions may be made. That freedom of speech and of the press are elements of liberty all will acclaim. Indeed, they are so intimate to liberty in everyone's convictions—we may say feelings—that there is an instinctive and instant revolt from any limitation of them either by law or a charge under the law, and judgment must be summoned against the impulse that might condemn [475] a limitation without consideration of its propriety. But, notwithstanding this instant jealousy of any limitation of speech or of the press, there is adduced an instance of oppression by the government, and, it is said, to hold that publications such as those in this case "can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities."

If there be such practice, this case is not concerned with it. The assertion of its existence, therefore, we are not called upon to consider, as there is nothing before us to justify it. Therefore, putting it aside and keeping free from exaggerations, and alarms prompted by an imagination of improbable conditions, we bring this case, as it should be brought, like other criminal cases, to no other scrutiny or submission than to the sedate and guiding principles of criminal justice. And this was the effort of the trial court, and was impressed on the jury.

The court drew the attention of the jury to "the features which gave importance" to the case, but admonished it that they brought a challenge to a sense of duty and a sense of justice, and that while the enforcement of any law made a "strong call" upon court and jury, it could not "override the obligation of the other call, which is to make sure that no man is found guilty of a crime unless the evidence points to his guilt with the degree of certainty which the law requires."

Again, and we quote the words of the court, "No people is fit to be self-governed whose juries, chosen from among the great body of the people, cannot give due consideration to cases of this kind, and who cannot give to any defendant a fair and impartial trial, and render a just verdict. I know of no greater service an American citizen can perform for his country than to manifest by his attitude in cases of this kind that we are a people who [476] are governed by law, and who follow unswervingly that sense of justice which we should follow. Calling up just that spirit of justice, and breathing its very atmosphere, let us go to a consideration of the real merits of this case."

Did the admonition fulfil the duty of the court, or should the court, as it is intimated, have taken the case from the jury? To do so is sometimes the duty of a court, but it is to be remembered a jury is a tribunal constituted by law as the court is, its function has as definite sanction as that of the court, and it alone is charged with the consideration and decision of the facts of a case. And the duty is of such value as to have been considered worthy of constitutional provision and safeguard. See Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

If it be said this comment is but the expression of commonplaces, we reply that commonplaces are sometimes necessary to be brought forward lest earnestness or interest disregard them and urge too far the supervising power of the court, which, we repeat, is subordinate to that of the jury on questions of fact, and certainly "a rule of reason" cannot be asserted for it upon a mere difference in judgment. All the principles and practices of the law are the other way. May such rule be urged in an appellate court against the concurrence of court and jury in the trial court, or, if there be division in the appellate court, for which view may a satisfaction of the rule be asserted? Passing by presumptions that may be challenged, an answer in this case may be left to the facts. But first as to the law.

The indictment is based on the Espionage Act, and that was addressed to the condition of war, and its restraints are not excessive nor ambiguous.[1] We

[1] "Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause

need not enumerate [477] them. They were directed against conduct—speech or writings—that was designed to obstruct the recruitment or enlistment service, or to weaken or debase the spirit of our armies, causing them, it might be, to operate to defeat, and the immeasurable horror and calamity of it.

But, simple as the law is, perilous to the country as disobedience to it was, offenders developed, and, when it was exerted against them, challenged it to decision as a violation of the right of free speech assured by the Constitution of the United States. A curious spectacle was presented: that great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered Congress to declare war, and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime,—that it was an impregnable attribute of free speech upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge, and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention: we forestalled all shades of repetition of it, including that in the case at bar. Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249; Debs v. United States, 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252; Abrams v. United States, decided November 10, 1919, 250 U. S. 616, 63 L. ed. 1173, 40 Sup. Ct. Rep. 17. That, however, though in some respects retrospect, [478] is a pertinent introduction to the facts of the pending case.

The charges of the indictment were against certain articles or editorials in the newspapers published by defendants in German, and intended to be circulated in families and read by persons who understood that language. The articles were adapted to the situation, and, we may say, allusion and innuendo could be as effective as direct charge, and "coarse or heavy humor," when accompanied by sneering headlines and derision of America's efforts, could have evil influence. And such was the character of the article upon which count three of the indictment was based. It had the following headlines:

"Yankee Bluff."

"Professor Jenny Does Not Take the American Preparations for War Seriously."

"Ambassador Page Assures England That We Will Send Ten Million Men."

The following, with some other comments, was in the body of the article: "The army of ten million and the hundred thousand airships which were to annihilate Germany have proved to be American boasts, which will not stand washing. It was worthy of note how much the Yankees can yell their throats out without spraining their mouths. This is in accord with their spiritual quality. They enjoy a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words." Coarse, indeed, this was, and vulgar to us, but it was expected to produce, and, it may be, did produce, a different effect upon its readers. To them its derisive contempt may have been truly descriptive of American feebleness and inability to combat Germany's prowess, and thereby chill and check the ardency of patriotism and make it despair of success, and, in hopelessness, relax energy both in preparation and action. If it and the other articles, which we shall presently refer to, [479] had not that purpose, what purpose had they? Were they the mere expression of peevish discontent,—aimless, vapid, and innocuous? We cannot so conclude. We must take them at their word, as the jury did, and ascribe to them a more active and sinister purpose. They were the publications of a newspaper, deliberately prepared, systematic, always of the same trend, more specific in some instances, it may be, than in others. Their effect on the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offense,—their "intent" and "attempt," for those are the words of the

or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished. . . ." [Act of June 15, 1917, 40 Stat. at L. 219, chap. 30, Comp. Stat. § 10,212C, Fed. Stat. Anno. Supp. 1918, p. 120.]

law, and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny.

The article was preceded by one July 4, 1917, headed, "For the Fourth of July," in which it was declared that "the Fourth of July celebration, which has long been an empty formality, will this year become a miserable farce." England was represented as the enemy of the United States, carrying a hostility watchful of opportunity from the time of the Revolution through all crises until the United States "had become so strong that nothing could be undertaken against her." And further: "The ruling classes of England have always despised and hated the United States, and to-day, while they flatter them, they still cherish the same feeling toward them." The emphasis of a paragraph was given to the statement that "under Wilson's régime the United States" had "sprung to the side of England as its savior in time of need. They provided it with means to carry on the war and when that wasn't enough, they sprang into the war themselves. History will sometime pronounce its judgment upon this."

The aid so asserted to have been rendered to England by President Wilson was represented to have been in [480] opposition to the wishes of the people, expressed "by the unwillingness of their (the United States) young men to offer themselves as volunteers for the war. But it will not rest there. The call for peace will come from the masses and will demand to be heard. And the sooner the better. No blood has been shed yet, no hate or bitterness has yet arisen against Germany, who has never done this country any harm, but has sent millions of her sons for its upbuilding. The sooner the American people come to their senses and demand peace, the better and more honorable it will be for this country."

The animus of the article and the effect expected of it need no comment to display. It was followed, supplemented, we may say, and reinforced by another article July 7, 1917. It (the latter) had for headlines the words "Failure of Recruiting," and recruiting failed, was its representation, notwithstanding an "advertising campaign was worked at high pressure" and "all sorts of means were tried to stir up patriotism." Its further declaration was that "Germany was represented as a violator of all human rights and all international law, yet all in vain. Neither the resounding praises nor the obviously false accusations against Germany were of any avail. The recruits did not materialize." The cause was represented to be "that the American who was not a coward" did "not care to allow himself to be shot to satisfy British lust for the mastery of the world." And "the people instinctively recognized and felt" that "the pro-British policy of the government is an error, which can bring nothing but injury upon this country." It was then added that "the nation, therefore," was doing the only thing it could still do, "since its desires were not consulted at first." It refused "to take part."

The purpose is manifest, however the statements of the article may be estimated, whether as criminal means—violations of law,—or the exercise of free speech and of the [481] press. And its statements were deliberate and wilfully false, the purpose being to represent that the war was not demanded by the people, but was the result of the machinations of executive power, and thus to arouse resentment to it and what it would demand of ardor and effort. In final comment we may say that the article in effect justified the German aggressions.

We do not deem it necessary to adduce the other charges of the indictment. We may, however, refer to the plausibility of the excuse of the alteration of Senator La Follette's speech, and remark that it disappears when the speech is considered in connection with the articles that preceded and followed it. The alterations were, it is true, of two words only, but words of different import than those the Senator used. The Senator urged that the burden of taxation made necessary by the war be imposed upon those who might profit by the war, in order to relieve those who might suffer by it and be brought to "bread lines." The article changed the words to "bread riots;" that is, changed the expression of acceptance of what might come as a consequence of the war, to turbulent resistance to it, and thus giving the article the character of the others, with a definite illustration of the opposition to the war by a Senator and his prophecy of a riotous protest by the people. It will be recalled that in other articles the antagonism of the people to the war was declared, and in one of them it was

said that the war was commenced "under Wilson's régime" and "without their (the people's) consent."

In conclusion we may add that there are in the record what are called "intent" articles which supplement and emphasize the charges of the indictment, and it is to be remembered that defendants were witnesses and had the opportunity of explanation, and to preclude any misapprehension of the German originals or defect in their translation. And the jury could judge of the defendants by their presence.

[482] We have not deemed it necessary to consider the articles commented on with reference to the verdicts; the Abrams Case has made it unnecessary. On any count of which any defendant was convicted he could have been sentenced to twenty years' imprisonment. The highest sentence on any defendant was five years.

Further comment is unnecessary, and our conclusion is that the judgment must be affirmed as to Werner, Darkow, and Lemke, but reversed as to Schaefer and Vogel; as to them the case is remanded for further proceedings in accordance with this opinion.

So ordered.

Mr. Justice **Brandeis** delivered the following opinion, in which Mr. Justice **Holmes** concurred:

With the opinion and decision of this court reversing the judgment against Schaefer and Vogel on the ground that there was no evidence legally connecting them with the publication I concur fully. But I am of opinion that the judgments against the other three defendants should also be reversed because either the demurrers to the several counts should have been sustained, or a verdict should have been directed for each defendant on all of the counts.

The extent to which Congress may, under the Constitution, interfere with free speech, was in Schenck v. United States, 249 U. S. 47, 52, 63 L. ed. 470, 473, 39 Sup. Ct. Rep. 247, declared by a unanimous court to be this: "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

This is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the [483] exercise of good judgment; and to the exercise of good judgment, calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. The question whether, in a particular instance, the words spoken or written fall within the permissible curtailment of free speech, is, under the rule enunciated by this court, one of degree. And because it is a question of degree, the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited. The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error. In my opinion, no jury acting in calmness could reasonably say that any of the publications set forth in the indictment was of such a character or was made under such circumstances as to create a clear and present danger either that they would obstruct recruiting, or that they would promote the success of the enemies of the United States. That they could have interfered with the military or naval forces of the United States or have caused insubordination, disloyalty, mutiny, or refusal of duty in its military or naval services was not even suggested; and there was no evidence of conspiracy except the co-operation of editors and business manager in issuing the publications complained of.

The nature and possible effect of a writing cannot be properly determined by culling here and there a sentence and presenting it separated from the context. In making such determination, it should be read as a whole; at least, if it is short, like these news items and editorials. Sometimes [484] it is necessary to consider, in connection with it, other evidence which may enlarge or otherwise control its meaning, or which may show that it was circulated under circumstances which gave it a peculiar significance or effect. But no such evidence was introduced by the government.

The writings here in question must speak for themselves. Fifteen publications were set forth in the indictment; and others were introduced in evidence. To reproduce all of them would unduly prolong this opinion. Four are selected which will illustrate the several contentions of the government. That at least three of these four were deemed by it of special importance is shown by the fact that each of the three was made the subject of a separate count.

First: There were convictions on three counts of wilfully obstructing the recruiting and enlistment service. The conviction of the news editor of so obstructing rested wholly upon his having inserted the following reprint from a Berlin paper in the Tageblatt:

Yankee Bluff.

Professor Jenny Does Not Take the American Preparations for War Seriously.

Ambassador Page Assures England That We Will Send Ten Million Men.

London, Aug. 5.—Ambassador Page followed Lloyd George at Guild Hall in Plymouth, with a great speech. He declares there that the differences between England and the United States in former times were only of a superficial nature, and that both peoples are now united inseparably, to fight for freedom and against the hydra of militarism. He assures his hearers that the United States is ready for all sacrifices in order to end the war victoriously, and that if necessary it will send ten million men to France.

Berlin, Aug. 5.—In the "Täglishe Rundschau," Professor Jenny writes under the title "Americanism" as [485] follows:—Americans think in exaggerations and talk in superlatives. Even Ambassador Andrew White in his Memoirs falls into superlatives in comparatively insignificant cases. He speaks of them as the most important events of his life and maintains that certain people have made an indelible impression on him, whom others consider to be ordinary, average men.

The army of ten million men has dwindled to a voluntary army of 120,000; while the new conscripted army of 565,000 will not even be ready to begin drilling for the front in six months. The hundred thousand airships were reduced to 20,000 and then to 3,000, which the Americans hope to have ready for next summer if they find the right model for them. As for the thousands of ships that were to be sent across the ocean, America, six months after the declaration of war, has not yet decided whether they are to be wood or steel ships; so far not even the keel of one ship has been laid. It amounts to this, that now when the Americans can scrape some tonnage together, the troops are not ready, and when they have the troops ready, the tonnage will not be available.

The army of ten million and the hundred thousand airships which were to annihilate Germany, have proved to be American boasts which will not stand washing. It is worthy to note how much the Yankees can yell their throats out without spraining their mouths. This is in accord with their spiritual quality. They enjoy a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words.

But some fine day, if they do not stop their boasting and bluffing, it might happen to them that they get the lockjaw, for which there is no better relief than a good box on the ear. Moreover it is not to be assumed that the Americans are really in earnest with the war. No one would be surprised if they found a thousand and one excuses for taking no active part in the European War.

[486] It is not apparent on a reading of this article—which is not unlike many reprints from the press of Germany to which our patriotic societies gave circulation in order to arouse the American fighting spirit—how it could rationally be held to tend even remotely or indirectly to obstruct recruiting. But as this court has declared, and as Professor Chafee has shown in his "Freedom of Speech in War Time," 32 Harvard L. Rev. 932, 963, the test to be applied—as in the case of criminal attempts and incitements—is not the remote or possible effect. There must be the clear and present danger. Certainly men judging in calmness and with his test presented to them could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting. Compare United States v. Hall, 248 Fed. 150; United States v. Schutte, 252 Fed. 212; Von Bank v. United States, 165 C. C. A. 267, 253 Fed. 641; Balbas v. United States, 168 C. C. A. 229, 257 Fed. 17; Sandberg v. United States, 168 C. C. A. 593, 257 Fed. 643; Kammann v. United States, 170 C. C. A. 260, 259 Fed. 192; Wolf v. United

States, 170 C. C. A. 364, 259 Fed. 388, 391, 392.

Second: There were convictions on three counts of wilfully conveying false reports and statements with intent to promote the success of the enemies of the United States. The Tageblatt, like many of the smaller newspapers, was without a foreign or a national news service of any kind and did not purport to have any. It took such news usually from items appearing in some other paper theretofore published in the German or the English language. It did not in any way indicate the source of its news. The item, if taken from the English press, was, of course, translated. Sometimes it was copied in full; sometimes in part only; and sometimes it was rewritten; or editorial comment was added. The government did not attempt to prove that any statement made in any of the news items published in the Tageblatt was false in fact. Its evidence, [487] under each count, was limited to showing that the item as published therein varied in some particular from the item as it appeared in the paper from which it had been copied; and no attempt was made to prove the original despatch to the latter paper. The government contended that solely because of variation from the item copied it was a false report, although the item in the Tageblatt did not purport to reproduce an item from another paper, and in no way indicated the source of the news. Each of the three items following illustrates a different method by which the variation was effected:

1. The publication for which the news editor was convicted on the fifth count by reason of an addition to the item copied:

(The translation of the Tageblatt item as set forth in the indictment.)

Further Economies.

Amsterdam, September 2.—It has been reported here that permission to export the wheat and flour on the ships held in New York has been refused. Information to this effect is contained in an official proclamation of the latest cut in bread rations and of the need for economy which has reached the civil authorities. This document says: "We know now with certainty that we cannot count upon the import of breadstuffs from America and that we must strive to make our own provisions suffice. In initiated circles it is said that under no conditions can the new American proposal be accepted, and that the foodstuffs may rot before the ships will be unloaded."

(The original Tageblatt item as set forth in the indictment.)

Weitere Einschränkungen.

Amsterdam, 2. Sept. Es wird hier gemeldet, daß der Export von Weizen und Mehl auf den in New York zurückgehaltenen Schiffen verweigert wurde. Eine diesbezügliche Mittheilung ist in einer amtlichen Erklärung der jüngsten Brotrationen-Verringerung und der Aufforderung zur Einschränkung enthalten, welche den Gemeindebehörden zuging. In derselben heißt es: „Wir wissen nun bestimmt, daß wir auf die Einfuhr von Brotgetreide aus Amerika nicht rechnen können, und daß wir uns bemühen müssen, mit den eigenen Vorräthen auszukommen." — In eingeweihten Kreisen heißt es, daß man auf den neuen Vorschlag Amerikas unter keinen Umständen eingehen und das Getreide eher verfaulen lassen wird, als die Schiffe auszuladen.

[488] The falsification charged is said to consist in having added to the despatch which was copied from the Staatszeitung the words: "In initiated circles it is said that under no conditions can the new American proposal be accepted, and that the foodstuffs may rot before the ships will be unloaded." But it is obvious, upon comparing the English translation with the German original, that the defendant did no such thing. What occurred was this: The sentence referred to was not made a part of the despatch in the Tageblatt. It followed the despatch; it was not within the quotation marks; and was separated from it by a dash;—a usual method of indicating that what follows is comment or an addition made by the editor. In the English translation, as set forth in the indictment, this sentence, through some inadvertence of the government's translator or draftsman, was included as part of the despatch and brought with the quotation therein. Evidently both the jury and the trial judge failed to examine the German original.

2. One of the publications for which the news editor was convicted on the

first count because of an omission from the item copied:

Ready for the Fray?

St. Petersburg, September 7th.—The Russian Baltic fleet will defend Kronstadt and Reval, and through them the Russian capital itself. The commanders of the two fortresses have made this report to the provisional government. A large part of the Baltic fleet was under control of the Maximalists who hitherto have opposed Kerensky. The commanders of Sveaborg and Helsingfors have also telegraphed their assurance to the government that the Baltic fleet has expressed its willingness to offer desperate resistance, in case the Germans should make a naval attack upon the strongholds between Riga and the capital.

Investigation of the Fall of Riga.

The Russians devastated the land through which [439] they retreated from Riga in order to impede the German advance. Roads were broken up, bridges destroyed, and provisions burned. A special commission has been set up by Premier Kerensky to investigate the fall of Riga. As far as reports have so far been permitted to appear, it is established that only two regiments gave up their positions without fighting, and the others offered the attacking Germans bold resistance. The retreat was carried out in an orderly manner, in spite of pursuit by the German armies. The first of these, advancing along the coast in the region of Dunaburg, is apparently endeavoring to reach Berna, on the Gulf of Riga. The second German army is pressing along the Pskoff road to execute a turning movement, while the third is energetically pushing in a northeasterly direction against Ostroff. The Germans are showing signs of nervousness in advancing through this marshy lake-strewn country, which are increased by the Russian resistance.

The falsification here is said to consist in the omission from the end of the first paragraph of the following sentence, which appeared in the paper from which the item was taken: "From this it can be concluded that the fall of Riga has united the opposing political factions in Russia."

3. The publication for which the news editor was convicted on the sixth count because of the change of a word in the item copied:

War of the Rich.

Senator La Follette Thinks They Ought Not to Make a Cent of Profit.

Hot Fight in the Senate Over Increased Taxation of War Profits.

Washington, August 21.—Taxation of riches in such a measure that the burdens of the cost of the war will be taken from the shoulders of the poor man was recommended to-day in the Senate by Senator La Follette in a long speech. He declared that the proposed two billion [490] dollar bill as drawn up in the Senate's Committee on Financial Affairs is impractical because it covers less than 17 per cent of the war expenses of the first year and from this would result the necessity of issuing bonds for billions of dollars. Bonds, however, mean the same as an increased cost of living, and one of the consequences would be that next winter bread riots could be expected in the big cities. He recommended the acceptance of amendments by which further taxation of large incomes and big war profits would be effected, which would bring the total amount of the bill to about $3,500,000,000.

Senator La Follette declared that wealth had never, in any war, offered itself on the altar of patriotism. He attacked the proposed issue of bonds and prophesied that the Liberty bonds would eventually find their way into the hands of the rich, if they had not already done so. "But," he continued, "this is not all, for war, and principally the sale of bonds, leads inevitably to inflation. This raises prices and through that the cost of living for the great mass of people is raised. Reason and experience teach us that the policy of financing a war for the most part by borrowing the necessary money is in itself one of the worst financial burdens that war imposes upon men. But wealth is always a powerful factor in the government. It fattens on war loans and war contracts as well as on speculation, which is not wanting in time of war. Upon these grounds the rich are always in favor of war, and when they have succeeded in bringing on a war, they are often powerful enough with ministers of war and parliaments and congresses to force the maximum of loans and to reduce taxation to a minimum by every possible intrigue and argument.

"And that is the case with us in this war. Within thirty days after the declaration of war wealth had precipitated us into bond issues of unheard-of size. Morgan came to the city, the press urged it, the administration [491] commanded it, and Congress authorized the issue of five billions of untaxable government bonds and two billions of interest-bearing Treasury notes."

Senator La Follette attacked the program of the administration under which a new tax measure will be introduced next winter. "Of what use is the postponement?" he asked. "Whose interest is served if taxes on incomes and war profits are kept down and the masses are delivered over to the money lenders as security for an enormous and wickedly disproportionate issue of bonds?" He insisted that the policy of financing the war should at once be decided upon.

"To-day the way is clear," he explained; "hesitation to provide now for heavy taxes would not be a mistake, it would be something worse."

Senator La Follette reviewed the financial history of previous American wars. "We must not repeat such mistakes," he said; "it would be blind madness if we did not learn from the mistakes that were made in previous wars. A mistake that we make now may be fatal. It would certainly cost us untold millions of dollars and thousands upon thousands of lives, as by it we would prolong the war unnecessarily.

"As long as one man can be found who makes war profits, I am in favor of taking away in taxes such part of those profits as the government requires, and the government needs the whole of such profits before adding a penny to the taxation of people who are already staggering under heavy burdens by reason of the higher prices occasioned by the war. This may be a new principle in war financing, but it is the least that one can do for the mass of the people, and it is considerably less than simple justice would demand for them.

"The great mass of the people bear the costs of war, although they may not be directly taxed one dollar. The great mass of the people pay in higher prices and prolonged [492] hours of labor. They pay in service, not alone on the battle field, but wherever men and women work hard all day long. But more than all this, they pay the cost of war with their blood and their lives, and what is the greatest sacrifice of all, with the blood and lives of their loved ones.

"If bread lines are a familiar sight in every city in the land, as they undoubtedly will be if the present prices of the most necessary supplies for living hold firm during the coming winter, if cold and hunger become daily guests with thousands of families who, until now, have only known comfort, a condition which is certain to come about during the coming winter months if no help against the present level of prices can be found, then it is my opinion that the members of this Congress will do little enough if they come to realize that they are adding to the privations and pains of the mass of the people if they hesitate to place even a fairly moderate portion of the financial burden upon the rich."

Falsification is charged solely because the word "Brot-riots" (translated as "bread-riots") was used in the eleventh line of the article instead of the word "Brodreihen" (translated as "bread lines").

The act punishes the wilful making and conveying of "false reports and false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." Congress sought thereby to protect the American people from being wilfully misled to the detriment of their cause by one actuated by the intention to further the cause of the enemy. Wilfully untrue statements which might mislead the people as to the financial condition of the government and thereby embarrass it; as to the adequacy of the preparations for war or the support of the forces; as to the sufficiency of the food supply; or wilfully untrue statements or reports of military operations [493] which might mislead public opinion as to the competency of the Army or Navy or its leaders (see "The Relation between the Army and the Press in War Time," War College Publication, 1916); or wilfully untrue statements or reports which might mislead officials in the execution of the law, or military authorities in the disposition of the forces. Such is the kind of false statement, and the only kind which, under any rational construction, is made criminal by the act. Could the military and naval forces of the United States conceivably have been interfered with or the success of the enemy conceivably have been promoted by any of the three publications set forth above? Surely, neither the addi-

tion to the first, nor the omission from the second, constituted the making of a false statement or report. The mistranslation of "bread lines" in one passage of the third, if it can be deemed a false report, obviously could not have promoted the success of our enemies. The other publications set out in the indictment were likewise impotent to produce the evil against which the statute aimed.

Darkow, the news editor, and Werner, the editor, were each sentenced to five years in the penitentiary; Lemke, the business manager, to two years. The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts, but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance. To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act [June 15, 1917, 40 Stat. at L. 217, chap. 30, Comp. Stat. § 10,212a, Fed. Stat. Anno. Supp. 1918, p. 120] had in effect restored the crime of constructive treason.[1] To hold that such harmless additions [494] to or omissions from news items, and such impotent expressions of editorial opinion, as were shown here, can afford the basis even of a prosecution, will doubtless discourage criticism of the policies of the government. To hold that such publications can be suppressed as false reports subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities. Nor will this grave danger end with the passing [495] of the war. The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief.

Mr. Justice **Clarke**, dissenting:

On a single indictment, containing nine counts, five men, Peter Schaefer, Paul Vogel, Louis Werner, Martin Darkow, and Herman Lemke, were convicted and sentenced to the penitentiary for printing seventeen articles, in a German language newspaper, published at Philadelphia, between June 24 and September 17, 1917.

Schaefer was president and Vogel was treasurer of the company which published the paper, but their entire time was given to the service of labor unions, which had loaned money to the company, and they were given these official

[1] The presiding judge, in charging the jury, said of the act: ". . . its general purpose is to protect our military strength and efficiency, to protect ourselves against anything which would promote the success of our enemies by undermining our morale, lessening our will to win, or, as it is generally expressed, our will to conquer . . . creating divisions among our people . . .

"These acts which are prohibited are treasonable in the sense in which that word is used in the common speech of the people. Indeed, they may constitute legal treason as defined in some jurisdictions, but they are not treason against the United States, for the simple reason that there is a provision in our Constitution (which, of course, the acts of Congress follow) that treason against the United States—you will observe that it does not say 'treason generally,' but treason against the United States—shall consist only in making war upon them, or in adhering to their enemies, giving them aid and comfort, and there is another provision to the effect that no person shall be convicted of the crime of treason unless there are two witnesses to the same overt act, making, as you will see, it perfectly clear that mere words, whether published or not, as long as they are mere words, do not constitute the crime of treason, but they must be words uttered and published under such circumstances as to become deeds or acts in themselves, as 'words' may be. So that words, unless there is something to which they may attach, and unless the direct, natural, and reasonably to be expected consequences of them would be to aid the enemy, do not constitute the crime of treason. Every man will observe, however, that even mere words may be fraught with consequences which, although too remote to constitute the crime of treason, may nevertheless be words which are fraught with most awful consequences . . . and that therefore it is properly within the province of the law to prohibit . . . and make it a crime even to utter them. This is, in substance, what the law does. Congress could not call some mere words treason, because the Constitution prohibits it; but there is no constitutional limitation on the power of Congress to declare those things a crime against the law which Congress has done in this act. . . ."

positions for the purpose of enabling them to keep informed as to its business progress and the disposition of its earnings.

All the members of the court agree that there was no substantial evidence that Schaefer or Vogel were in any respect responsible for the publications complained of, and that as to them the judgment must be reversed.

In this conclusion I cordially concur, but I go further and am clear that a similar reversal should be entered as to Herman Lemke, who was convicted, as Schaefer and Vogel were, on only one of the nine counts of the indictment.

Lemke was given the sounding title of "business manager," but, as a matter of fact, he was a mere bookkeeper, [496] of a small business, with very limited authority. The newspaper led a precarious financial existence and Lemke's duties were restricted to making out and collecting bills for advertising and circulation, to paying some bills, and to turning over the remainder of the money, if any remained, to the treasurer, Vogel. Lemke himself and two or three other witnesses testified that he had nothing whatever to do with deciding what should be published in the newspaper, and that he never wrote for it excepting that, when a reporter was ill, he occasionally reported a concert. There was no evidence to the contrary.

On such a record it is very clear that a man holding such a position as Lemke held could not, and did not, have anything to do with determining what should be published in the paper. He had no more to do with the policy of the paper than a porter would have with determining the policy of a railroad company. In my judgment the failure of proof as to Lemke was as complete as it was to Schaefer and Vogel, and I cannot share in permitting him to be imprisoned in the penitentiary for a year for publications which he was powerless either to authorize or prevent.

A different case is made against Werner and Darkow. Werner was a writer of political editorials for the paper, and Darkow was the news editor. Werner was found guilty on four counts and not guilty on five. Darkow was found guilty on five counts and not guilty on four.

Two of the articles written, or caused to be published, by Werner, and one, or perhaps two, of those caused to be published by Darkow, were of a character such that they might have been fairly convicted of violating the act under which they were indicted, but none of these articles was included in count one, and only one of them was included in count nine, and with respect to this one article in count nine Werner was found not guilty when charged with its publication in count three. The charge of the court did [497] not distinguish between these really offending publications and the many innocent ones the publication of which was charged to be criminal, with the result that it failed to give such direction to the deliberations of the jury as I think every person accused of crime is entitled to have given.

The denial of separate motions to instruct the jury to render a verdict of not guilty as to Werner and Darkow on the first and ninth counts seems to me to constitute error so fundamental and pervasive as to render the entire trial unfair and unjust, to a degree which requires the granting of a new trial to each of them.

I shall state my reasons for this conclusion as briefly as I may.

The first count charges that the defendants "knowingly, wilfully, and unlawfully made and conveyed false reports and statements, with intent to promote the success of the enemy of the United States, to wit, the Imperial German Government."

The indictment and the record in general make it very plain that the district attorney, in framing the indictment, and during the trial, believed that the statute prohibiting the making and conveying of a false report and statement would be violated by the publication of any article which had been published elsewhere if, in the publication, it was changed, either by addition or omission, and this without any proof that the original publication was true and the second publication false, and seemingly without regard to whether or not the publication had any tendency to promote the success of the enemy. The trial court accepted this construction of the statute and submitted the first count to the jury on this theory of the law.

I cannot doubt that this was gravely erroneous, for the real purpose of the statute is to punish published, not suppressed, reports and statements, whether original or [498] copies, made with the intent to promote the success, and which were of a nature reasonably likely to promote the success, of the enemy of the United States, by discouraging our own people or encouraging the enemy.

The first of the thirteen false reports which it is charged in the first count

were published, is typical of the others, and will sufficiently explain my position.

It purported to be a despatch from London, and, translated, reads as follows:

The Crisis.

Is Advancing in Russia with Rapid Strides. The Coalition Government Will Probably Not Last Long.

Its Position in Foreign Affairs Is Condemned.

London, June 23.—The Petrograd correspondent of the Chronicle telegraphs to-day that a great crisis is in progress in Russia. (By that he means apparently that the unstable and weak coalition government will soon be got rid of. It seems to obey unwillingly the instructions of the Workmen's and Soldiers' Council to request the allies to revise their war aims. The workmen will not stand for this much longer. It is highly significant too that not a word has been reported for four days about the great general congress of the Workmen's and Soldiers' delegates; apparently because its behavior does not please the allies.)

The correspondent of the Chronicle quotes an extract from Maxim Gorky's newspaper "New Life" which says that people all over the world are to understand that Russia rejects the aggressive war aims of the allies. The correspondent sees a sign in this that the Socialists of Russia will not wait much longer.

Obviously there is nothing in this, as published, which could either discourage Americans or encourage the German enemy, and the indictment does not claim that there is. That which the indictment charges makes the publication criminally false is that there was omitted from it "a [499] proposal by Maxim Gorky that Russia wage a separate war against Germany." Thus the charge is that the crime consisted not in publishing something which tended to encourage German enemies, but in omitting to publish something which it is conceived might have discouraged them. It is not charged that what was printed was harmful, but that something which was unfavorable to Germany was not published.

This is characteristic of all but two of the thirteen articles in the first count, and to these, additions were made so inconsequential as in my judgment not to deserve notice.

It seems to me very clear that the statute could not be violated by publishing reports and statements harmless in themselves, and which were not shown to be false, merely because they had been published in a different form in another paper,—and this is the extent to which the proof in this case goes as to all of the publications complained of in the first count. Without more discussion, I am so clear that the requested instruction for the defendants Werner and Darkow as to the first count should have been granted, that I think the refusal of it entitles them to a new trial.

The ninth count consists of a charge of conspiracy on the part of the entire five defendants to wilfully make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States; with wilfully causing and attempting to cause insubordination, disloyalty, and mutiny in the military and naval forces of the United States, and with wilfully obstructing the recruiting and enlisting service of the United States by the publication of various articles referred to, but not quoted, in the indictment. With a single exception these articles are the same as those incorporated in the first count, and this exception purported to be a despatch from the Hague, giving the [500] reasons for the unrest in Germany, from which it is charged there was omitted a statement that one of the reasons for such unrest was the failure of the submarine campaign carried on by the German government. Even in this ninth count it is not charged that the publications as actually made were harmful, but it proceeds, as does the first count, upon the implication that they might have been more discouraging than they were to the German enemy if the omitted statements had been incorporated into them, and that for this reason they violated the statute. In other words, it comes to this: that the ninth count charges as criminal, not a conspiracy to publish the articles complained of, which were innocent, but a conspiracy to suppress certain statements which were published in other newspapers in connection with or as a part of the published articles, and which, it is argued, might have been harmful to the German cause if they had been published. It is impossible for me to think that the statute could be violated in any such manner.

It was clearly proved that the newspaper was so poor financially that it was not able to have telegraphic service of any character, and, morning paper that

it was, it filled its news columns with clippings from the evening papers of the night before and from early editions of the morning papers when it could procure them before its hour for going to press. It did not print nearly as many columns as the newspapers from which it obtained its news, and for this reason it was necessarily obliged to cut and condense, both headlines and the body of the articles. In several of the instances complained of these exigencies of publication plainly caused the omissions complained of.

Convinced as I am that the requested instructions to the jury that Werner and Darkow could not be found guilty on the first and ninth counts should have been given, and that the charge of the court was so utterly unadapted to the case as it would have been if they had been [501] given, as to be valueless or worse as a direction to the jury, I think that the least that can be done, in the interest of the orderly administration of justice, is to grant a new trial and let a new jury, properly instructed, pass upon the case.

I cannot see, as my associates seem to see, that the disposition of this case involves a great peril either to the maintenance of law and order and governmental authority, on the one hand, or to the freedom of the press, on the other. To me it seems simply a case of flagrant mistrial, likely to result in disgrace and great injustice, probably in life imprisonment for two old men, because this court hesitates to exercise the power, which it undoubtedly possesses, to correct, in this calmer time, errors of law which would not have been committed but for the stress and strain of feeling prevailing in the early months of the late deplorable war.

CARBON STEEL COMPANY, Petitioner,
v.
C. G. LEWELLYN, Collector of Internal Revenue.

(See S. C. Reporter's ed. 501–506.)

Internal revenue — munitions tax — who is manufacturer.

1. A corporation which, having contracted to manufacture and deliver to a foreign government high explosive shells, enters into contracts with others for the performance of the necessary operations to produce a completed shell, doing none of the work itself except the manufacturing of steel in bar form suitable for the shells, and the furnishing its subcontractors with certain other materials such as "transit plugs," "fixing screws," and "copper tubing," is subject to the munitions manufacturers' tax imposed by the Act of September 8, 1916, § 301, upon every person manufacturing projectiles, shells, or torpedoes of any kind.

Internal revenue — munitions tax — manufacturers and subcontractors.

2. The question whether the subcontractors of a corporation which has contracted to manufacture and deliver to a foreign government high explosive shells were correctly assessed under the munitions tax imposed by the Act of September 8, 1916, § 301, does not concern the corporation in its efforts to resist such a tax on the profits made by it.

[No. 535.]

Argued January 12, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Pennsylvania in favor of defendant in a suit to recover back a munition manufacturer's tax paid under protest. Affirmed.

See same case below, 169 C. C A. 473, 258 Fed. 533.

The facts are stated in the opinion.

Mr. H. V. Blaxter argued the cause, and, with Messrs. Frederick De C. Faust and Henry O'Neill, filed a brief for petitioner:

The statute levies an excise tax.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Knowlton v. Moore, 178 U. S. 41, 88, 44 L. ed. 969, 988, 20 Sup. Ct. Rep. 747; Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95.

The absence of any definition of "manufacturing" implies its ordinary acceptation.

Dewey v. United States, 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981; United States v. Wigglesworth, 2 Story. 369, Fed. Cas. No. 16,690.

The provisions of statutes levying taxes will not be extended by implication. In cases of doubt the construction will be in favor of the citizen.

Gould v. Gould, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; United States v. Watts, 1 Bond, 580, Fed. Cas. No. 16,653; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38.

55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189.

Assistant Attorney General **Frierson** argued the cause and filed a brief for respondent.

Mr. Justice **McKenna** delivered the opinion of the court:

Petitioner brought this action against Lewellyn, who is collector of internal revenue for the 23d district of Pennsylvania, to recover the sum of $271,062.62, with interest from December 29, 1917, paid to him, under a demand made by him as collector, for an excise tax assessed under § 301 of title III. of the Act of September 8, 1916 [39 Stat. at L. 781, chap. 463, Comp. Stat. § 6336¼b, Fed. Stat. Anno. Supp. 1918, p. 350], known as munition manufacturers' tax.

Petitioner made a verified return under protest, reciting its belief that the tax should be abated for the following reasons: (1) It, petitioner, did not manufacture munitions; (2) the munitions taxed were manufactured by certain independent contractors; (3) the profit derived by petitioner was from the sale of the munitions, not from their manufacture.

The tax was not abated and petitioner paid it under protest.

[**503**] The facts are stipulated: Petitioner, through its president, who went to England, entered into three contracts with the British government, dated, respectively, January 26, September 29, and October 7, 1915, for the manufacture and delivery f. a. s. New York, of a certain number of high explosive shells.

The work to complete the shells consisted of the following operations: (1) Obtaining suitable steel in bar form: (2) cutting or breaking the bars to proper length; (3) converting the bars or slugs into a hollow shell forging by means of a hydraulic press; (4) turning the shell upon a lathe to exact dimensions; (5) closing one end of the forging to form the nose of the shell; (6) drilling out the case of the shell and inserting a base plate; (7) threading the nose of the shell and inserting the nose bushing, and inserting in the nose bushing a wooden plug to protect the thread thereof; (8) cutting a groove around the circumference of the shell and inserting thereon a copper driving band, and turning the band to required dimensions; (9) varnishing, greasing, and crating the completed shell.

Petitioner was not equipped, nor did it have facilities, for doing any of the described work except the manufacture of steel suitable for the shells in bar form, and, therefore, to procure the manufacture of the shells, it, petitioner, did certain work and entered into numerous contracts in relation to the various steps in making a completed shell.

These steps are not necessary to give. The question in the case is not a broad one, and all of the details of the stipulation are not necessary to its decision. The essential elements of fact we have given, and whether they bring petitioner within the Munitions Tax Act we shall proceed to consider.

The act is as follows: "Sec. 301. (1) That every person manufacturing . . . ; (c) projectiles, shells, or torpedoes of any kind . . . ; or (f) any part of any of the articles mentioned . . . ; (c) . . . shall pay [**504**] for each taxable year, in addition to the income tax imposed by title I., an excise tax of twelve and one half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: . . ."

The act is explicit in its declaration; perplexity and controversy come over its application. One must be a "person manufacturing" to incur the tax, but who is to be regarded as such person in the sense of the act? Or, to put it another way, when is "manufacturing" (the word of the act) done, and when is "manufactured" (the word of the act) attained? In elucidation of the words, the specifications enumerate nine operations to produce a shell; that is, a completed shell (except for explosive charge and detonating device), such as petitioner contracted to deliver to the British government. And all of the operations are asserted to be necessary, and all must be performed seemingly by the same person in order that he may be designated as a "person manufacturing." We put aside, for the purpose of testing the contention, the provision of the act making a person manufacturing "any part of any of the articles mentioned" subject to "a tax."

The contention reduces the act to a practical nullity on account of the ease of its evasion. Besides, petitioner minimizes what it did. It was the contractor for the delivery of shells, made the profits on them, and the profits necessarily reimbursed all expenditures on account of the shells. It was such profits that the act was intended to reach,—profits made out of the war and taxed to defray the expense of the war. Or,

as expressed by the court of appeals, Congress "felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation." Petitioner, it is true, used the services of others, but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. And petitioner kept control [505] throughout, —never took its hands off, was at pains to express the fact, and retained its ownership of all of the materials furnished by it, and the completed shell belonged to it until delivered to the British government. And further, the steel furnished by it was advanced above a crude state—advanced to slugs. The nicking by an outside company we consider of no consequence, for after nicking they were redelivered to petitioner and by it "broken or separated" into slugs.

And petitioner supplied its respective subcontractors with other materials,— "transit plugs," "fixing screws," and "copper tubing." It is, of course, the contention of petitioner that this was furnishing, not *manufacturing*, and that the literal meaning of words can be insisted on in resistance to a taxing statute. We recognize the rule of construction, but it cannot be carried to reduce the statute to empty declarations. And, as we have already said, petitioner's contention would so reduce it. How universal must the manufacturing be? Will the purchase of an elemental part destroy it? And how subsidiary must the work of the subcontractor be not to relieve the contractor—take from him the character of a "person manufacturing"? And such is the tangle of inquiries we encounter when we undertake to distinguish between what a contractor to deliver a thing does himself, and what he does through others as subsidiary to his obligation.

It is, after all, but a question of the kind or degree of agency,—the difference, to use counsel's words, between "servants and general agents" and "brokers, dealers, middlemen, or factors." And this distinction between the agents counsel deems important, and expresses it another way, as follows: "'Every person manufacturing' means the person doing the actual work individually, or through servants or general agents, and that the ownership of the material worked upon does not alter this meaning of the word."

[506] We are unable to assent to this meaning of the word. It takes from the act a great deal of utility and makes it miss its purpose. Of course it did not contemplate that "person manufacturing" should use his own hands,—it contemplated the use of other aid and instrumentalities, machinery, servants, and general agents, availing thereby of the world's division of labor, but it contemplated also the world's division of occupations; and, in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and when availed of for profits, the latter could not thereby escape being taxed. And where, indeed, was the hardship of it? The tax was on profits and measured by them.

It is, however, alleged, and the stipulation shows, that the subcontracting companies paid a tax on their profits, and profits were testified to be the difference between what was paid the subcontracting companies for the work and their cost in doing it. And it thus appears, it is urged, that petitioner has been taxed upon the theory that it manufactured the shells, and the contracting companies "have been taxed for actually performing all the manufacturing necessary to complete the same shells."

But it is a sufficient answer to say that the tax here in issue is the tax on the profits of the petitioner, not on the profits of the subcontractors. The question whether such subcontractors were correctly assessed concerns them, and not the petitioner, who is resisting a tax on the profits actually made by him, and none other.

We consider further discussion unnecessary.

Judgment affirmed.

Mr. Justice Day and Mr. Justice Van Devanter dissent.

---

[507] WORTH BROTHERS COMPANY
v.
EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania.

(See S. C. Reporter's ed. 507-511.)

Internal revenue — munitions tax — who is manufacturer.

A corporation which, under inspection in behalf of the French government, made the steel for, and did the forging on, certain shell bodies under an order from another corporation, to enable the latter to carry out its contract with such government for certain explosive shells, was engaged in manufacturing a part of such

shells within the meaning of the Munition Manufacturers' Tax Act of September 8, 1916, imposing a tax upon the profits of every person manufacturing projectiles, shells, or torpedoes, or any part of any of such articles.

[No. 525.]

Argued January 8 and 9, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania in favor of a collector of internal revenue in a suit to recover back a munitions tax paid under protest. Affirmed.

See same case below, 169 C. C. A. 473, 258 Fed. 533.

The facts are stated in the opinion.

Mr. **A. H. Wintersteen** argued the cause, and, with Mr. William Wallace, Jr., filed a brief for petitioner:

The word "part" in taxing statutes means a practically finished part, where there are no qualifying words in the particular statute indicating to the contrary.

United States v. 31 Boxes, Fed. Cas. No. 16,465a; Re Blumenthal, 51 Fed. 76, affirmed in 4 C. C. A. 680, 1 U. S. App. 680; Treasury Dec. 16,977—G. A. 3405; United States v. Simon, 84 Fed. 154; Treasury Dec. 35,578—G. A. 7749; United States v. Reisinger, 36 C. C. A. 626, 94 Fed. 1002; Treasury Dec. 21,719—G. A. 4590; Treasury Dec. vol. 2, p. 615; Treasury Dec. 23,296 (Abstract No. 28,094) 1912; Hunter v. United States, 67 C. C. A. 343, 134 Fed. 361; Treasury Dec. vol. 29, p. 203, Treasury Dec. 35,697—G. A. 7771; Treasury Dec. vol. 29, p. 796, Abstract No. 38,991; Fenton v. United States, 1 Ct. Cust. App. 529; Redden & Martin v. United States, 5 Ct. Cust. App. 485, 489; Lyon & Healy v. United States, 4 Ct. Cust. App. 438; Richard & Co. v. United States, 4 Ct. Cust. App. 470.

Shell forgings are not parts of shells according to the Treasury Department's own definition of the word "part," in construing the Revenue Act, and certain of its rulings thereunder.

Treasury Dec. 2384, art. 13; Treasury Dec. 2547, Oct. 26, 1917.

The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed.

United States v. Potts, 5 Cranch, 284, 3 L. ed. 102; Lawrence v. Allen, 7 How. 785, 12 L. ed. 914; Hartranft v. Wiegmann, 121 U. S. 609, 615, 30 L. ed. 1012, 1014, 7 Sup. Ct. Rep. 1240; De Jonge v. Magone, 159 U. S. 562, 568, 40 L. ed. 260, 262, 16 Sup. Ct. Rep. 119; Anheuser-Busch Brewing Asso. v. United States, 207 U. S. 556, 562, 52 L. ed. 336, 338, 28 Sup. Ct. Rep. 204; Robertson v. Gerdan, 132 U. S. 454, 33 L. ed. 403, 10 Sup. Ct. Rep. 119; Worthington v. Robbins, 139 U. S. 337, 338, 35 L. ed. 181, 182, 11 Sup. Ct. Rep. 581; Saltonstall v. Wiebusch & Hilger, 156 U. S. 601, 603, 39 L. ed. 549, 550, 15 Sup. Ct. Rep. 476; United States v. Semmer, 41 Fed. 326; Tide Water Oil Co. v. United States, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837; Allen v. Smith, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446; Burdon Cent. Sugar Ref. Co. v. Payne, 167 U. S. 127, 42 L. ed. 105, 17 Sup. Ct. Rep. 754.

There is no difference in kind between customs duties and excise duties such as would, even a priori, require any different rule of interpretation to be applied in respect of the meaning of "parts" of shells.

Pacific Ins. Co. v. Soule, 7 Wall. 433, 445, 19 L. ed. 95, 99; Nicol v. Ames, 173 U. S. 509, 519, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; Patton v. Brady, 184 U. S. 608, 617, 618, 46 L. ed. 713, 718, 719, 22 Sup. Ct. Rep. 493; Flint v. Stone Tracy Co. 220 U. S. 107, 150, 151, 55 L. ed. 389, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The cases fixing the meaning of the word "part" in a composite article run back well into the era of the prevalence of the tariff-for-revenue doctrine; and in no case has it been asserted, or made a ratio decidendi, that the meaning of the word is to be determined with a view to having it fit in with any tariff-for-protection view.

See United States v. 31 Boxes, Fed. Cas. No. 16,465a.

In none of the later cases where the "part" has come up for interpretation, so far as we have been able to find, has anything but resort to the natural meaning of the word been found necessary to interpret it,—excepting only when Congress, in terms or by implication, in enacting any particular statute, divorced the word from its natural meaning. This is in accord with the settled doctrine that the natural, obvious meaning must be given to the language of a statute where there is no ambiguity in it.

Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 36, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508.

The lower court was wholly in error in its assumption that the meaning of the words we are considering was fixed for it exclusively in the customs tariff cases, and that that meaning must be confined to such cases.

Burdon Cent. Sugar Ref. Co. v. Payne, 167 U. S. 127, 42 L. ed. 105, 17 Sup. Ct. Rep. 754; Allen v. Smith, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446; Tide Water Oil Co. v. United States, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837; Re I. Rheinstrom & Sons Co. 207 Fed. 130; Central Trust Co. v. Lueders, 137 C. C. A. 387, 221 Fed. 838.

The essential inquiry was not what Congress intended, but what is the meaning of the words it used to express that intent; and that meaning, when ascertained, not only determines the meaning of the statute, but the congressional intent in enacting it.

United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 37, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981.

A tax is never imposed on a citizen when the question of his liability is at all doubtful.

Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 36, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508; 36 Cyc. 1114; Rice v. United States, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 912; Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397, 416, 48 L. ed. 496, 503, 24 Sup. Ct. Rep. 376; Benziger v. United States, 192 U. S. 38, 55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189; Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515; Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53.

Assistant Attorney General **Frierson** argued the cause and filed a brief for respondent.

Mr. Justice **McKenna** delivered the opinion of the court:

This writ is directed to the judgment of the circuit court of appeals, affirming a judgment of the district court for Lederer, to whom we shall refer as the collector, [**508**] in an action by petitioner to recover from him the sum of $74,857.07, exacted as a tax under § 301 of the Munitions Manufacturers Tax Act of September 8, 1916 (39 Stat. at L. 756, 781, chap. 463, Comp. Stat. §§ 6336a, 6336¼b, Fed. Stat. Anno. Supp. 1918, pp. 312, 350), and paid by petitioner under protest.

A detail of the imposition of the tax and the protest of its payment is unnecessary to give. The other facts were stipulated, and it appears from the stipulation that during the taxable year 1916 petitioner made the steel for and did the forging on certain shell bodies under an order from the Midvale Steel Company, to enable the latter company to carry out a contract which it had with the government of France for certain explosive shells. The steel was made and the forging done by petitioner in accordance with specifications required by the French government, which specifications were attached to the order from the Midvale Steel Company to petitioner.

Inspectors employed by the French government inspected the work done by petitioner, testing the steel and examining the forgings as they passed through petitioner's hands. "Up to the time when the blooms of steel were sliced partly through into billets, the right of inspection was exercised by the French inspector in chief, only whenever he desired to exercise it." Some forgings were rejected, and those that were passed were so marked by the inspector. This was done in accordance with an understanding between petitioner and the Midvale Steel Company.

The profits upon which the tax claimed in this case was imposed were derived solely from the sale of the above-mentioned forgings.

The Munitions Tax Act provides (§ 301, 39 Stat. at L. chap. 463, p. 781, Comp. Stat. § 6336¼b, Fed. Stat. Anno. Supp. 1918, p. 350) "that every person manufacturing" certain articles and "shells," "or any part of any of the articles mentioned . . . shall pay for each taxable year, in addition to the income tax imposed by title I., an excise tax of twelve and one half per centum upon the entire net [**509**] profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

The question is the simple and direct one whether a shell forging under the stipulation and evidence is "any part of a shell within the meaning of the law. The argument of petitioner, in support of a negative answer, is very diffuse, pressing considerations which we do not think are relevant.

A shell is a definite article, constituted

of materials of a certain kind and quality, assembled and fitted and finished so as to be adequate for its destructive purposes. Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is) of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part? We use the negative as an antithetic word does not occur to us to express that something necessary to constitute a thing is not a part of it. Petitioner surmounts the difficulty by contending that the law, by its words "any part" of any of the "shells," implies a substantially finished part, as related to the whole structure and to the purpose it is intended to subserve. "Otherwise," counsel say, "the word [part] loses all precision, and becomes equivalent to the words 'ingredient' or 'material composing or making up.'" And to sustain this view they take us to the dictionaries and to an enumeration of the processes to which the material must be subjected to make a forging, and those afterwards to prepare it for a shell. In this enumeration letters of the alphabet are used of which "A, B, C, and H represent stages of development of the material prior to delivery" to the Midvale Company, and "D, E, F, G, H, I, and K represent stages of development by Midvale after delivery to it." It is quite obvious, of course, as counsel declare, that the forgings were "not *shells;* since a shell is a composite structure of several parts." But [**510**] counsel go farther and say that the forgings were "not *parts of shells*, in any practical and legal sense, because their development was so far short—80 per cent—of the point where they could be related to or combined with any other component of the shell structure, that they could not satisfy any fair meaning of the shell body unit as entering into the composite shell as a whole." We give counsel's words because we fear that by paraphrasing them we might not correctly represent their meaning and contention.

We reject the contention. Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law. Besides, petitioner understates its work. It did not deliver raw material to the Midvale Company. Certain processes had been performed on the material, giving it a shape adapted to its destination. It was made cylindrical, hollow, with one end closed. It was rough, it is true, but an advance upon the raw material.

The progressive processes need not be enumerated. The lower courts have enumerated them, and the court of appeals, describing them, said that the "steps," "six in all," were progressive advances toward the chemical constituents, the shape and dimensions required by and essential to, the manufacturer of shells in compliance with the contract. And the court distinguished the effect of the steps. With the fourth, it was said, the inspection by the French government began; the fifth took the fluid metal [the result of the second step] from the possibility of use for general commercial purposes, and by a forging process restricted the steel to the field of use for shells. By the sixth step this forging "was drawn to a length, and to an inside and outside diameter which enabled the Midvale Company to carry forward its twenty-nine progressive steps, which the six" of [**511**] petitioner "were required to complete the manufactured shell of the contract."

"Manifestly," as counsel for the collector says, "the shell body was not completely manufactured by either of the companies which were engaged in its production," but "by the two acting together." And each, therefore, is liable for the profit it made, and judgment is affirmed.

Mr. Justice **Day** and Mr. Justice **Van Devanter** dissent.

FORGED STEEL WHEEL COMPANY, Petitioner,
v.
C. G. LEWELLYN, Collector of Internal Revenue.

(See S. C. Reporter's ed. 511-516.)

Internal revenue — munitions tax — who is manufacturer.

1. The net profits received by a corporation from the manufacture and sale of certain steel forgings to be used by the vendee to fulfil the latter's contract to supply a foreign government with high explosive shells are taxable under the Munition Manufacturer's Tax Act of September 8, 1916, imposing a tax on any person manufacturing shells or any part of them.

Appeal — review — question not raised below — reversal without remanding for new trial.

2. The action of a Federal circuit court of appeals in simply reversing the

judgment of a district court against a collector of internal revenue for the recovery back of certain taxes paid under protest without remanding the case for a new trial is not open to attack in the Federal Supreme Court where there was no objection made to that action and no request for a remand of the case,—especially where there was nothing to retry, the case involving only propositions of law.

[For other cases, see Appeal and Error, VIII. j, 9; IX. i, 1, b, in Digest Sup. Ct. 1908.]

[No. 526.]

Argued January 8 and 9, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Western District of Pennsylvania against a collector of internal revenue for the recovery back of a munition manufacturer's tax paid under protest. Affirmed.

See same case below, 169 C. C. A. 473, 258 Fed. 533.

The facts are stated in the opinion.

Messrs. **George B. Gordon** and **George Sutherland** argued the cause, and, with Messrs. William Watson Smith, James McKirdy, and S. G. Nolin, filed a brief for petitioner:

The intent of Congress is to be derived from the meaning of the words used to express that intent; and that meaning, when ascertained, not only determines the meaning of the statute, but the congressional intent in enacting it.

United States v. Goldenberg, 168 U. S. 95, 102. 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155; United States v. Fisher. 2 Cranch, 358, 386, 2 L. ed. 304, 313; The Abbotsford, 98 U. S. 440, 25 L. ed. 168; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 111, 18 L. ed. 518, 519; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981; McDermon v. Southern P. Co. 122 Fed. 675; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 36, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 516.

Revenue laws are designed to operate upon the public at large, and are supposed to use words in the sense belonging to the familiar language of common life and commercial business.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690.

In every case of doubt, such revenue statutes are construed most strongly against the government, and in favor of the subjects or citizens.

Gould v. Gould, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; United States v. Wigglesworth, supra; Rice v. United States, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 910; Partington v. Atty. Gen. L. R. 4 H. L. 122, 38 L. J. Exch. N. S. 205, 21 L. T. N. S. 370.

The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed.

United States v. Potts, 5 Cranch, 284, 287, 3 L. ed. 102, 103; Lawrence v. Allen, 7 How. 785, 794, 12 L. ed. 914, 917; Hartranft v. Wiegmann, 121 U. S. 609, 615, 30 L. ed. 1012, 1014, 7 Sup. Ct. Rep. 1240; De Jonge v. Magone, 159 U. S. 562, 568, 40 L. ed. 260, 262, 16 Sup. Ct. Rep. 119; Anheuser-Busch Brewing Asso. v. United States, 207 U. S. 556, 562, 52 L. ed. 336, 338, 28 Sup. Ct. Rep. 204; Re Blumenthal, 51 Fed. 76; United States v. Reisinger, 36 C. C. A. 626, 94 Fed. 1002; Hunter v. United States, 67 C. C. A. 343, 134 Fed. 361; Tide Water Oil Co. v. United States, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837; United States v. Semmer, 41 Fed. 326; Erhardt v. Hahn, 5 C. C. A. 99, 14 U. S. App. 117, 55 Fed. 273; Robertson v. Gerdan, 132 U. S. 454, 33 L. ed. 403, 10 Sup. Ct. Rep. 119; Worthington v. Robbins, 139 U. S. 337, 35 L. ed. 181, 11 Sup. Ct. Rep. 581; Saltonstall v. Wiebusch & Hilger, 156 U. S. 601, 39 L. ed. 549, 15 Sup. Ct. Rep. 476; Allen v. Smith, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446; Burdon Cent. Sugar Ref. Co. v. Payne, 167 U. S. 127, 42 L. ed. 105, 17 Sup. Ct. Rep. 754; Schoverling v. United States, 142 Fed. 302; Norris Bros. v. Com. 27 Pa. 494; Re First Nat. Bank, 81 C. C. A. 260, 152 Fed. 67, 11 Ann. Cas. 355; Central Trust Co. v. Lueders, 137 C. C. A. 387, 221 Fed. 829; Vandegrift v. United States, 164 Fed. 69; United States v. Thomas Prosser & Son, 177 Fed. 571; Bromley v. United States, 154 Fed. 400, 84 C. C. A. 458, 156 Fed. 958.

A part of a thing means a substantially finished part.

United States v. 31 Boxes, Fed. Cas. 16,465a; Vanacker v. Spalding, 24 Fed. 88; United States v. Simon, 84 Fed. 154; Grempler v. United States, 46 C. C. A, 557, 107 Fed. 688; Boker v. United States, 38 C. C. A. 114, 97 Fed. 205; Re Reiss Bros. & Co. Treasury Dec. 16,977, G. A. 3405, 1896, p. 273; Treasury Dec. 21,719, G. A. 4590; Treasury Dec. vol. 2, p. 615; Treasury Dec. 32,396;

of materials of a certain kind and quality, assembled and fitted and finished so as to be adequate for its destructive purposes. Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is) of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part? We use the negative as an antithetic word does not occur to us to express that something necessary to constitute a thing is not a part of it. Petitioner surmounts the difficulty by contending that the law, by its words "any part" of any of the "shells," implies a substantially finished part, as related to the whole structure and to the purpose it is intended to subserve. "Otherwise," counsel say, "the word [part] loses all precision, and becomes equivalent to the words 'ingredient' or 'material composing or making up.'" And to sustain this view they take us to the dictionaries and to an enumeration of the processes to which the material must be subjected to make a forging, and those afterwards to prepare it for a shell. In this enumeration letters of the alphabet are used of which "A, B, C, and H represent stages of development of the material prior to delivery" to the Midvale Company, and "D, E, F, G, H, I, and K represent stages of development by Midvale after delivery to it." It is quite obvious, of course, as counsel declare, that the forgings were "not *shells;* since a shell is a composite structure of several parts." But [**510**] counsel go farther and say that the forgings were "not *parts of shells,* in any practical and legal sense, because their development was so far short—80 per cent—of the point where they could be related to or combined with any other component of the shell structure, that they could not satisfy any fair meaning of the shell body unit as entering into the composite shell as a whole." We give counsel's words because we fear that by paraphrasing them we might not correctly represent their meaning and contention.

We reject the contention. Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law. Besides, petitioner understates its work. It did not deliver raw material to the Midvale Company. Certain processes had been performed on the material, giving it a shape adapted to its destination. It was made cylindrical, hollow, with one end closed. It was rough, it is true, but an advance upon the raw material.

The progressive processes need not be enumerated. The lower courts have enumerated them, and the court of appeals, describing them, said that the "steps," "six in all," were progressive advances toward the chemical constituents, the shape and dimensions required by and essential to, the manufacturer of shells in compliance with the contract. And the court distinguished the effect of the steps. With the fourth, it was said, the inspection by the French government began; the fifth took the fluid metal [the result of the second step] from the possibility of use for general commercial purposes, and by a forging process restricted the steel to the field of use for shells. By the sixth step this forging "was drawn to a length, and to an inside and outside diameter which enabled the Midvale Company to carry forward its twenty-nine progressive steps, which the six" of [**511**] petitioner "were required to complete the manufactured shell of the contract."

"Manifestly," as counsel for the collector says, "the shell body was not completely manufactured by either of the companies which were engaged in its production," but "by the two acting together." And each, therefore, is liable for the profit it made, and judgment is affirmed.

Mr. Justice **Day** and Mr. Justice **Van Devanter** dissent.

FORGED STEEL WHEEL COMPANY, Petitioner,
v.
C. G. LEWELLYN, Collector of Internal Revenue.

(See S. C. Reporter's ed. 511–516.)

Internal revenue — munitions tax — who is manufacturer.

1. The net profits received by a corporation from the manufacture and sale of certain steel forgings to be used by the vendee to fulfil the latter's contract to supply a foreign government with high explosive shells are taxable under the Munition Manufacturer's Tax Act of September 8, 1916, imposing a tax on any person manufacturing shells or any part of them.

Appeal — review — question not raised below — reversal without remanding for new trial.

2. The action of a Federal circuit court of appeals in simply reversing the

judgment of a district court against a collector of internal revenue for the recovery back of certain taxes paid under protest without remanding the case for a new trial is not open to attack in the Federal Supreme Court where there was no objection made to that action and no request for a remand of the case,—especially where there was nothing to retry, the case involving only propositions of law.

[For other cases, see Appeal and Error, VIII. j, 9; IX. i, 1, b, in Digest Sup. Ct. 1908.]

[No. 526.]

Argued January 8 and 9, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Western District of Pennsylvania against a collector of internal revenue for the recovery back of a munition manufacturer's tax paid under protest. Affirmed.

See same case below, 169 C. C. A. 473, 258 Fed. 533.

The facts are stated in the opinion.

Messrs. **George B. Gordon** and **George Sutherland** argued the cause, and, with Messrs. William Watson Smith, James McKirdy, and S. G. Nolin, filed a brief for petitioner:

The intent of Congress is to be derived from the meaning of the words used to express that intent; and that meaning, when ascertained, not only determines the meaning of the statute, but the congressional intent in enacting it.

United States v. Goldenberg, 168 U. S. 95, 102. 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155; United States v. Fisher. 2 Cranch, 358, 386, 2 L. ed. 304, 313; The Abbotsford, 98 U. S. 440, 25 L. ed. 168; Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 111, 18 L. ed. 518, 519; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981; McDermon v. Southern P. Co. 122 Fed. 675; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 36, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 516.

Revenue laws are designed to operate upon the public at large, and are supposed to use words in the sense belonging to the familiar language of common life and commercial business.

United States v. Wigglesworth, 2 Story, 369, Fed. Cas. No. 16,690.

In every case of doubt, such revenue statutes are construed most strongly against the government, and in favor of the subjects or citizens.

Gould v. Gould, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; United States v. Wigglesworth, supra; Rice v. United States, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 910; Partington v. Atty. Gen. L. R. 4 H. L. 122, 38 L. J. Exch. N. S. 205, 21 L. T. N. S. 370.

The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed.

United States v. Potts, 5 Cranch, 284, 287, 3 L. ed. 102, 103; Lawrence v. Allen, 7 How. 785, 794, 12 L. ed. 914, 917; Hartranft v. Wiegmann, 121 U. S. 609, 615, 30 L. ed. 1012, 1014, 7 Sup. Ct. Rep. 1240; De Jonge v. Magone, 159 U. S. 562, 568, 40 L. ed. 260, 262, 16 Sup. Ct. Rep. 119; Anheuser-Busch Brewing Asso. v. United States, 207 U. S. 556, 562, 52 L. ed. 336, 338, 28 Sup. Ct. Rep. 204; Re Blumenthal, 51 Fed. 76; United States v. Reisinger, 36 C. C. A. 626, 94 Fed. 1002; Hunter v. United States, 67 C. C. A. 343, 134 Fed. 361; Tide Water Oil Co. v. United States, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837; United States v. Semmer, 41 Fed. 326; Erhardt v. Hahn, 5 C. C. A. 99, 14 U. S. App. 117, 55 Fed. 273; Robertson v. Gerdan, 132 U. S. 454, 33 L. ed. 403, 10 Sup. Ct. Rep. 119; Worthington v. Robbins, 139 U. S. 337, 35 L. ed. 181, 11 Sup. Ct. Rep. 581; Saltonstall v. Wiebusch & Hilger, 156 U. S. 601, 39 L. ed. 549, 15 Sup. Ct. Rep. 476; Allen v. Smith, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446; Burdon Cent. Sugar Ref. Co. v. Payne, 167 U. S. 127, 42 L. ed. 105, 17 Sup. Ct. Rep. 754; Schoverling v. United States, 142 Fed. 302; Norris Bros. v. Com. 27 Pa. 494; Re First Nat. Bank, 81 C. C. A. 260, 152 Fed. 67, 11 Ann. Cas. 355; Central Trust Co. v. Lueders, 137 C. C. A. 387, 221 Fed. 829; Vandegrift v. United States, 164 Fed. 69; United States v. Thomas Prosser & Son, 177 Fed. 571; Bromley v. United States, 154 Fed. 400, 84 C. C. A. 458, 156 Fed. 958.

A part of a thing means a substantially finished part.

United States v. 31 Boxes, Fed. Cas. 16,465a; Vanacker v. Spalding, 24 Fed. 88; United States v. Simon, 84 Fed. 154; Grempler v. United States, 46 C. C. A, 557, 107 Fed. 688; Boker v. United States, 38 C. C. A. 114, 97 Fed. 205; Re Reiss Bros. & Co. Treasury Dec. 16,977, G. A. 3405, 1896, p. 273; Treasury Dec. 21,719, G. A. 4590; Treasury Dec. vol. 2, p. 615; Treasury Dec. 32,396;

Re United States Exp. Co. Treasury Dec. 35,697; Treasury Dec. vol. 29, p. 203; Re Benedict Weiss, Treasury Dec. vol. 29, p. 796; Parts of Musical Instruments, Treasury Dec. 27,207; Treasury Dec. 2547, p. 1208, § 6526; Treasury Dec. 2570, p. 1215; Fenton v. United States, 1 U. S. Ct. Cust. App. 532.

The government contends that the cases cited by us are not controlling because they are import duty cases, while this tax is not on the article, but on the business. There is no such distinction in the cases.

Allen v. Smith, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446; Burdon Cent. Sugar Ref. Co. v. Payne, 167 U. S. 127, 42 L. ed. 105, 17 Sup. Ct. Rep. 754; Box-Shook Case (Tide Water Oil Co. v. United States) 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837; Norris Bros. v. Com. 27 Pa. 494.

So, when the question has arisen under the bankruptcy or insolvency acts, as to whether the bankrupt was a manufacturer, identically the same test has been applied, and the same cases appealed to as authority.

Re First Nat. Bank, 81 C. C. A. 260, 152 Fed. 64, 11 Ann. Cas. 355; Re I. Rheinstrom & Sons Co. 207 Fed. 119; Central Trust Co. v. Lueders, 137 C. C. A. 387, 221 Fed. 829; Smith v. Rheinstrom, 13 C. C. A. 261, 31 U. S. App. 271, 65 Fed. 984; Erhardt v. Hahn, 5 C. C. A. 99, 14 U. S. App. 117, 55 Fed. 275.

Assistant Attorney General **Frierson** argued the cause and filed a brief for respondent.

Mr. Justice **McKenna** delivered the opinion of the court:

Action brought by petitioner against Lewellyn, collector of internal revenue in the district court for the western district of Pennsylvania, to recover the sum of $246,920.18, exacted from petitioner as a tax under the Munitions Tax Act, and paid under protest. Interest was also prayed from November 27, 1917.

The tax was exacted upon the ground (and it was so alleged) that that sum was the tax on the amount of the net profits received by petitioner from the manufacture and sale of certain steel forgings used in the manufacture of shells.

The circumstances said to show the tax to have been illegally exacted were detailed, of which there was denial by the collector, and, upon issues thus formed, the case was tried to a jury, which, in submission to the instructions of the court, returned a verdict for petitioner for the amount prayed. Judgment upon the verdict for the sum of $263,258.06 was reversed by the circuit court of appeals.

The court of appeals considered in one opinion this case and Carbon Steel Co. v. Lewellyn, 251 U. S. 501, ante, 375, 40 Sup. Ct. Rep. 283, and Worth Bros. Co. v. Lederer, 251 U. S. 507, ante, 377, 40 Sup. Ct. Rep. 282. The last two cases we have just decided, and we can immediately say, that if this case does not differ from them in its facts, it does not in principle. It will turn, as they did, upon the construction of § 301 of the Munitions Tax Act (Sept. 8, 1916, 39 Stat. at L. 756, 781, chap. 463, Comp. Stat. §§ 6336a, 6336½b, Fed. Stat. Anno. Supp. 1918, pp. 312, 350), which imposes upon "every person manufacturing . . . shells . . . , [513] *or any part*" [italics ours] of them, a tax of 12½ per cent for each taxable year upon the entire net profits received or accrued" for such years from the sale or disposition of the shells manufactured in the United States. The contention in the Worth Case was explicitly as it is in this case, that the words "any part," as used in the act, "means a substantially finished part;" a part, as there said, which has relation "to the whole structure and to the purpose it is intended to subserve." Here it is said, "The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed."

The reasoning of the Worth Case covers, therefore, the contention here, and rejects it, if, as we have said, the facts be the same, and we think they are. There are some circumstances of complexity, but they are easily resolved, and do not disturb the principle of decision. Of the facts, the court of appeals said:

"From the proofs it appears the British government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement, and inspection of the said government. To fulfil such shell contract the contractor made subcontracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor, rough steel shell forgings of the character provided in the contract as to chemical constituents, tensile strength, size, shape, etc. To fulfil its contract,

the Forged Steel Wheel Company either made, had made, or bought in the market, the grade of steel required. This steel was of a common commercial type known as rounds. These rounds it nicked and broke into 18-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within 2 inches of the other; by the second, the round was lengthened by drawing [514] it through three successive rings of a hydraulic press. The output of the Forged Steel Wheel Company's work was a hollow steel body or shell form, of a suitable composition, shape, and length from which to make, to the British government standards, the high explosive projectiles contracted for. The weight of such shell forms was about 170 pounds. To make this shell form suitable for use as a shell, the contractor, to whom the Forged Steel Wheel Company then delivered it, was required to dress, bore, and machine it down to 77 pounds; this required some 27 distinct and separate processes."

The court, after further comment on the facts, and consideration of the opinion of the district court and its reasoning, and distinguishing the cases that influenced the district court, said: "But in the excise law in question, Congress is dealing with the imposing of taxes as the main object, and with the work done as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial." And again, "The crucial question is not the quantum of the manufacture, measured by steps, but the fact of manufacture, resulting in profits."

Replying to the contention that the purpose of Congress was not to tax anyone but the manufacturer of a completed shell or the maker of a completed part of a shell, and that the forging of the Wheel Company was not a completed part of a shell, the court of appeals said: "It is manifest that, standing alone, the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words 'any part' to the restricted, specific, qualified term, 'any completed part.'"

The court of appeals also considered the rule of construction that statutes levying taxes should not be extended by implication beyond the clear import of their language and the cases from which the rule was deduced. The rule was conceded; its application to the present controversy was denied.

[515] For the sake of brevity we consider only the cited decisions of this court. They are Tide Water Oil Co. v. United States, 171 U. S. 210, 218, 43 L. ed. 139, 141, 18 Sup. Ct. Rep. 837; Worthington v. Robbins, 139 U. S. 337, 35 L. ed. 181, 11 Sup. Ct. Rep. 581; Anheuser-Busch Brewing Asso. v. United States, 207 U. S. 556, 52 L. ed. 336, 28 Sup. Ct. Rep. 204. These were customs cases and the statutes were given an interpretation on account of their purpose. They are, besides, not in point. In the first one the statute had the words "wholly manufactured," and, giving effect to them, it was decided that boxes made from shooks imported from Canada, though nailed together, and the sides of the boxes thus formed trimmed in the United States, were not boxes "wholly manufactured" in the United States, and entitled, upon being exported, to a drawback under a statute which allowed a drawback on articles "wholly manufactured of materials imported." The Worthington Case was cited. In that case a duty was exacted upon "white hard enamel" under a statute which imposed a duty of 25 per cent upon "watches, watch cases, watch movements, parts of watches, and watch materials." This on the contention of the government that the enamel fell under the head of "watch materials." The contention was rejected, it being conceded that the enamel was used for many other purposes than for watch faces. In the Anheuser-Busch Brewing Asso. Case a claim of drawback upon corks exported with bottled beer was rejected. The ground of the claim was that the corks were subjected to a special treatment to be fit for use, and hence it was contended that they should be regarded as "imported materials . . . used in the manufacture of articles manufactured or produced in the United States;" that is, the bottled beer. We replied: "A cork put through the claimant's process is still a cork." The cases, therefore, do not sustain the contention for which they are cited.

Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court, and not remanding the case for a new trial. There [516] was no objection made to that action, and no request for a remand of the case; and,

other cases are opposed to the contention, and that, besides, no constitutional rights can be based on the error of prior decisions.

Judgment affirmed.

SOUTH COAST STEAMSHIP COMPANY, Claimant of the Steamer "South Coast," Petitioner,[1]

v.

J. C. RUDBACH.

(See S. C. Reporter's ed. 519–523.)

Maritime liens — supplies — chartered vessel — authority of master.

A person furnishing supplies on the master's order to a chartered vessel in a domestic port on the credit of the vessel, although notified by the owner not to do so, is entitled to a lien therefor where the charter party recognizes that liens may be imposed by the charterers and allowed to stand for less than one month, in view of the Act of June 23, 1910, which in § 1 gives a maritime lien for such supplies, and in § 3 declares the presumption that a master appointed by a charterer has authority to procure them, although the statute further provides that nothing in it shall be considered to give a lien where the furnisher knew, or, by the exercise of reasonable diligence, could have ascertained, that, because of the terms of the charter party, or for any other reason, the person ordering necessaries was without authority to bind the vessel, since if the assumption expressed in the words of the charter party, that the charterers had power to authorize the master to impose the lien, was not equivalent to a grant of power, it at least cannot be taken to have excluded it, and there was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

[For other cases, see Maritime Liens, II. b, in Digest Sup. Ct. 1908.]

[No. 68.]

Submitted November 10, 1919. Decided March 1, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the Northern District of California, enforcing a maritime lien for supplies furnished to a vessel. Affirmed.

See same case below, 159 C. C. A. 302, 247 Fed. 84.

The facts are stated in the opinion.

Mr. Oliver Dibble submitted the cause for petitioner. Messrs. Marcel E. Cerf and C. H. Sooy were on the brief:

A charter party which requires the charter to furnish supplies to the ship withdraws from the master the power to order supplies for which the materialman, with knowledge of the terms of the charter party, may assert a lien.

The Columbus, 5 Sawy. 487, Fed. Cas. No. 3,044; The William Cook, 12 Fed. 919; The S. M. Whipple, 14 Fed. 354; The Secret, 15 Fed. 480; Stephenson v. The Francis, 21 Fed. 725; The Cumberland, 30 Fed. 449; The Ellen Holgate, 30 Fed. 125; The International, 30 Fed. 375; The Samuel Marshall, 49 Fed. 760, 54 Fed. 398; The Kate, 164 U. S. 458, 41 L. ed. 512, 17 Sup. Ct. Rep. 135; The Valencia, 165 U. S. 264, 272, 273, 41 L. ed. 710, 714, 17 Sup. Ct. Rep. 323; The Alvira, 63 Fed. 156; The Rosalie, 75 Fed. 29; The H. C. Grady, 87 Fed. 232; The Robert Dollar, 115 Fed. 219; The North Pacific, 40 C. C. A. 510, 100 Fed. 490; The George Farwell, 43 C. C. A. 373, 103 Fed. 882; The Underwriter, 119 Fed. 713; The Vigilant, 81 C. C. A. 371, 151 Fed. 751; Northwestern Fuel Co. v. Dunkley-Williams Co. 98 C. C. A. 95, 174 Fed. 121; The City of Milford, 199 Fed. 956; The Thomas W. Rodgers, 197 Fed. 772; The Ha Ha, 195 Fed. 1013; The J. Doherty, 207 Fed. 997; The Malola, 214 Fed. 308; The Francis J. O'Hara, Jr. 229 Fed. 312; The Oceana, 233 Fed. 139; The Yankee, 147 C. C. A. 593, 233 Fed. 925; The Oceana, 156 C. C. A. 508, 244 Fed. 80.

Surely it cannot be said that any principle of law justifies the conclusion that a man's property is not immune from lien for a debt which the man himself is not required to pay.

The Sarah Cullen, 45 Fed. 511; The Iris, 40 C. C. A. 301, 100 Fed. 109.

The provision of the charter party requiring the charterer to hold the owner harmless from any lien asserted for

[1] Reported by the Official Reporter under the title of "The South Coast."

Note.—As to maritime liens, generally —see notes to Blaine v. The Charles Carter, 2 L. ed. U. S. 636; The General Smith, 4 L. ed. U. S. 609; and The Palmyra, 6 L. ed. U. S. 531.

As to who is liable for repairs, necessaries, and supplies furnished to a ship —see notes to The General Smith, 4 L. ed. U. S. 609, and Harmony v. United States, 11 L. ed. 239.

As to what contracts will support a maritime lien—see note to Chamberlain Transp. Co. v. Ashland Nat. Bank, 70 L.R.A. 353.

supplies furnished the ship is not tantamount to a declaration by the owner that such liens may be asserted.

The Oceana, 156 C. C. A. 508, 244 Fed. 81; Northwestern Fuel Co. v. Dunkley-Williams Co. 98 C. C. A. 95, 174 Fed. 121; The City of Milford, 199 Fed. 956; The Gen. J. A. Dumont, 158 Fed. 312; The Golden Rod, 80 C. C. A. 246, 151 Fed. 6.

By the terms of the charter party in the instant case, and by virtue of the notice which the trial judge found was given libellant, the charterer and his masters and his agent, Mr. Mills, were without authority to bind the vessel for the supplies ordered by them respectively.

The Sarah Cullen, 45 Fed. 511; The Underwriter, 119 Fed. 713; The Francis J. O'Hara, Jr. 229 Fed. 312; The J. Doherty, 207 Fed. 997.

Supplies furnished a chartered vessel when she is not in distress or in such a position that the supplies availed the owner as well as the charterer cannot constitute the basis of a lien, if the vessel were held under a charter party which required the charterer to furnish the supplies, and the furnisher knew the facts, or, by the exercise of reasonable diligence, could have ascertained them. And this is so even though the supplies were furnished at the instance of the master.

The Columbus, 5 Sawy. 487, Fed. Cas. No. 3,044; The William Cook, 12 Fed. 919; The S. M. Whipple, 14 Fed. 354; The Ellen Holgate, 30 Fed. 125; The Cumberland, 30 Fed. 449; The Sarah Cullen, supra; The Samuel Marshalll, 49 Fed. 754; The Burton, 84 Fed. 999; The Tillie A. 84 Fed. 685; The H. C. Grady, 87 Fed. 232; The Algonquin, 88 Fed. 319; The North Pacific, 40 C. C. A. 510, 100 Fed. 490; The Underwriter, supra; The O. H. Vessels, 106 C. C. A. 107, 183 Fed. 562; The City of Milford, 199 Fed. 959; The J. Doherty, 207 Fed. 1001; The Francis J. O'Hara, Jr., supra; The Kate, 164 U. S. 458, 41 L. ed. 512, 17 Sup. Ct. Rep. 135; The Mary A. Tryon, 93 Fed. 221.

The charter party, by requiring the charterer to hold the owner harmless from liens upon the vessel, does not concede to the charterer the authority to bind the vessel for the supplies furnished by libellant.

Northwestern Fuel Co. v. Dunkley-Williams Co. 98 C. C. A. 95, 174 Fed. 121; The City of Milford, 199 Fed. 956; The Golden Rod, 80 C. C. A. 246, 151 Fed. 6; The Gen. J. A. Dumont, 158 Fed. 314.

There is no doubt that a charter party may be oral.

The J. Doherty, 207 Fed. 1001; The H. C. Grady, 87 Fed. 232; James v. Brophy, 18 C. C. A. 49, 33 U. S. App. 330, 71 Fed. 310.

The terms upon which the vessel was held are not those delineated literally by the charter party, but those which the parties believed and declared were the true facts of the case, as evidenced not alone by the formal charter party, but by all of their writings and transactions.

Raymond v. Tyson, 17 How. 53, 15 L. ed. 47; James v. Brophy, 18 C. C. A. 49, 33 U. S. App. 330, 71 Fed. 310; Barreda v. Silsbee, 21 How. 146, 16 L. ed. 86.

The presumption is that the legislature does not intend to change or modify the law beyond what it declares in express terms, or by unmistakable implication.

The Dredge A, 217 Fed. 617.

It is the general principle of the maritime law that an admiralty lien is to be construed stricti juris, and cannot be extended by construction, analogy, or inference.

The James T. Furber, 157 Fed. 129; Pratt v. Reed, 19 How. 359, 361, 15 L. ed. 660, 661; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; The Aurora, 194 Fed. 559; Vandewater v. Mills, 19 How. 82, 15 L. ed. 554; The Dixie, 236 Fed. 608.

The terms of a charter party or agreement for the sale of a vessel are not the exclusive source of a charterer's inability to create liens upon the vessel.

The Valencia, 165 U. S. 264, 272, 273, 41 L. ed. 710, 714, 17 Sup. Ct. Rep. 323; The Sinaloa, 209 Fed. 288; The Dredge A, 217 Fed. 628; The Yankee, 147 C. C. A. 593, 233 Fed. 925; Pratt v. Reed, 19 How. 359, 361, 15 L. ed. 660, 661; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; The Aurora, 194 Fed. 559; The James T. Furber, 157 Fed. 129; Vandewater v. Mills, 19 How. 82, 15 L. ed. 554; The Dixie, 236 Fed. 608; Taylor v. Weir, 110 Fed. 1005; The Havana, 87 Fed. 488; The Kate, 164 U. S. 463, 465, 471, 41 L. ed. 515, 516, 518, 17 Sup. Ct. Rep. 135; The Oceana, 233 Fed. 139.

Mr. **S. Hasket Derby** submitted the cause for respondent. Mr. Ira S. Lillick was on the brief:

A provision in a charter party requiring a charterer to pay the operating expenses is not equivalent, under the

recent statute, to a limitation in the charter party on the authority of the charterer to bind the vessel.

The Surprise, 64 C. C. A. 309, 129 Fed. 873; The Oceana, 233 Fed. 146; The Bud III. 250 Fed. 918.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a libel against the steamer South Coast, belonging to the claimant, a California corporation, and registered in San Francisco, for necessary supplies furnished in San Pedro, California. The answer denies the authority of the master to bind the steamer. The bare vessel at the time was under charter to one Levick, the contract stipulating that Levick was to pay all charges and to save the owner harmless from all liens or expenses that it might be put to in consequence of such liens. There was also a provision that the owner might retake the vessel in case of failure of Levick to discharge within thirty days any debts which were liens upon it, and another for surrender of the vessel free of all liens upon Levick's failure to make certain payments. When the supplies were ordered, representatives of the owner in San Pedro warned the libellant that the steamer was under charter, and that he must not furnish the supplies on the credit of the vessel. He replied that he would not furnish them in any other way, but the reply does not affect the case, because, by the terms of the charter, the master who ordered them, although appointed by the owner, was under the orders of Levick. It is agreed by both courts below that if the owner had power to prevent the attaching of a lien by its warning, it had done so. Both courts, however, held that the charter gave the master power to create the lien. 233 Fed. 327; 159 C. C. A. 302, 247 Fed. 84.

[**523**] By the Act of June 23, 1910, chap. 373, § 1, 36 Stat. at L. 604, Comp. Stat. § 7783, 9 Fed. Stat. Anno. 2d ed. p. 346, a maritime lien is given for such supplies, and by § 3 a presumption is declared that a master appointed by a charterer has authority from the owner to procure them. It is true that the act goes on that nothing in it shall be considered to give a lien where the furnisher knew, or, by the exercise of reasonable diligence, could have ascertained, that, because of the terms of a charter party, or for any other reason, the person ordering the necessaries was without authority to bind the vessel. But the authority of the owner to prohibit or to speak was displaced, so far as the charter went, by that conferred upon the charterers, who became owners pro hac vice, and therefore, unless the charter excluded the master's power, the owner could not forbid its use. The charter party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month, and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port, and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

Decree affirmed.

Mr. Justice McKenna, Mr. Justice Pitney, and Mr. Justice Clarke dissent.

[**524**] JOHN L. BATES, Receiver of the National City Bank of Cambridge, Massachusetts, Appt.,

v.

SUMNER DRESSER, Administrator of the Estate of Edwin Dresser, Deceased. (No. 155.)

SUMNER DRESSER, Administrator, Appt.,

v.

JOHN L. BATES, Receiver. (No. 156.)

JOHN L. BATES, Receiver, Appt.,

v.

JOHN M. DEAN, Executor of George W. Gale, Deceased, Sumner Dresser, and David A. Barber. (No. 157.)

JOHN L. BATES, Receiver, Appt.,

v.

CLARENCE ALFRED BUNKER and John D. Hardy, Administrators, etc., of George E. Richardson, Deceased. (No. 158.)

(See S. C. Reporter's ed. 524-532.)

National banks — liability of directors — negligence — defalcation by employee.

1. The directors of a national bank

Note.—Generally, as to liability of directors for defalcations by executive

did not necessarily so neglect their duty as to be answerable for thefts by a teller and bookkeeper, concealed by overcharging a depositor, or by a false addition in the column of drafts or deposits in the depositors' ledger, merely because they accepted the cashier's statement of liabilities and did not inspect the depositors' ledger, even after an apparent shrinkage in deposits, where the cashier's statements of assets always were correct, the semiannual examination by the government examiners had disclosed nothing pointing to malfeasance, and they were encouraged in their belief that all was well by the president, whose responsibility as executive officer, interest as large stockholder and depositor, and knowledge from long daily presence in the bank were greater than theirs.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

National banks — liability of president — negligence — defalcation by employee.

2. The failure of the president and executive officer of a national bank to heed hints and warnings, including an apparent shrinkage in deposits, which, however little they may have pointed to the specific facts of theft by a teller and bookkeeper, would, if accepted, have led to an examination of the depositors' ledger, thereby disclosing past and preventing future thefts, may be treated by the courts as such negligence as renders him liable for thefts by such employee after he had the warnings which should have led to steps that would have made fraud impossible, even though the precise form that the fraud would take hardly could have been foreseen.

[For other cases, see Banks, IV. e, 8, in Digest Sup. Ct. 1908.]

Interest — on judgment.

3. The reduced amount which a circuit court of appeals, modifying a decree of a district court, finds to be due the receiver of a national bank from its president on account of the latter's failure to guard against thefts by a teller and bookkeeper should bear interest from the date of the decree of the district court until the receiver interposed a delay by appealing to the Supreme Court from the decree of the circuit court of appeals.

[For other cases, see Interest, II. c, in Digest Sup. Ct. 1908.]

[Nos. 155, 156, 157, and 158.]

Argued January 19 and 20, 1920. Decided March 1, 1920.

FOUR APPEALS from the United States Circuit Court of Appeals for the First Circuit to review a decree which reversed in part a decree of the District Court for the District of Massachusetts in favor of the receiver of a national bank in a suit to charge its former president and directors with a loss of assets through the theft of an employee. Modified by allowing interest upon the sum found to be due, and, as so modified, affirmed.

See same case below, 162 C. C. A. 541, 250 Fed. 525.

The facts are stated in the opinion.

Mr. **Frank N. Nay** argued the cause, and, with Mr. William A. Kneeland, filed a brief for John L. Bates:

As a matter of law, the directors of a bank may be liable for their negligence in handling the affairs of the bank, even when no dishonesty is to be imputed to them.

1 Michie, Banks & Bkg. p. 267, ¶ 53; 1 Bolles, Bkg. p. 276; 1 Morawetz, Priv. Corp. § 561; 2 Thomp. Corp. 1909 ed. §§ 1268, 1273, 1274, 1276, 1277; Rankin v. Cooper, 149 Fed. 1010; Williams v. Brady, 221 Fed. 121; Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Preston v. Prather, 137 U. S. 610, 34 L. ed. 790, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599; Martin v. Webb, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 428; Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120; Ellis v. H. P. Gates Mercantile Co. 103 Miss. 560, 43 L.R.A.(N.S.) 982, 60 So. 649, Ann. Cas. 1915B, 526; Gibbons v. Anderson, 80 Fed. 345; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Cockrill v. Cooper, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 7; Robinson v. Hall, 12 C. C. A. 674, 25 U. S. App. 48, 63 Fed. 222.

Of course, technically, the directors of a national bank are not trustees, since they have no title to the assets of the bank; but the tendency of modern decisions has been to hold that they act in a fiduciary capacity. See Greenfield Sav. Bank v. Abercrombie, 211 Mass. 252, 39 L.R.A.(N.S.) 173, 97 N. E. 897,

officer or employee—see note to Besselieu v. Brown, 2 A.L.R. 867.

As to liability of bank for misappropriation of collections by its officers or employees—see note to Minnesota Mut. L. Ins. Co. v. Tagus State Bank, L.R.A. 1917A, 522.

As to liability of directors of bank for default or negligence of cashier—see note to Mason v. Moore, 4 L.R.A. (N.S.) 597.

As to care required of bank directors—see note to Swentzel v. Penn Bank, 15 L.R.A. 305.

As to interest on judgments—see note to Rockwell v. Butler, 17 L.R.A. 612.

Ann. Cas. 1913B, 420. See also the following cases on the general question of the fiduciary relationship between directors and their corporation:

Henry L. Doherty & Co. v. Rice, 186 Fed. 204; Asheville Lumber Co. v. Hyde, 172 Fed. 730; Canton Roll & Mach. Co. v. Rolling Mills Co. 93 C. C. A. 621, 168 Fed. 465; Field v. Western Life Indemnity Co. 166 Fed. 607; Singers-Bigger v. Young, 91 C. C. A. 510, 166 Fed. 82; Pepper v. Addicks, 153 Fed. 383; McCourt v. Singers-Bigger, 76 C. C. A. 73, 145 Fed. 103, 7 Ann. Cas. 287; Kessler & Co. v. Ensley Co. 129 Fed. 397; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; West v. Camden, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838; Woodstock Iron Co. v. Richmond & D. Extension Co. 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402; Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; Williams v. Brady, 221 Fed. 118, s. c. 232 Fed. 740; Klotz v. Pan-American Match Co. 221 Mass. 41, 108 N. E. 764, Ann. Cas. 1917D, 895.

An examination by officials of a department of the government does not relieve a corporation or concern examined from liability for negligence.

O'Connor v. Armour Packing Co. 15 L.R.A.(N.S.) 812, 85 C. C. A. 459, 158 Fed. 241, 14 Ann. Cas. 66; Ketterer v. Armour & Co. L.R.A.1918D, 798, 160 C. C. A. 111, 247 Fed. 921; Witters v. Sowles, 32 Fed. 764.

Ordinarily a by-law of a corporation has all the force of a requirement of statute law as regards the directors and officers of a corporation. By-laws are not trivial things, are binding on both directors and stockholders of a corporation, and are not to be disregarded.

9 C. J. pp. 1112, 1113; 7 C. J. pp. 586, 587, §§ 214, 218, and notes; Cockrill v. Cooper, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 13.

Where a man violates the law and another suffers as a result thereof, as stockholders and depositors did in this case, the sufferer has the right to hold the violator fully responsible. If this by-law is binding on the directors, the same rule should apply.

Parker v. Barnard, 135 Mass. 120, 46 Am. Rep. 450.

A neglect is not sanctioned by the fact that it has existed a long time and has become a part of the routine.

Minor v. Mechanics' Bank, 1 Pet. 69–72, 7 L. ed. 57, 58.

Interest should be allowed in this case.

Arnold v. Maxwell, 230 Mass. 445, 119 N. E. 776; De La Rama v. De La Rama, 241 U. S. 154, 60 L. ed. 932, 36 Sup. Ct. Rep. 518, Ann. Cas. 1917C, 411; Kneeland v. American Loan & T. Co. 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426; Illinois C. R. Co. v. Turrill, 110 U. S. 301, 28 L. ed. 154, 4 Sup. Ct. Rep. 5; Oelwerke Teutonia v. Erlanger, 248 U. S. 521, 63 L. ed. 399, 39 Sup. Ct. Rep. 180.

Mr. **Robert G. Dodge** argued the cause, and, with Messrs. Harold S. Davis, John B. Sullivan, Jr., Paul Dudley Dean, and Robert M. Morse, filed a brief for Sumner Dresser and John M. Dean:

The master alone saw and heard the witnesses, and therefore was in a much better position to reach a correct conclusion than were the judges. His report should obviously be given great weight.

Adamson v. Gilliland, 242 U. S. 350, 353, 61 L. ed. 356, 358, 37 Sup. Ct. Rep. 169; Tilghman v. Proctor, 125 U. S. 136, 149, 31 L. ed. 664, 668, 8 Sup. Ct. Rep. 894; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Camden v. Stuart, 144 U. S. 104, 118, 36 L. ed. 363, 368, 12 Sup. Ct. Rep. 585; Davis v. Schwartz, 155 U. S. 631, 636, 39 L. ed. 289, 291, 15 Sup. Ct. Rep. 237.

A liability of this kind should not be lightly imposed in the absence of any element of positive misfeasance.

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599; Spering's Appeal, 71 Pa. 20, 10 Am. Rep. 684; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; Overend & G. Co. v. Gibb, L. R. 5 H. L. 480, 42 L. J. Ch. N. S. 67; Foutz v. Miller, 112 Md. 458, 76 Atl. 1111; Citizens Bldg. Loan & Sav. Asso. v. Coriell, 34 N. J. Eq. 392; North Hudson Mut. Bldg. & L. Asso. v. Childs, 82 Wis. 476, 33 Am. St. Rep. 57, 52 N. W. 600; Bailey v. Babcock, 241 Fed. 501; Swentzel v. Penn Bank, 147 Pa. 140, 150, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

Unless there is some unusual reason for suspecting irregularities, the directors of a bank are under no obligation to examine or verify the books and accounts, and may rely upon the cashier's supervision of these matters.

Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; Re National Bank [1899] 2 Ch. 629, 68 L. J. Ch. N. S. 634, 48 Week. Rep. 99, 81 L. T. N. S. 363, 15 Times L. R. 517; Dovey v. Cory [1901] A. C. 477, 6 B. R. C. 179, 70 L. J. Ch. N. S. 753, 50 Week. Rep. 65, 85 L. T. N. S. 257, 17 Times L. R. 732, 8 Manson, 346; Land Credit Co. v. Fermoy, L. R. 5 Ch. 763, 23 L. T. N. S. 439, 18 Week. Rep. 1089; Grimwade v. Mutual Soc. 52 L. T. N. S. 409; London Financial Asso. v. Kelk, L. R. 26 Ch. Div. 107, 53 L. J. Ch. N. S. 1025, 50 L. T. N. S. 492; Re Denham, L. R. 25 Ch. Div. 752, 50 L. T. N. S. 523, 32 Week. Rep. 487; Préfontaine v. Grenier, Rap. Jud. Quebec, 15 B. R. 143; Savings Bank v. Caperton, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; Mason v. Moore, 73 Ohio St. 276, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240; Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403; Jones Nat. Bank v. Yates, 240 U. S. 541, 557, 60 L. ed. 788, 799, 36 Sup. Ct. Rep. 429.

Directors are entitled, in the absence of substantial evidence to the contrary, to proceed on the assumption that the bank's employees are honest, and not to subject them to a system of espionage.

Scott v. Depeyster, 1 Edw. Ch. 513; Briggs v. Spaulding, 141 U. S. 162, 35 L. ed. 674, 11 Sup. Ct. Rep. 921; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 590; Mason v. Moore, 73 Ohio St. 297, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240; Ricker v. Hall, 69 N. H. 592, 45 Atl. 556; Préfontaine v. Grenier [1907] A. C. 111, 76 L. J. P. C. N. S. 4, 95 L. T. N. S. 623, 23 Times L. R. 27, 13 Manson, 401.

In the absence of an express vote or well-established usage, the president of a national bank has no greater powers or responsibilities than the other directors, except as he is the presiding officer at meetings of the board and of the stockholders, and is charged by statute with certain specific duties which are of no consequence in this case. With relation to the other directors, the president is simply primus inter pares.

United States v. Britton, 108 U. S. 193, 197, 27 L. ed. 701, 702, 2 Sup. Ct. Rep. 526; Baird v. Bank of Washington, 11 Serg. & R. 415; Putnam v. United States, 162 U. S. 687, 713, 40 L. ed. 1118, 1128, 16 Sup. Ct. Rep. 923; Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 543, 104 Am. St. Rep. 879, 80 S. W. 601; First Nat. Bank v. Lucas, 21 Neb. 285, 31 N. W. 805; Montgomery Bank & T. Co. v. Walker, 181 Ala. 380, 61 So. 951.

On the other hand, the cashier of a bank is ordinarily its chief executive, and all matters connected with the details of its business, including the supervision of the employees and of the books, are properly intrusted to him.

Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 649, 19 L. ed. 1008, 1019; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 590; Baldwin v. Bank of Newbury, 1 Wall. 234, 240, 17 L. ed. 534, 535; Fleckner v. Bank of United States, 8 Wheat. 338, 360, 361, 5 L. ed. 631, 636; Security Sav. Bank v. Smith, 144 Iowa, 207, 122 N. W. 825; Arnold v. National Bank, 126 Wis. 366, 3 L.R.A. (N.S.) 580, 105 N. W. 828.

It is, of course, possible for the president of a bank to be made by the directors its executive head, and this is often the case with large banks in which the president devotes his whole time to the affairs of the bank, and receives a salary proportionate to the responsibilities thus assumed. But such a situation is to be sharply distinguished from the ordinary case of a small bank, whose president receives only a nominal compensation, if any, and is engaged primarily in other business.

5 Cyc. 463; Ex parte Rickey, 31 Nev. 100, 135 Am. St. Rep. 651, 100 Pac. 134; First State Bank v. Morton, 146 Ky. 294, 142 S. W. 694; Dunn v. Kyle, 14 Bush, 142; Prefontaine v. Grenier [1907] A. C. 101, 76 L. J. P. C. N. S. 4, 95 L. T. N. S. 623, 23 Times L. R. 27, 13 Manson, 401.

Whatever the measure of responsibility, neither Edwin Dresser nor any other director can be held liable for any damage not the proximate result of the acts or omissions complained of.

Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Chicago, B. & Q. R. Co. v. Gelvin, L.R.A.1917C, 983, 151 C. C. A. 90, 238 Fed. 14; Briggs v. Spaulding, 141 U. S. 132, 151, 35 L. ed. 662, 670, 11 Sup. Ct. Rep. 924; Wallach v. Billings, 277 Ill. 218, L.R.A.1918A, 1097, 115 N. E. 382;

Ann. Cas. 1913B, 420. See also the following cases on the general question of the fiduciary relationship between directors and their corporation:

Henry L. Doherty & Co. v. Rice, 186 Fed. 204; Asheville Lumber Co. v. Hyde, 172 Fed. 730; Canton Roll & Mach. Co. v. Rolling Mills Co. 93 C. C. A. 621, 168 Fed. 465; Field v. Western Life Indemnity Co. 166 Fed. 607; Singers-Bigger v. Young, 91 C. C. A. 510, 166 Fed. 82; Pepper v. Addicks, 153 Fed. 383; McCourt v. Singers-Bigger, 76 C. C. A. 73, 145 Fed. 103, 7 Ann. Cas. 287; Kessler & Co. v. Ensley Co. 129 Fed. 397; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; West v. Camden, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838; Woodstock Iron Co. v. Richmond & D. Extension Co. 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402; Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; Williams v. Brady, 221 Fed. 118, s. c. 232 Fed. 740; Klotz v. Pan-American Match Co. 221 Mass. 41, 108 N. E. 764, Ann. Cas. 1917D, 895.

An examination by officials of a department of the government does not relieve a corporation or concern examined from liability for negligence.

O'Connor v. Armour Packing Co. 15 L.R.A.(N.S.) 812, 85 C. C. A. 459, 158 Fed. 241, 14 Ann. Cas. 66; Ketterer v. Armour & Co. L.R.A.1918D, 798, 160 C. C. A. 111, 247 Fed. 921; Witters v. Sowles, 32 Fed. 764.

Ordinarily a by-law of a corporation has all the force of a requirement of statute law as regards the directors and officers of a corporation. By-laws are not trivial things, are binding on both directors and stockholders of a corporation, and are not to be disregarded.

9 C. J. pp. 1112, 1113; 7 C. J. pp. 586, 587, §§ 214, 218, and notes; Cockrill v. Cooper, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 13.

Where a man violates the law and another suffers as a result thereof, as stockholders and depositors did in this case, the sufferer has the right to hold the violator fully responsible. If this by-law is binding on the directors, the same rule should apply.

Parker v. Barnard, 135 Mass. 120, 46 Am. Rep. 450.

A neglect is not sanctioned by the fact that it has existed a long time and has become a part of the routine.

Minor v. Mechanics' Bank, 1 Pet. 69–72, 7 L. ed. 57, 58.

Interest should be allowed in this case.

Arnold v. Maxwell, 230 Mass. 445, 119 N. E. 776; De La Rama v. De La Rama, 241 U. S. 154, 60 L. ed. 932, 36 Sup. Ct. Rep. 518, Ann. Cas. 1917C, 411; Kneeland v. American Loan & T. Co. 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426; Illinois C. R. Co. v. Turrill, 110 U. S. 301, 28 L. ed. 154, 4 Sup. Ct. Rep. 5; Oelwerke Teutonia v. Erlanger, 248 U. S. 521, 63 L. ed. 399, 39 Sup. Ct. Rep. 180.

Mr. **Robert G. Dodge** argued the cause, and, with Messrs. Harold S. Davis, John B. Sullivan, Jr., Paul Dudley Dean, and Robert M. Morse, filed a brief for Sumner Dresser and John M. Dean:

The master alone saw and heard the witnesses, and therefore was in a much better position to reach a correct conclusion than were the judges. His report should obviously be given great weight.

Adamson v. Gilliland, 242 U. S. 350, 353, 61 L. ed. 356, 358, 37 Sup. Ct. Rep. 169; Tilghman v. Proctor, 125 U. S. 136, 149, 31 L. ed. 664, 668, 8 Sup. Ct. Rep. 894; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Camden v. Stuart, 144 U. S. 104, 118, 36 L. ed. 363, 368, 12 Sup. Ct. Rep. 585; Davis v. Schwartz, 155 U. S. 631, 636, 39 L. ed. 289, 291, 15 Sup. Ct. Rep. 237.

A liability of this kind should not be lightly imposed in the absence of any element of positive misfeasance.

Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599; Spering's Appeal, 71 Pa. 20, 10 Am. Rep. 684; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; Overend & G. Co. v. Gibb, L. R. 5 H. L. 480, 42 L. J. Ch. N. S. 67; Foutz v. Miller, 112 Md. 458, 76 Atl. 1111; Citizens Bldg. Loan & Sav. Asso. v. Coriell, 34 N. J. Eq. 392; North Hudson Mut. Bldg. & L. Asso. v. Childs, 82 Wis. 476, 33 Am. St. Rep. 57, 52 N. W. 600; Bailey v. Babcock, 241 Fed. 501; Swentzel v. Penn Bank, 147 Pa. 140, 150, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405.

Unless there is some unusual reason for suspecting irregularities, the directors of a bank are under no obligation to examine or verify the books and accounts, and may rely upon the cashier's supervision of these matters.

Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; Re National Bank [1899] 2 Ch. 629, 68 L. J. Ch. N. S. 634, 48 Week. Rep. 99, 81 L. T. N. S. 363, 15 Times L. R. 517; Dovey v. Cory [1901] A. C. 477, 6 B. R. C. 179, 70 L. J. Ch. N. S. 753, 50 Week. Rep. 65, 85 L. T. N. S. 257, 17 Times L. R. 732, 8 Manson, 346; Land Credit Co. v. Fermoy, L. R. 5 Ch. 763, 23 L. T. N. S. 439, 18 Week. Rep. 1089; Grimwade v. Mutual Soc. 52 L. T. N. S. 409; London Financial Asso. v. Kelk, L. R. 26 Ch. Div. 107, 53 L. J. Ch. N. S. 1025, 50 L. T. N. S. 492; Re Denham, L. R. 25 Ch. Div. 752, 50 L. T. N. S. 523, 32 Week. Rep. 487; Préfontaine v. Grenier, Rap. Jud. Quebec, 15 B. R. 143; Savings Bank v. Caperton, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; Mason v. Moore, 73 Ohio St. 276, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240; Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403; Jones Nat. Bank v. Yates, 240 U. S. 541, 557, 60 L. ed. 788, 799, 36 Sup. Ct. Rep. 429.

Directors are entitled, in the absence of substantial evidence to the contrary, to proceed on the assumption that the bank's employees are honest, and not to subject them to a system of espionage.

Scott v. Depeyster, 1 Edw. Ch. 513; Briggs v. Spaulding, 141 U. S. 162, 35 L. ed. 674, 11 Sup. Ct. Rep. 921; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 590; Mason v. Moore, 73 Ohio St. 297, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240; Ricker v. Hall, 69 N. H. 592, 45 Atl. 556; Préfontaine v. Grenier [1907] A. C. 111, 76 L. J. P. C. N. S. 4, 95 L. T. N. S. 623, 23 Times L. R. 27, 13 Manson, 401.

In the absence of an express vote or well-established usage, the president of a national bank has no greater powers or responsibilities than the other directors, except as he is the presiding officer at meetings of the board and of the stockholders, and is charged by statute with certain specific duties which are of no consequence in this case. With relation to the other directors, the president is simply primus inter pares.

United States v. Britton, 108 U. S. 193, 197, 27 L. ed. 701, 702, 2 Sup. Ct. Rep. 526; Baird v. Bank of Washington, 11 Serg. & R. 415; Putnam v. United States, 162 U. S. 687, 713, 40 L. ed. 1118, 1128, 16 Sup. Ct. Rep. 923; Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 543, 104 Am. St. Rep. 879, 80 S. W. 601; First Nat. Bank v. Lucas, 21 Neb. 285, 31 N. W. 805; Montgomery Bank & T. Co. v. Walker, 181 Ala. 380, 61 So. 951.

On the other hand, the cashier of a bank is ordinarily its chief executive, and all matters connected with the details of its business, including the supervision of the employees and of the books, are properly intrusted to him.

Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 649, 19 L. ed. 1008, 1019; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 590; Baldwin v. Bank of Newbury, 1 Wall. 234, 240, 17 L. ed. 534, 535; Fleckner v. Bank of United States, 8 Wheat. 338, 360, 361, 5 L. ed. 631, 636; Security Sav. Bank v. Smith, 144 Iowa, 207, 122 N. W. 825; Arnold v. National Bank, 126 Wis. 366, 3 L.R.A. (N.S.) 580, 105 N. W. 828.

It is, of course, possible for the president of a bank to be made by the directors its executive head, and this is often the case with large banks in which the president devotes his whole time to the affairs of the bank, and receives a salary proportionate to the responsibilities thus assumed. But such a situation is to be sharply distinguished from the ordinary case of a small bank, whose president receives only a nominal compensation, if any, and is engaged primarily in other business.

5 Cyc. 463; Ex parte Rickey, 31 Nev. 100, 135 Am. St. Rep. 651, 100 Pac. 134; First State Bank v. Morton, 146 Ky. 294, 142 S. W. 694; Dunn v. Kyle, 14 Bush, 142; Prefontaine v. Grenier [1907] A. C. 101, 76 L. J. P. C. N. S. 4, 95 L. T. N. S. 623, 23 Times L. R. 27, 13 Manson, 401.

Whatever the measure of responsibility, neither Edwin Dresser nor any other director can be held liable for any damage not the proximate result of the acts or omissions complained of.

Atchison, T. & S. F. R. Co. v. Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Chicago, B. & Q. R. Co. v. Gelvin, L.R.A.1917C, 983, 151 C. C. A. 90, 238 Fed. 14; Briggs v. Spaulding, 141 U. S. 132, 151, 35 L. ed. 662, 670, 11 Sup. Ct. Rep. 924; Wallach v. Billings, 277 Ill. 218, L.R.A.1918A, 1097, 115 N. E. 382;

checks for the amount he wanted, exchange checks with a Boston broker, get cash for the broker's check, and, when his own check came to the bank through the clearing house, would abstract it from the envelop, enter the others on his book, and conceal the difference by a charge to some other account or a false addition in the column of drafts or deposits in the depositors' ledger. He handed to the cashier only the slip from the clearing house that showed the totals. The cashier paid whatever appeared to be due and thus Coleman's checks were honored. So far as Coleman thought it necessary, in view of the absolute trust in him on the part of all concerned, he took care that his balances should agree with those in the cashier's book.

[528] By May 1, 1907, Coleman had abstracted $17,000, concealing the fact by false additions in the column of total checks, and false balances in the deposit ledger. Then for the moment a safer concealment was effected by charging the whole to Dresser's account. Coleman adopted this method when a bank examiner was expected. Of course when the fraud was disguised by overcharging a depositor it could not be discovered except by calling in the pass books, or taking all the deposit slips and comparing them with the depositors' ledger in detail. By November, 1907, the amount taken by Coleman was $30,100, and the charge on Dresser's account was $20,000. In 1908 the sum was raised from $33,000 to $49,671. In 1909 Coleman's activity began to increase. In January he took $6,829.26; in March, $10,833.73; in June, his previous stealings amounting to $83,390.94, he took $5,152.06; in July, $18,050; in August, $6,250; in September, $17,350; in October, $47,277.08; in November, $51,847; in December, $46,956.44; in January, 1910, $27,395.53; in February, $6,473.97; making a total of $310,143.02, when the bank closed on February 21, 1910. As a result of this the amount of the monthly deposits seemed to decline noticeably and the directors considered the matter in September, but concluded that the falling off was due in part to the springing up of rivals, whose deposits were increasing, but was parallel to a similar decrease in New York. An examination by a bank examiner in December, 1909, disclosed nothing wrong to him.

In this connection it should be mentioned that in the previous semiannual examinations by national bank examiners nothing was discovered pointing to malfeasance. The cashier was honest and everybody believed that they could rely upon him, although in fact he relied too much upon Coleman, who also was unsuspected by all. If Earl had opened the envelops from the clearing house, and had seen the checks, or had examined the deposit [529] ledger with any care, he would have found out what was going on. The scrutiny of anyone accustomed to such details would have discovered the false additions and other indicia of fraud that were on the face of the book. But it may be doubted whether anything less than a continuous pursuit of the figures through pages would have done so except by a lucky chance.

The question of the liability of the directors in this case is the question whether they neglected their duty by accepting the cashier's statement of liabilities and failing to inspect the depositors' ledger. The statements of assets always were correct. A by-law that had been allowed to become obsolete or nearly so is invoked as establishing their own standard of conduct. By that a committee was to be appointed every six months "to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank in a sound and solvent condition." Of course, liabilities as well as assets must be known to know the condition, and, as this case shows, peculations may be concealed as well by a false understatement of liabilities as by a false show of assets. But the former is not the direction in which fraud would have been looked for, especially on the part of one who, at the time of his principal abstractions, was not in contact with the funds. A debtor hardly expects to have his liability understated. Some animals must have given at least one exhibition of dangerous propensities before the owner can be held. This fraud was a novelty in the way of swindling a bank, so far as the knowledge of any experience had reached Cambridge before 1910. We are not prepared to reverse the finding of the master and the circuit court of appeals that the directors should not be held answerable for taking the cashier's statement of liabilities to be as correct as the [530] statement of assets always was. If he had not been negligent without their knowledge it

would have been. Their confidence seemed warranted by the semiannual examinations by the government examiner, and they were encouraged in their belief that all was well by the president, whose responsibility as executive officer, interest as large stockholder and depositor, and knowledge, from long daily presence in the bank, were greater than theirs. They were not bound by virtue of the office gratuitously assumed by them to call in the pass books and compare them with the ledger, and, until the event showed the possibility, they hardly could have seen that their failure to look at the ledger opened a way to fraud. See Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Warner v. Penoyer, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587. We are not laying down general principles, however, but confine our decision to the circumstances of the particular case.

The position of the president is different. Practically he was the master of the situation. He was daily at the bank for hours, he had the deposit ledger in his hands at times, and might have had it at any time. He had had hints and warnings in addition to those that we have mentioned,—warnings that should not be magnified unduly, but still that, taken with the auditor's report of 1903, the unexplained shortages, the suggestion of the teller, Cutting, in 1905, and the final seeming rapid decline in deposits, would have induced scrutiny but for an invincible repose upon the status quo. In 1908 one Fillmore learned that a package containing $150 left with the bank for safekeeping was not to be found, told Dresser of the loss, wrote to him that he could but conclude that the package had been destroyed or removed by someone connected with the bank, and in later conversation said that it was evident that there was a thief in the bank. He added that he would advise the president to look after Coleman, that he believed he was living at a pretty fast pace, and that he [531] had pretty good authority for thinking that he was supporting a woman. In the same year, or the year before, Coleman, whose pay was never more than $12 a week, set up an automobile, as was known to Dresser and commented on unfavorably to him. There was also some evidence of notice to Dresser that Coleman was dealing in copper stocks. In 1909 came the great and inadequately explained seeming shrinkage in the deposits. No doubt plausible explanations of his conduct came from Coleman and the notice as to speculations may have been slight, but, taking the whole story of the relations of the parties, we are not ready to say that the two courts below erred in finding that Dresser had been put upon his guard. However little the warnings may have pointed to the specific facts, had they been accepted, they would have led to an examination of the depositors' ledger, a discovery of past and a prevention of future thefts.

We do not perceive any ground for applying to this case the limitations of liability ex contractu adverted to in Globe Ref. Co. v. London Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754. In accepting the presidency Dresser must be taken to have contemplated responsibility for losses to the bank, whatever they were, if chargeable to his fault. Those that happened were chargeable to his fault, after he had warnings that should have led to steps that would have made fraud impossible, even though the precise form that the fraud would take hardly could have been foreseen. We accept with hesitation the date of December 1, 1908, as the beginning of Dresser's liability, but think it reasonable that interest should be charged against his estate upon the sum found by the circuit court of appeals to be due. It is a question of discretion, not of right (Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 539, 52 L. ed. 606, 609, 28 Sup. Ct. Rep. 367); but to the extent that the decree of the district court was affirmed (Kneeland v. American Loan & T. Co. 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426; De la Rama v. [532] De la Rama, 241 U. S. 154, 159, 60 L. ed. 932, 934, 36 Sup. Ct. Rep. 518, Ann. Cas. 1917C, 411), it seems to us just, upon all the circumstances, that it should run until the receiver interposed a delay by his appeal to this court (The Scotland, 118 U. S. 507, 520, 30 L. ed. 153, 156, 6 Sup. Ct. Rep. 1174). Upon this, as upon the other points, our decision is confined to the specific facts.

Decree modified by charging the estate of Dresser with interest from February 1, 1916, to June 1, 1918, upon the sum found to be due, and affirmed.

Mr. Justice McKenna and Mr. Justice Pitney dissent, upon the ground that not only the administrator of the president of the bank, but the other direc-

tors, ought to be held liable to the extent to which they were held by the district court (229 Fed. 772).

Mr. Justice **Van Devanter** and Mr. Justice **Brandeis** took no part in the decision.

FORT SMITH LUMBER COMPANY, Plff. in Err.,
v.
STATE OF ARKANSAS EX REL. JOHN D. ARBUCKLE, Attorney General.

(See S. C. Reporter's ed. 532–534.)

Constitutional law — due process of law — equal protection of the laws — double taxation.

1. The 14th Amendment to the Federal Constitution no more forbids double taxation than it does doubling the amount of the tax, short of confiscation or proceedings unconstitutional on other grounds.

[For other cases, see Constitutional Law, 292–336, 523–553, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — taxes — discrimination against corporation.

2. A state may, so far as the Federal Constitution is concerned, tax its own corporations in respect of the stock held by them in other domestic corporations, although unincorporated stockholders are exempt.

[For other cases, see Constitutional Law, 292–336, 523–553, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — taxes — discrimination against corporation.

3. Confining the recovery of back taxes to those due from corporations does not offend against the Federal Constitution.

[For other cases, see Constitutional Law, 292–336, 523–553, in Digest Sup. Ct. 1908.]

[No. 394.]

Submitted under the 20th Rule, January 5, 1920. Decided March 1, 1920.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Chancery Court of Sebastian county, in that state, for the recovery of certain back taxes alleged to be due from a corporation. Affirmed.

See same case below, 131 Ark. 40, 198 S. W. 702.

The facts are stated in the opinion.

Messrs. **Joseph M. Hill** and **Henry L. Fitzhugh** submitted the cause for plaintiff in error:

A taxing act which discriminates between properties on account of ownership violates the equality and due process clauses of the 14th Amendment.

State ex rel. Atty. Gen. v. Bodcaw Lumber Co. 128 Ark. 522, 194 S. W. 692; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity of the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation.

Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88.

The mode of assessment which requires a corporation to pay taxes upon corporate shares which have in them taxable value derived from ownership in shares of another corporation, which other corporation is by law required to separately assess and pay taxes upon the value in those shares, is duplicate taxation, inimical to the equality and due process clauses of the 14th Amendment.

Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. ed. 779, 36 Sup. Ct. Rep. 453; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Louisville & J. Ferry Co. v. Kentucky,

---

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On taxation of shares of stock and corporate assets as double taxation—see notes to East Livermore v. Livermore Falls Trust & Bkg. Co. 15 L.R.A. (N.S.) 952, and State Bd. v. People, 58 L.R.A. 589.

On constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

To say that the two taxes levied, one on the value of the capital stock of the Fort Smith Lumber Company, including in that value the value of the stock owned by the Lumber Company in the Railway Company and the Investment Company, are valid because a taxation of different persons, the Railway Company and the Investment Company already being taxed as such, serves to emphasize a plain disregard of the Constitution, which is construed by the supreme court of Arkansas as authorizing a taxation once, and only once, against the value inhering in the capital stock of any corporation.

Bank of California v. Richardson, 248 U. S. 476, 63 L. ed. 372, 39 Sup. Ct. Rep. 165.

Mr. John D. Arbuckle, in propria persona, Attorney General of Arkansas, and **Mr. George Vaughan** submitted the cause for defendant in error:

The general background, chronology of legislation, and the contemporaneous unrest of the times reflect and confirm the court's interpretation of the revenue laws of Arkansas as applicable to corporations.

Pike v. State, 5 Ark. 204; Hempstead, History of Arkansas, pp. 326, 334; Clayton, Aftermath of the Civil War in Arkansas, pp. 41, 44; St. Louis, I. M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; Huntington v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469; 5 Wilson, History of the American People, pp. 166 et seq.

Corporations are judicially recognized as a distinct and appropriate legislative class.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; 1 Fletcher, Cyc. Priv. Corp. p. 42.

In matters relating to its internal revenues a state's legislative discretion is supreme.

Hawley v. Malden, 232 U. S. 1, 58 L. ed. 447, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Corry v. Baltimore, 196 U. S. 467, 49 L. ed. 557, 25 Sup. Ct. Rep. 297; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

Holding companies occupy a peculiar legal status, and the "law of the case," as clearly pointed out (State ex rel. Atty. Gen. v. Bodcaw Lumber Co. 128 Ark. 505, 194 S. W. 692; Dallas County v. Home Fire Ins. Co. 97 Ark. 254, 113 S. W. 1113; Crossett Lumber Co. v. State, — Ark. —, 214 S. W. 43), and the construction thereof by the state court, are controlling upon Federal courts (Commercial Nat. Bank v. Chambers, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863; Webster v. Cooper, 14 How. 488, 14 L. ed. 510; Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 444, note).

In such a field the 14th Amendment is not an iron rule of equality.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Nicol v. Ames, 173 U. S. 509, 515, 516, 43 L. ed. 786, 791, 792, 19 Sup. Ct. Rep. 522; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; St. Louis, I. M. & S. R. Co. v. Worthen, 52 Ark. 529, 7 L.R.A. 374, 13 S. W. 254; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 475, 46 L. ed. 283, 286, 22 Sup. Ct. Rep. 176; Clement Nat. Bank v. Vermont, 231 U. S. 120, 134, 58 L. ed. 147, 155, 34 Sup. Ct. Rep. 31; Michigan C. R. Co v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459; Wright v. Louisville & N. R. Co. 195 U. S. 219, 49 L. ed. 167, 25 Sup. Ct. Rep. 16; Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705, affirmed in 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Giozza v. Tiernan, 148 U. S. 657, 659, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; Tucker, Const. pp. 862-864; Home Ins. Co. v. New York, 134 U. S. 594, 606, 33 L. ed. 1025, 1032, 10 Sup. Ct. Rep. 593.

Retrospective laws are not new, but are of recognized validity.

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; 37 Cyc. 1020; State ex rel. Moose v. Kansas City & M. R. & Bridge Co. 117 Ark. 606, 174 S. W. 248; League v. Texas, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475;

Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Weyerhaeuser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Citizens' Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171.

The constitutionality of the Arkansas amended act is not impaired because leveled at corporations only.

Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Dartmouth College v. Woodward, 4 Wheat. 518, 638, 4 L. ed. 629, 659; People ex rel. Bank of Watertown v. Assessors, 1 Hill, 620; Wilson v. United States, 221 U. S. 361, 382, 55 L. ed. 771, 780, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558; Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796; State ex rel. Norwood v. New York L. Ins. Co. 119 Ark. 328, 171 S. W. 871, 173 S. W. 1099; Cook, Corporation Problem, pp. 2, 3, 89, 106, 201, 203, 204; Wilgus, Federal Incorporation, 27 Am. Bar. Asso. Rep. pp. 694, 703; Mathews, Principles of American State Administration, pp. 253, 254; Hadley, Economics, pp. 93, 454, 504; Lyon, Principles of Taxn. pp. 118, 119; Industrial Commission of Washington, 1902, vol. 19, pp. 1065, 1067; New York v. Barker, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121.

The act itself does not impinge upon the 14th Amendment.

State ex rel. Moose v. Kansas City & M. R. & Bridge Co. 117 Ark. 606, 174 S. W. 248; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; 7 Fletcher, Cyc. Priv. Corp. § 4617; Williams v. Albany County, 22 Blatchf. 302, 21 Fed. 99, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244; Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; St. Louis, I. M. & S. R. Co. v. Paul, 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705, affirmed in 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; Chicago, R. I. & P. R. Co. v. State, 86 Ark. 412, 111 S. W. 456, affirmed in 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796; Aluminum Co. of North America v. Ramsey, 89 Ark. 522, 117 S. W. 568, affirmed in 222 U. S. 251, 56 L. ed. 185, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 251; Gallup v. Schmidt, 183 U. S. 300, 46 L. ed. 207, 22 Sup. Ct. Rep. 162; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Ozan Lumber Co. v. Union County Nat. Bank, 76 C. C. A. 218, 145 Fed. 344, 7 Ann. Cas. 390, reversed in 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; Hammond Packing Co. v. State, 81 Ark. 519, 126 Am. St. Rep. 1047, 100 S. W. 407, 1199, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; St. Louis Southwestern R. Co. v. State, 106 Ark. 321, 152 S. W. 110, 235 U. S. 350, 59 L. ed. 265, 35 Sup. Ct. Rep. 99; Stanton v. Baltic Min. Co. 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278; State ex rel. Moose v. Kansas City & M. R. & Bridge Co. 117 Ark. 606, 174 S. W. 248; State ex rel. Atty. Gen. v. Bodcaw Lumber Co. 128 Ark. 505, 194 S. W. 692; State ex rel. Atty. Gen. v. Ft. Smith Lumber Co. 131 Ark. 40, 198 S. W. 702, 138 Ark. 581, 211 S. W. 662.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by the state of Arkansas against the plaintiff in error, a corporation of the state, to recover back taxes alleged to be due upon a proper valuation of its capital stock. The corporation owned stock in two other corporations of the state, each of which paid full taxes, and it contended that it was entitled to omit the value of such stock from the valuation of its own. This omission is the matter in dispute. The corporation defends on the ground that individuals are not taxed for such stock or subject to suit for back taxes, and that the taxation is double, setting up the 14th Amendment. The case was heard on demurrer to the answer and agreed facts, and the statute levying the tax was sustained by the supreme court of the state.

The objection to the taxation as double may be laid on one side. That is a matter of state law alone. The 14th Amendment no more forbids double taxation than it does doubling the amount of a tax, short of confiscation or proceedings unconstitutional on other grounds. Davidson v. New Orleans, 96 U. S. 97, 106, 24 L. ed. 616, 620; Tennessee v. Whitworth, 117 U. S. 129, 136, 137, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 274, 35 Sup. Ct. Rep.

99. We are of opinion that it also is within the power of a state, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by them [534] in other domestic corporations, although unincorporated stockholders are exempt. A state may have a policy in taxation. Quong Wing v. Kirkendall, 223 U. S. 59, 63, 56 L. ed. 350, 352, 32 Sup. Ct. Rep. 192. If the state of Arkansas wished to discourage, but not to forbid, the holding of stock in one corporation by another, and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individu- with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the state to insert the distinction in the law.

The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the state. See New York v. Barker, 179 U. S. 279, 283, 45 L. ed. 190, 193, 21 Sup. Ct. Rep. 121. We have nothing to do with the supposed limitations upon the power of the state legislature in the Constitution of the state. Those must be taken to be disposed of by the decisions of the state court. As this case properly comes here by writ of error, an application for a writ of certiorari that was presented as a precaution will be denied.

Judgment affirmed.

Mr. Justice McKenna, Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissent.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

WILLIAM J. GEARY, Plaintiff in Error, v. ALICE GEARY. [No. 182.]

Error to state court—error or certiorari.

In Error to the Supreme Court of the State of Nebraska to review a decree which affirmed a decree of the District Court of Wayne County, in that state, for the support of certain minor children in a suit in which defendant set up as a defense a divorce decree of an Iowa court.

See same case below, 102 Neb. 511, — A.L.R. —, 167 N. W. 778.

Mr. T. M. Zink for plaintiff in error.

Mr. R. E. Evans for defendant in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

JOSLIN MANUFACTURING COMPANY, Plaintiff in Error, v. CITY OF PROVIDENCE et al. [No. 183]; SCITUATE LIGHT & POWER COMPANY, Plaintiff in Error, v. CITY OF PROVIDENCE et al. [No. 184]; and THERESA B. JOSLIN, Plaintiff in Error, v. CITY OF PROVIDENCE et al. [No. 185.]

Error to state court—final judgment.

Three Writs of Error to the Supreme Court of the State of Rhode Island to review its action in deciding certain constitutional questions certified to it by the Superior Court of Providence County, in that state.

See same case below, 41 R. I. 350, 103 Atl. 935.

Messrs. Robert H. McCarter, Francis I. McCanna, Alfred G. Chaffee, and J. Jerome Hahn for plaintiffs in error.

Messrs. Albert A. Baker and Elmer S. Chace for defendants in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; Coe v. Armour Fertilizer Works, 237 U. S. 413, 418, 59 L. ed. 1027, 1029, 35 Sup. Ct. Rep. 625; Bruce v. Tobin, 245 U. S. 18, 19, 62 L. ed. 123, 124, 38 Sup. Ct. Rep. 7; and see Collard v. Pittsburgh, C. C. & St. L. R. Co. 246 U. S. 653, 62 L. ed. 922, 38 Sup. Ct. Rep. 336. Petition for certiorari denied.

---

[536] J. W. THOMPSON, Plaintiff in Error, v. R. B. DAY, Sheriff and Tax Collector, et al. [No. 286.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the District Court for the Parish of East Baton Rouge, in that state, dismissing a suit to cancel an assessment for taxes levied on a wrecked steamship.

See same case below, 143 La. 1086, 8 A.L.R. 660, 79 So. 870.

Mr. William C. Marshall for plaintiff in error.

Mr. Harry P. Sneed for defendants in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; United Surety Co. v. American Fruit Product Co. 238 U. S. 140, 142, 59 L. ed. 1238, 1239, 35 Sup. Ct. Rep. 828; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

NATIONAL COUNCIL, JUNIOR ORDER UNITED AMERICAN MECHANICS, Plaintiff in Error, v. CATHERINE A. NICODEMUS. [No. 354.]

Error to state court—Federal question—service of process.

In Error to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the County Court for the City and County of Denver, in that state, in favor of plaintiff in a suit against a foreign insurance corporation.

Mr. George P. Steele for plaintiff in error.

Mr. Fred Herrington for defendant in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

RUDOLPH ERNEST TIEDEMANN, Plaintiff in Error, v. GERTRUDE ELEANOR TIEDEMANN. [No. 438.]

Error to state court—error or certiorari.

In Error to the Supreme Court of the State of New York in and for the County of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Supreme Court, Appellate Division, First Department, modifying, and affirming as modified, a judgment of the Supreme Court, Special Term, in favor of plaintiff in a suit upon a foreign divorce decree.

See same case below, in supreme court, 172 App. Div. 819, 158 N. Y. Supp. 851; in court of appeals, 225 N. Y. 709, 122 N. E. 892, reargument denied in 226 N. Y. 658, 123 N. E. 891.

Messrs. Homer S. Cummings and Nash Rockwood for plaintiff in error.

Messrs. Elijah N. Zoline and Louis J. Vorhaus for defendant in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

[537] BERT RUCKER, Plaintiff in Error, v. MARION A. TATLOW. [No. 59.]

Error to state court—Federal question—body execution.

In Error to the Supreme Court of the State of Kansas to review a judgment which affirmed an order of the District Court of Shawnee County, in that state, for the issuance of an execution against the person of a judgment debtor.

See same case below, 101 Kan. 26, — A.L.R. —, 165 Pac. 835.

Messrs. Joseph M. Stark and Joseph G. Waters for plaintiff in error.

Messrs. Lee Monroe and C. M. Monroe for defendant in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; United Surety Co. v. American Fruit Product Co. 238 U. S. 140, 142, 59 L. ed. 1238, 1239, 35 Sup. Ct. Rep. 828; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

EDWARD E. O'BRIEN et al., Plaintiffs in Error, v. PUBLIC SERVICE COMMISSION OF THE FIRST DISTRICT OF THE STATE OF NEW YORK, etc. [No. 69.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of New York in and for the County of Kings, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Supreme Court, Appellate Division, Second Department, confirming the report of appraisers in condemnation proceedings.

See same case below, in supreme court, 167 App. Div. 908, 151 N. Y. Supp. 766; in court of appeals, 217 N. Y. 61, 111 N. E. 658.

Mr. Robert H. Elder for plaintiffs in error.

Mr. William P. Burr for defendant in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Harding v. Wilson, 196 U. S. 78, 86, 49 L. ed. 394, 396, 25 Sup. Ct. Rep. 176.

(2) Thomas v. Iowa, 209 U. S. 258, 263, 52 L. ed. 782, 783, 28 Sup. Ct. Rep. 487; Bowe v. Scott, 233 U. S. 658, 664, 58 L. ed. 1141, 1145, 34 Sup. Ct. Rep. 769; and see El Paso Sash & Door Co. v. Carraway, 245 U. S. 643, 62 L. ed. 528, 38 Sup. Ct. Rep. 222.

MARGARET H. SANGER, Plaintiff in Error, v. PEOPLE OF THE STATE OF NEW YORK. [No. 75.]

Error to state court—Federal question.

In Error to the Court of Special Sessions of the City of New York for the County of Kings, State of New York, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Supreme Court, Appellate Division, Second Department, affirming a conviction in the trial court for selling articles and giving information for the purpose of preventing conception.

See same case below, in supreme court, 179 App. Div. 939, 166 N. Y. Supp. 1107; in court of appeals, 222 N. Y. 192, 118 N. E. 637.

Mr. Jonah J. Goldstein for plaintiff in error.

Mr. Harry G. Anderson for defendant in error.

November 17, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Sayward v. [538] Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Harding v. Wilson, 196 U. S. 78, 86, 49 L. ed. 394, 396, 25 Sup. Ct. Rep. 176.

(2) Thomas v. Iowa, 209 U. S. 258, 263, 52 L. ed. 782, 783, 28 Sup. Ct. Rep. 487; Bowe v. Scott, 233 U. S. 658, 664, 58 L. ed. 1141, 1145, 34 Sup. Ct. Rep. 769; and see El Paso Sash & Door Co. v. Carraway, 245 U. S. 643, 62 L. ed. 528, 38 Sup. Ct. Rep. 222.

GULF, COLORADO, & SANTA FE RAILWAY COMPANY et al., Plaintiffs in Error, v. GEORGE H. BOWLES. [No. 78.]

Federal courts—jurisdiction—suit arising under Federal statute.

In Error to the District Court of the United States for the Southern District of Texas to review a judgment dismissing, for want of jurisdiction, an action by a carrier to recover freight charges on an interstate shipment.

Messrs. Alexander Britton, J. W. Terry, and John G. Gregg for plaintiffs in error.

No appearance for defendant in error.

November 17, 1919. Per Curiam: Reversed upon the authority of Louisville & N. R. Co. v. Rice, 247 U. S. 201, 62 L. ed. 1071, 38 Sup. Ct. Rep. 429.

GEORGIA M. HOUSTON, Administratrix, etc., Plaintiff in Error, v. SEABOARD AIR LINE RAILWAY COMPANY. [No. 188.]

Error to state court—Federal question.

In Error to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Circuit Court of Norfolk County, in that state, sustaining a demurrer to the evidence in an action under the Federal Employers' Liability Act.

See same case below, 123 Va. 290, 96 S. E. 270.

Mr. R. Randolph Hicks for plaintiff in error.

Mr. G. Hatton for defendant in error.

November 24, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

MISSOURI PACIFIC RAILROAD COMPANY, Plaintiff in Error, v. G. W. BOLLIS. [No. 544.]

Error to state court—error or certiorari.

In Error to the Supreme Court of the State of Tennessee to review a judgment which, in effect, affirmed a judgment of the Court of Civil Appeals of that state, affirming a judgment of the Circuit Court of Shelby County, in favor of plaintiff in a personal-injury action.

Messrs. J. W. Canada and Edward J. White for plaintiff in error.

Messrs. Julian C. Wilson and Walter P. Armstrong for defendant in error.

[539] November 24, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 488.

Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2. Petition for writ of certiorari herein denied.

SOUTHERN PACIFIC COMPANY, Plaintiff in Error, v. LEO L. D'UTASSY. [No. 334.]

Error to state court—error or certiorari.

In Error to the Supreme Court of the State of New York in and for the County of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Supreme Court, Appellate Division, First Department, affirming a judgment of the Trial Term in favor of plaintiff in a suit against a carrier for the loss of an interstate shipment.

See same case below, in supreme court, 174 App. Div. 547, 161 N. Y. Supp. 222; in court of appeals, 225 N. Y. 694, 122 N. E. 879.

Mr. Fred H. Wood for plaintiff in error.

Messrs. Wilson E. Tipple and Arthur W. Clement for defendant in error.

November 24, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2. See writ of certiorari denied, 1918 term, No. 944, 250 U. S. 639, 63 L. ed. 1184, 39 Sup. Ct. Rep. 490.

JEFFERSON C. POWERS et al., Plaintiffs in Error, v. CITY OF RICHMOND. [No. 115.]

Error to state court—Federal question.

In Error to the Supreme Court of Appeals of the State of Virginia to review a decree which affirmed a decree of the Chancery Court of the City of Richmond, enforcing a tax lien against the interests of remaindermen.

See same case below, 122 Va. 328, 94 S. E. 803.

Mr. Robert H. Talley for plaintiffs in error.

Mr. H. R. Pollard for defendant in error.

December 8, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

UNITED STATES OF AMERICA, Plaintiff in Error, v. MILL CREEK & MINE HILL NAVIGATION & RAILROAD COMPANY TO USE OF PHILADELPHIA & READING RAILWAY COMPANY, Lessee [No. 103]; [540] UNITED STATES OF AMERICA, Plaintiff in Error, v. NORTH PENNSYLVANIA RAILROAD COMPANY TO USE OF PHILADELPHIA & READING RAILWAY COMPANY, Lessee [No. 104]; and UNITED STATES OF AMERICA, Plaintiff in Error, v. DELAWARE & BOUND BROOK RAILROAD COMPANY TO USE OF PHILADELPHIA & READING RAILWAY COMPANY, Lessee [No. 105].

Error to district court—affirmance.

Three Writs of Error to the District Court of the United States for the Eastern District of Pennsylvania to review judgments for the recovery of taxes paid under protest.

See same case below, 246 Fed. 1013.

Assistant Attorney General Frierson for plaintiff in error.

Mr. William Clarke Mason for defendants in error.

December 8, 1919. Per Curiam: Affirmed upon the authority of United States v. Larkin, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417 (Mr. Justice Pitney took no part in the decision of these cases).

SARAH J. BRIGGS, Administratrix, etc., Plaintiff in Error, v. UNION PACIFIC RAILROAD COMPANY. [No. 116.]

Error to state court—error or certiorari.

In Error to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Shawnee County, in that state, in favor of defendant in a suit brought under the Federal Employers' Liability Act.

See same case below, 102 Kan. 441, 175 Pac. 105.

Mr. Joseph G. Waters for plaintiff in error.

Messrs. N. H. Loomis and T. M. Lillard for defendant in error.

December 8, 1919. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

ALEXANDER BERKMAN v. A. CAMINETTI, Commissioner of Immigration, etc. [No. ——.]

Application for Writ of Error or Appeal, for admission to bail and for a stay order.

Mr. Harry Weinberger for petitioner.

Assistant Attorney General Stewart for respondent.

December 11, 1919. Denied.

---

[541] GEORGE J. TWOHY, Executor, etc., Plaintiff in Error, v. E. J. DORAN, Commissioner of the Revenue, et al. [No. 251].

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Corporation Court of the City of Norfolk, denying redress against certain tax assessments.

Mr. George Mason Dillard for plaintiff in error.

Messrs. John R. Saunders and J. D. Hank, Jr., for defendants in error.

January 5, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 727, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

W. W. HARRIS, Plaintiff in Error, v. STATE OF KANSAS. [No. 239.]

Error to state court—Federal question—raising on rehearing.

In Error to the Supreme Court of the State of Kansas to review a judgment which affirmed a conviction of arson, rendered in the District Court of Barton County, in that state.

See same case below, 103 Kan. 347, 175 Pac. 153.

Mr. Chester H. Krum for plaintiff in error.

The Attorney General for defendant in error.

January 12, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510; St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 240, 241, 60 L. ed. 622, 624, 36 Sup. Ct. Rep. 274; Bilby v. Stewart, 246 U. S. 255, 257, 62 L. ed. 701, 702, 38 Sup. Ct. Rep. 264.

MATTY MCLAUGHLIN, Plaintiff in Error, v. UNITED STATES OF AMERICA. [No. 591.]

Error to district court—criminal case.

In Error to the District Court of the United States for the Northern District of Ohio to review a commitment for contempt of an injunction order.

Mr. Daniel L. Cruice for plaintiff in error.

Solicitor General King and Mr. A. F. Myers for defendant in error.

January 12, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) Toledo Newspaper Co. v. United States, 247 U. S. 402, 410, 411, 62 L. ed. 1186, 1189, 1190, 38 Sup. Ct. Rep. 560; Bessette v. W. B. Conkey Co. 194 U. S. 324, 328–337, 48 L. ed. 997, 1002–1005, 24 Sup. Ct. Rep. 665; O'Neal v. United States, 190 U. S. 36, 37, 38, 47 L. ed. 945, 946, 23 Sup. Ct. Rep. 776, 14 Am. Crim. Rep. 303.

(2) Carey v. Houston & T. C. R. Co. 150 U. S. 171, 37 L. ed. 1042, 14 Sup. Ct. Rep. 63; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

(3) Re Lennon, 150 U. S. 393, 399–401, 37 L. ed. 1120, 1122, 1123, 14 Sup. Ct. Rep. 123.

(4) Itow v. United States, 233 U. S. 581, 58 L. ed. 1102, 34 Sup. Ct. Rep. 699; Sugarman v. United States, 249 [542] U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

OHIO VALLEY WATER COMPANY, Plaintiff in Error, v. BEN AVON BOROUGH et al. [No. 128.]

In Error to the Supreme Court of the State of Pennsylvania.

See same case below, 260 Pa. 289, 103 Atl. 744.

Messrs. George B. Gordon, William Watson Smith, and John G. Buchanan for plaintiff in error.

Messrs. Berne H. Evans, Leonard K. Guiler, David L. Starr, and Albert G. Liddell for defendants in error.

January 12, 1920. Per Curiam: Restored to the docket for reargument. The attention of counsel is directed to the question of whether, under the state law, the right to review the action of the Commission was limited by the state statutes to the particular remedy which was here resorted to, or whether such statutes left open the right to invoke judicial power by way of independent

suit for the purpose of redressing wrongs deemed to have resulted from action taken by the Commission.

E. GOUGE et al., Appellants, v. JOHN M. HART, Collector of Internal Revenue, et al. [No. 136.]

Appeal—from district court—jurisdiction below.

Appeal from the District Court of the United States for the Western District of Virginia to review the dismissal, for want of jurisdiction, of the bill in a suit to remove a cloud on title.

See same case below, 250 Fed. 802.

Messrs. J. S. Ashworth, John W. Price, and C. J. St. John for appellants.

Solicitor General King and Assistant Attorney General Frierson for appellees.

January 19, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Courtney v. Pradt, 196 U. S. 89, 91, 49 L. ed. 398, 399, 25 Sup. Ct. Rep. 208; Farrugia v. Philadelphia & R. R. Co. 233 U. S. 352, 353, 58 L. ed. 997, 34 Sup. Ct. Rep. 591; Louisville & N. R. Co. v. [543] Western U. Teleg. Co. 234 U. S. 369, 371, 372, 58 L. ed. 1356, 1358, 34 Sup. Ct. Rep. 810; Male v. Atchison, T. & S. F. R. Co. 240 U. S. 97, 99, 60 L. ed. 544, 545, 36 Sup. Ct. Rep. 351.

EX PARTE: IN THE MATTER OF JAMES F. BISHOP, Administrator, etc., Petitioner. [No. —, Original.]

Motion for leave to file petition for a writ of prohibition of mandamus herein.

Mr. Harry W. Standidge for petitioner.

No appearance for respondent.

January 19, 1920. Denied.

HARMON P. MCKNIGHT v. UNITED STATES. [No. —.]

Application for leave to proceed in forma pauperis for the purposes of a petition for certiorari to and on appeal from the District Court of the United States for the District of Massachusetts.

January 20, 1920. Per Curiam: The prayer to be allowed to proceed in forma pauperis for the purpose of an application for certiorari to review the judgment below, as well as for the purpose of an appeal asked to review a refusal to release on habeas corpus, made to the Chief Justice, and by him submitted to the court for its action, is hereby denied.

EVANSVILLE & BOWLING GREEN PACKET COMPANY, Plaintiff in Error, v. M. M. LOGAN et al., etc. [No. 152.]

Error to state court—error or certiorari.

In Error to the Court of Appeals of the State of Kentucky to review a decree which, on a second appeal, affirmed a decree of the Circuit Court of Franklin County, in that state, dismissing the petition in a suit to enjoin the collection of a franchise tax.

See same case below, on first appeal, 178 Ky. 716, 199 S. W. 1059; on rehearing, 179 Ky. 710, 201 S. W. 2; on second appeal, 180 Ky. 216, 202 S. W. 492.

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

Mr. William T. Fowler for defendants in error.

January 26, 1920. Per [544] Curiam: Dismissed for want of jurisdiction, upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

V. & S. BOTTLE COMPANY, Plaintiff in Error, v. MOUNTAIN GAS COMPANY. [No. 176.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Pennsylvania to review a decree which affirmed a decree of the Court of Common Pleas of Potter County, in that state, dismissing the bill in a suit to enjoin a public service corporation from shutting off the supply of gas to a customer.

See same case below, 261 Pa. 523, 104 Atl. 667.

Messrs. C. La Rue Munson and W. K. Swetland for plaintiff in error.

Mr. Churchill Mehard for defendant in error.

January 26, 1920. Per Curiam: Dismissed for want of jurisdiction, upon the authority of California Powder Works v. Davis, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Harding v. Illinois, 196 U. S. 78, 80, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 481, 56 L. ed. 1171, 1174, 32 Sup. Ct. Rep. 790; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 53, 59 L. ed. 127, 128, 35 Sup. Ct. Rep. 21.

SUPERIOR & PITTSBURGH COPPER COMPANY, Plaintiff in Error, v. STEVE DAVIDOVICH, Sometimes Known as Steve Davis. [No. 180.]

Constitutional law—due process of law—equal protection of the laws—employers' liability.

In Error to the Supreme Court of the State of Arizona to review a judgment which affirmed a judgment of the Superior Court of Cochise County, in that state, in favor of an employee in an action under the state Employers' Liability Law.

See same case below, 19 Ariz. 402, 171 Pac. 127, 16 N. C. C. A. 801.

Mr. Cleon T. Knapp for plaintiff in error.

Mr. Samuel Herrick for defendant in error.

January 26, 1920. Per Curiam: Affirmed upon the authority of Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer) 250 U. S. 400, 63 L. ed. 1058, 6 A.L.R. 1537, 39 Sup. Ct. Rep. 553.

---

[545] GERTRUDE MINNIE JONES, Plaintiff in Error, v. MAX HILTSCHER. [No. 181.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of New Mexico to review a judgment which reversed, with directions to enter judgment for plaintiff, a judgment of the District Court of Sierra County, in that state, in favor of defendant in a suit to quiet title.

See same case below, 23 N. M. 674, 170 Pac. 884.

Messrs. W. Martin Jones and Harry P. Owen for plaintiff in error.

Messrs. Edward D. Tittmann and Charles T. Tittmann for defendant in error.

January 26, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error, v. JOHN S. COFFLAND. [No. 189.]

Error to state court—Federal question—final judgment.

In Error to the Court of Appeals, Harrison County, Seventh Appellate District of the State of Ohio, to review a judgment which reversed a judgment of the Court of Common Pleas of Harrison County, in that state, in favor of defendant in a suit by a shipper against a carrier to recover damages for injuries to shipment.

Mr. D. A. Hollingsworth for plaintiff in error.

Mr. Ernest Sidney McNamee for defendant in error.

January 26, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 Sup. Ct. Rep. 654; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 101, 57 L. ed. 138, 140, 33 Sup. Ct. Rep. 78; Gray's Harbor Logging Co. v. Coats-Fordney Logging Co. (Washington ex rel. Gray's Harbor Logging Co. v. Superior Ct.) 243 U. S. 251, 255, 61 L. ed. 702, 705, 37 Sup. Ct. Rep. 295; Bruce v. Tobin, 245 U. S. 18, 19, 62 L. ed. 123, 124, 38 Sup. Ct. Rep. 7.

(2) § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY et al., Plaintiffs in Error, v. CITY AND COUNTY OF DENVER. [No. 596.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Colorado to review a judgment which reversed an order of the state Public Utilities Commission, increasing telephone rates.

See same case below, — Colo. —, 184 Pac. 604.

Messrs. Charles R. [546] Brock and Milton Smith for plaintiffs in error.

Messrs. J. A. Marsh and Norton Montgomery for defendant in error.

February 2, 1920. Per Curiam: Dismissed for want of jurisdiction, upon the authority of Pawhuska v. Pawhuska Oil & Gas Co. 250 U. S. 394, 63 L. ed. 1054, P.U.R.1919E, 178, 39 Sup. Ct. Rep. 526. See Chicago v. Dempcy, 250 U. S. 651, 63 L. ed. 1189, 40 Sup. Ct. Rep. 53, decided November 10, 1919.

EX PARTE: IN THE MATTER OF J. E. BROUSSARD et al., Petitioners. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus herein.

Messrs. A. D. Lipscomb and Frederick S. Tyler for petitioners.

Mr. Horace Chilton for respondent.

February 2, 1920. Denied.

EX PARTE: IN THE MATTER OF THE UNITED STATES, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writs of Mandamus and Prohibition.

Solicitor General King and Assistant Attorney General Stewart for petitioner.

Messrs. J. E. B. Cunningham, R. M. Gibson, and W. C. McKean for respondent.

March 1, 1920. Denied.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant, v. UNITED STATES. [No. 163.]

Postoffice—railway mail service—compensation.

Appeal from the Court of Claims to review a judgment adverse to the claim of a railway company for compensation for railway mail service.

See same case below, 53 Ct. Cl. 638.

Messrs. F. Carter Pope and Benjamin Carter for appellant.

Assistant Attorney General Davis for appellee.

March 1, 1920. Per Curiam: Affirmed upon the authority of Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 56 L. ed. 1236, 32 Sup. Ct. Rep. 702.

CITY OF FULTON, Plaintiff in Error, v. PUBLIC SERVICE COMMISSION OF MISSOURI, etc., et al. [No. 218.]

Error to state court—Federal question.

In Error to the Supreme [547] Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Cole County, in that state, affirming an order of the state Public Service Commission, increasing telephone rates.

See same case below, 275 Mo. 67, 204 S. W. 386.

Messrs. Eugene C. Brokmeyer and John Robison Baker for plaintiff in error.

Mr. James D. Lindsay for defendants in error.

March 1, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Pawhuska v. Pawhuska Oil & Gas Co. 250 U. S. 394, 63 L. ed. 1054, P.U.R.1919E, 178, 39 Sup. Ct. Rep. 526. See Chicago v. Dempcy, 250 U. S. 651, 63 L. ed. 1189, 40 Sup. Ct. Rep. 53, decided November 10, 1919.

STATE OF MISSOURI AT THE RELATION OF THE CITY OF SEDALIA, Plaintiff in Error, v. PUBLIC SERVICE COMMISSION OF MISSOURI, etc. [No. 215.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Cole County, in that state, affirming an order of the state Public Service Commission, increasing water rates.

See same case below, 275 Mo. 201, 204 S. W. 497.

No brief was filed for plaintiff in error.

Mr. James D. Lindsay for defendant in error.

March 1, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Pawhuska v. Pawhuska Oil & Gas Co. 250 U. S. 394, 63 L. ed. 1054, P.U.R.1919E, 178, 39 Sup. Ct. Rep. 526; Chicago v. Dempcy, 250 U. S. 651, 63 L. ed. 1189, 40 Sup. Ct. Rep. 53, decided November 10, 1919.

LAFOREST L. SIMMONS, Plaintiff in Error, v. JOE DUART. [No. 277.]

Error to state court—error or certiorari.

In Error to the Superior Court of the State of Massachusetts to review a judgment entered pursuant to the mandate of the Supreme Judicial Court of that state, which affirmed a judgment of the Superior Court in favor of plaintiff in a personal-injury action.

See same case below, in supreme judicial court, 231 Mass. 313, 121 N. E. 10.

Mr. Edward C. Stone for plaintiff in error.

Mr. David R. Redovsky for defendant in error.

March 1, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

KOSTA KISIN, Petitioner, v. STATE OF CALIFORNIA. [No. —.]

On Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Contra Costa.

Mr. Kosta Kisin in propria persona, petitioner.

[548] March 1, 1920. Per Curiam: The motion for leave to proceed in forma pauperis in this case, and that the clerk of this court be directed to file the petition for a writ of certiorari herein, is denied.

KATE C. ARCHER,[1] Administratrix of George F. Archer, Deceased, et al., Appellants, v. UNITED STATES [No. 125]; and UNITED STATES, Appellant, v. KATE C. ARCHER, Administratrix of George F. Archer, Deceased, et al. [No. 220.]

Appeals from the Court of Claims.

See same case below, 53 Ct. Cl. 405.

Solicitor General King for appellant.

Messrs. T. M. Miller and Percy Bell for appellees.

March 1, 1920. Judgment affirmed by an equally divided court.

UNION PACIFIC RAILROAD COMPANY, Petitioner, v. JAMES J. E. BURKE. [No. 568.]

Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

See same case below, 178 App. Div. 783, 166 N. Y. Supp. 100.

Messrs. D. Roger Englar and Oscar R. Houston for petitioner.

Messrs. Arthur W. Clement and Wilson E. Tipple for respondent.

November 17, 1919. Granted.

---

[549] MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY et al., Plaintiffs in Error, v. HANNAH L. ZUBER. [No. 592.]

Petition for a Writ of Certiorari herein.

Messrs. Joseph M. Bryson, Clifford L. Jackson, Gardiner Lathrop, J. R. Cottingham, Samuel W. Hayes, C. S. Burg, and Alexander Britton for plaintiffs in error.

Mr. Charles W. Smith for defendant in error.

December 15, 1919. Granted.

LILLIAN B. PEMBLETON, Petitioner, v. ILLINOIS COMMERCIAL MEN'S ASSOCIATION. [No. 625.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

See same case below, 289 Ill. 99, 124 N. E. 355.

Messrs. Harrison Musgrave and William S. Oppenheim for petitioner.

Mr. James G. Condon for respondent.

January 5, 1920. Granted.

YEE WON, Petitioner, v. EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco. [No. 634.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 170 C. C. A. 86, 258 Fed. 792.

Mr. W. E. Harvey for petitioner.

No appearance for respondent.

January 19, 1920. Granted.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Petitioner, v. McCAULL-DINSMORE COMPANY. [No. 628.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 171 C. C. A. 561, 260 Fed. 835.

Messrs. H. H. Field, O. W. Dynes, and F. W. Root for petitioner.

No appearance for respondent.

January 26, 1920. Granted.

WESTERN UNION TELEGRAPH COMPANY, Petitioner, v. EUGENE E. SOUTHWICK. [No. 638.]

Petition for a [550] Writ of Certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of the State of Texas.

See same case below, — Tex. Civ. App. —, 214 S. W. 987.

Messrs. Rush Taggart and Francis Raymond Stark for petitioner.

No appearance for respondent.

January 26, 1920. Granted.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al., Petitioners, v. NICHOLS & COMPANY. [No. 655.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

See same case below, 120 Miss. 690, 83 So. 5.

Messrs. Charles N. Burch, H. D. Minor, and Blewett Lee for petitioners.

Messrs. John W. Cutrer and Frederick S. Tyler for respondent.

January 26, 1920. Granted.

NORFOLK-SOUTHERN RAILROAD COMPANY, Petitioner, v. M. R. OWENS. [No. 674.]

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina.

See same case below, 178 N. C. 325, 100 S. E. 617.

Messrs. W. B. Rodman and W. B. Rodman, Jr., for petitioner.

No appearance for respondent.

March 1, 1920. Granted.

[1] Death of George F. Archer suggested, and appearance of Kate C. Archer, as administratrix of the estate of George F. Archer, deceased, as a party, filed and entered January 13, 1920, on motion of counsel for Kate C. Archer.

BIRMINGHAM TRUST & SAVINGS COMPANY, as Trustee, etc., Petitioner, v. UNITED STATES OF AMERICA. [No. 410.]

[551] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 169 C. C. A. 502, 258 Fed. 562.

Mr. John P. Tillman for petitioner.

Assistant Attorney General Brown for respondent.

November 17, 1919. Denied.

MICHAEL TOMASCO, Petitioner, v. DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY. [No. 427.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 167 C. C. A. 286, 256 Fed. 14.

Mr. George Clinton for petitioner.

Mr. Maurice C. Spratt for respondent.

November 17, 1919. Denied.

ARMOUR & COMPANY et al., Petitioners, v. TEXAS & PACIFIC RAILWAY COMPANY et al. [No. 466.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 169 C. C. A. 253, 258 Fed. 185.

Messrs. James Manson McCormick and Francis Marion Etheridge for petitioners.

Mr. Thomas J. Freeman for respondents.

November 17, 1919. Denied.

FREY & SON, Incorporated, Petitioner, v. WELCH GRAPE JUICE COMPANY. [No. 572.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 171 C. C. A. 664, 261 Fed. 68.

Mr. Horace T. Smith for petitioner.

No appearance for respondent.

November 17, 1919. Denied.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Petitioner, v. GRACE F. FULLER, as Administratrix, etc. [No. 561.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon.

See same case below, 92 Or. 443, 181 Pac. 345; on rehearing, 93 Or. 180, 181 Pac. 991.

[552] Mr. Arthur C. Spencer for petitioner.

No appearance for respondent.

November 17, 1919. Denied.

W. L. BRUCE, as Administrator, etc., et al., Petitioners, v. WILLIAM TOBIN. [No. 530.]

Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota.

See same case below, — S. D. —, 171 N. W. 603.

Mr. L. H. Salinger for petitioners.

No brief was filed for respondent.

November 17, 1919. Denied.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Petitioner, v. ROBERT W. SMITH. [No. 557.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Missouri.

See same case below, — Mo. —, 213 S. W. 481.

Messrs. Samuel W. Moore and Cyrus Crane for petitioner.

Mr. Alfred N. Gossett for respondent.

November 17, 1919. Denied.

FRANK SHAFFER, Petitioner, v. UNITED STATES OF AMERICA. [No. 449.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 167 C. C. A. 206, 255 Fed. 886.

Messrs. David A. Baer and John J. Sullivan for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

November 24, 1919. Denied.

INTER-URBAN RAILWAY COMPANY et al., Petitioners, v. MRS. FRED SMITH. [No. 563.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Iowa.

See same case below, — Iowa, —, 171 N. W. 134.

Messrs. Frank J. Hogan and James L. Parrish for petitioners.

Mr. R. M. Haines for respondent.

November 24, 1919. Denied.

[553] BASCOM C. THOMPSON, Petitioner, v. UNITED STATES OF AMERICA. [No. 598.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 169 C. C. A. 264, 258 Fed. 196.

Mr. P. H. Cullen for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

November 24, 1919. Denied.

CHICAGO, DULUTH, & GEORGIAN BAY TRANSIT COMPANY, Owner of Steamship South America, Petitioner, v. CHARLES T. MOORE et al. [No. 594.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 170 C. C. A. 483, 259 Fed. 507.

Mr. Charles E. Kremer for petitioner.

Mr. George E. Brand for respondents.

December 8, 1919. Denied.

TOLEDO & CINCINNATI RAILROAD COMPANY et al., Petitioners, v. EQUITABLE TRUST COMPANY OF NEW YORK et al. [No. 595.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 170 C. C. A. 613, 259 Fed. 813.

Messrs. John Randolph Schindel and Morison R. Waite for petitioners.

Mr. Murray Seasongood for respondents.

December 8, 1919. Denied.

LOUIS DRAGO, Petitioner, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY. [No. 583.]

Petition for a Writ of Certiorari to the Circuit Court of Hudson County, State of New Jersey.

See same case below, 93 N. J. L. 176, 106 Atl. 803.

Mr. Alexander Simpson for petitioner.

Mr. James D. Carpenter, Jr., for respondent.

December 15, 1919. Denied.

STATE OF WASHINGTON, Petitioner, v. ISAAC BELKNAP. [No. 590.]

Petition for a Writ of Certiorari to the [554] Supreme Court of the State of Washington.

See same case below, 104 Wash. 221, 176 Pac. 5, 182 Pac. 570.

Messrs. L. L. Thompson and W. V. Tanner for petitioner.

No appearance for respondent.

December 15, 1919. Denied.

HOWARD BROWN, Petitioner, v. UNITED STATES OF AMERICA. [No. 605.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 168 C. C. A. 653, 257 Fed. 703.

Mr. R. P. Henshall for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

December 15, 1919. Denied.

REWARD OIL COMPANY, Petitioner, v. PETROLEUM RECTIFYING COMPANY OF CALIFORNIA. [No. 606.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 213, 260 Fed. 177.

Mr. William K. White for petitioner.

Messrs. Frederick P. Fish, John H. Miller, and J. H. Brickenstein for respondent.

December 15, 1919. Denied.

J. R. SMITH and B. J. Ostrander, Petitioners, v. THE STEAMER J. J. HILL, etc., Pittsburgh Steamship Company, Claimant. [No. 611.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 171 C. C. A. 419, 260 Fed. 655.

Messrs. Harvey D. Goulder and Charles E. Kremer for petitioners.

Messrs. Hermon A. Kelley and G. W. Cottrell for respondent.

December 15, 1919. Denied.

EMMA PELL FETTERS, Petitioner, v. UNITED STATES OF AMERICA. [No. 616.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 178, 260 Fed. 142.

[555] Mr. Marshall B. Woodworth for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

December 15, 1919. Denied.

WILL MAYNARD et al., Petitioners, v. UNITED THACKER COAL COMPANY. [No. 624.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 262 Fed. 478.

Mr. Ed. Nooncheste for petitioners.

No appearance for respondent.

December 15, 1919. Denied.

ARTHUR C. GILSON and Thomas J. Duffy, Petitioners, v. UNITED STATES OF AMERICA. [No. 505.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 169 C. C. A. 528, 258 Fed. 588.

Mr. William A. Smith for petitioners.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

December 22, 1919. Denied.

CHARLES F. GOODSPEED, Petitioner, v. HERBERT E. LAW. [No. 613.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 299, 260 Fed. 497.

Mr. Peter F. Dunne for petitioner.

Messrs. Frank D. Madison, E. S. Pillsbury, Alfred Sutro, H. D. Pillsbury, and Oscar Sutro for respondent.

December 22, 1919. Denied.

ELLSWORTH J. TRADER, Petitioner, v. UNITED STATES. [No. 617.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 260 Fed. 923.

Messrs. H. Ralph Burton and Blaine Mallan for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

December 22, 1919. Denied.

[556] CARLOS L. BYRON, Petitioner, v. UNITED STATES OF AMERICA. [No. 604.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 170 C. C. A. 347, 259 Fed. 371.

Mr. Edward M. Comyns for petitioner.

Assistant Attorney General Nebeker and Mr. H. L. Underwood for respondent.

January 5, 1920. Denied.

BALTIMORE DRY DOCK & SHIP BUILDING COMPANY, Petitioner, v. NEW YORK & PORTO RICO STEAMSHIP COMPANY, Owner and Claimant of the Steamship Isabella, et al. [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 262 Fed. 485.

Mr. George Weems Williams for petitioner.

Messrs. George Forbes and Ray Rood Allen for respondent New York & P. R. S. S. Co.

Assistant Attorney General Spellacy and Mr. J. Frank Staley for the United States.

January 5, 1920. Denied.

HURNI PACKING COMPANY, Petitioner, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. [No. 608.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 171 C. C. A. 405, 260 Fed. 641.

Mr. Deloss C. Shull for petitioner.

Messrs. Frederick L. Allen and Frederic D. McKenney for respondent.

January 12, 1920. Denied.

NORMA MINING COMPANY, Petitioner, v. HUGH MACKAY. [No. 619.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 169 C. C. A. 634, 258 Fed. 914; on rehearing, 169 C. C. A. 672, 258 Fed. 991.

Mr. George Lull for petitioner.

Mr. Frederick A. Williams for respondent.

January 12, 1920. Denied.

WADE C. KILMER, Trustee, etc., Petitioner, v. FIRST SAVINGS AND BANKING COMPANY. [No. 623.]

[557] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 262 Fed. 497.

Messrs. C. H. Syme and F. H. Stephens for petitioner.

Mr. Clarence E. Martin for respondent.

January 12, 1920. Denied.

VIRGINIA-WESTERN POWER COMPANY, Petitioner, v. COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE CITY OF CLIFTON FORGE [No. 629]; VIRGINIA-WESTERN POWER COMPANY, Petitioner, v. COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE CITY OF BUENA VISTA [No. 630]; VIRGINIA-WESTERN POWER COMPANY, Petitioner, v. COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE TOWN OF COVINGTON [No. 631]; and VIRGINIA-WESTERN POWER COMPANY, Petitioner, v. COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE TOWN OF LEXINGTON. [No. 632.]

Petitions for Writs of Certiorari to the Supreme Court of Appeals of the State of Virginia.

See same case below, — Va. —, 9 A.L.R. 1148, 99 S. E. 723.

Messrs. F. W. King and J. M. Perry for petitioner.

Messrs. O. B. Harvey, Wm. A. Anderson, Frank Moore, and O. C. Jackson for respondent.

January 12, 1920. Denied.

ERIE RAILROAD COMPANY, Petitioner, v. JAMES B. CONNORS. [No. 635.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 261 Fed. 303.

Messrs. C. D. Hine and Paul J. Jones for petitioner.

Mr. W. J. Kenealy for respondent.

January 12, 1920. Denied.

EDWARD HINES LUMBER COMPANY, Petitioner, v. AMERICAN CAR & FOUNDRY COMPANY. [No. 637.]

Petition [558] for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 262 Fed. 757.

Messrs. Jacob Newman, C. H. Poppenhusen, Henry L. Stern, and Edward R. Johnston for petitioner.

Mr. William D. McKenzie for respondent.

January 12, 1920. Denied.

EMIL HERMAN, Petitioner, v. UNITED STATES OF AMERICA. [No. 639.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 168 C. C. A. 551, 257 Fed. 601.

Mr. C. E. S. Wood for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

January 12, 1920. Denied.

CONSOLIDATED WINDOW GLASS COMPANY, Petitioner, v. WINDOW GLASS MACHINE COMPANY et al. [Nos. 641 and 642]; PENNSYLVANIA WINDOW GLASS COMPANY, Petitioner, v. WINDOW GLASS MACHINE COMPANY et al. [Nos. 643 and 644]; and KANE GLASS COMPANY, Petitioner, v. WINDOW GLASS MACHINE COMPANY et al. [Nos. 645 and 646.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 261 Fed. 362.

Messrs. Marshall A. Christy and Charles Neave for petitioners.

Messrs. George H. Parmelee, Clarence P. Byrnes, and Livingston Gifford for respondents.

January 12, 1920. Denied.

ARCTIC IRON COMPANY, Petitioner, v. CLEVELAND-CLIFFS IRON COMPANY et al. [No. 648.]

Petition for a Writ of Certiorari to United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 171 C. C. A. 611, 261 Fed. 15.

Messrs. Otto C. Sommerich and Edwin M. Borchard for petitioner.

Messrs. A. C. Duskin, Horace Andrews, and W. P. Belden for respondents.

January 12, 1920. Denied.

---

[559] W. F. HALLOWELL, Petitioner, v. UNITED STATES OF AMERICA. [No. 600.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 165 C. C. A. 345, 253 Fed. 865; on rehearing, 169 C. C. A. 303, 258 Fed. 237.

Mr. William P. Richardson for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

January 19, 1920. Denied.

AMERICAN GUARANTY COMPANY, Petitioner, v. AMERICAN FIDELITY COMPANY. [No. 660.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 260 Fed. 897.

Messrs. Smith W. Bennett, Ralph E. Westfall, and Hugh M. Bennett for petitioner.

Mr. H. B. Arnold for respondent.

January 19, 1920. Denied.

MORRIS & CUMMINGS DREDGING COMPANY, Petitioner, v. CORNELL STEAMBOAT COMPANY. [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 261 Fed. 897.

Messrs. Chauncey I. Clark and George Noyes Slayton for petitioner.

Messrs. J. Parker Kirlin and Robert S. Erskine for respondent.

January 19, 1920. Denied.

JEONG QUEY HOW, Petitioner, v. EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco. [No. 664.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 170 C. C. A. 72, 258 Fed. 618.

Mr. Jackson H. Ralston for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

January 19, 1920. Denied.

ATLANTA TERMINAL COMPANY, Petitioner, v. UNITED STATES OF AMERICA. [No. 647.]

Petition for a Writ of Certiorari [560] to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 171 C. C. A. 505, 260 Fed. 779.

Messrs. Mark Bolding and Arthur Heyman for petitioner.

Assistant Attorney General Frierson for respondent.

January 26, 1920. Denied.

JAMES G. WILSON, Trustee, etc., Petitioner, v. A. J. BENHAM et al. [No. 658.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 658, 261 Fed. 62.

Mr. James G. Wilson for petitioner.

No appearance for respondents.

January 26, 1920. Denied.

MARIE EQUI, Petitioner, v. UNITED STATES OF AMERICA. [No. 666.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 649, 261 Fed. 53.

Messrs. C. E. S. Wood and James E. Fenton for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

January 26, 1920. Denied.

EDWIN RIETZ, Petitioner, v. UNITED STATES OF AMERICA. [No. 675.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 169 C. C. A. 19, 257 Fed. 731.

Mr. Louis W. Crofoot for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

January 26, 1920. Denied.

J. E. BROUSSARD et al., Petitioners, v. WALTER J. CRAWFORD, Trustee. [No. 640.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 171 C. C. A. 158, 260 Fed. 122.

Messrs. A. D. Lipscomb and Frederick S. Tyler for petitioners.

Mr. Horace Chilton for respondent.

February 2, 1920. Denied.

---

[561] CONTINENTAL BANK OF NEW YORK, Petitioner, v. EZRA P. PRENTICE, Trustee, etc. [No. 662.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 261 Fed. 858.

Mr. Myron T. Lesser for petitioner.

Mr. James N. Rosenberg for respondent.

February 2, 1920. Denied.

LUCIAN C. LAUGHTER, Petitioner, v. UNITED STATES OF AMERICA. [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 171 C. C. A. 664, 261 Fed. 68.

Mr. Theodore Mack for petitioner.

Assistant Attorney General Frierson for respondent.

February 2, 1920. Denied.

GULF & SHIP ISLAND RAILROAD COMPANY et al., Plaintiffs in Error, v. CARL BOONE, Robert Boone, et al., etc. [No. 669.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

See same case below, 120 Miss. 632, 82 So. 335.

Messrs. B. E. Eaton and T. J. Wills for plaintiffs in error.

Mr. George Anderson for defendants in error.

February 2, 1920. Denied.

A. J. PARTAN et al., Petitioners, v. UNITED STATES OF AMERICA. [No. 670.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 261 Fed. 515.

Mr. Thomas Mannix for petitioners.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

February 2, 1920. Denied.

CLARENCE E. REED, Petitioner, v. HUGHES TOOL COMPANY. [No. 659.]

Petition for a Writ of Certiorari to [562] the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 192.

Messrs. Melville Church, Edwin T. Merrick, and William F. Hall for petitioner.

Mr. Frank Andrews for respondent.

March 1, 1920. Denied.

GUTIERREZ HERMANOS, Petitioner, v. INSULAR COLLECTOR OF CUSTOMS. [No. 661.]

Petition for a Writ of Certiorari to the Supreme Court of the Philippine Islands.

Messrs. David A. Baer and S. W. O'Brien for petitioner.

Messrs. Dana T. Gallup, Laurence H. Hedrick, and Charles Marvin for respondent.

March 1, 1920. Denied.

WABASH RAILWAY COMPANY, Petitioner, v. CHARLOTTE SHEEHAN, Administratrix, etc. [No. 673.]

Petition for a Writ of Certiorari to the Appellate Court, Third District, of the State of Illinois.

See same case below, 214 Ill. App. 347.

Mr. Frederic D. McKenney for petitioner.

Mr. Charles C. Le Forgee for respondent.

March 1, 1920. Denied.

POSTAL TELEGRAPH-CABLE COMPANY, Petitioner, v. BOWMAN & BULL COMPANY. [No. 687.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

See same case below, 290 Ill. 155, 124 N. E. 851.

Messrs. Jacob E. Dittus, Leon A. Berezniak, and W. W. Millan for petitioner.

Mr. Edwin H. Cassels for respondent.

March 1, 1920. Denied.

MALLEABLE IRON RANGE COMPANY, Petitioner, v. FRED E. LEE, as Administrator, etc. [No. 688.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 263 Fed. 896.

Messrs. Thomas A. Banning [563] and Samuel Walker Banning for petitioner.

Messrs. Harry C. Howard and Fred L. Chappell for respondent.

March 1, 1920. Denied.

ROBERT L. FRINK, Petitioner, v. OKMULGEE WINDOW GLASS COMPANY. [No. 695.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 171 C. C. A. 195, 260 Fed. 159.

Mr. E. N. Huggins for petitioner.

Mr. William M. Matthews for respondent.

March 1, 1920. Denied.

HERMAN M. WARTELL, Petitioner, v. RALPH S. MOORE, Trustee, etc. [No. 700.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 261 Fed. 762.

Mr. James McNamara for petitioner.

Mr. Benjamin Vosper for respondent.

March 1, 1920. Denied.

EVERGLADES DRAINAGE LEAGUE et al., Appellants, v. NAPOLEON B. BROWARD DRAINAGE DISTRICT et al. [No. 216.]

Appeal from the District Court of the United States for the Southern District of Florida.

See same case below, 253 Fed. 246.

Mr. Clair D. Vallette for appellants.

Mr. William Glenn Terrell for appellees.

January 30, 1920. Dismissed with costs on motion of counsel for the appellants.

JOSÉ LOPEZ GARCIA, Appellant, v. ORVAL P. TOWNSHEND, Commanding Officer, Camp Las Casas. [No. 223.]

Appeal from the District Court of the United States for Porto Rico.

Mr. Francis H. Dexter for appellant.

No appearance for appellee.

[568] January 30, 1920. Dismissed with costs, on motion of counsel for the appellant.

STATE OF NEW YORK, Complainant, v. INTERNATIONAL NICKEL COMPANY. [No. 14, Original.]

Messrs. F. La Guardia, Edgar Bromberger, Merton E. Lewis, and Cortlandt A. Johnson for complainant.

Messrs. W. J. Curtis and Ligon Johnson for respondent.

March 1, 1920. Dismissed, per stipulation.

STATE OF NEW YORK, Complainant, v. STANDARD OIL COMPANY. [No. 15, Original.]

Messrs. F. La Guardia, Edgar Bromberger, Merton E. Lewis, and Cortlandt A. Johnson for complainant.

Mr. Chester O. Swain for respondent.

March 1, 1920. Dismissed, per stipulation.

WYSONG & MILES COMPANY et al., Plaintiffs in Error, v. PLANTERS NATIONAL BANK OF RICHMOND. [No. 477.]

In Error to the Supreme Court of the State of North Carolina.

See same case below, 177 N. C. 380, 99 S. E. 199.

Mr. Thomas J. Jerome for plaintiffs in error.

Messrs. Garland S. Ferguson, Jr., and Ashbel B. Kimball for defendant in error.

March 1, 1920. Dismissed, per stipulation.

WYSONG & MILES COMPANY et al., Plaintiffs in Error, v. BANK OF NORTH AMERICA, Philadelphia, Pa. [No. 478.]

In Error to the Supreme Court of the State of North Carolina.

See same case below, 177 N. C. 394, 99 S. E. 207.

Mr. Thomas J. [569] Jerome for plaintiffs in error.

Messrs. Garland S. Ferguson, Jr., and Ashbel B. Kimball for defendant in error.

March 1, 1920. Dismissed, per stipulation.

FRED S. THOMPSON, Appellant, v. ALEXANDER H. NICHOLS. [No. 612.]

Appeal from the District Court of the United States for the District of Maine.

See same case below, 254 Fed. 973.

Mr. Franklin H. Hough for appellant.

Mr. Charles Henry Butler for appellee.

March 1, 1920. Dismissed, per stipulation. Mandate granted on motion of counsel for the defendant in error.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1919,

AND REPORTED HEREIN,

VOLUME 252,

AS ALSO APPEAR IN

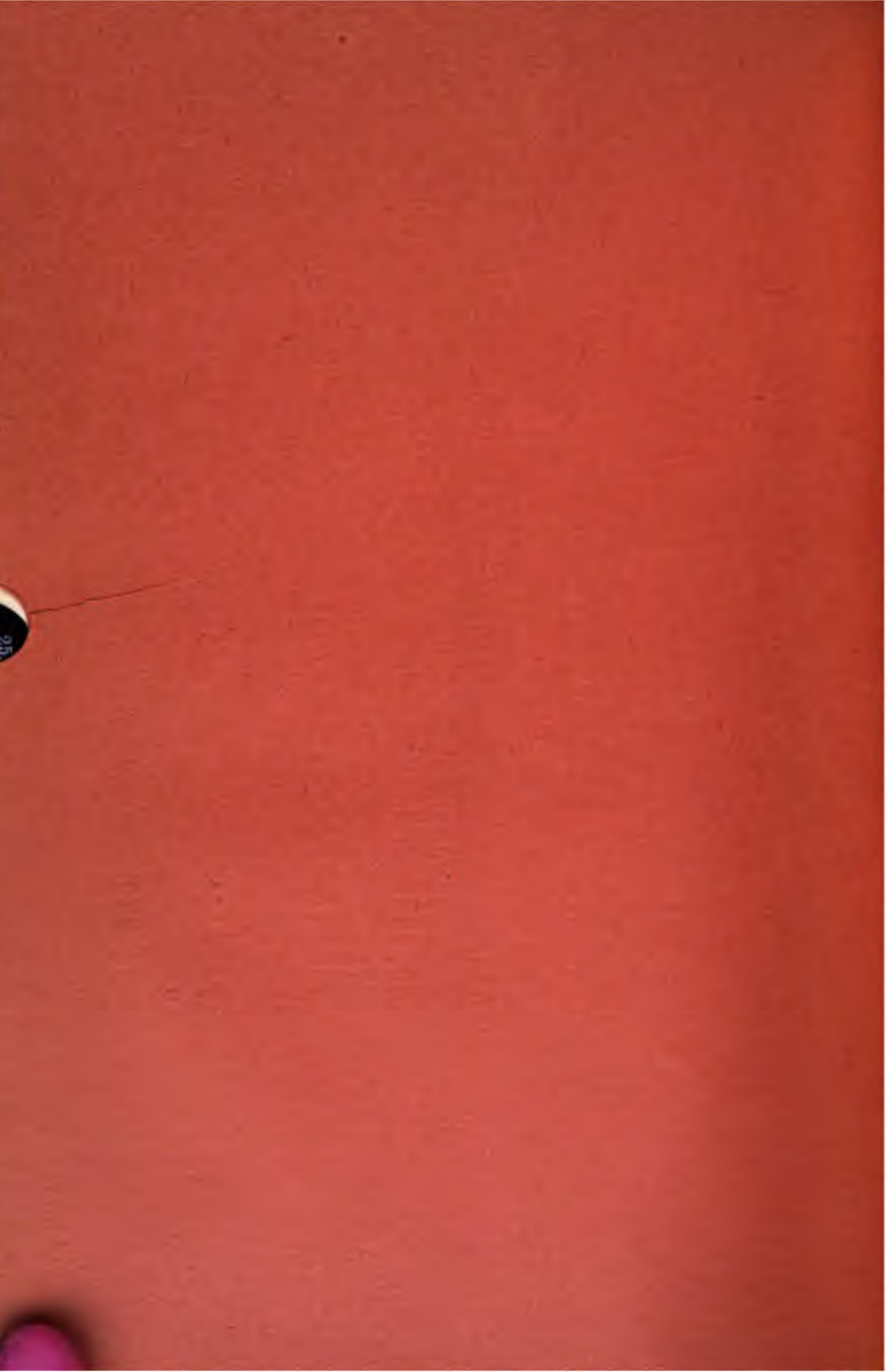
OFFICIAL REPORTER'S EDITION.

Off. Rep. 252 U. S.	Title.	Here in
1	Jett Bros. Distilling Co. v. Carrollton	421
3-4	" "	422
4-6	" "	423
6-7	" "	424
7	Farncomb v. Denver	424
8-9	" "	425
9-11	" "	426
11-12	" "	427
12	Goldsmith v. George C. Prendergast Constr. Co.	427
14-16	" "	429
16-18	" "	430
18	Chicago, R. I. & P. R. Co. v. Ward	430
19-21	" "	433
21-23	" "	434
23	Pennsylvania Gas Co. v. Public Service Commission	434
26-28	" "	441
28-30	" "	442
30-31	" "	443
32	Re Tiffany	443
34-36	" "	444
36-37	" "	445
37	Shaffer v. Carter	445
43-45	" "	453
46-48	" "	454
48-50	" "	455
50-52	" "	456
52-55	" "	457
55-57	" "	458
57-59	" "	459
59	" "	460
60	Travis v. Yale & T. Mfg. Co.	460
72-73	" "	466
73-75	" "	467
75-78	" "	468
78-80	" "	469
80-82	" "	470
83	Cheshrough v. Northern Trust Co.	470
83-84	" "	471

Off. Rep. 252 U. S.	Title.	Here in
85	United States v. A. Schrader's Son	471
94-95	" "	473
95-97	" "	474
97-100	" "	475
100	" "	476
100	Milwaukee Electric R. & Light Co. v. Wisconsin ex rel. Milwaukee	476
101-102	" "	478
102-104	" "	479
104-106	" "	480
107	McCloskey v. Tobin	481
107-108	" "	482
109	Lee v. Central of Georgia R. Co.	482
109-110	" "	488
110-111	" "	484
112	Grand Trunk Western R. Co. v. United States	484
116-117	" "	487
117-120	" "	488
120-122	" "	489
122-124	" "	490
124-125	" "	491
126	Chapman v. Wintroath	491
131-133	" "	493
133-135	" "	494
135-137	" "	495
137-139	" "	496
140	National Lead Co. v. United States	496
143-144	" "	498
144-146	" "	499
146-147	" "	500
147	Kansas City Southern R. Co. v. United States	500
148-150	" "	501
150-151	" "	502
152	New York C. R. Co v. Mohney	502
152-153	" "	504
153-155	" "	505
155-157	" "	506

Off. Rep. 252 U. S.	Title.	Here in
405–406	South Covington & C. Street R. Co. v. Kentucky	635
406–408	" "	636
408	" "	637
408	Cincinnati, C. & E. R. Co. v. Kentucky	637
409–410	" "	637
410–411	" "	638
411	Kenney v. Loyal Order of Moose (Supreme Lodge)	638
413–415	" "	640
415–416	" "	641
416	Missouri v. Holland	641
430–431	" "	646
431–432	" "	647
433–435	" "	648
435	" "	649
436	Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.	649
437–439	" "	651
439–441	" "	652
441–443	" "	653
443–444	" "	654
444	Askren v. Continental Oil Co.	654
445–446	" "	657
446–448	" "	658
448–450	" "	659
450	Cameron v. United States	659
454–455	" "	660
456–458	" "	661
458–460	" "	662
460–462	" "	663
462–465	" "	664
465	United States v. Simpson	665
466	" "	666
466–468	" "	666
469	Houston v. Ormes	667
471–473	" "	669
473–474	" "	670
475	Hull v. Philadelphia & R. R. Co.	670
477–479	" "	672
479–481	" "	673
481–484	" "	674
484	" "	675
485	United States v. Chase Nat. Bank	675
486–491	" "	677
491–493	" "	678
493–495	" "	679

Off. Rep. 252 U. S.	Title.	Here in
495–496	United States v. Chase Nat. Bank	680
496	Boehmer v. Pennsylvania R. Co.	680
497	" "	683
497–498	" "	684
499	Munday v. Wisconsin Trust Co.	684
501	" "	688
501–503	" "	689
503	" "	690
504	First Nat. Bank v. Williams	690
508	" "	690
508–510	" "	691
510–512	" "	692
512	Burnap v. United States	692
514–516	" "	694
516–518	" "	695
518–520	" "	696
520	" "	697
521–522	Oneida Nav. Corp. v. W. & S. Job & Co.	697
523	Penn Mut. L. Ins. Co. v. Lederer	698
523–525	" "	699
525–528	" "	700
528–530	" "	701
530–533	" "	702
533–535	" "	703
535–538	" "	704
538	" "	705
538	Estate of P. D. Beckwith v. Commissioner of Patents	705
539–540	" "	705
540–542	" "	706
542–544	" "	707
544–547	" "	708
547	Simpson v. United States	709
548–549	" "	711
549–551	" "	712
551–553	" "	713
553	Canadian Northern R. Co. v. Eggen	713
558–560	" "	715
560–563	" "	716
563	" "	717
563–565	Pennsylvania v. West Virginia	717
565	" "	718
567–591	Memorandum Decisions	719–731



CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1919.

Vol. 252.

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1919.

JETT BROTHERS DISTILLING COMPANY, Plff. in Err.,
v.
CITY OF CARROLLTON.

(See S. C. Reporter's ed. 1-7.)

Error to state court — Federal question — validity of state statute or authority.

1. The mere objection to an exercise of authority under a state statute whose validity is not attacked cannot be made the basis of a writ of error from the Federal Supreme Court to a state court since the amendment of September 6, 1916, to the Judicial Code, § 237. There must be a substantial challenge of the validity of the statute or authority upon the claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention.

[For other cases, see Appeal and Error, 1645–1716, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — raising by petition for rehearing.

2. The overruling by the highest court of a state without opinion of a petition for rehearing cannot be made the basis of a writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 1292–1310, in Digest Sup. Ct. 1908.]

[No. 108.]

Argued December 19, 1919. Decided March 1, 1920.

IN ERROR to the Court of Appeals of the State of Kentucky, to review a judgment which affirmed in part a judgment of the Circuit Court of Carroll County, in that state, in favor of a municipality in a suit to recover taxes. Dismissed for want of jurisdiction.

See same case below, 178 Ky. 561, 199 S. W. 37.

The facts are stated in the opinion.

Mr. **Helm Bruce** argued the cause, and, with Mr. George B. Winslow, filed a brief for plaintiff in error:

The general rule in this court is that a Federal question made for the first time in a petition for a rehearing, after delivery of an opinion by the supreme court of the state, is not made in proper time, unless the state court actually de-

---

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamlin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

cides the question, in which event this court will take jurisdiction.

Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346.

The reason for holding that a Federal question made for the first time in a petition for a rehearing is not generally sufficient is that, as a general rule, new grounds for decisions will not be allowed to be presented in a petition for a rehearing; and therefore if the state court, in overruling the petition for a rehearing, is silent on the subject of a Federal question, it will not be presumed that it passed on the Federal question.

Texas & P. R. Co. v. Southern P. Co. 137 U. S. 48, 53, 34 L. ed. 614, 616, 11 Sup. Ct. Rep. 10.

But in Kentucky new grounds for decision are allowed to be presented by a petition for a rehearing, and if the points thereby made are well taken, the court will change its ruling.

Elsey v. People's Bank, 168 Ky. 701, 182 S. W. 873.

It has often been held that where a Federal question is distinctly made in the court of original jurisdiction, and where the court of last resort in the state must necessarily have decided the question in order to make the decision it did make, this is sufficient to give this court jurisdiction, even though the state court was silent on the subject.

Steines v. Franklin County, 14 Wall. 15, 21, 20 L. ed. 846, 848.

Mr. A. E. Stricklett argued the cause, and, with Messrs. J. L. Donaldson, J. A. Donaldson, and G. A. Donaldson, filed a brief for defendant in error:

A Federal question raised for the first time in a petition for rehearing after judgment comes too late, and will not be considered by the Federal Supreme Court on a writ of error.

Chappell v. Bradshaw, 128 U. S. 132, 32 L. ed. 369, 9 Sup. Ct. Rep. 40; Loeber v. Schroeder, 149 U. S. 574, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

Mr. Justice Day delivered the opinion of the court:

The city of Carrollton brought suit against Jett Brothers Distilling Company to recover balances alleged to be due as taxes upon distilled spirits belonging to the company, held in a bonded warehouse in that city. The taxes sued for were those for the years 1907 to 1916, inclusive. It appears that during those years the city assessor undertook to assess for taxation the distilled spirits in the bonded warehouse, and the city taxes were paid as thus assessed. This suit was brought to recover taxes for the above-mentioned years upon the theory that during that period the spirits should have been valued by the state board of valuation and assessment, as provided by the statutes of Kentucky. Ky. Stat. §§ 4105, 4114. It was alleged that the valuation by the city assessor was without authority of law, by mistake, and for a much less sum than that fixed for each of said years by the state board. It was also alleged that the company had notice of the valuation fixed by the state board; that the city assessor was without authority to assess spirits in bonded warehouses; that the value fixed by him was an inconsiderable sum, and much less than that fixed by the state board in accordance with the Kentucky statutes. The Distilling Company took issue upon the petition. It pleaded the original levies for the years in question, and the payment of the taxes for each and all of the said years. It pleaded that the whisky which it was sought to tax under the new levy of 1915–1916 had been removed from the bonded warehouse of the company, and was no longer its property, and that it could no longer protect itself, as it could have done had the tax been levied while the spirits were in its possession.

[4] In the nineteenth paragraph of the answer a defense was set up upon a ground of Federal right under the Constitution. It was averred that during all the years covered by the amended petition it had been the rule, custom, habit, practice, and system in the city of Carrollton to assess and cause to be assessed the real estate therein at an average of not more than 40 per cent of its fair cash value, and to assess and cause to be assessed personal property in that city at an average of not more than 30 per cent of its fair cash value; that the assessment made by the state board upon which taxes were sought to be recovered was made at 100 per cent of the fair cash value of the whisky, and that the attempt of the plaintiff to collect the same was in violation of the defendant's rights under the Constitution of the state of Kentucky and the 14th Amendment of the Constitution of the United States.

The circuit court gave judgment in favor of the city for the amounts claimed under the new levy of 1916, giving credit for the amounts paid under the

original levies for the preceding years. The company appealed to the court of appeals of Kentucky, where the judgment of the circuit court was affirmed. 178 Ky. 561, 199 S. W. 37. There was no other reference to the Federal Constitution than that contained in the answer, so far as we have been able to discover, and the court of appeals dealt with the Federal question, deemed to be before it, as follows (178 Ky. 566, 199 S. W. 37):

"It is further asserted that the recent cases of Greene v. Louisville & Interurban R. Co. and Greene v. Louisville R. Co. decided by the Supreme Court of the United States and reported in 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88, uproot the contention that the act is constitutional, and hold that the state board of valuation, and the city assessor and board of supervisors, acting independently of each other, and fixing different valuations [5] of the same property, work a discrimination, inimical both to the Federal and state Constitutions. In this, however, appellant is in error. It must be borne in mind that complaint is only made of the assessment. The warehouseman had his remedy, in case of an excessive or unfair valuation, by appearing before the board of valuation and assessment at the time he received notice of the valuation fixed, and there make complaint, as provided in § 4107, Kentucky Statutes. This appellant failed to do, but acquiesced in the assessment by paying taxes both to the county and state on the valuation fixed by the state board. This being true, it cannot be heard to complain now."

The case is brought here by the allowance of a writ of error. As the judgment was rendered after the Act of September 6, 1916, chap. 448, 39 Stat. at L. 726, Judicial Code, § 237, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411, became effective, that act must determine the right to have a review in this court.

If the case can come here by writ of error, it is because there was drawn in question the validity of a statute or authority exercised under the state on the ground of their being repugnant to the Constitution, laws, or treaties of the United States. Before the petition for rehearing, the contentions based upon constitutional grounds, by the plaintiff in error, were those embraced in the nineteenth paragraph of the answer, to which we have referred, and such as were deemed to be before the court of appeals of Kentucky in the portion of the opinion from which we have quoted. Neither the answer nor the opinion of the court of appeals shows that any claim under the Federal Constitution was made, assailing the validity of a statute of the state, or of an authority exercised under the state, on the ground of repugnancy to the Federal Constitution. The answer, in the nineteenth paragraph, set up discrimination because of different valuations of the property of others, claimed to violate [6] rights secured by the 14th Amendment to the Constitution of the United States. The opinion of the court of appeals likewise discussed the discriminatory action alleged by the plaintiff in error.

Drawing in question the validity of a statute or authority as the basis of appellate review has long been a subject of regulation in statutes of the United States, as we had occasion to point out in United States ex rel. Champion Lumber Co. v. Fisher, 227 U. S. 445, 450, 451, 57 L. ed. 591, 593, 594, 33 Sup. Ct. Rep. 329. What is meant by the validity of a statute or authority was discussed by this court in Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503, in which this court, speaking by Mr. Chief Justice Fuller, said: "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise." And the Chief Justice added, upon the authority of Millingar v. Hartupee, 6 Wall. 258, 261, 262, 18 L. ed. 829, 830, that the word "authority" stands upon the same footing.

In order to give this court jurisdiction by writ of error under amended § 237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority, upon a claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention. Champion Lumber Co. v. Fisher, supra, and cases cited.

In the present case no such claim of the invalidity of a state statute or authority was raised in a manner requiring the court below to pass upon the question in disposing of the rights as-

serted. As we have said, whatever the effect of a petition for rehearing, it came too late [7] to make the overruling of it, in the absence of an opinion, the basis of review by writ of error. It follows that the allowance of the writ of error in the present case did not rest upon a decision in which was drawn in question the validity of a statute of the state, or any authority exercised under it, because of repugnancy to the Federal Constitution, and the writ of error must be dismissed, and it is so ordered.

Dismissed.

HENRY FARNCOMB, Emma Donahue, Henry Lorie, et al., Plffs. in Err.,
v.
CITY AND COUNTY OF DENVER et al.

(See S. C. Reporter's ed. 7–12.)

Error to state court — following decision below — construction of state statute.

1. The Federal Supreme Court, when dealing with the constitutionality of state statutes challenged under U. S. Const., 14th Amend., accepts the meaning of such statutes as construed by the highest court of the state.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — hearing on assessment for public improvement.

2. The hearing by a board of supervisors, sitting as a board of equalization, of all complaints and objections respecting assessments for public improvements, which was provided for by a city charter, satisfies the requirement of due process of law, although such board apparently is given power only to make recommendations to the board of public works for relief, where such charter provision is construed by the state courts as not taking away the legislative power and discretion of the board of supervisors and vesting it in the board of public works, but as empowering the former board to pass an assessing ordinance charging property with the cost of an improvement which, according to its judgment, would be just and equitable.

[For other cases, see Constitutional Law, 745–763, in Digest Sup. Ct. 1908.]

[No. 110.]

Argued January 14, 1920. Decided March 1, 1920.

IN ERROR to the Supreme Court of the State of Colorado to review a decree which affirmed a decree of the District Court of the City and County of Denver, in that state, dismissing a suit to enjoin the enforcement of certain assessments for public improvements. Affirmed.

See same case below, — Colo. —, 171 Pac. 66.

The facts are stated in the opinion.

Mr. T. J. O'Donnell argued the cause, and, with Mr. J. W. Graham, filed a brief for plaintiffs in error:

An opportunity to be heard before a body or tribunal which has no power to decide does not afford due process of law under the Federal Constitution.

Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619; Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Moss v. Whitzel, 108 Fed. 582; Charles v. Marion, 100 Fed. 538; Embree v. Kansas City & L. B. Road Dist. 240 U. S. 242, 251, 60 L. ed. 624, 629, 36 Sup. Ct. Rep. 317; Shumaker & L. Jurisdiction, Cyc. Law Dict. 1912; Bigham v. Henrici, — Pa. —, 16 Atl. 618; Bassick Min. Co. v. Schoolfield, 10 Colo. 46, 14 Pac. 65; Re Mahany, 29 Colo. 442, 68 Pac. 235; Bennett v. Wilson, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac. 883; Central P. R. Co. v. Beard

---

Note.—As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 380.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required generally to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

As to tax or assessment for public improvements on highway—see note to Graham v. Detroit, 44 L.R.A.(N.S.) 836.

On landowner's right to notice and hearing for assessment on a public improvement—see note to Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A. (N.S.) 1201.

of Equalization, 43 Cal. 368; Alexander v. Archer, 21 Nev. 22, 24 Pac. 376; Templeton v. Ferguson, 89 Tex. 47, 33 S. W. 332; Robertson v. State, 109 Ind. 79, 10 N. E. 582, 643; Herman, Estoppel, § 69; Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863.

The question presented was not determined in Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708.

The privileges and immunities of citizens are abridged by taking private property for public use without compensation.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Cowley v. Spokane, 99 Fed. 840; Zehnder v. Barber Asphalt Paving Co. 106 Fed. 103; New York L. Ins. Co. v. Prest, 71 Fed. 817; St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 429, 60 L. ed. 1072, 1079, 36 Sup. Ct. Rep. 647; Charles v. Marion, 100 Fed. 538.

Mr. James A. Marsh argued the cause, and, with Mr. Norton Montgomery, filed a brief for defendants in error:

The construction of the highest judicial tribunal of the state forms a part of its statute law as much as an enactment of the legislature.

Castillo v. McConnico, 168 U. S. 674, 680, 42 L. ed. 622, 624, 18 Sup. Ct. Rep. 229; St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419, 427, 60 L. ed. 1072, 1078, 36 Sup. Ct. Rep. 647; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Green v. Neal, 6 Pet. 291, 8 L. ed. 402; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

In this case there were two forums provided by the charter, either of which could have granted relief against the objections complained of, but as no objections were filed before either forum, plaintiffs are not now in a position to seek relief in equity and claim that due process of law was not afforded.

Voigt v. Detroit, 184 U. S. 115, 122, 46 L. ed. 459, 462, 22 Sup. Ct. Rep. 337; Goodrich v. Detroit, 184 U. S. 432, 438, 46 L. ed. 627, 631, 22 Sup. Ct. Rep. 397; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Spalding v. Denver, 33 Colo. 175, 80 Pac. 126.

[8] Mr. Justice Day delivered the opinion of the court:

Suit was brought in the district court of the city and county of Denver by the plaintiffs in error to enjoin the city from enforcing an assessment ordinance passed to raise the necessary means to pay for certain park improvements and the construction of boulevards and streets in the city of Denver.

The charter of the city of Denver was before this court in Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708. Sections 298 and 299 of the charter provided that the board of local improvements shall prepare a statement showing the costs of improvements, interest, cost of collection, etc., and apportion the same upon each lot or tract of land to be assessed, shall cause the same to be certified by the president, and filed in the office of the clerk. The clerk shall then, by advertisement in some newspaper of general circulation, published in the city and county, notify the owners of the real estate to be assessed, and all persons interested, that said improvements have been or will be completed, and shall specify the whole cost of the improvement, and the share so apportioned to each lot, or tract of land, or person, and any complaint or objection that may be made in writing by such persons or owners to the board of supervisors, and filed with the clerk within sixty days from the first publication of such notice, shall be heard and determined by the board of supervisors at its first regular meeting after sixty days, and before the passage of any ordinance assessing the cost of the improvements.

Section 300 provides: "At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of their apportionments; the board of public [9] works may thereupon make such modifications and changes as to them may seem equitable and just, and may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by ordinance, assess the costs of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

Section 328 of the charter provides: "When the cost of any such park site or parkway is definitely determined, the park commission shall prepare, certify and file with the clerk a statement showing the cost thereof as required in

Lawrence v. Grand Rapids, 166 Mich. 144, 131 N. W. 581; Mt. St. Mary's Cemetery v. Mullins, 248 U. S. 501, 505, 63 L. ed. 383, 387, 39 Sup. Ct. Rep. 173.

The findings of fact made by the trial court are conclusive, and may not be aided by additional findings. If they are insufficient to support the judgment of the trial court, that judgment should be reversed.

Downing v. Bourlier, 21 Mo. 150; Allison v. Darton, 24 Mo. 343; Abeles v. Pillman, 261 Mo. 376, 168 S. W. 1180; Sun Mut. Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 500, 27 L. ed. 337, 342, 1 Sup. Ct. Rep. 582; Farleigh v. Cadman, 159 N. Y. 175, 53 N. E. 808; 38 Cyc. 1954, 1964, 1968.

The conclusions of law upon which the trial court based its judgment were erroneous, and are ground for the reversal of that judgment—

(1) Because the omission of the park property from the sewer district warranted a finding of fact that the members of the municipal assembly were actuated by motives which constitute legal fraud; and

(2) Because the motives of the municipal assembly were immaterial.

Soon Hing v. Crowley, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; Brown v. Cape Girardeau, 90 Mo. 383, 59 Am. Rep. 28, 2 S. W. 302; Kansas City v. Hyde, 196 Mo. 507, 7 L.R.A.(N.S.) 639, 113 Am. St. Rep. 766, 96 S. W. 201; Kerfoot v. Chicago, 195 Ill. 232, 63 N. E. 101; Potter v. McDowell, 31 Mo. 69.

The refusal of division No. 2 of the supreme court of Missouri to transfer this cause to the court en banc was arbitrary, and violated § 1 of the 14th Amendment to the Constitution of the United States.

Moore v. Missouri, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179.

The action of said division No. 2 was the action of the state, within the purview of the Federal Constitution, and, if arbitrary, violated said § 1 of the 14th Amendment.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 289, 57 L. ed. 510, 515, 33 Sup. Ct. Rep. 312; Hovey v. Elliott, 167 U. S. 409, 417, 418, 42 L. ed. 215, 221, 17 Sup. Ct. Rep. 841; Ex parte Nelson, 251 Mo. 104, 157 S. W. 794.

Moreover, if no Federal question had been involved, the supreme court of Missouri would have had no jurisdiction of this case.

Barber Asphalt Paving Co. v. Hezel, 138 Mo. 228, 39 S. W. 781; Smith v. Westport, 174 Mo. 394, 74 S. W. 610; Platt v. Parker-Washington Co. 235 Mo. 467, 139 S. W. 124.

And if the judgment of the supreme court was rendered without jurisdiction, then that, in itself, constituted a taking of property without due process of law.

Scott v. McNeal, 154 U. S. 34, 45, 46, 38 L. ed. 896, 901, 902, 14 Sup. Ct. Rep. 1108; Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; Lent v. Tillson, 140 U. S. 316, 331, 35 L. ed. 419, 426, 11 Sup. Ct. Rep. 825; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 15, 51 L. ed. 345, 348, 27 Sup. Ct. Rep. 236.

Mr. Hickman P. Rodgers argued the cause, and, with Messrs. A. R. Taylor and Howard Taylor, filed a brief for defendant in error:

In the absence of evidence of fraud, oppression, or palpable injustice, the exercise of the discretion confided to the city to pass ordinances establishing sewers and sewer districts is conclusive, and not subject to collateral attack.

McGhee v. Walsh, 249 Mo. 286, 155 S. W. 445; Heman v. Allen, 156 Mo. 543, 57 S. W. 559.

If there was connection made with this sewer after the sewer was constructed and tax bill issued, it in no manner affects the validity of the tax bill.

Heman v. Schulte, 166 Mo. 417, 66 S. W. 163; Prior v. Buehler & C. Constr. Co. 170 Mo. 451, 71 S. W. 205; McGhee v. Walsh, and Heman v. Allen, supra.

The 14th Amendment means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

But it was not designed to interfere with the power of the state to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the state in administering the process provided by the law of the state.

Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The refusal of the supreme court of Missouri to grant a rehearing en banc is not a denial of due process of law when an opinion of a division is adverse to a claim made under the Federal Constitution, but is correct.

State v. Moore, 121 Mo. 514, 42 Am. St. Rep. 542, 26 S. W. 345, affirmed in 159 U. S. 675, 40 L. ed. 302, 16 Sup. Ct. Rep. 179.

Mr. Justice Day delivered the opinion of the court:

Suit was brought in the circuit court of the city of St. Louis by the Construction Company to recover upon a special tax bill issued by the city of St. Louis for the construction of the sewer in what is known as Manchester Road Sewer District No. 111, city of St. Louis. The Construction Company recovered a judgment on the tax bills against the plaintiffs in error, who were owners of abutting property. Upon appeal to the supreme court of Missouri the judgment below was affirmed upon hearing and rehearing. 273 Mo. 184, 201 S. W. 354.

The record discloses that the sewer, for the construction of which the assessment was made, was constructed in a certain boulevard known as Kingshighway boulevard. On the east of this boulevard, and fronting on the same for a considerable distance, is a tract belonging to the city, and known as Tower Grove park; this property was not assessed for the building of the sewer. This omission is alleged to be of such an arbitrary and discriminatory character as to render the ordinance making the assessment void as a deprivation of Federal constitutional rights [15] secured to the plaintiffs in error by the due process and equal protection clauses of the 14th Amendment.

The circuit court made findings of fact in which it found that there was no evidence that the municipal assembly of the city of St. Louis, in passing the ordinances in question, was actuated by motives of fraud or oppression; that such motives, if any, must be inferred solely from the failure to incorporate parcels or tracts of land in the sewer district, the topography of which might render it necessary or expedient to then, or thereafter, drain the water or sewage therefrom into the sewer. The court recites the nature of the title of the tract known as Tower Grove park.

It appears that the park had been conveyed to the city, the grantor reserving therefrom a strip 200 feet wide, surrounding the same. The court found that the western front of the tract thus conveyed to the city included the western gate or entrance of the park and the strip of 200 feet in width, surrounding the park proper, and embraced a total frontage along Kingshighway of about 1,470 feet, and that none of the property included within Tower Grove park and the strip of 200 feet in width, reserved for residence property, was included within the taxing district for such sewer construction. The court also finds that with the exception of an area composing some 300 feet, each way, located at the southwestern corner of the park, the western part of the park for a distance of some 600 feet east of Kingshighway is of an elevation higher than Kingshighway between Arsenal street and Magnolia avenue, and the natural drainage thereof is, in the main, westwardly towards Kingshighway, and that before the building of the sewer in question surface water and hydrants drained from said part of the park through drains and gutters under said street and sidewalk to a point west of Kingshighway. That whatever drains for surface and hydrant water existed in said western and northwestern [16] portion of the park led into that section of the sewer in question, situated in Kingshighway, adjoining the park; but the court finds that it is unable to determine from the evidence as to when such connection with said sewer was accomplished, or by whom. The court also finds that at the time the work in question was performed, it was provided by the revised ordinances of the city of St. Louis that water draining from roofs of houses should not flow over sidewalks, but should be conducted through pipes to a sewer, if available, and if not, then through pipes below the sidewalk, and into the open gutter of the street. The court does not find from the evidence that it was not possible or feasible to drain the surface water falling upon or collected from that portion of Tower Grove park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land, in any other manner than through or by the district sewer constructed in Kingshighway, and that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer.

As conclusions of law the court finds that it was within the powers of the municipal assembly, in the passage of the ordinances establishing the sewer district wherein the work sued for was performed, to embrace and designate therein only such real estate as, in their judgment, should be benefited thereby; that the discretion vested in the munic-

ipal legislature was not subject to review by this court, unless the powers of the legislature were affirmatively shown to have been exercised fraudulently, oppressively, or arbitrarily. And the court found that the mere omission of the lands from said district which might, at one time, be reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would be more conveniently served by the sewer in question than any other, did not justify [17] the court in concluding that the municipal assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud or oppression; or that the prima facie liability of defendants, established by the certified special tax bill, is thereby rebutted and overturned.

On the facts and conclusions of law the judgment was affirmed by the supreme court of Missouri.

The establishment of sewer districts was committed to local authorities by the charter of the city of St. Louis, which had the force and effect of a statute of the state. That charter provided that, within the limits of the district prescribed by ordinance recommended by the board of public improvements, the municipal assembly might establish sewer districts, and such sewers may be connected with a sewer of any class, or with a natural course of drainage. See Woerner's Revised Code of St. Louis, 1907, p. 410, § 21.

The mere fact that the court found that a part of Tower Grove park might have been drained into the sewer, it was held by the Missouri courts, under all the circumstances, did not justify judicial interference with the exercise of the discretion vested in the municipal authorities. The court commented on the fact that it was not shown that any considerable amount of surface water was conducted away from the park by this sewer. Much less do such findings afford reason for this court, in the exercise of its revisory power under the Federal Constitution, to reverse the action of the state courts, which fully considered the facts, and refused to invalidate the assessment.

As we have frequently declared, this court only interferes with such assessments on the ground of violation of constitutional rights secured by the 14th Amendment, when the action of the state authorities is found to be arbitrary, or wholly unequal in operation and effect. [18] We need but refer to some of the cases in which this principle has been declared: Embree v. Kansas City & L. B. Road Dist. 240 U. S. 242, 60 L. ed. 624, 36 Sup. Ct. Rep. 317; Withnell v. Ruecking Constr. Co. 249 U. S. 63, 63 L. ed. 479, 39 Sup. Ct. Rep. 200; Hancock v. Muskogee, 250 U. S. 454, 63 L. ed. 1081, 39 Sup. Ct. Rep. 528; Branson v. Bush, decided December 22, 1919, 251 U. S. 182, ante, 215, 40 Sup. Ct. Rep. 113.

We find no merit in the contention that a Federal constitutional right was violated because of the refusal to transfer the cause from the division of the supreme court of Missouri, which heard it, to the court in banc. See Moore v. Missouri, 159 U. S. 673, 679, 40 L. ed. 301, 303, 16 Sup. Ct. Rep. 179.

Affirmed.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY and A. J. Carney, Petitioners,

v.

FRED WARD.

(See S. C. Reporter's ed. 18–23.)

Master and servant — assumption of risk — employers' liability.

1. Assumption of risk is a defense to which a defendant sued under the Federal Employers' Liability Act is entitled, where the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employees.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk — extraordinary hazard — employers' liability.

2. So far as extraordinary hazards are concerned, an interstate railway employee may assume that the employer and his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and dangers arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

Note.—Generally, as to servant's assumption of risk—see notes to Pidcock v. Union P. R. Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374; and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

On the constitutionality, application, and effect of the Federal Employers'

Master and servant — assumption of risk — employers' liability.

3. The Federal Employers' Liability Act places a coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of the assumption of risk.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk — extraordinary hazard.

4. A switchman riding on a cut of freight cars which he was to check by applying a brake when these cars should be cut off from the engine does not assume the risk of sudden precipitation from the front end of a car by the abrupt checking resulting from the failure of the engine foreman to make the disconnection at the proper time.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

Appeal — harmless error — instructions.

5. The inaccuracy of a charge on the assumption of risk could have worked no harm to the defendant where the situation did not make the doctrine of assumed risk a defense to the action.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

Appeal — harmless error — instructions.

6. A charge that contributory negligence would prevent a recovery under the Federal Employers' Liability Act could not have prejudiced the defendants, being more favorable to them than they were entitled to.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

Jury — infringement of right — nonunanimous verdict — employers' liability.

7. State courts, when enforcing rights under the Federal Employers' Liability Act, may give effect to a local practice permitting a less than unanimous verdict.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

[No. 198.]

Submitted January 28, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the Superior Court of Pottawatomie County, in that state, in favor of plaintiff in a personal-injury action brought under the Federal Employers' Liability Act. Affirmed.

See same case below, — Okla. —, 173 Pac. 212.

The facts are stated in the opinion.

Messrs. **R. J. Roberts, W. H. Moore, Thomas P. Littlepage, Sidney F. Taliaferro,** and **W. F. Dickinson** submitted the cause for petitioners. Messrs. C. O. Blake and J. E. Du Mars were on the brief:

The proof is sufficient to bring the case under the Federal Employers' Liability Act.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 476, 482, 56 L. ed. 1171, 1174, 32 Sup. Ct. Rep. 790; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 161, 57 L. ed. 1129, 1134, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Taylor v. Taylor, 232 U. S. 365, 370, 58 L. ed. 639, 641, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 49, 58 L. ed. 838, 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Wabash R. Co. v. Hayes, 234 U. S. 88, 90, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Central Vermont R. Co. v. White, 238 U. S. 507, 513, 59 L. ed. 1433, 1437, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252; Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 61 L. ed. 476, 37 Sup. Ct. Rep. 188, 17 N. C. C. A. 349.

Plaintiff assumed the risk of the injury he received as one incident to the service in which he was engaged.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542,

Plaintiff assumed the risk of injury as

Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

On volenti non fit injuria as defense to action by injured servant—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161.

As to whether servant may assume the risk of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

As to servant's assumption of risk of dangers imperfectly appreciated—see note to Tuckett v. American Steam & H. Laundry, 4 L.R.A.(N.S.) 990.

On number and agreement of jurors necessary to constitute a valid verdict—see notes to Silsby v. Foote, 14 L. ed. U. S. 394, and State v. Bates, 43 L.R.A. 33.

one resulting from the alleged negligence, of which he knew, or which was so obvious as to be apparent to an ordinary man under such circumstances.

Northern P. R. Co. v. Freeman, 174 U. S. 380, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. ed. 1016, 36 Sup. Ct. Rep. 564.

Defendants were deprived of Federal guaranties by erroneous instructions on assumption of risk which were prejudicial.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 65, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 379, 59 L. ed. 277, 278, 35 Sup. Ct. Rep. 130; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 458, 59 L. ed. 671, 673, 35 Sup. Ct. Rep. 306; Reese v. Philadelphia & R. R. Co. 239 U. S. 463, 60 L. ed. 384, 36 Sup. Ct. Rep. 134, 10 N. C. C. A. 926; Jacobs v. Southern R. Co. 241 U. S. 229, 60 L. ed. 970, 36 Sup. Ct. Rep. 588; Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 60 L. ed. 1102, 36 Sup. Ct. Rep. 620; Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. ed. 1107, 36 Sup. Ct. Rep. 624; Boldt v. Pennsylvania R. Co. 245 U. S. 441, 62 L. ed. 385, 38 Sup. Ct. Rep. 139; Missouri, K. & T. R. Co. v. Wilhoit, 87 C. C. A. 401, 160 Fed. 440; District of Columbia v. McElligott, 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884; Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; Jones v. East Tennessee, V. & G. R. Co. 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Osage Coal & Min. Co. v. Sperra, 42 Okla. 726, 142 Pac. 1040; Guthrie v. Swan, 3 Okla. 116, 41 Pac. 84; Oklahoma City R. Co. v. Diab, 30 Okla. 32, 118 Pac. 351; Oklahoma City R. Co. v. Barkett, 30 Okla. 28, 118 Pac. 350; St. Louis & S. F. R. Co. v. Kral, 31 Okla. 624, 122 Pac. 177; Muskogee Electric Traction Co. v. Staggs, 34 Okla. 161, 125 Pac. 481; Metropolitan R. Co. v. Fonville, 36 Okla. 76, 125 Pac. 1125; St. Louis & S. F. R. Co. v. Elsing, 37 Okla. 333, 132 Pac. 483; Chicago, R. I. & P. R. Co. v. Pitchford, 44 Okla. 197, 143 Pac. 1146; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 58 L. ed. 521, 34 Sup. Ct. Rep. 229.

The instructions either state that contributory negligence is a bar, which shows clearly that the instructions are based upon the Constitution and statutes of Oklahoma, or omit reference to it altogether; in which case the jury would necessarily be misled by erroneous instructions.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 458, 59 L. ed. 671, 673, 35 Sup. Ct. Rep. 306.

Mr. W. S. Pendleton submitted the cause for respondent. Mr. T. G. Cutlip was on the brief:

This court is without jurisdiction.

Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 61 L. ed. 476, 37 Sup. Ct. Rep. 188, 17 N. C. C. A. 349; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; Baldwin v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

The alleged errors of the trial court in giving instructions as to assumed risk and contributory negligence were harmless, and not prejudicial misdirections.

Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 60 L. ed. 1102, 36 Sup. Ct. Rep. 620; Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. ed. 745, 36 Sup. Ct. Rep. 399; Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130; Illinois C. R. Co. v. Nelson, 128 C. C. A. 525, 212 Fed. 69.

Mr. Justice Day delivered the opinion of the court:

Suit was brought in the superior court, Pottawatomie county, Oklahoma, against the Chicago, Rock Island, & Pacific Railway Company and A. J. Carney to recover damages for injuries alleged to have been received by Ward while he was employed as a switchman of the railway company in its yards at Shawnee. He recovered a judgment which was affirmed by the supreme court of Oklahoma (— Okla. —, 173 Pac. 212). The ground upon which recovery was sought against the railway company and Carney, who was an engine foreman, was that Ward, while engaged in his duty as a switchman, was suddenly thrown from the top of a box car upon which he was about to apply a brake. The petition alleged, and the testimony tended to show, that Ward was engaged as a switchman [20] on a cut of cars which it was the duty of the engine foreman to cut loose from the engine pushing the cars in order that Ward might gradually stop the cars by applying the brake. It appears that, at the time of the injury to Ward, the cut of cars had been pushed up an incline by the engine, over an elevation, and as the cars ran down the track the effect was to cause the slack to run out between them, permitting them to pull apart sufficiently to be uncoupled, at which time it was the duty of the engine foreman to uncouple the cars. The testimony tended to support the allegations of the petition as to the negligent manner in which this operation was performed at the time of the injury, showing the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed of the engine, thereby causing them to slow down in such manner that when the check reached the car upon which Ward was about to set the brake, he was suddenly thrown from the top of the car, with the resulting injuries for which he brought this action.

The railway company and Carney took issue upon the allegations of the petition, and set up contributory negligence and assumption of risk as defenses. The trial court left the question of negligence on the part of the company and the engine foreman to the jury, and also instructed it as to assumption of risk by an employee of the ordinary hazards of the work in which he was engaged, and further charged the jury as follows:

"You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment, yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence, nor such as are latent, or are only discoverable at [21] the time of the injury. The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or, in the exercise of reasonable and ordinary care, should know, the risk to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know, or, knowing, does not appreciate such risk, and his ignorance or nonappreciation is not due to negligence or want of care on his part, there is no assumption of risk on the part of the servant, preventing a recovery for injuries."

Treating the case, as the court below did, as one in which the injury occurred while the petitioners and respondent were engaged in interstate commerce, this charge as to the assumption of risk was not accurate, in stating without qualification that the servant did not assume the risk created by the master's negligence. We have had occasion to deal with the matter of assumption of risk in cases where the defense is applicable under the Federal Employers' Liability Act, being those in which the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employees. As this case was not one of the latter class, assumption of risk was a defense to which the defendants below were entitled. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Jacobs v. Southern R. Co. 241 U. S. 229, 60 L. ed. 970, 36 Sup. Ct. Rep. 588.

As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 315, 60 L. ed. 1016, 1020, 36 Sup. Ct. Rep. 564: "According to our decisions, the settled rule is not that it is the

duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until [22] notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them." The Federal Employers' Liability Act places a coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313. See also Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 468, 60 L. ed. 1102, 1106, 36 Sup. Ct. Rep. 620; Erie R. Co. v. Purucker, 244 U. S. 320, 61 L. ed. 1166, 37 Sup. Ct. Rep. 629.

Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assume the risk.

[23] The trial court also charged that contributory negligence by Ward would prevent a recovery. This charge was more favorable to the petitioners than they were entitled to, as, under the Federal Employers' Liability Act, contributory negligence is not a defense, and only goes in mitigation of damages. The giving of this charge could not have been prejudicial error requiring a reversal of the judgment.

Another assignment of error, dealt with by the supreme court of Oklahoma, that a jury of less than twelve returned the verdict, conforming to the state practice, does not seem to be pressed here. In any event, it is disposed of by St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223, 60 L. ed. 966, 36 Sup. Ct. Rep. 602.

We find no error in the judgment of the Supreme Court of Oklahoma, and the same is affirmed.

PENNSYLVANIA GAS COMPANY, Plff. in Err.,
v.
PUBLIC SERVICE COMMISSION, Second District, of the State of New York, the City of Jamestown, New York, et al.

(See S. C. Reporter's ed. 23-31.)

Commerce — what is — transportation of natural gas.

1. The direct transmission of natural gas from the source of supply outside the state to local consumers in municipalities within the state is interstate commerce.

[For other cases, see Commerce, I. b, in Digest Sup. Ct. 1908.]

Commerce — state regulation — congressional inaction — natural gas rates.

2. Until Congress acts under its superior authority by regulating the subject-matter for itself, the exercise of authority conferred by a state upon a public service commission to regulate rates for natural gas transmitted directly from the source of supply outside the state to local consumers in municipalities within the state does not offend against the commerce clause of the Federal Constitution.

[For other cases, see Commerce, I. c; III. c, in Digest Sup. Ct. 1908.]

[No. 330.]

Note.—State regulation of natural gas rates as affected by the commerce clause of the Federal Constitution.

It is settled that the transportation of gas through pipe lines from one state to another is interstate commerce. West

Argued December 8 and 9, 1919. Decided March 1, 1920.

IN ERROR to the Supreme Court of the State of New York in and for the County of Ulster to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, Third Department, reversing an order of the Special Term, granting a writ of prohibition to restrain the state Public Service Commission from regulating natural gas rates. Affirmed.

See same case below in appellate division, 184 App. Div. 556, P.U.R.1919A, 372, 171 N. Y. Supp. 1028; in court of appeals, 225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260.

The facts are stated in the opinion.

Mr. John E. Mullin argued the cause, and, with Mr. Marion H. Fisher, filed a brief for plaintiff in error:

Natural gas is a legitimate article of commerce, and the transportation thereof by pipe line from one state for sale in another is interstate commerce.

West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; Haskell v. Kansas Natural Gas Co. 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442; Haskell v. Cowham, 109 C. C. A. 235, 187 Fed. 403; Landon v. Public Utilities Commission, P.U.R.1918A, 31, 242 Fed. 682.

The facts at bar present a much stronger case for the protection of the commerce clause than those to which the protection of the "original package" doctrine is commonly given. The gas company cannot be deprived of this protection merely because its business cannot be tested by some particular phrase originally used by the court in applying the Constitution to the facts before it at a time when the natural gas business was not even dreamed of. To give to such phrases the binding force of inflexible law is to nullify the boasted flexibility of the Federal Constitution.

---

v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Public Utilities Co. v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, decree modified on another point in 249 U. S. 590, 63 L. ed. 791, 39 Sup. Ct. Rep. 389; PENNSYLVANIA GAS CO. v. PUBLIC SERVICE COMMISSION (reported herewith) ante, 434; State ex rel. Caster v. Flannelly, 96 Kan. 372, P.U.R.1916C, 810, 152 Pac. 22; West Virginia & M. Gas Co. v. Towers, — Md. —, P.U.R. 1919D, 332, 106 Atl. 265; Traders & Labor Council v. Fayette County Gas Co. P.U.R.1918B, 165.

This principle, however, does not prevent all regulation of the rates by the state in which the gas is sold. The theory followed in PENNSYLVANIA GAS CO. v. PUBLIC SERVICE COMMISSION, that, in the absence of action by Congress, relating thereto, the states may regulate rates for natural gas transmitted from other states, had been anticipated in several decisions. Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940; State ex rel. Caster v. Flannelly, 96 Kan. 372, P.U.R.1916C, 810, 152 Pac. 22; State ex rel. Bristow v. Landon, 100 Kan. 593, 165 Pac. 1111.

Where the gas is produced in several states and commingled in pipe lines, from which it is sold, some doubt has been expressed as to its being interstate commerce.

In Manufacturers' Light & Heat Co. v. Ott, supra, corporations from West Virginia, Ohio, and Pennsylvania had united their operations in pumping gas into a common system of pipes supplying customers in the three states. The action involved the right of the West Virginia Public Service Commission to regulate the rates charged to customers in West Virginia. The court says that although the fact that this system of operation may have resulted in some gas from Ohio and Pennsylvania coming into West Virginia, it is undisputed that a much larger quantity of gas went out of West Virginia into Ohio and Pennsylvania; and further, that this interflow of gas from one state to another, according to the pressure from the main gas pipe at common reservoirs, cannot affect the power of the state of West Virginia to make reasonable regulations as to the rates for gas furnished to its own citizens. But it is further stated that it is unnecessary to decide whether Congress may not regulate charges for natural gas under such conditions, and that, Congress having taken no action, it was clearly within the power of the state legislature to provide for the protection of its own citizens against excessive charges.

In State ex rel. Caster v. Flannelly, 96 Kan. 372, P.U.R.1916C, 810, 152 Pac. 22, it is said not to be interstate commerce to sell natural gas to the

Re Debs, 158 U. S. 564, 590, 39 L. ed. 1092, 1104, 15 Sup. Ct. Rep. 900; 1 Watson, Const. pp. 496, 497; 2 Willoughby, Const. §§ 300, 301, pp. 644, 650.

The breaking of an original package of an interstate shipment before the delivery of the articles therein to the persons for whom they were ultimately intended when shipped, the delivery of some of the articles from the broken package to persons for whom they were intended when shipped, the further transportation within the state of remaining articles from the broken package, and the delivery of them to various persons for whom they were intended when shipped, do not deprive the entire transaction of its character as interstate commerce, or subject any part of it to state law.

Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Rep. 623; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Swift & Co. v. United States, 196 U. S. 398, 49 L. ed. 525, 25 Sup. Ct. Rep. 276; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; United States v. Illinois C. R. Co. 230 Fed. 940; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438.

The power to regulate interstate commerce granted by the commerce clause to the Federal government is not only paramount, but exclusive of any power in the states, and the inaction of Congress is an expression of its intention that such commerce shall be free from

---

consumers thereof in Kansas, where the gas sold was produced in Kansas and Oklahoma, and that produced in Oklahoma, after being conveyed in pipe lines to Kansas, was so commingled in the pipe lines conveying the same with the gas produced in Kansas that it was impossible to separate or distinguish the two, and, after being so commingled, it was conveyed from city to city throughout the state, and there sold to the consumers. The Kansas court seems to reach this conclusion on the "original package" theory, holding that, after the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sales, the interstate commerce is at an end. This decision, however, seems finally to be rested upon the principle that the state may regulate interstate commerce of the character of natural gas in the absence of action by Congress. It seems that at least the same companies were involved in the foregoing Kansas cases as were involved in the United States Supreme Court case of Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, where the court emphasizes the sale by the transporting company to the local company as taking it out of the domain of interstate commerce. The United States Supreme Court holds that the sale and delivery of gas to customers at burner tips by local distributing companies operating under special franchises, and the payment of two thirds of their receipts to the natural gas company furnishing the gas through interstate pipe lines, do not constitute any part of interstate commerce so as to exclude state regulation of local rates as confiscatory and as unduly burdening such commerce.

The "original package" doctrine was invoked by the Maryland court of appeals in West Virginia & M. Gas Co. v. Fowers, — Md. —, P.U.R.1919D, 332, 106 Atl. 265, although the company which actually sold the gas to consumers received it at a point in West Virginia and transported it across the state line into Maryland. It appeared in this case that the gas was transported from the wells in gathering lines to compresser stations, where it was compressed and taken into other pipe lines to the main compresser station, where it was again compressed. After leaving this station and passing through other pipes it ultimately entered the main pipe line of the corporation which transferred it into Maryland. The gas could not be served to the consumer at the high pressure necessary for its transmission through the main line, and its pressure was reduced through what was known as a regulator, and the gas then carried to the community in low pressure mains with which the various service lines were connected. The separation of the gas from the general bulk of gas, and confining it in the intermediate pipe lines, whence it could not return to the main pipe line, where it must remain until consumed, was held to be a breaking up of the original package, and a mingling of the gas with the common mass of property in the state; hence, its

the imposition by the states of any substantial or material burden, restraint, or regulation.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Brown v. Houston, 114 U. S. 622, 630, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 572, 30 L. ed. 244, 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Bowman v. Chicago & N. W. R. Co. 125 U. S. 498, 507, 31 L. ed. 711, 714, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 212, 38 L. ed. 962, 966, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 36, 46 L. ed. 416, 420, 22 Sup. Ct. Rep. 277; Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596.

The exclusive nature of the Federal power has not only been asserted in cases where the state has attempted to fix interstate rates, but also to prevent interference by the state with the sale of commodities moving in interstate commerce. Attempts by the states to regulate or restrict the freedom of importation, delivery, and sale of interstate commodities have repeatedly been declared repugnant to the Constitution.

Walling v. Michigan, 116 U. S. 455, 29 L. ed. 694, 6 Sup. Ct. Rep. 454; Leisy v. Hardin, 135 U. S. 100, 119, 120, 34 L. ed. 128, 136, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lying v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Caldwell v. North Carolina, 187 U. S. 622, 625, 627, 47 L. ed. 336, 338, 339, 23 Sup. Ct. Rep. 229; West v. Kansas Natural Gas Co. 221 U. S. 261, 55 L. ed. 728, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Clark Distilling Co. v. West-

---

sale subject to regulation by the state commission. It is doubtful whether the view of the Maryland court of appeals is correct in view of the decision in the reported case (PENNSYLVANIA GAS CO. v. PUBLIC SERVICE COMMISSION, ante, 434), which affirmed a decision of the court of appeals of New York (225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260). In the discussion of the question whether the transportation of natural gas through pipe lines from one state into another, where it is sold to consumers by the corporation making the transportation, amounts to interstate commerce, the state court says that "there is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterward develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage had been reached. Kehrer v. Stewart, 197 U. S. 65, 49 L. ed. 666, 25 Sup. Ct. Rep. 403; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091 (the transactions would then be similar to those common in the oil business). We do not now determine the rule that should govern them. It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known and the gas is transmitted not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous." The transportation was accordingly held to be interstate commerce.

The district court in Landon v. Public Utilities Commission, 245 Fed. 950 (reversed on other grounds in 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, the decree in which was vacated and the judgment modified on another point in 249 U. S. 590, 63 L. ed. 791, 39 Sup. Ct. Rep. 389), holds that where any storage which exists is merely incidental to the transportation of the gas, the interstate character of the transportation is not destroyed.

The Pennsylvania Public Service Commission in Duggan v. Fayette County Gas Co. P.U.R.1918B, 165, held that a gas company operating in Pennsylvania, which obtained a part of its gas from Pennsylvania and part from a West Virginia company, the gas from the West Virginia company being delivered to it at the boundary line between the two states, could not defeat the jurisdiction of the Pennsylvania Public Service Commission to regulate the rates to consumers, on the theory that it was engaged in interstate commerce.

ern Maryland R. Co. 242 U. S. 311, 328, 329, 61 L. ed. 326, 339, 340, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438.

That the action threatened by the state in this case is a "regulation" of interstate commerce within the meaning of the commerce clause cannot be denied.

Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438; Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623; Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Brown v. Maryland, 12 Wheat. 419, 447, 6 L. ed. 678, 688; Leisy v. Hardin, 135 U. S. 100, 108, 119, 123, 34 L. ed. 128, 132, 136, 137, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 328, 329, 61 L. ed. 326, 339, 340, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Bowman v. Chicago & N. W. R. Co. 125 U. S. 507, 31 L. ed. 714, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Judson, Interstate Commerce, § 17; West v. Kansas Natural Gas Co. 221 U. S. 255, 256, 55 L. ed. 726, 727, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438; Brown v. Maryland, 12 Wheat. 419, 439, 6 L. ed. 678, 685; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Railroad Commission v. Worthington, 225 U. S. 101, 107, 56 L. ed. 1004, 1007, 32 Sup. Ct. Rep. 653.

Federal functions may not be usurped under the police power, nor does the occupancy of highways by the plaintiff in error under local franchises authorize the state to regulate the price of gas moving in interstate commerce.

Leisy v. Hardin, 135 U. S. 100, 108, 119-123, 34 L. ed. 128, 132, 136, 137, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lyng v. Michigan, 135 U. S. 161-166, 34 L. ed. 150-153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup Ct. Rep. 564; Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438.

The interstate natural gas business conducted by the plaintiff in error is national, not local, in character, and the proposed state regulation thereof is not local in its operation. Therefore, the state does not have the power of regulation.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; Glouster Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; St. Clair County v. Interstate Sand & Car Transfer Co. 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. Rep. 300; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438; West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; Haskell v. Cowham, 109 C. C. A. 235, 187 Fed. 403; Landon v. Public Utilities Commission, P.U.R.1918A, 31, 242 Fed. 682; Haskell v. Kansas Natural Gas Co. 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442.

The power of a state to enforce common-law duties, or like statutory duties, of public utilities engaged in interstate commerce, does not extend to prescribing rates for interstate commerce.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 222, 38 L. ed. 962, 970, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Railroad Commission v. Worthington, 225 U. S. 101, 107, 56 L. ed. 1004, 1007, 32 Sup. Ct. Rep. 653; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 412, 57 L. ed. 1511, 1547, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18;

Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 38, 43, 44, 46 L. ed. 416, 421, 423, 424, 22 Sup. Ct. Rep. 277; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 575, 30 L. ed. 244, 250, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

The least that the plaintiff in error is entitled to receive for the transportation and supply of its gas is a rate which will produce a fair return upon the fair and reasonable value of its property used and useful in serving the public.

Taylor, Due Process of Law, p. 414; Smyth v. Ames, 169 U. S. 466, 546, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 755–757, 43 L. ed. 1154, 1160, 1161, 19 Sup. Ct. Rep. 804; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 89, 91, 46 L. ed. 92, 101, 102, 22 Sup. Ct. Rep. 30; Lincoln Gas & E. L. Co. v. Lincoln, 223 U. S. 349, 56 L. ed. 466, 32 Sup. Ct. Rep. 271; Wilcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 434, 454, 457, 57 L. ed. 1511, 1555, 1563, 1565, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

In fixing intrastate rates for an interstate public utility, the state has no right to take into consideration the business of the company outside of the state, or base them on the value of the property outside the state.

Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418; Judson, Interstate Commerce, § 134; 2 Willoughby, Const. § 343, pp. 730, 731; Wood v. Vandalia R. Co. 231 U. S. 1, 7, 58 L. ed. 97, 100, 34 Sup. Ct. Rep. 7; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 498, 504, 57 L. ed. 1571, 1590, 1593, 33 Sup. Ct. Rep. 975; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 459, 467, 471, 57 L. ed. 1511, 1565, 1568, 1570, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

Where state regulations necessarily operate on interstate commerce they are void, regardless of the motive or asserted purpose of the state.

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Stockard v. Morgan, 185 U. S. 27, 37, 46 L. ed. 785, 794, 22 Sup. Ct. Rep. 576; Asbell v. Kansas, 209 U. S. 251, 254, 256, 52 L. ed. 778, 780, 781, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 22, 46, 54 L. ed. 355, 363, 374, 30 Sup. Ct. Rep. 190; Illinois C. R. Co. v. Greene, 244 U. S. 555, 61 L. ed. 1309, 37 Sup. Ct. Rep. 697; Union P. R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131, P.U.R.1919B, 315, 39 Sup. Ct. Rep. 24.

If this case be regarded as involving a conflict between the principle that a state may make certain regulations involving interstate commerce, and the vital principle that, in the absence of action by Congress, a state may not make any regulation which impedes interstate commerce, the Federal rule must prevail.

Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 351, 58 L. ed. 1341, 1348, 34 Sup. Ct. Rep. 833; Landon v. Public Utilities Commission, 245 Fed. 950.

In fixing the gas rates, the state necessarily regulates the rate or return for the interstate transportation of the gas, and that is beyond its power.

West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419; Kelley v. Rhoads, 188 U. S. 9, 47 L. ed. 363, 23 Sup. Ct. Rep. 259; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956.

The protection of interstate commerce from state regulation afforded by the commerce clause is not limited to common carriers.

International Paper Co. v. Massachusetts, 246 U. S. 135, 142, 64 L. ed. 624, 629, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617; Looney v. Crane Co. 245 U. S. 178, 62 L. ed. 230, 38 Sup. Ct. Rep. 85; International Text-book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

The finding of the court of appeals that the transaction in its entirety is interstate commerce is a finding of fact, based on the evidence (the pleadings), and is conclusive.

Interstate Amusement Co. v. Albert, 239 U. S. 560, 60 L. ed. 439, 36 Sup. Ct. Rep. 168; German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 48

L. ed. 614, 24 Sup. Ct. Rep. 396; Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 288, 54 L. ed. 1042, 1044, 31 Sup. Ct. Rep. 14.

Even if the determination by the court of appeals that the transaction in its entirety is interstate commerce should be regarded as a conclusion of law instead of a finding of fact, it is a conclusion necessarily resulting from the finding of fact by the court of appeals.

Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438.

Mr. Ledyard P. Hale argued the cause and filed a brief for the Public Service Commission:

The decision of the court in Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, is conclusive unless the fact that the Pennsylvania Gas Company is a foreign corporation gives it a privilege in the state of New York which a domestic corporation engaged in the same service could not claim.

See also West Virginia & M. Gas Co. v. Towers, — Md. —, P.U.R.1919D, 332, 106 Atl. 265; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, affirmed in 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 432, 57 L. ed. 1511, 1555, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Vandalia R. Co. v. Public Service Commission, 242 U. S. 255, 258, 260, 61 L. ed. 276, 285, 286, P.U.R. 1917B, 1004, 37 Sup. Ct. Rep. 93.

The Pennsylvania Gas Company is engaged in a public service at Jamestown, Falconer, and Ellicott which is subject to the regulation of the state of New York, limited only by the 14th Amendment of the Federal Constitution and the Bill of Rights embodied in the state Constitution.

Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 134, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Munn v. Illinois, 94 U. S. 125, 24 L. ed. 84; Budd v. New York, 143 U. S. 535, 36 L. ed. 252, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

A foreign corporation may not engage in a business in New York that is forbidden to a New York corporation; nor may it escape a regulation lawfully prescribed for a New York corporation.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Horn Silver Min. Co. v. New York, 143 U. S. 305, 314, 315, 36 L. ed. 164, 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; German-American Coffee Co. v. Diehl, 216 N. Y. 57, 109 N. E. 875.

Mr. Louis L. Thrasher argued the cause and filed a brief for the city of Jamestown et al.:

The state may regulate this matter in the absence of legislation by the Federal government.

Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Pound v. Turck, 95 U. S. 459, 24 L. ed. 525; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Vandalia R. Co. v. Public Service Commission, 242 U. S. 255, 61 L. ed. 276, P.U.R.1917B, 1004, 37 Sup. Ct. Rep. 93; Western U. Teleg. Co. v. Richmond, 178 Fed. 310, affirmed in 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449.

Regulation of the selling price of natural gas piped from one state to another is not of a character requiring uniform national legislation, and hence is not within that class of cases where the states are prohibited from legislation, even though Congress has not acted.

Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; State ex rel. Caster v. Flannelly, 96 Kan. 372, P.U.R.1916C, 810, 152 Pac. 22.

The delivery and sale of natural gas, after transportation from one state to another, is not interstate commerce.

Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268; Leisy v. Hardin, 135 U. S. 128, 34 L. ed. 139, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

State regulation of the selling price of gas piped in from another state is not a regulation of interstate commerce. It infringes no province of Congress, is not a restriction upon interstate commerce in any sense, and is an appropriate exercise of a purely state function.

Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940.

The case of Public Utilities Commis-

sion v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, is decisive of the state's right to fix and determine the proper rate to be charged for gas sold to its inhabitants.

The court below having correctly determined that the Public Service Commission of the State of New York has jurisdiction to fix the rates for gas sold within that state, this court will not disturb that holding, even though a wrong reason was adopted for such correct result.

Taylor v. Thomas, 195 N. Y. 590, 89 N. E. 1113, affirmed in 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403; People ex rel. White v. Buffalo, 157 N. Y. 431, 52 N. E. 181; Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434; East Hampton v. Bowman, 136 N. Y. 521, 32 N. E. 987.

Mr. Justice **Day** delivered the opinion of the court:

This writ of error brings before us for consideration the question whether the Public Service Commission of the State of New York has the power to regulate rates at which natural gas shall be furnished by the Pennsylvania Gas Company, plaintiff in error, to consumers in the city of Jamestown, in the state of New York. The court of [**27**] appeals of New York (225 N. Y. 397, P.U.R.1919C, 663, 122 N. E. 260) held that the Commission had such authority.

The statute of the state of New York, § 65, Public Service Commissions Law, Laws 1910, chap. 480, provides: "Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."

Consumers of gas furnished by the plaintiff in error in the city of Jamestown, New York, filed a complaint demanding a reduction of gas rates in that city. The Public Service Commission asserted its jurisdiction, which, as we have said, was sustained by the court of appeals of New York.

The Federal question presented for our consideration involves the correctness of the contention of the plaintiff in error that the authority undertaken to be exercised by the Commission, and sustained by the court, was an attempt, under state authority, to regulate interstate commerce, and violative of the constitutional power granted to Congress over commerce among the states. The facts are undisputed. The plaintiff in error, the Pennsylvania Gas Company, is a corporation organized under the laws of the state of Pennsylvania, and engaged in transmitting and selling natural gas in the state of New York and Pennsylvania. It transports the gas by pipe lines about 50 miles in length from the source [**28**] of supply in the state of Pennsylvania into the state of New York. It sells and delivers gas to consumers in the city of Jamestown, in the town of Ellicott, and in the village of Falconer, all in Chautauqua county, New York. It also sells and delivers natural gas to consumers in the cities of Warren, Corry, and Erie, in Pennsylvania.

We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principles of the cases already determined by this court. West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. ed. 716, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564; Haskell v. Kansas Natural Gas Co. 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A.L.R. 1278, P.U.R. 1918D, 865, 38 Sup. Ct. Rep. 438.

This case differs from Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268, wherein we dealt with the piping of natural gas from one state to another, and its sale to independent local gas companies in the receiving state, and held that the retailing of gas by the local companies to their consumers was intrastate commerce, and not a continuation of interstate commerce although the mains of the local companies receiving and distributing the gas to local consumers were connected

permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation.

In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single, and is, in our opinion, a transmission in interstate commerce, and therefore [29] subject to applicable constitutional limitations which govern the states in dealing with matters of the character of the one now before us.

The general principle is well established and often asserted in the decisions of this court that the state may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.

In dealing with interstate commerce it is not, in some instances, regarded as an infringement upon the authority delegated to Congress, to permit the states to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the states a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation. After stating the limitations upon state authority, of this subject, we said (p. 402): "But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled [30] pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. . . . Our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope, without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The rates of gas companies transmitting gas in interstate commerce are not

only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from Federal control. June 18, 1910, chap. 309, § 7, 36 Stat. at L. 539, 544, Comp. Stat. §§ 993, 8563, 5 Fed. Stat. Anno. 2d ed. p. 1108, 4 Fed. Stat. Anno. 2d ed. p. 337.

The thing which the state Commission has undertaken to regulate, while part of an interstate transmission, [31] is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the state from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution.

The principles announced, often reiterated in the decisions of this court, were applied in the judgment affirmed by the Court of Appeals of New York, and we agree with that court that until the subject-matter is regulated by congressional action, the exercise of authority conferred by the state upon the Public Service Commission is not violative of the commerce clause of the Federal Constitution.

Affirmed.

[32] IN THE MATTER OF THE APPLICATION OF RAYMOND J. TIFFANY, as Receiver Appointed by the Court of Chancery of New Jersey of William Necker, Inc., a Body Corporate, for a Writ of Mandamus, or, in the Alternative, a Writ of Prohibition against the Honorable J. Warren Davis, District Judge of the United States for the District of New Jersey.

(See S. C. Reporter's ed. 32–37.)

Appeal — from district court — final decision.

1. An order of a Federal district court which denied the application of a receiver of an insolvent corporation, appointed by a state chancery court, for an order turning over to him the assets of the corporation in the possession of a receiver previously appointed by the Federal court, is a final decision within the meaning of the Judicial Code, § 128, governing the appellate review in the circuit courts of appeals of final decisions of the district court.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Mandamus — prohibition — existence of other remedy.

2. Resort may not be had to the extraordinary writ of mandamus or prohibition where the petitioner has the right to a writ of error or appeal.

[For other cases, see Mandamus, II. b; Prohibition, II. in Digest Sup. Ct. 1908.]

[No. 26, Original.]

Argued January 19, 1920. Decided March 1, 1920.

APPLICATION of the receiver of an insolvent corporation, appointed by a Court of Chancery of New Jersey, for a writ of mandamus, or, in the alternative, a writ of prohibition to require the assets of such corporation in the hands of a Federal receiver to be turned over to the applicant for administration by him as receiver. Rule discharged.

The facts are stated in the opinion.

Mr. **Merritt Lane** argued the cause, and, with Mr. Dougal Herr, filed a brief for petitioner.

Mr. **Samuel Heyman** argued the cause and filed a brief for respondent.

Note.—As to when mandamus is the proper remedy, generally—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

Mr. Justice **Day** delivered the opinion of the court:

This is an application of J. Raymond Tiffany, as receiver, appointed by the court of chancery of New Jersey, of William Necker, Inc., for a writ of mandamus, or, in the alternative, a writ of prohibition, the object of which is to require the district judge and the district court of the United States for the district of New Jersey to order the assets of the corporation, in the hands of a Federal receiver, to be turned over to applicant for administration by him as receiver appointed by the New Jersey court of chancery.

An order to show cause why the prayer of the petition should not be granted was issued, a return was made by the district judge, and the matter was argued and submitted. The pertinent facts are: On September 30, 1916, creditors and shareholders of William Necker, Inc., a corporation of the state of New Jersey, filed a bill in the United States district court of New Jersey, alleging the [**35**] insolvency of the corporation, praying for the appointment of a receiver, and a distribution of the corporate assets among the creditors and shareholders. The bill alleged diversity of citizenship as a ground for jurisdiction. The defendant corporation appeared and answered, admitting the allegations of the bill, and joined in the prayer that its assets be sold and distributed according to law. Upon consent, the district court appointed a receiver. The estate is insolvent, and the assets in the hands of the Federal receiver are insufficient to pay creditors, and shareholders will receive nothing. On April 1, 1919, two and one-half years after the appointment of the Federal receiver, creditors of William Necker, Inc., filed a bill in the court of chancery of New Jersey, alleging the corporation's insolvency, praying that it be decreed to be insolvent, that an injunction issue restraining it from exercising its franchises, and that a receiver be appointed to dispose of the property, and distribute it among creditors and shareholders. A decree was entered in said cause, adjudging the corporation insolvent, and appointing the petitioner, J. Raymond Tiffany, receiver. Thereupon Tiffany made application to the United States district court, asking that its injunction enjoining the corporation and all of its officers, and all other persons, from interfering with the possession of the Federal receiver, be dissolved; that the Federal receivership be vacated, and that the Federal receiver turn over the assets of the company, then in his hands, less administration expenses, to the chancery receiver for final distribution,—the contention being that the appointment of the chancery receiver and the proceedings in the state court superseded the Federal proceeding, and deprived the Federal court of jurisdiction.

The Federal receiver had made various reports and conducted the business of the corporation up until the time of the application in the court of chancery of New [**36**] Jersey, in which the applicant was appointed receiver. It appears that the applicants in the state court also filed their verified claims with the Federal receiver, and that no creditor or shareholder made objection to the exercise of the jurisdiction of the Federal court until the application in the state court.

The Federal district court permitted the chancery receiver to intervene, heard the parties, and delivered an opinion in which the matter was fully considered. As a result of such hearing and consideration an order was entered in which it was recited that Tiffany, the state receiver, had made an application to the Federal district court for an order directing it to turn over to the chancery receiver all of the assets of the corporation in the possession of the Federal receiver, and the district court ordered, adjudged, and decreed that the said application of J. Raymond Tiffany, receiver in chancery, "be and the same hereby is denied."

By the Judicial Code, § 128 [36 Stat. at L. 1133, chap. 231, Comp. Stat. § 1120, 5 Fed. Stat. Anno. 2d ed. p. 607], the circuit court of appeals is given appellate jurisdiction to review, by appeal or writ of error, final decisions in the district courts, with certain exceptions not necessary to be considered. It is clear that the order made in the district court, refusing to turn over the property to the chancery receiver, was a final decision within the meaning of the section of the Judicial Code to which we have referred, and from which the chancery receiver had the right to appeal to the circuit court of appeals. By the order the right of the state receiver to possess and administer the property of the corporation was finally denied. The words, "final decision in the district court," mean the same thing as "final judgments and decrees," as used in former acts regulating appellate jurisdiction. Loveland, Appellate Juris-

diction of Federal Courts, § 39. This conclusion is amply sustained by the decisions of this court. Savannah v. Jesup, 106 U. S. 563, 27 L. ed. 276, 1 Sup. Ct. Rep. 512; Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. Rep. 616; [37] Krippendorf v. Hyde, 110 U. S. 276, 287, 28 L. ed. 145, 149, 4 Sup. Ct. Rep. 27. See also a well-considered case in the circuit court of appeals, ninth circuit,—Dexter Horton Nat. Bank v. Hawkins, 111 C. C. A. 514, 190 Fed. 924.

It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition. Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324; Re Oklahoma, 220 U. S. 191, 55 L. ed. 431, 31 Sup. Ct. Rep. 426. As the petitioner had the right of appeal to the circuit court of appeals, he could not resort to the writ of mandamus or prohibition. It results that an order must be made discharging the rule.

Rule discharged.

CHARLES B. SHAFFER, Appt.,
v.
FRANK C. CARTER, State Auditor, and Abner Bruce, Sheriff of Creek County, Oklahoma. (No. 531.)

CHARLES B. SHAFFER, Appt.,
v.
FRANK C. CARTER, State Auditor, and Abner Bruce, Sheriff of Creek County, Oklahoma. (No. 580.)

(See S. C. Reporter's ed. 37-59.)

Appeal — from district court — dismissal — interlocutory decree — merger.

1. An appeal to the Federal Supreme Court, taken under the Judicial Code, § 266, from the denial by a district court of an interlocutory application for an injunction to restrain the enforcement of a state statute on constitutional grounds, must be dismissed where the decree as entered not only disposed of the application, but dismissed the action, and another appeal was later taken from the same decree under § 238, this being the proper practice, since the denial of the application was merged in the final decree.

[For other cases, see Appeal and Error, 860-993, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — remedy at law.

2. Statutes which may furnish an adequate legal remedy against taxes assessed under an unconstitutional law do not bar resort to equity by a taxpayer, who avers that the tax lien asserted by virtue of the levy and tax warrant, itself attacked on constitutional grounds, creates a cloud on title, where there appears to be no legal remedy for the removal of a cloud on title cast by an invalid lien imposed for a tax valid in itself.

[For other cases, see Equity, I. c, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — doing complete justice — multiplicity of suits.

3. Equitable jurisdiction of a suit which presents one ground for equitable relief, with no adequate remedy at law, extends to the disposition of all the questions raised by the bill, since a court of equity does not do justice by halves, and will prevent, if possible, a multiplicity of suits.

[For other cases, see Equity, I. a; I. d, 1, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taxing income of nonresidents.

4. A state may, consistently with due process of law, impose an annual tax upon the net income derived by nonresidents from property owned by them within the state, and from any business, trade, or profession carried on by them within its borders.

[For other cases, see Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taxing income of nonresidents.

5. The facts that it required the personal skill and management of a nonresident to bring his income from producing

---

Note.—On direct review by Federal Supreme Court of circuit or district court judgments or decrees—see notes to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed. U. S. 894; and Berkman v. United States, 63 L. ed. U. S. 877.

On the jurisdiction of equity where remedy at law exists—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. 6 L.R.A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

As to constitutionality of income tax—see notes to State ex rel. Bolens v. Frear, L.R.A.1915B, 569, and Alderman v. Wells, 27 L.R.A.(N.S.) 864.

As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S 1041;

property within the state to fruition, and that his management was exerted from his place of business in another state, did not, by reason of the due process of law clause of the Federal Constitution, deprive the former state of jurisdiction to tax the income which arose within its own borders.
[For other cases, see Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

Constitutional law — privileges and immunities — equal protection of the laws — taxing income of nonresidents — discrimination.

6. Nonresidents are not denied their constitutional privileges or immunities, nor the equal protection of the laws, by a state tax imposed upon the net income derived by them from property owned within the state, and from any business, trade, or profession carried on within its borders, either on the theory that, since the tax is, as to citizens of the state, a purely personal tax, measured by their incomes, while, as applied to a nonresident, it is essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected, there was a discrimination against the nonresident, or because the taxing statute permits residents to deduct from their gross income not only losses incurred within the state, but also those sustained elsewhere, while nonresidents may deduct only those incurred within the state.
[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Commerce — state taxation — income of nonresidents.

7. A state income tax upon the net income of a nonresident from the business carried on by him in the state is not a burden on interstate commerce merely because the products of the business are

---

Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Validity and construction of statutes taxing the income of nonresidents from trade, business, or other sources within the state.

The right of a state to levy an income tax upon income received by a nonresident from property within the state is definitely settled in the affirmative by the decisions in SHAFFER v. CARTER, and Travis v. Yale & T. Mfg. Co. post, 460.

The validity of a state tax upon the incomes of nonresidents was questioned in the Income Tax Cases, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, but was not determined in that case, which was one to test the act as a whole, the court stating that the rejection of any or all of the provisions objected to could not reasonably be held to invalidate the whole act. A writ of error to review the decision of the Wisconsin court was dismissed by the United States Supreme Court in 231 U. S. 616, 58 L. ed. 400, 34 Sup. Ct. Rep. 272.

But the state cannot grant to its residents an exemption which it denies to nonresidents. Travis v. Yale & T. Mfg. Co. post, 460. See that case for exemption involved.

The right of the state to levy a tax in the nature of an excise tax requiring the payment of a given per cent on the net income of corporations doing business within the state, and, in the case of foreign corporations apportioned according to a fixed rule, was sustained in Underwood Typewriter Co. v. Chamberlain, 94 Conn. 47, 108 Atl. 154, where the apportionment was made dependent in fact on the value of the corporate property situated within the state, and the amount of the tax was not excessive, regarded as a tax on property within the state, and where there was no discrimination against interstate commerce in the measurement or apportionment of the tax.

Necessarily a great many questions arise over the construction of such statutes.

The income from stocks and bonds of corporations organized under laws of the United States, and from bonds and mortgages secured upon property in the United States,—all owned by a nonresident alien,—which income is collected and remitted to her by an agent domiciled in the United States who has physical possession of such securities under a power of attorney which gives him authority to sell, assign, or transfer any of them,—and to invest and reinvest the proceeds of such sales, as he may deem best in the management of the business affairs of the principal, was income derived from property owned in the United States, within the meaning of the Federal Act of October 3, 1913 (38 Stat. at L. 166, chap. 16, 4 Fed. Stat. Anno. 2d ed. p. 236), section II. A, subd. 1, imposing a tax upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere. De Ganay v. Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524.

shipped out of the state, since the tax, not being upon gross receipts, but only upon the net proceeds, is plainly sustainable even if it includes net gains from interstate commerce.

[For other cases, see Commerce, III. d, 3, in Digest Sup. Ct. 1908.]

Taxes — income of nonresident — gross production tax — implied repeal.

8. The Oklahoma gross production tax imposed upon those engaged in producing oil or natural gas within the state, in lieu of all taxes imposed by the state, counties, or municipalities upon the land or the leases, mining rights, and privileges, and the machinery, appliances, and equipment pertaining to such production, does not relieve a nonresident of the payment of the income tax imposed by that state upon the net income derived by nonresidents from oil operations within the state. The gross production tax was intended as a substitute for the ad valorem tax, but not for the income tax, and there is no such repugnance between it and the income tax as to produce a repeal by implication.

[For other cases, see Taxes, I. c, 6; Statutes, III. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — double taxation.

9. Nothing in the Federal Constitution or in the 14th Amendment prevents the states from imposing double taxation or any other form of unequal taxation so long as the inequality is not based upon arbitrary distinctions.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taxing income of nonresidents — lien.

10. A nonresident whose entire property within the state consists of oil-produc-

---

But interest due a nonresident on bonds of a domestic corporation was held not income derived from sources within the state or within the jurisdiction of the state, within the meaning of the Wisconsin Income Tax Law, in State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848.

A state statute levying a tax upon the income of a nonresident derived from sources within the state or within its jurisdiction does not authorize a tax upon the income of a trust estate,—the trustee and beneficiaries all being nonresidents, and the income not being derived from property located or business transacted within the state,—merely because a county court within the state was administering the trust. Bayfield County v. Pishon, 162 Wis. 466, 156 N. W. 463.

In some cases the statutes levy the tax upon business transacted within the jurisdiction. When business is transacted or done in a jurisdiction is a question that depends upon the facts of the individual case.

A Canadian company was transacting business in the United States, where it sent its agents clothed with power, even though limited, to travel about and solicit customers or purchasers for its manufactured products, and paid their expenses and hired a place of business in the United States, even though but desk room, and empowered such salesmen to make written contracts in part in the United States, subject to its approval in Canada, and, when approved, to deliver them, and did so ratify and have such contracts delivered, paid rent, storage charges, and other expenses and also for the work so done, by checks drawn on a bank in the United States, where it kept temporarily its funds received for goods delivered in the United States to purchasers, and then, to carry out and perform its written contracts so made, and which in nearly all cases were to be performed in the United States as to delivery of goods, and in part as to making payments therefor, shipped such goods, consigned to itself, into the United States at different points, where it hired and paid for storage or warehouse room, and had them delivered to itself at such rooms, where it stored them for itself in its own name and at its own risk, pending delivery to the customer, and did this for its own convenience and to insure delivery according to contract, and also shipped to the United States and stored in like manner goods to meet anticipated demands. Accordingly the Canadian company was held liable to an income tax in the United States. Laurentide Co. v. Durey, 231 Fed. 223.

The English statute of 1853, chap. 34, § 2, schedule D, imposes a tax upon every person, although nonresident of the United Kingdom, in respect of profits from any trade exercised within the United Kingdom.

The English court admits the difficulty of determining when a trade is carried on within the United Kingdom. Lord Esher, M. R., states in Werle v. Colquhoun, L. R. 20 Q. B. Div. 753: "I agree with the opinion expressed by the late Lord Chief Justice Cockburn in Sulley v. Atty. Gen. [infra] that it is probably a question of fact where the trade is carried on. That question is divisible into two,—Is there a trade carried on? If so, is it carried on in England? If it is a question of fact in each case it will be impossible to give

ing land, oil and gas mining leaseholds, and other property used in the production of oil and gas, and whose entire net income in the state was derived from his oil operations, which he managed in that and other states as one business, having proceeded, with notice of a law of the state taxing incomes derived by nonresidents from business carried on within its borders, to manage the property and conduct the business out of which arose the income taxed under such law, cannot claim that the state exceeded its power or authority so as to deny due process of law by treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process upon all the property employed by him within the state in the business.

[For other cases, see Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

[Nos. 531 and 580.]

Argued December 11 and 12, 1919. Decided March 1, 1920.

APPEAL from the District Court of the United States for the Eastern District of Oklahoma to review the refusal of a temporary injunction to restrain the enforcement of an income tax assessed against a nonresident. Dismissed for want of jurisdiction. Also AN APPEAL from the same decree as a final decree dismissing the suit. Affirmed.

The facts are stated in the opinion.

Mr. **Malcolm E. Rosser** argued the cause, and, with Messrs. George S. Ramsey, Edgar A. De Meules, Villard Martin, and J. Berry King, filed a brief for appellant:

The appellant has no plain, adequate, and complete remedy at law.

Thompson v. Detroit, 114 Mich. 502, 72 N. W. 320; Weston v. Luce County, 102 Mich. 528, 61 N. W. 15; Chauncey v. Wass, 35 Minn. 1, 25 N. W. 826, 30 N. W. 830; Dodge v. Osborn, 240 U. S. 118, 60 L. ed. 557, 36 Sup. Ct. Rep. 275;

---

an exhaustive definition of what constitutes carrying on a trade. The question in each case must be whether the facts shewn to exist in that particular case establish that a trade is carried on and that it is carried on in England . . . One way of testing whether this trade was carried on in England is that which I enunciated in Erichsen v. Last [infra]; that 'wherever profitable contracts are habitually made in England by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad.' . . . I think that both the learned judges who heard that case expressed the same thing. Cotton, L. J., said: 'When a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business;' and Jessel, M. R., said: 'There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things;' and further: 'The company habitually receive money in this country from English subjects for messages sent from England to places abroad, and may transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying on of trade in this country.' There is no reliance placed on the fact of there being an establishment in England, nor upon the fact of the money being received in England. If both these facts exist, they are strong circumstances to shew that a trade is carried on in England, but their absence is not conclusive against this." In the same case, Fry, L. J., states: "Now I shall not attempt anything like a definition of exercising a trade within the United Kingdom. I think it is obvious that the late Master of the Rolls was correct when he said that whatever else those words may mean, they plainly included carrying on a trade; and I also entirely agree in his observation that the question whether a trade is carried on is not a matter of law, or one in respect of which you can lay down any one distinguishing incident, but it is a compound fact, made up of a variety of things."

Lord Watson states in Grainger v. Gough [1896] A. C. 325, that the decision of the court of appeal in Werle v. Colquhoun "was based upon the express ground that the foreign wine merchant exercised his trade in England by making contracts there for the sale of his champagne through his English agent." This interpretation put upon the theory of the court in Werle v. Colquhoun seems correct. It was urged in that case, however, that the English agent had no authority to receive orders for the wine as contracts, but that all he could do was to forward them to the French merchant for acceptance. The court, however, states that the inference

Union P. R. Co. v. Weld County, 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510; Davis v. Wakelee, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

Income, for the purpose of taxation under the Oklahoma law, is a generic or special subject of taxation.

State ex rel. Bolens v. Frear, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904; Com. v. Werth, 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916D, 1263; Brushaber v. Union P. R. Co. 240 U. S. 1, 18, 60 L. ed. 493, 501, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Doyle v. Mitchell Bros. Co. 247 U. S. 179-185, 62 L. ed. 1054-1059, 38 Sup. Ct. Rep. 467; Stanton v. Baltic Min. Co. 240 U. S. 103, 112, 60 L. ed. 546, 553, 36 Sup. Ct. Rep. 278; Cooley, Taxn. 3d ed. 6; Oliver v. Washington Mills, 11 Allen, 268; Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136.

As to what is net income, see—

Stratton's Independence v. Howbert, supra; Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904; State ex rel. Bundy v. Nygaard, 163 Wis. 307, L.R.A.1917E, 563, 158 N. W. 87; United States Glue Co. v. Oak Creek, 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421.

The tax is intended as a tax chargeable to persons rather than to property.

State ex rel. Bolens v. Frear, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673,

---

is irresistibly to the contrary; that the French wine merchant, by virtue of the contract made with his agent in London, undertook to select and despatch the wine to the address given him in England.

See also note to Maguire v. Trefry, post, —, on the question as to where a trade is carried on.

A foreign cable company which had the ends of two cables in England, at which places it maintained a staff of servants to manage the same, and also maintained an office in London, employing in all about forty clerks and electricians, and which transmitted messages from England to distant foreign ports, having an arrangement with the post-office by which messages received in England were transmitted to its outlying stations, the company making no profits by the transmission of messages over the land lines in England, was held to be exercising a trade in England, and therefore taxable under the Income Tax Law. Erichsen v. Last, L. R. 8 Q. B. Div. 414, 45 L. T. N. S. 703, 51 L. J. Q. B. N. S. 86, 30 Week. Rep. 301, 46 J. P. 357.

A French wine merchant who supplied large quantities of wine in England through agents, resident there, who canvassed for orders for the wine and transmitted those received to the merchant, who exercised his discretion as to filling them, the customer purchasing the wine as it lay in the cellar of the merchant, and paying the cost of packing and carriage from the cellar, taking all risks, and receiving an invoice direct from the French merchant, was held in Grainger v. Gough, supra, not to be exercising a trade in England within the meaning of the Income Tax Law, taxing nonresidents who exercised a trade within the United Kingdom.

But in Werle v. Colquhoun, L. R. 20 Q. B. Div. 753, 57 L. J. Q. B. N. S. 323, 58 L. T. N. S. 756, 36 Week. Rep. 613, 52 J. P. 644, a French wine merchant who carried on his business under very similar conditions was held taxable with respect of profits on his English business.

In Tischler v. Apthorpe, 52 L. T. N. S. 814, 33 Week. Rep. 548, 49 J. P. 372, a French wine merchant was held subject to the tax where one of the partners of the French firm came to England every year and remained for about four months, soliciting orders for wines of the firm, and at the office of an English agent had a room devoted to his business, and occupied by a clerk who represented him, and the fact that the English agent was a del credere agent was held not to change this rule.

So, in Pommery v. Apthorpe, 56 L. J. Q. B. N. S. 155, 56 L. T. N. S. 24, 35 Week. Rep. 307, a French wine merchant was held subject to taxes on profits derived from his English business where he established an agency in London, put his name over the office, had bankers in London and his name in the London directory, describing his business with the name of his agent added as wine merchants, and where the agent in London received as many orders as he could get, filled part of them from a stock which

135 N. W. 164, Ann. Cas. 1913A, 1147; Black, Income Tax, 2d ed. § 197; Maguire v. Tax Comr. 230 Mass. 503, 120 N. E. 162; Brady v. Anderson, 153 C. C. A. 463, 240 Fed. 665; State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848; State ex rel. Sallie F. Moon Co. v. Wisconsin Tax Commission, 166 Wis. 287, 163 N. W. 639, 165 N. W. 470; United States Glue Co. v. Oak Creek, 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

Under the facts of this case, appellant's income is never in Oklahoma. Its situs is in Illinois.

Southern P. R. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13; Adams v. Colonial & U. S. Mortg. Co. 82 Miss. 263, 17 L.R.A.(N.S.) 138, 100 Am. St. Rep. 633, 34 So. 482; Pyle v. Brenneman, 60 C. C. A. 409, 122 Fed. 787; State v. Clement Nat. Bank, 84 Vt. 167, 78 Atl. 947, Ann. Cas. 1912D, 22; Marr v. Vienna, 10 U. C. L. J. 275; Re Ashworth, 7 U. C. L. J. 47; Board of Assessors v. New York L. Ins. Co. 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385.

Oklahoma cannot tax property not in the state. To do so would be to take property without due process of law.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 38, 54 L. ed. 355, 370, 30 Sup. Ct. Rep. 190; Northern C. R. Co. v. Jackson, 7 Wall. 262, 267, 19 L. ed.

---

he kept in London for that purpose, and the remainder from the stock which the French wine merchant kept in France and transmitted to him upon orders. Payments in this case were made in various ways: in cash, in notes, and in some instances in drafts or bills. It was the duty of the agent to receive all these forms of paper, and, when so received, they were accepted by the English agent upon the authority of his principals as payment, unless they should be dishonored when they came to maturity.

Profits made by a New York firm in selling goods which it had purchased in England through a member of the firm who was resident there are not taxable in England. Sulley v. Atty. Gen. (1860) 5 Hurlst. & N. 711, 157 Eng. Reprint, 1364, 29 L. J. Exch. N. S. 464, 6 Jur. N. S. 1018, 2 L. T. N. S. 439, 8 Week. Rep. 472.

A foreign banking corporation which had a branch bank in London admitted its liability to an income tax for the profits realized at its London branch in Atty. Gen. v. Alexander, L. R. 10 Exch. 20, 44 L. J. Exch. N. S. 3, 31 L. T. N. S. 694, 23 Week. Rep. 255.

Profits derived by what was apparently an English company from sales in England on commission of produce shipped by growers in and under arrangements and contracts made in New Zealand for sale by the company were held not to be income derived from business in New Zealand within the meaning of a New Zealand Income Taxing Law, in Lovell & Christmas v. Tax Comrs. [1908] A. C. 46. The House of Lords admits the difficulty of determining what is income, but states that "in the present case their Lordships are of opinion that the business which yields the profit is the business of selling goods on commission in London. The commission is the consideration for effecting such sales. The moneys received by the appellants out of which they deduct their commission and from which, therefore, their profits come, are paid to them under the contract of sale effected in London. The earlier arrangements entered into in New Zealand appear to their Lordships to be transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit. To make those transactions a ground for taxing in New Zealand, the profits actually realized in London, would, in their Lordships' opinion, be to extend the area of taxation further than the authorities would warrant."

A provision in a state income tax law granting the board of review power to increase the assessment of a nonresident without notice, while requiring notice to be given to a resident, does not violate § 2 of article 4 of the Federal Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Income Tax Cases, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147. A writ of error to review this decision was dismissed by the United States Supreme Court in 231 U. S. 616, 58 L. ed. 400, 34 Sup. Ct. Rep. 272.

88, 89; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669.

Inheritance taxes rest on an entirely different basis.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Union Nat. Bank v. Chicago, 3 Biss. 82, Fed. Cas. No. 14,374.

The jurisdiction of the Federal government over incomes of aliens is greater than that of the states over nonresidents.

United States v. Bennett, 232 U. S. 299, 58 L. ed. 612, 34 Sup. Ct. Rep. 433; Chae Chang Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; United States ex rel. Turner v. Williams, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719; Willoughby, Const. § 124; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Yale & T. Mfg. Co. v. Travis, 262 Fed. 576.

Oklahoma cannot tax the business, skill, ability, and energy of appellant.

Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136.

There is a difference between corporations and individuals in this regard.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604.

The provisions of the statute attempting to create a lien on all of appellant's property in Oklahoma to secure payment of the income tax are void and create no lien.

Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; New York v. McLean, 170 N. Y. 374, 63 N. E. 380; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99.

If the tax is held to be an excise tax, the payment by appellant of the gross production tax required by Okla. Laws 1916, chap. 39, relieves him from liability. That chapter repeals the Income Tax Law so far as the income is derived from the production of oil and gas.

Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. ed. 1025, 38 Sup. Ct. Rep. 444; Large Oil Co. v. Howard, — Okla. —, 163 Pac. 537; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737, 34 Sup. Ct. Rep. 342; Louisville & N. R. Co. v. Greene, 244 U. S. 522, 61 L. ed. 1291, 37 Sup. Ct. Rep. 683, Ann. Cas. 1917E, 97.

If the tax is an excise tax, it is void because it deprives the appellant of privileges and immunities enjoyed by citizens of Oklahoma, and because it denies him the equal protection of the laws, and takes his property without due process of law.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. Rep. 366; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Wiley v. Parmer, 14 Ala. 627; Sprague v. Fletcher, 69 Vt. 69, 37 L.R.A. 840, 37 Atl. 239; New York v. Weaver, 100 U. S. 539, 27 L. ed. 705; Farmington v. Downing, 67 N. H. 441, 30 Atl. 345; Paul v. Virginia, 8 Wall. 180, 19 L. ed. 360; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Oliver v. Washington Mills, 11 Allen, 268; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 30, 54 L. ed. 355, 367, 30 Sup. Ct. Rep. 190; Louisville & N. R. Co. v. Greene, 244 U. S. 522, 61 L. ed. 1291, 37 Sup. Ct. Rep. 683, Ann. Cas. 1917E, 97.

If the tax is a privilege or excise tax, it is void because it lays a burden on interstate commerce.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; West v. Kansas Natural Gas Co. 221 U. S. 260, 55 L. ed. 728, 35 L.R.A.(N.S.) 1193, 31 Sup. Ct. Rep. 564.

Mr. S. P. Freeling, Attorney General of Oklahoma, and Mr. C. W. King argued the cause, and, with Mr. W. R. Bleakmore, filed a brief for appellees:

There is an adequate remedy at law.

Berryhill v. Carter, 76 Okla. 248, 185 Pac. 93; Baldwin Tool Works v. Blue, 240 Fed. 203; Black v. Geissler, — Okla. —, 159 Pac. 1124; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1289, 33 Sup. Ct. Rep. 941; Sutherland, Stat. Constr. § 284; Black, Interpretation of Laws, p. 307; Walker v. Chicago, 56 Ill. 277; Hammerslough v. Kansas City, 46 Kan. 40, 26 Pac. 496; Augusta v. Timmerman, 147 C. C. A. 222, 233 Fed. 216; Dodge v. Osborn, 240 U. S. 116, 60 L. ed. 557, 36 Sup. Ct. Rep. 275; Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Black, Income Tax, 2d ed. 350.

As to the nature of the Oklahoma income tax, see—

Black, Income Tax, 2d ed. 187; Com. v. Werth, 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916D, 1263; Tyee Realty Co. v. Anderson, 240 U. S. 115, 60 L. ed. 554, 36 Sup. Ct. Rep. 281.

The situs of the income is in Oklahoma.

Adams v. Colonial & U. S. Mortg. Co. 82 Miss. 263, 17 L.R.A.(N.S.) 138, 100 Am. St. Rep. 633, 34 So. 482; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Helser v. State, 128 Md. 228, 97 Atl. 539; Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 45 N. E. 647, 47 N. E. 8; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Com. v. Werth, 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916D, 1263; State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Hawley v. Malden, 232 U. S. 11, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Blakemore & B. Inheritance Taxes, § 214; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

A state may levy an income tax on nonresidents.

M'Culloch v. Maryland, 4 Wheat. 316, 429, 4 L. ed. 579, 607; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294, 62 L. ed. 295, 297, 38 Sup. Ct. Rep. 126; Duer v. Small, 4 Blatchf. 263, Fed. Cas. No. 4,116; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Rogers v. Hennepin County, 240 U. S. 184, 60 L. ed. 594, 36 Sup. Ct. Rep. 265; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Coe v. Errol, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Blackstone v. Miller, 188 U. S. 189, 205, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277.

The Oklahoma law does not discriminate against nonresidents nor deny due process of law.

Black, Income Tax, § 200; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; State R. Tax Cases, 92 U. S. 611, 23 L. ed. 673; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 32 L. ed. 892, 10 Sup. Ct. Rep. 533; Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737, 34 Sup. Ct. Rep. 372; People ex rel. Thurber-Whyland v. Barker, 141 N. Y. 118, 23 L.R.A. 95, 35 N. E. 1073, 37 Cyc. 1005; Tischler v. Apthorpe, 52 L. T. N. S. 814, 33 Week. Rep. 548, 49 J. P. 372, 2 Tax Cas. 89; Dowell, Income Tax, 7th ed. 449, 450; Wingate v. Weber, 34 Scot. L. R. 699, 3 Tax Cas. 569; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

The instant tax is not a burden on interstate commerce.

12 C. J. 114, § 160; United States Glue Co. v. Oak Creek, 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421; Armour & Co. v. Virginia, 246 U. S. 1, 62 L. ed. 547, 38 Sup. Ct. Rep. 267; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

The tax lien on appellant's property violates no fundamental right.

Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; Shaffer v. Howard, 250 Fed. 873.

The Income Tax Law was not repealed

or affected by the Gross Production Tax Act.

Large Oil Co. v. Howard, — Okla. —, 163 Pac. 537.

Mr. Justice Pitney delivered the opinion of the court:

These are two appeals, taken under circumstances that will be explained, from a single decree in a suit in equity brought by appellant to restrain the enforcement of a tax assessed against him for the year 1916 under the Income Tax Law of the state of Oklahoma, on the ground of the unconstitutionality of the statute.

A previous suit, having the same object, was brought by him in the same court against the officials then in office, in which an application for an interlocutory injunction, heard before three judges, pursuant to § 266, Judicial Code [36 Stat. at L. 1162, chap. 231, Comp. Stat. § 1243, 5 Fed. Stat. Anno. 2d ed. p. 983], was denied, one judge dissenting. Shaffer v. Howard, 250 Fed. 873. An appeal was taken to this court, but, pending its determination, the terms of office of the defendants expired, and, there being no law of the [44] state authorizing a revival or continuance of the action against their successors, we reversed the decree and remanded the cause, with directions to dismiss the bill for want of proper parties. 249 U. S. 200, 63 L. ed. 559, 39 Sup. Ct. Rep. 255.

After such dismissal the present defendant Carter, as state auditor, issued another tax warrant and delivered it to defendant Bruce, sheriff of Creek county, with instructions to levy upon and sell plaintiff's property in that county in order to collect the tax in question; and the sheriff having threatened to proceed, this suit was commenced. An application for an interlocutory injunction, heard before three judges, was denied upon the authority of the decision in 250 Fed., and of certain recent decisions of this court. The decree as entered not only disposed of the application, but dismissed the action. Plaintiff, apparently unaware of this, appealed to this court under § 266, Judicial Code, from the refusal of the temporary injunction. Shortly afterwards he took an appeal under § 238, Judicial Code, from the same decree as a final decree dismissing the action. The latter appeal is in accord with correct practice, since the denial of the interlocutory application was merged in the final decree. The first appeal (No. 531) will be dismissed.

The Constitution of Oklahoma, besides providing for the annual taxation of all property in the state upon an ad valorem basis, authorizes (art. 10, § 12) the employment of a variety of other means for raising revenue, among them income taxes.

The act in question is chap. 164 of the Laws of 1915. Its 1st section reads as follows: "Each and every person in this state shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this [45] state by persons residing elsewhere." Subsequent sections define what the term "income" shall include; prescribe how net income shall be computed; provide for certain deductions; prescribe varying rates of tax for all taxable incomes in excess of $3,000, this amount being deducted (by way of exemption) from the income of each individual, and for one living with spouse an additional $1,000, with further deductions where there are children or dependents, exemptions being the same for residents and nonresidents; require (§ 2) a return on or before March 1st from each person liable for an income tax under the provisions of the act for the preceding calendar year; provide (§ 9) that the state auditor shall revise returns and hear and determine complaints, with power to correct and adjust the assessment of income; that (§ 10) taxes shall become delinquent if not paid on or before the 1st day of July, and the state auditor shall have power to issue to any sheriff of the state a warrant commanding him to levy the amount upon the personal property of the delinquent party; and (by § 11): "If any of the taxes herein levied become delinquent, they shall become a lien on all the property, personal and real, of such delinquent person, and shall be subject to the same penalties and provisions as are all ad valorem taxes."

Plaintiff, a nonresident of Oklahoma, being a citizen of Illinois and a resident of Chicago, in that state, was at the time of the commencement of the suit and for several years theretofore (including the years 1915 and 1916) engaged in the oil business in Oklahoma, having purchased, owned, developed, and operated a number of oil and gas mining leases, and being the owner in fee of certain oil-producing land, in that state.

From properties thus owned and operated during the year 1916 he received a net income exceeding $1,500,000, and of this he made, under protest, a return which showed that, [46] at the rates fixed by the act, there was due to the state an income tax in excess of $76,000. The then state auditor overruled the protest and assessed a tax in accordance with the return; the present auditor has put it in due course of collection; and plaintiff resists its enforcement upon the ground that the act, in so far as it subjects the incomes of nonresidents to the payment of such a tax, takes their property without due process of law and denies to them the equal protection of the laws, in contravention of § 1 of the 14th Amendment; burdens interstate commerce, in contravention of the commerce clause of § 8 of art. 1 of the Constitution; and discriminates against nonresidents in favor of residents, and thus deprives plaintiff and other nonresidents of the privileges and immunities of citizens and residents of the state of Oklahoma, in violation of § 2 of art. 4. He also insists that the lien attempted to be imposed upon his property pursuant to § 11, for taxes assessed upon income not arising out of the same property, would deprive him of property without due process of law.

As ground for resorting to equity, the bill alleges that plaintiff is the owner of various oil and gas mining leases covering lands in Creek county, Oklahoma, and that the lien asserted thereon by virtue of the levy and tax warrant creates a cloud upon his title. This entitles him to bring suit in equity (Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 516, 525, 28 L. ed. 1098, 1101, 5 Sup. Ct. Rep. 601; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 348, 35 L. ed. 1035, 1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Ogden City v. Armstrong, 168 U. S. 224, 237, 42 L. ed. 444, 451, 18 Sup. Ct. Rep. 98; Ohio Tax Cases, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; Greene v. Louisville & I. R. Co. 244 U. S. 499, 506, 61 L. ed. 1280, 1285, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88), unless the contention that he has a plain, adequate, and complete remedy at law be well founded.

This contention is based, first, upon the provision of § 9 of chap. 164, giving to the state auditor the same power to correct and adjust an assessment of income that is given to the county board of equalization in case of ad [47] valorem assessments, taken in connection with chap. 107 of the Laws of 1915, which provides (art. 1, subd. B, § 2, p. 147) for an appeal from that board to the district court of the county. In a recent decision (Berryhill v. Carter, — Okla. —, 185 Pac. 93), the supreme court of the state held that an aggrieved income taxpayer may have an appeal under this section, and that thus "all matters complained of may be reviewed and adjusted to the extent that justice may demand." But the case related to "correcting and adjusting an income tax return," and the decision merely established the appeal to the district court as the appropriate remedy, rather than an application to the supreme court for a writ of certiorari. It falls short of indicating—to say nothing of plainly showing—that this procedure would afford an adequate remedy to a party contending that the Income Tax Law itself was repugnant to the Constitution of the United States.

Secondly, reference is made to § 7 of subd. B, art. 1, of chap. 107, Oklahoma Laws 1915, p. 149, wherein it is provided that where illegality of a tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person, on paying the tax, may give notice to the officer collecting it stating the grounds of complaint and that suit will be brought against him; whereupon it is made the duty of such officer to hold the tax until the final determination of such suit, if brought within thirty days; and if it be determined that the tax was illegally collected, the officer is to repay the amount found to be in excess of the legal and correct amount. But this section is one of several that have particular reference to the procedure for collecting ad valorem taxes; and they are prefaced by this statement (p. 147): "Subdivision B. To the existing provisions of law relating to the ad valorem or direct system of taxation the following provisions are added:" Upon this ground, in Gypsy [48] Oil Co. v. Howard and companion suits brought by certain oil-producing companies to restrain enforcement of taxes authorized by the Gross Production Tax Law (Sess. Laws 1916, p. 102), upon the ground that they were an unlawful imposition upon Federal instrumentalities, the United States district court for the western district of Oklahoma held that the legal remedy provided in § 7 of chap. 107 applied only to ad valorem taxes, and did not constitute a bar to equitable relief against the production taxes. Defendants appealed to this court, and assigned this ruling for error.

inter alia; but they did not press the point, and the decrees were affirmed upon the merits of the Federal question. Howard v. Gipsy Oil Co. 247 U. S. 503, 62 L. ed. 1239, 38 Sup. Ct. Rep. 426.

We deem it unnecessary to pursue further the question whether either of the statutory provisions referred to furnishes an adequate legal remedy against income taxes assessed under an unconstitutional law, since one of the grounds of complaint in the present case is that, even if the tax itself be valid, the procedure prescribed by § 11 of the Income Tax Law for enforcing such a tax by imposing a lien upon the taxpayer's entire property, as threatened to be put into effect against plaintiff's property, for taxes not assessed against the property itself, and not confined to the income that proceeded from the same property, is not "due process of law," within the requirement of the 14th Amendment. For removal of a cloud upon title caused by an invalid lien imposed for a tax valid in itself, there appears to be no legal remedy. Hence, on this ground, at least, resort was properly had to equity for relief; and since a court of equity does not "do justice by halves," and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill. Camp v. Boyd, 229 U. S. 530, 551, 552, 57 L. ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785; McGowan v. Parish, 237 U. S. 285, 296, 59 L. ed. 955, 963, 35 Sup. Ct. Rep. 543.

[49] This brings us to the merits.

Under the "due process of law" provision appellant makes two contentions: first, that the state is without jurisdiction to levy a tax upon the income of nonresidents; and, secondly, that the lien is invalid because imposed upon all his property, real and personal, without regard to its relation to the production of his income.

These are separate questions, and will be so treated. The tax might be valid, although the measures adopted for enforcing it were not. Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the state by action taken within its borders, either in personam or in rem, according to the circumstances of the case, as by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture of franchise, or the like; and the jurisdiction to act remains even though all permissible measures be not resorted to. Michigan Trust Co. v. Ferry, 228 U. S. 346, 353, 57 L. ed. 867, 874, 33 Sup. Ct. Rep. 550; Ex parte Indiana Transp. Co. 244 U. S. 456, 457, 61 L. ed. 1253, 1255, 37 Sup. Ct. Rep. 717.

It will be convenient to postpone the question of the lien until all questions as to the validity of the tax have been disposed of.

The contention that a state is without jurisdiction to impose a tax upon the income of nonresidents, while raised in the present case, was more emphasized in Travis v. Yale & T. Mfg. Co. decided this day [252 U. S. 60, post, 460, 40 Sup. Ct. Rep. 228], involving the Income Tax Law of the state of New York. There it was contended, in substance, that while a state may tax the property of a nonresident situate within its borders, or may tax the incomes of its own citizens and residents because of the privileges they enjoy under its Constitution and laws and the protection they receive from the state, yet a nonresident, although conducting a business or carrying on an occupation there, cannot [50] be required through income taxation to contribute to the governmental expenses of the state whence his income is derived; that an income tax, as against nonresidents, is not only not a property tax, but is not an excise or privilege tax, since no privilege is granted; the right of the noncitizen to carry on his business or occupation in the taxing state being derived, it is said, from the provisions of the Federal Constitution.

This radical contention is easily answered by reference to fundamental principles. In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. In well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of

these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the [51] fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution. New York Laws 1778, chap. 17; Report of Oliver Wolcott, Jr., Secretary of the Treasury, to 4th Congress, 2d Sess. (1796), concerning direct taxes; American State Papers, 1 Finance, 423, 427, 429, 437, 439.

The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579, while denying their power to impose a tax upon any of the operations of the Federal government, Mr. Chief Justice Marshall, speaking for the court, conceded (pp. 428, 429) that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction, saying: "It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation," etc. In Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459, the court, by Mr. Justice Brewer, said (pp. 292, 293): "We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects [52] and methods." That a state may tax callings and occupations as well as persons and property has long been recognized. "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. . . . It [taxation] may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186. See also Welton v. Missouri, 91 U. S. 275, 278, 23 L. ed. 347, 348; Armour & Co. v. Virginia, 246 U. S. 1, 6, 62 L. ed. 547, 550, 38 Sup. Ct. Rep. 267; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463, 63 L. ed. 1084, 1087, 39 Sup. Ct. Rep. 522.

And we deem it clear, upon principle as well as authority, that just as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to nonresidents (New Orleans v. Stempel, 175 U. S. 309, 320, et seq., 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110; Bristol v. Washington County, 177 U. S. 133, 145, 44 L. ed. 701, 707, 20 Sup. Ct. Rep. 585; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550), and sustaining Federal taxation of the income of an alien nonresident derived from securities held in this country (De Ganay v. Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524).

That a state, consistently with the Fed-

eral Constitution, may not prohibit the citizens of other states from carrying on legitimate business within its borders like its own [53] citizens, of course is granted; but it does not follow that the business of nonresidents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresident, although not personally, yet to the extent of his property held or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state. Sec. 2 of art. 4 of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452.

Oklahoma has assumed no power to tax nonresidents with respect to income derived from property or business beyond the borders of the state. The 1st section of the act, while imposing a tax upon inhabitants with respect to their entire net income arising from all sources, confines the tax upon nonresidents to their net income from property owned and business, etc., carried on within the state. A similar distinction has been observed in our Federal income tax laws, from one of the earliest down to the present.[1] The Acts of 1861 (12 Stat. at L. 309, chap. 45) and 1864 (13 Stat. at L. 281, chap. 173, 13 Stat. at L. 417) [54] confined the tax to persons residing in the United States and citizens residing abroad. But in 1866 (14 Stat. at L. 137, 138, chap. 184, Comp. Stat. § 6292) there was inserted by amendment the following: "And a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, not citizens thereof." Similar provisions were embodied in the Acts of 1870 and 1894; and in the Act of 1913 (38 Stat. at L. 166, 4 Fed. Stat. Anno. 2d ed. p. 236), after a clause imposing a tax upon the entire net income arising or accruing from all sources (with exceptions not material here) to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, the following appears: "And a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere." Evidently this furnished the model for § 1 of the Oklahoma statute.

No doubt is suggested (the former requirement of apportionment having been removed by constitutional amendment) as to the power of Congress thus to impose taxes upon incomes produced within the borders of the United States or arising from sources located therein, even though the income accrues to a nonresident alien. And, so far as the question of jurisdiction is concerned, the due process clause of the 14th Amendment imposes no greater restriction in this regard upon the several states than the corresponding clause of the 5th Amendment imposes upon the United States.

It is insisted, however, both by appellant in this case and by the opponents of the New York law in Travis v. Yale & T. Mfg. Co. 252 U. S. 60, post, 460, 40 Sup. Ct. Rep. 228, that an income tax is in its nature a personal tax, or a "subjective tax imposing personal liability upon the recipient of the income;" and that as to a [55] non-

[1] Acts of August 5, 1861 (chap. 45, § 49, 12 Stat. at L. 292, 309); June 30, 1864 (chap. 173, § 116, 13 Stat. at L. 223, 281, Comp. Stat. § 6368, 4 Fed. Stat. Anno. 2d ed. p. 324); July 4, 1864 (Joint Res. 77, 13 Stat. at L. 417); July 13, 1866 (chap. 184, § 9, 14 Stat. at L. 98, 137, 138, Comp. Stat. § 6292, 9 Fed. Stat. Anno. 2d ed. p. 391); March 2, 1867 (chap. 169, § 13, 14 Stat. at L. 471, 477, 478, Comp. Stat. § 5895, 3 Fed. Stat. Anno. 2d ed. p. 1002); July 14, 1870 (chap. 255, § 6, 16 Stat. at L. 256, 257, Comp. Stat. § 5971 (1), 3 Fed. Stat. Anno. 2d ed. p. 1045); August 27, 1894 (chap. 349, § 27, 28 Stat. at L. 509, 553); October 3, 1913 (chap. 16, § II. A, subd. 1, 38 Stat. at L. 114, 166, Comp. Stat. § 5291, 2 Fed. Stat. Anno. 2d ed. p. 724, 4 Fed. Stat. Anno. 2d ed. p. 236); September 8, 1916 (chap. 463, title 1, pt. 1, § 1 (a), 39 Stat. at L. 756, Comp. Stat. § 6366a, Fed. Stat. Anno. Supp. 1918, p. 312); October 3, 1917 (chap. 63, title 1, §§ 1 & 2, 40 Stat. at L. 300, Comp. Stat. §§ 6336aa, 6336aaa, Fed. Stat. Anno. Supp. 1918, p. 336); February 24, 1919 (chap. 18, §§ 210, 213 (c), 40 Stat. at L. 1057, 1062, 1066, Comp. Stat. §§ 6336½e, 6336½ff).

resident the state has no jurisdiction to impose such a liability. This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99; Mountain Timber Co. v. Washington, 243 U. S. 219, 237, 61 L. ed. 685, 696, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294, 62 L. ed. 295, 297, 38 Sup. Ct. Rep. 126; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463, 63 L. ed. 1084, 1087, 39 Sup. Ct. Rep. 522. The practical burden of a tax imposed upon the net income derived by a nonresident from a business carried on within the state certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen.

The fact that it required the personal skill and management of appellant to bring his income from producing property in Oklahoma to fruition, and that his management was exerted from his place of business in another state, did not deprive Oklahoma of jurisdiction to tax the income which arose within its own borders. The personal element cannot, by any fiction, oust the jurisdiction of the state within which the income actually arises, and whose authority over it operates in rem. At most, there might be a question whether the value of the service of management rendered from without the state ought not to be allowed as an expense incurred in producing the income; but no such question is raised in the present case, hence we express no opinion upon it.

The contention that the act deprives appellant and others similarly circumstanced of the privileges and immunities enjoyed by residents and citizens of the state of Oklahoma, in violation of § 2 of art. 4 of the Constitution, [56] is based upon two grounds, which are relied upon as showing also a violation of the "equal protection" clause of the 14th Amendment.

One of the rights intended to be secured by the former provision is that a citizen of one state may remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter state are subjected to. Paul v. Virginia, 8 Wall. 168, 180, 19 L. ed. 357, 360; Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452; Maxwell v. Bugbee, 250 U. S. 525, 537, 63 L. ed. 1124, 1130, 40 Sup. Ct. Rep. 2. The judge who dissented in Shaffer v. Howard, 250 Fed. 873, 883, concluded that the Oklahoma Income Tax Law offended in this regard, upon the ground (p. 888) that since the tax is, as to citizens of Oklahoma, a purely personal tax measured by their incomes, while, as applied to a nonresident, it is "essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected," there was a discrimination against the nonresident. We are unable to accept this reasoning. It errs in paying too much regard to theoretical distinctions and too little to the practical effect and operation of the respective taxes as levied; in failing to observe that in effect citizens and residents of the state are subjected at least to the same burden as nonresidents, and perhaps to a greater, since the tax imposed upon the former includes all income derived from their property and business within the state, and, in addition, any income they may derive from outside sources.

Appellant contends that there is a denial to noncitizens of the privileges and immunities to which they are entitled, and also a denial of the equal protection of the laws, in that the act permits residents to deduct from their gross income not only losses incurred within the state of Oklahoma, but also those sustained outside of that state, while nonresidents may deduct only those incurred within the [57] state. The difference, however, is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources.

Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred. It may be remarked, in passing, that there is no showing that appellant has sustained such losses, and so he is not entitled to raise this question.

It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748. Compare William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

Reference is made to the Gross Production Tax Law of 1915 (chap. 107, art. 2, subd. A, § 1; Sess. Laws 1915, p. 151), as amended by chap. 39 of Sess. Laws 1916 (p. 104), under which every person or corporation engaged in producing oil or natural gas within the state is required to pay a tax equal to 3 per centum of the gross value of such product in lieu of all taxes imposed by the state, counties, or municipalities upon the land or the leases, mining rights, [58] and privileges, and the machinery, appliances, and equipment pertaining to such production. It is contended that payment of the gross production tax relieves the producer from the payment of the income tax. This is a question of state law, upon which no controlling decision by the supreme court of the state is cited. We overrule the contention, deeming it clear, as a matter of construction, that the gross production tax was intended as a substitute for the ad valorem property tax, but not for the income tax, and that there is no such repugnance between it and the income tax as to produce a repeal by implication. Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the 14th Amendment prevents the states from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 274, 35 Sup. Ct. Rep. 99.

The contention that there is a want of due process in the proceedings for enforcement of the tax, especially in the lien imposed by § 11 upon all of the delinquent's property, real and personal, reduces itself to this: that the state is without power to create a lien upon any property of a nonresident for income taxes except the very property from which the income proceeded; or, putting it in another way, that a lien for an income tax may not be imposed upon a nonresident's unproductive property, nor upon any particular productive property beyond the amount of the tax upon the income that has proceeded from it.

But the facts of the case do not raise this question. It clearly appears from the averments of the bill that the whole of plaintiff's property in the state of Oklahoma consists of oil-producing land, oil and gas mining leaseholds, and other property used in the production of oil and gas; and that, beginning at least as early as the year 1915, [59] when the act was passed, and continuing without interruption until the time of the commencement of the suit (April 16, 1919), he was engaged in the business of developing and operating these properties for the production of oil; his entire business in that and other states was managed as one business; and his entire net income in the state for the year 1916 was derived from that business. Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the lien will rest upon the same property interests which were the source of the income upon which the tax was imposed. The entire jurisdiction of the state over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction in rem; and we are clear that the state acted within its lawful power in treating his property interests and business as having both unity and continuity. Its purpose to impose income taxes was declared in its own Constitution, and the precise nature of the tax and the measures to be taken for enforcing it were plainly set forth in the Act of 1915; and plaintiff

having thereafter proceeded, with notice of this law, to manage the property and conduct the business out of which proceeded the income now taxed, the state did not exceed its power or authority in treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process, upon all property employed in the business.

No. 531. Appeal dismissed.

No. 580. Decree affirmed.

Mr. Justice **McReynolds** dissents.

---

[60] EUGENE M. TRAVIS, as Comptroller of the State of New York, Appt.,
v.
YALE & TOWNE MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 60–82.)

Constitutional law — due process of law — taxing incomes of nonresidents.

1. No violation of due process of law results from the exercise by the state of New York of its jurisdiction to tax incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, and to enforce payment so far as it can by the exercise of a just control over persons and property within the state, and by a garnishment of credits (of which the withholding provision of such law is a practical equivalent).

[For other cases, see Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — privileges and immunities — taxing income of nonresidents — discrimination — deductions.

2. There is no unconstitutional discrimination against citizens of other states in a state income tax law merely because it confines the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — privileges and immunities — taxing income of nonresidents — withholding at source.

3. A state income tax law does not unconstitutionally discriminate against noncitizens merely because it confines the withholding at source to the income of nonresidents, since such provision does not in any way increase the burden of the tax upon nonresidents, but merely recognizes the fact that, as to them, the state imposes no personal liability, and hence adopts a convenient substitute for it.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — regulating foreign corporations — withholding income tax at source.

4. A foreign corporation doing business within the state and elsewhere has no just ground of complaint against a state income tax, in the absence of any contract limiting the state's power of regulation, by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfil the duty of deducting and withholding the tax from that part of the salaries and wages of its nonresident employees which was earned by them within the state, although the corporation asserts that the statute impairs the obligation of contracts between it and its employees, there being no averment, however, that any such contract, made before the passage of the statute, required the wages or salaries to be paid in the state of incorporation, where it has its principal place of business, or contained other provisions in anywise conflicting with the withholding requirement.

[For other cases, see Constitutional Law, IV. h, in Digest Sup. Ct. 1908.]

Constitutional law — privileges and immunities — taxing income of nonresidents — exemptions.

5. Privileges and immunities of citizens of New York are unconstitutionally denied to citizens of Connecticut and New Jersey by the provision of the New York Income Tax Law which denies to all nonresidents, without special reference to citizenship, the exemptions accorded to residents, viz., $1,000 of the income of a single person, $2,000 in the case of a married person, and $200 additional for each dependent, although the nonresident, if liable to an income tax in his own state, including income derived from sources within New York, and subject to taxation under the New York act, is allowed a credit upon the income tax otherwise payable to New York by the same proportion of the tax payable to the state of his residence as his income subject to taxation by the New York act bears to his entire income taxed in his own state, provided that such credit shall be given only if the laws of said state grant a substantially similar credit to residents of New York subject to income tax under such laws, and although the

---

Note.—On constitutionality of income tax—see notes to State ex rel. Bolens v. Frear, L.R.A.1915B, 569, and Alderman v. Wells, 27 L.R.A.(N.S.) 864.

On constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

New York act also excludes from the income of nonresident taxpayers annuities, interest on bank deposits, interest on bonds, notes, or other interest-bearing obligations, or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession, or occupation carried on in the state, subject to taxation under that act.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — privileges and immunities — taxing incomes of nonresidents — exemptions.

6. The discrimination against citizens of Connecticut and New Jersey, produced by the provision of the New York Income Tax Law which denies to all nonresidents, without special reference to citizenship, the exemptions accorded to residents, viz., $1,000 of the income of a single person, $2,000 in the case of a married person, and $200 additional for each dependent, cannot be upheld on the theory that nonresidents have untaxed income derived from sources in their home states or elsewhere outside of the state of New York, corresponding to the amount upon which residents of the latter state are exempt from taxation under the act.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — privileges and immunities — taxing income of nonresidents — discrimination.

7. A discrimination by the state of New York in its income tax legislation against citizens of adjoining states would not be cured were those states to establish like discriminations against citizens of the state of New York.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

[No. 548.]

Argued December 15 and 16, 1919. Decided March 1, 1920.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree enjoining the enforcement of the Income Tax Law of that state as against nonresidents. Affirmed.

The facts are stated in the opinion.

See same case below, on motion to dismiss bill, 262 Fed. 576.

Mr. James S. Y. Ivins argued the cause, and, with Mr. Charles D. Newton, Attorney General of New York, and Mr. E. C. Aiken, filed a brief for appellant:

The power of taxation, inherent in a sovereign, includes the power to lay a tax upon incomes.

M'Culloch v. Maryland, 4 Wheat. 316, 429, 4 L. ed. 579, 607.

Whether a tax levied upon incomes from all sources is a direct or an indirect tax was a question of prime importance in considering the validity of Federal income taxes, prior to the adoption of the 16th Amendment, but it has no importance since the adoption of that Amendment, and it never had any importance with respect to taxes laid by the states.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

The characterization of a tax by administrative officers, by the phraseology of the statute, or by the opinion of other courts, is not controlling. This court will look only at the practical effect of the tax as it is enforced.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294, 62 L. ed. 295, 297, 38 Sup. Ct. Rep. 126.

The underlying reason for taxation: the support of the government in its protection of the lives, liberty, and property of those having life, liberty, or property within its borders extends equally to residents and nonresidents, citizens and aliens.

Duer v. Small, 4 Blatchf. 263, Fed. Cas. No. 4,116.

Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of the taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186.

The doctrine that movable property follows the person for purposes of taxation has given way to the doctrine that where property has a situs, there it is taxable.

Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; State Tax on Foreign-held bonds, 15 Wall. 300, 21 L. ed. 179; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20

Sup. Ct. Rep. 110; State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Rogers v. Hennepin County, 240 U. S. 184, 191, 60 L. ed. 594, 599, 36 Sup. Ct. Rep. 265; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 355, 55 L. ed. 762, 767, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550.

The New York Income Tax Law does not deny to citizens of any state any of the privileges or immunities of citizens of the several states.

La Tourette v. McMaster, 248 U. S. 465, 470, 63 L. ed. 362, 365, 39 Sup. Ct. Rep. 160; Frost v. Brisbin, 19 Wend. 11, 32 Am. Dec. 423; Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. ed. 806; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346; Blake v. McClung, 172 U. S. 239, 256, 257, 43 L. ed. 432, 438, 439, 19 Sup. Ct. Rep. 165.

Classification in taxation is a proper exercise of legislative power.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 351, 35 L. ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Barrett v. Indiana, 229 U. S. 26, 29, 30, 57 L. ed. 1050–1053, 33 Sup. Ct. Rep. 692; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 329, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 833; International Harvester Co. v. Missouri, 234 U. S. 199, 210, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 138, 62 L. ed. 1025, 1037, 38 Sup. Ct. Rep. 444; Tanner v. Little, 240 U. S. 369, 382, 383, 60 L. ed. 691, 701, 702, 36 Sup. Ct. Rep. 379.

The classification of residents and nonresidents by the New York income tax is reasonable.

La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 Sup. Ct. Rep. 160; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. ed. 1025, 38 Sup. Ct. Rep. 444; Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379; Rast v. Van Deman & L. Co. 240 U. S. 342, 357, 60 L. ed. 679, 687, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 256, 52 L. ed. 195, 197, 28 Sup. Ct. Rep. 89; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 329, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833.

The different method of collection provided by the statute for the tax on income received by way of compensation for personal services by residents and by nonresidents does not deprive any person of the equal protection of the laws.

St. John v. New York, 201 U. S. 633, 637, 50 L. ed. 896, 898, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 505, 22 L. ed. 189, 195; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 97, 98, 43 L. ed. 623, 627, 628, 19 Sup. Ct. Rep. 346; Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Merchants' & Mfrs. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

The New York Income Tax Law does not deny to any person due process of law.

People ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Merchants' & Mfrs. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

The New York Income Tax Law does not violate the commerce clause of the Federal Constitution.

United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; William E. Peck & Co. v. Lowe, 247 U.

S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

The New York income tax does not impair the obligation of contracts.

Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Tanner v. Little, 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

Mr. Jerome L. Cheney also argued the cause for appellant.

Messrs. Laurence Arnold Tanzer, William P. Burr, William S. Rann, and William J. Wallin filed a brief as amici curiæ:

The difference in the base of the tax necessarily arises from the difference between the extent of a state's jurisdiction over residents and over nonresidents, respectively.

Kirtland v. Hotchkiss, 100 U. S. 491, 499, 25 L. ed. 558, 562; Hawley v. Malden, 232 U. S. 1, 11, 58 L. ed. 477, 482, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 58, 62 L. ed. 145, 148, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. ed. 150, 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

The difference in the base of the tax, being forced upon the state by reason of its limited jurisdiction, cannot be regarded as an arbitrary discrimination.

Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; Keeney v. New York, 222 U. S. 525, 535, 56 L. ed. 299, 305, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; District of Columbia v. Brooke, 214 U. S. 138, 150, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560.

The difference in the exemptions and deductions granted to residents and nonresidents corresponds to and bears a reasonable relation to the difference in the base of the tax.

Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; People ex rel. Thurber-Whyland Co. v. Barker, 141 N. Y. 122, 23 L.R.A. 95, 35 N. E. 1073; People ex rel. Hecker-Jones-Jewell Mill. Co. v. Barker, 147 N. Y. 31, 29 L.R.A. 393, 41 N. E. 435.

The statute does not in fact discriminate against nonresidents as a class.

Travellers' Ins. Co. v. Connecticut, supra.

Possible hardship in individual cases is not sufficient ground for invalidating the statute.

Henderson Bridge Co. v. Henderson, 173 U. S. 592, 616, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 369, 46 L. ed. 949, 953, 22 Sup. Ct. Rep. 673; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2.

In the last analysis, the objection is really to the policy of the law,—a question for the legislature, and not for the courts.

Amoskeag Sav. Bank v. Purdy, 231 U. S. 373, 393, 58 L. ed. 274, 282, 34 Sup. Ct. Rep. 114; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 371, 46 L. ed. 949, 954, 22 Sup. Ct. Rep. 673; District of Columbia v. Brooke, 214 U. S. 138, 150, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560; Flint v. Stone Tracy Co. 220 U. S. 107, 169, 55 L. ed. 389, 420, 31 Sup. Ct. Rep. 342; La Tourette v. McMaster, 248 U. S. 465, 468, 63 L. ed. 362, 364, 39 Sup. Ct. Rep. 160; Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 610, 59 L. ed. 379, 384, 35 Sup. Ct. Rep. 140, P.U.R.1915A, 121.

The taxing power of a state extends over all persons, property, and business within its jurisdiction.

Lane County v. Oregon, 7 Wall. 71, 76, 77, 19 L. ed. 101, 104, 105; Michigan C. R. Co v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459.

The power of a state to tax nonresidents on their property and business within the state is so well settled as not to require extended argument.

New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; Armour & Co. v. Virginia, 246 U. S. 1, 62 L. ed. 547, 38 Sup. Ct. Rep. 267; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463, 63 L. ed. 1084, 1087, 39 Sup. Ct. Rep. 522; Pollock v. Farmers' Loan & T. Co. 158 U. S. 635, 637, 39 L. ed. 1125, 1126, 15 Sup. Ct. Rep. 912; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 159,

162, 51 L. ed. 415, 423, 27 Sup. Ct. Rep. 188.

Power to tax income from property or business follows from the power to tax property or business.

Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; Society for Savings v. Coite, 6 Wall. 594, 608, 18 L. ed. 897, 903; Kirtland v. Hotchkiss, 100 U. S. 491, 499, 25 L. ed. 558, 562; Maine v. Grand Trunk R. Co. 142 U. S. 217, 228, 35 L. ed. 994, 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 58, 62 L. ed. 145, 148, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 356, 357, 55 L. ed. 762, 768, 769, L.R.A. 1915C, 903, 31 Sup. Ct. Rep. 550; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463, 63 L. ed. 1084, 1087, 39 Sup. Ct. Rep. 522; State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 599, 25 L. ed. 647, 648; Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397, 411, 48 L. ed. 496, 501, 24 Sup. Ct. Rep. 376; Flint v. Stone Tracy Co. 220 U. S. 107, 146, 165, 55 L. ed. 389, 411, 419, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; United States Exp. Co. v. Minnesota, 223 U. S. 335, 343, 345, 56 L. ed. 459, 464, 465, 32 Sup. Ct. Rep. 211; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 183, 62 L. ed. 1054, 38 Sup. Ct. Rep. 467; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 581, 582, 39 L. ed. 759, 819, 820, 15 Sup. Ct. Rep. 673; State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848; United States Glue Co. v. Oak Creek, 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421, affirmed in 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; Bayfield County v. Pishon, 162 Wis. 466, 156 N. W. 463; Maguire v. Tax Comr. 230 Mass. 503, 120 N. E. 162; Com. v. Werth, 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916D, 1263; Shaffer v. Howard, 250 Fed. 873.

The validity of the act depends not upon the theoretical nature of the tax, but upon its practical operation and effect.

Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 499, 503, 22 L. ed. 189, 193, 195; Corry v. Baltimore, 196 U. S. 475, 49 L. ed. 561, 25 Sup. Ct. Rep. 297; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 696, 697, 39 L. ed. 311, 315, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 225, 41 L. ed. 965, 979, 17 Sup. Ct. Rep. 604; Knowlton v. Moore, 178 U. S. 41, 82, 83, 44 L. ed. 969, 986, 987, 20 Sup. Ct. Rep. 747; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 59, 62 L. ed. 145, 148, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; American Mfg. Co. v. St. Louis, 250 U. S. 459, 462, 463, 63 L. ed. 1084, 1087, 39 Sup. Ct. Rep. 522; Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842.

The practical effect of denying or unduly limiting the power of a state to tax nonresidents would be a serious impairment of that power of taxation which is essential to sovereignty.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604.

Messrs. **Louis H. Porter** and **Archibald Cox** argued the cause and filed a brief for appellee:

The provisions of the statute relating to the taxation of nonresidents are inconsistent with the "due process of law" clause of the 14th Amendment, because they tax persons or things outside the jurisdiction of the state of New York, and within the jurisdiction of other states.

State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; New York, L. E. & W. R. Co. v. Penpsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; St. Louis v. Wiggins Ferry Co. 11 Wall. 423, 430, 20 L. ed. 192, 194; Coosa, Taxn. pp. 67, 145; Welton v. Missouri, 91 U. S. 275, 278, 23 L. ed. 347, 348.

The tax here in question is a subjective tax imposing personal liability upon the person receiving and enjoying the "net income," which merely measures the burden imposed on the taxpayer in personam.

State ex rel. Sallie F. Moon Co. v.

Wisconsin Tax. Commission, 166 Wis. 287, 163 N. W. 639, 165 N. W. 470; Income Tax Cases, 148 Wis. 456, L.R.A. 1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Maguire v. Tax Comrs. 230 Mass. 503, 120 N. E. 162; Brady v. Anderson, 153 C. C. A. 463, 240 Fed. 665.

Since this statute thus imposes a personal tax on a nonresident of the state, it is unconstitutional.

United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; New York v. McLean, 170 N. Y. 374, 63 N. E. 380; Wilcox v. Rochester, 129 N. Y. 247, 29 N. E. 99; Hilton v. Fonda, 86 N. Y. 340; Mygatt v. Washburn, 15 N. Y. 316; Litchfield v. Vernon, 41 N. Y. 123; Dorwin v. Strickland, 57 N. Y. 492; Stewart v. Crysler, 100 N. Y. 378, 3 N. E. 471; Maltbie v. Lobsitz Mills Co. 223 N. Y. 227, 119 N. E. 389; Barhyte v. Shepherd, 35 N. Y. 238; Cooley, Taxn. 3d ed. p. 24; Brown, Jurisdiction of Courts, 2d ed. § 160, pp. 549, 550; State, Potter, Prosecutor, v. Ross, 23 N. J. L. 521; Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The provisions of the statute here cannot be sustained as a tax on property.

Ayer & L. Tie Co. v. Kentucky, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 Ann. Cas. 205; Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Scottish Union & Nat. Ins. Co. v. Bowland, 196 U. S. 611, 49 L. ed. 619, 25 Sup. Ct. Rep. 345; State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Rogers v. Hennepin County, 240 U. S. 184, 60 L. ed. 594, 36 Sup. Ct. Rep. 265; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Board of Assessors v. New York L. Ins. Co. 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385; Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13; Pollock v. Farmers' Loan & T. Co. 158 U. S. 635, 637, 39 L. ed. 1125, 1126, 15 Sup. Ct. Rep. 912; United States v. Bennett, 232 U. S. 299, 58 L. ed. 612, 34 Sup. Ct. Rep. 433; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647.

The provisions of the statute taxing nonresidents cannot be sustained as imposing a privilege or license tax.

William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432; United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 340, 58 L. ed. 1337, 1340, 52 L.R.A.(N.S.) 574, 34 Sup. Ct. Rep. 826; Provident Sav. Life Assur. Soc. v. Kentucky, 239 U. S. 103, 60 L. ed. 167, L.R.A.1916C, 572, 36 Sup. Ct. Rep. 34; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

The statute cannot be sustained on the theory that the state of New York has in fact power to collect the tax.

Board of Assessors v. New York L. Ins. Co. 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385; New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303; Louisville & J. Ferry Co. v.

Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; United States v. Bennett, 232 U. S. 299, 58 L. ed. 612, 34 Sup. Ct. Rep. 433; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647.

The provisions operating to discriminate against appellee's nonresident employees conflict with art. 4, § 2, of the Constitution and the "privileges and immunities" clause of the 14th Amendment.

Paul v. Virginia, 8 Wall. 168, 180, 19 L. ed. 357, 360; Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. Rep. 366; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; La Tourette v. McMaster, 248 U. S. 465, 63 L. ed. 362, 39 Sup. Ct. Rep. 160; New York v. Weaver, 100 U. S. 539, 25 L. ed. 705; Sprague v. Fletcher, 69 Vt. 69, 37 L.R.A. 840, 37 Atl. 239.

Mr. John W. Griggs filed a brief as amicus curiæ:

The state of New York has no power to impose a license, privilege, or excise tax upon nonresidents carrying on any trade, business, or occupation within that state, unless a similar license, privilege, or excise tax is imposed upon citizens of New York.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

If the imposition of the tax cannot be sustained as a privilege tax, upon what basis can it be sustained?

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

One limitation upon the power of taxation of any state is that such power can be legally exercised only upon the assumption of an equivalent rendered to the taxpayer in the protection of his person or his property.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

Any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them.

Cooley, Const. Lim. p. 889.

The tax in question is not a property tax, and has no relation to property as such.

State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111, 152 N. W. 848; State ex rel. Sallie F. Moon Co. v. Wisconsin Tax Commission, 166 Wis. 287, 163 N. W. 639, 165 N. W. 470.

That the United States government taxes the incomes of nonresident aliens from property or business within the United States is no justification for taxation by New York of income earned by a nonresident within the state.

Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; State, Potter, Prosecutor, v. Ross, 23 N. J. L. 521; United States v. Bennett, 232 U. S. 299, 58 L. ed. 612, 34 Sup. Ct. Rep. 433; Shaffer v. Howard, 250 Fed. 883.

The scheme of the Federal Constitution was to unite the people of the various states in one Federal citizenship, and to put an end to those local discriminations and impositions by one state upon the citizens of another state, which had so seriously impaired the efficiency of the government under the Confederation.

Paul v. Virginia, 8 Wall. 168, 180, 19 L. ed. 357, 360.

Mr. Justice **Pitney** delivered the opinion of the court:

This was a suit in equity, brought in the district court by appellee against appellant as comptroller of the state of New York to obtain an injunction restraining the enforcement of the Income Tax Law of that state (Laws 1919, chap. 627) as against complainant, upon the ground of its repugnance to the Constitution of the United States because violating the interstate commerce clause, impairing the obligation of contracts, depriving citizens of the states of Connecticut and New Jersey, employed by complainant, of the privileges and immunities enjoyed by citizens of the state of New York, depriving complainant and its nonresident employees of their [73] property without due process of law, and denying to such employees the equal protection of the laws. A motion to dismiss the bill—equivalent to a demurrer—was denied upon the ground that the act violated § 2 of art. 4 of the Constitution by discriminating against nonresidents in the exemptions allowed from taxable income; an answer was filed, raising no question of fact; in

due course there was a final decree in favor of complainant; and defendant took an appeal to this court under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. p. 794].

The act (§ 351) imposes an annual tax upon every resident of the state with respect to his net income as defined in the act, at specified rates, and provides also: "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state." Section 359 defines gross income, and contains this paragraph: "3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article." In § 360 provision is made for deducting in the computation of net income expenses, taxes, losses, depreciation charges, etc.; but, by ¶ 11 of the same section, "in the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; . . ." By § 362, [74] certain exemptions are allowed to any resident individual taxpayer, viz., in the case of a single person a personal exemption of $1,000, in the case of the head of a family or a married person living with husband or wife, $2,000; and $200 additional for each dependent person under eighteen years of age or mentally or physically defective. The next section reads as follows: "Sec. 363. Credit for taxes in case of taxpayers other than residents of the state. Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws." Sec. 366 in terms requires that every "withholding agent" (including employers) shall deduct and withhold 2 per centum from all salaries, wages, etc., payable to nonresidents, where the amount paid to any individual equals or exceeds $1,000 in the year, and shall pay the tax to the comptroller. This applies to a resident employee, also, unless he files a certificate showing his residence address within the state.

Complainant, a Connecticut corporation doing business in New York and elsewhere, has employees who are residents, some of Connecticut, others of New Jersey, but are occupied in whole or in part in complainant's business in New York. Many of them have annual salaries or fixed compensation exceeding $1,000 per year, and the [75] amount required by the act to be withheld by complainant from the salaries of such nonresident employees is in excess of $3,000 per year. Most of these persons are engaged under term contracts calling for stipulated wages or salaries for a specified period.

The bill sets up that defendant, as comptroller of the state of New York, threatens to enforce the provisions of the statute against complainant, requires it to deduct and withhold from the salaries and wages payable to its employees residing in Connecticut or New Jersey and citizens of those states respectively, engaged in whole or in part in complainant's business in the state of New York, the taxes provided in the statute, and threatens to enforce against complainant the penalties provided by the act if it fails to do so; that the act is unconstitutional for the reasons above specified; and that if complainant does withhold the taxes as required it will be subjected to many actions by its employees for reimbursement of the sums so withheld. No question is made about complainant's right to resort to equity for relief; hence we come at once to the constitutional questions.

That the state of New York has jurisdiction to impose a tax of this kind upon

the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent), and that such a tax, so enforced, does not violate the due process of law provision of the 14th Amendment, is settled by our decision in Shaffer v. Carter, this day announced [252 U. S. 37, ante, 445, 40 Sup. Ct. Rep. 221], involving the Income Tax Law of the state of Oklahoma. That there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are [76] connected with income arising from sources within the taxing state, likewise is settled by that decision.

It is not here asserted that the tax is a burden upon interstate commerce; the point having been abandoned in this court.

The contention that an unconstitutional discrimination against noncitizens arises out of the provision of § 366, confining the withholding at source to the income of nonresidents, is unsubstantial. That provision does not in any wise increase the burden of the tax upon nonresidents, but merely recognizes the fact that as to them the state imposes no personal liability, and hence adopts a convenient substitute for it. See Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 239, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533.

Nor has complainant on its own account any just ground of complaint by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfil the duty of deducting and withholding the tax. This cannot be deemed an unreasonable regulation of its conduct of business in New York. New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952, cited in behalf of complainant, is not in point. In that case the state of Pennsylvania granted to a railroad company organized under the laws of New York and having its principal place of business in that state the right to construct a portion of its road through Pennsylvania, upon prescribed terms which were assented to and complied with by the company and were deemed to constitute a contract, not subject to impairment or modification through subsequent legislation by the state of Pennsylvania except to the extent of establishing reasonable regulations touching the management of the business done and the property owned by the company in that state, not materially interfering with or obstructing the substantial enjoyment of the rights previously granted. Afterwards, Pennsylvania undertook by statute to require [77] the company, when making payment of coupons upon bonds previously issued by it, payable at its office in the city of New York, to withhold taxes assessed by the state of Pennsylvania against residents of that state because of ownership of such bonds. The coupons were payable to bearer, and when they were presented for payment it was practically impossible for the company to ascertain who were the real owners, or whether they were owned by the same parties who owned the bonds. The statute was held to be an unreasonable regulation, and hence to amount to an impairment of the obligation of the contract.

In the case at bar complainant, although it is a Connecticut corporation and has its principal place of business in that state, is exercising the privilege of carrying on business in the state of New York without any contract limiting the state's power of regulation. The taxes required to be withheld are payable with respect to that portion only of the salaries of its employees which is earned within the state of New York. It might pay such salaries, or this portion of them, at its place of business in New York; and the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the state of New York of the right to impose such a regulation. It is true complainant asserts that the act impairs the obligation of contracts between it and its employees; but there is no averment that any such contract made before the passage of the act required the wages or salaries to be paid in the state of Connecticut, or contained other provisions in anywise conflicting with the requirement of withholding.

The district court, not passing upon the above questions, held that the act, in granting to residents exemptions denied to nonresidents, violated the provision of § 2 of art. 4 of the Federal Constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" and, notwithstanding [78] the elaborate and ingenious argument

submitted by appellant to the contrary, we are constrained to affirm the ruling.

The purpose of the provision came under consideration in Paul v. Virginia, 8 Wall. 168, 180, 19 L. ed. 357, 360, where the court, speaking by Mr. Justice Field, said: "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." And in Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449, holding a discriminatory state tax upon nonresident traders to be void, the court, by Mr. Justice Clifford, said (p. 430): "Beyond doubt those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

Of course the terms "resident" and "citizen" are not synonymous, and in some cases the distinction is important [79] (La Tourette v. McMaster, 248 U. S. 465, 470, 63 L. ed. 362, 365, 39 Sup. Ct. Rep. 160); but a general taxing scheme such as the one under consideration, if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled. In Blake v. McClung, 172 U. S. 239, 247, 43 L. ed. 432, 435, 19 Sup. Ct. Rep. 165, 176 U. S. 59, 67, 44 L. ed. 371, 374, 20 Sup. Ct. Rep. 307, the court held that a statute of Tennessee, declaring the terms upon which a foreign corporation might carry on business and hold property in that state, which gave to its creditors residing in Tennessee priority over all creditors residing elsewhere, without special reference to whether they were citizens or not, must be regarded as contravening the "privileges and immunities" clause.

The nature and effect of the crucial discrimination in the present case are manifest. Section 362, in the case of residents, exempts from taxation $1,000 of the income of a single person, $2,000 in the case of a married person, and $200 additional for each dependent. A nonresident taxpayer has no similar exemption; but by § 363, if liable to an income tax in his own state, including income derived from sources within New York and subject to taxation under this act, he is entitled to a credit upon the income tax otherwise payable to the state of New York by the same proportion of the tax payable to the state of his residence as his income subject to taxation by the New York act bears to his entire income taxed in his own state; "provided, that such credit shall be allowed only if the laws of said state . . . grant a substantially similar credit to residents of this state subject to income tax under such law." [1]

[80] In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which states has an income tax law. A considerable number of complainant's employees, residents and citizens of one or the other of those

[1] Reading the statute literally, there would appear to be an additional discrimination against nonresidents in that under § 366 the "withholding agent" (employer) is required to withhold 2 per cent from all salaries, wages, etc., payable to any individual nonresident amounting to $1,000 or more in the year; whereas by § 351 the tax upon residents (indeed, upon nonresidents likewise, so far as this section goes) is only 1 per centum upon the first $10,000 of net income. It is said, however, that the discrepancy arose through an amendment made to § 351 while the bill was pending in the legislature, no corresponding amendment having been made in § 366. In view of this, and taking the whole of the act together, the attorney general has advised the comptroller that § 366 requires withholding of only 1 per centum upon the first $10,000 of income. And the comptroller has issued regulations to that effect. Hence we treat the discrepancy as if it did not exist.

states, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity, due to the geographical situation of that city, in close proximity to the neighboring states, many thousands of men and women, residents and citizens of those states, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the state of New York,—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see Amoskeag [81] Sav. Bank v. Purdy, 231 U. S. 373, 393, 394, 58 L. ed. 274, 282, 283, 34 Sup. Ct. Rep. 114; Maxwell v. Bugbee, 250 U. S. 525, 543, 63 L. ed. 1124, 1132, 40 Sup. Ct. Rep. 2), but a general rule, operating to the disadvantage of all nonresidents, including those who are citizens of the neighboring states, and favoring all residents, including those who are citizens of the taxing state.

It cannot be deemed to be counterbalanced by the provision of ¶ 3 of § 359, which excludes from the income of nonresident taxpayers "annuities, interest on bank deposits, interest on bonds, notes, or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state, subject to taxation under this article." This provision is not so conditioned as probably to benefit nonresidents to a degree corresponding to the discrimination against them; it seems to have been designed rather (as is avowed in appellant's brief) to preserve the preëminence of New York city as a financial center.

Nor can the discrimination be upheld, as is attempted to be done, upon the theory that nonresidents have untaxed income derived from sources in their home states or elsewhere outside of the state of New York, corresponding to the amount upon which residents of that state are exempt from taxation under this act. The discrimination is not conditioned upon the existence of such untaxed income; and it would be rash to assume that nonresidents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them.

In the brief submitted by the attorney general of New York in behalf of appellant, it is said that the framers of the act, in embodying in it the provision for unequal treatment of the residents of other states with [82] respect to the exemptions, looked forward to the speedy adoption of an income tax by the adjoining states; in which event, injustice to their citizens on the part of New York could be avoided by providing similar exemptions, similarly conditioned. This, however, is wholly speculative. New York has no authority to legislate for the adjoining states; and we must pass upon its statute with respect to its effect and operation in the existing situation. But besides, in view of the provisions of the Constitution of the United States, a discrimination by the state of New York against the citizens of adjoining states would not be cured were those states to establish like discriminations against citizens of the state of New York. A state may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other states. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Decree affirmed.

Mr. Justice **McReynolds** concurs in the result.

---

[83] FRANK P. CHESBROUGH, Plff. in Err.,

v.

NORTHERN TRUST COMPANY, Executor of Mary Schreiber,[1] Eva A. Woodworth, and Margaret A. Smalley.

(See S. C. Reporter's ed. 83, 84.)

Federal courts — jurisdiction — amount in dispute.

After final judgment entered by a

[1] Death of Mary Schreiber, formerly Mary L. Hotchkiss, one of the defendants

Federal district court and affirmed by a circuit court of appeals, the trial court's jurisdiction will not ordinarily be denied on the theory that the requisite jurisdictional amount was not involved, where the action was in tort, the alleged damages exceeded the prescribed amount, the declaration discloses nothing rendering such a recovery impossible, and no bad faith appears.

[For other cases, see Courts, 887–927, in Digest Sup. Ct. 1908.]

[No. 206.]

Argued January 30, 1920. Decided March 1, 1920.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Michigan, Northern Division, in favor of plaintiffs in an action by stockholders in a national bank against a director, to recover damages suffered by reason of his action as such director. Affirmed.

See same case below, — C. C. A. —, 251 Fed. 881.

Mr. **Thomas A. E. Weadock** argued the cause and filed a brief for plaintiff in error.

Mr. **Edward S. Clark** argued the cause, and, with Mr. John C. Weadock, filed a brief for defendants in error.

Memorandum opinion under direction of the court, by Mr. Justice **McReynolds**:

Each of the three defendants in error instituted a suit against plaintiff in error for damages suffered by reason of his action as a director of the Old Second National Bank, Bay City, Michigan. These were consolidated in the district court, and thereafter all parties stipulated that, as the facts were approximately the same as in Woodworth v. Chesbrough (No. 137), the [84] "causes shall in all respects and as to all parties therein be governed and concluded by the final result in the said case," and "that if and when final judgment is entered upon the verdict heretofore rendered in said case Number 137, or on any verdict that may hereafter be rendered therein, and when proceedings (if any) for the review of said judgment have been concluded or abandoned so that execution may be issued thereon, then judgment shall be forthwith entered and execution issued in the above entitled causes," for specified amounts.

A judgment against Chesbrough in No. 137 having been affirmed here (244 U. S. 72, 61 L. ed. 1000, 37 Sup. Ct. Rep. 579), the district court, purporting to enforce the stipulation, entered judgments for defendants in error; and this action was properly approved by the circuit court of appeals. — C. C. A. —, 251 Fed. 881. See 116 C. C. A. 465, 195 Fed. 875, 137 C. C. A. 482, 221 Fed. 912.

Plain provisions of the stipulation were rightly applied. The objection, based upon alleged insufficiency of the amount involved, which plaintiff in error urges to the district court's jurisdiction of the cause first instituted by Mrs. Smalley in the state court and thereafter removed upon his petition, is without merit. The action is in tort; alleged damages exceed the prescribed amount; the declaration discloses nothing rendering such a recovery impossible; no bad faith appears. At this stage of the cause it would require very clear error to justify a negation of the trial court's jurisdiction. Smithers v. Smith, 204 U. S. 632, 642, 643, 51 L. ed. 656, 660, 661, 27 Sup. Ct. Rep. 297.

The judgment of the court below is affirmed.

---

[85] UNITED STATES OF AMERICA, Plff. in Err.,
v.
A. SCHRADER'S SON, Inc.

(See S. C. Reporter's ed. 85–100.)

Monopoly — agreements to control resale prices.

A manufacturer of patented automobile tire accessories violates the Sherman Anti-trust Act when it requires all tire manufacturers and jobbers to whom it sells to execute uniform contracts which obligate them to observe certain fixed resale prices;

Note.—As to the validity of contract provision seeking to control price at which an article shall be resold—see notes to Stewart v. W. T. Rawleigh Medical Co. L.R.A.1917A, 1285; Fisher Flouring Mills v. Swanson, 51 L.R.A. (N.S.) 522; and Grogan v. Chaffee, 27 L.R.A.(N.S.) 395.

On right of manufacturer, producer, or wholesaler to control resale price—see note to United States v. Colgate & Co. 7 A.L.R. 449.

---

in error herein, suggested, and appearance of Northern Trust Company, executor of the last will of Mary Schreiber, deceased, filed and entered as a party defendant in error, on January 27, 1920, on motion of counsel for the defendants in error.

it would be otherwise if the manufacturer had merely specified the resale prices and refused to deal with anyone who failed to observe them, but had not entered into any contract or combination which would obligate the vendees to maintain such prices.

[For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.]

[No. 567.]

Argued January 22 and 23, 1920. Decided March 1, 1920.

IN ERROR to the District Court of the United States for the Northern District of Ohio to review a judgment which sustained a demurrer to an indictment charging a violation of the Sherman Anti-trust Act. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Special Assistant to the Attorney General **Mitchell** and Solicitor General **King** argued the cause and filed a brief for plaintiff in error:

The indictment charges an offense under the decisions of this court.

United States v. Miller, 223 U. S. 599, 602, 56 L. ed. 568, 569, 32 Sup. Ct. Rep. 323; United States v. Carter, 231 U. S. 492, 493, 58 L. ed. 330, 331, 34 Sup. Ct. Rep. 173; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; United States v. Colgate & Co. 250 U. S. 300, 63 L. ed. 992, 7 A.L.R. 443, 39 Sup. Ct. Rep. 465.

The district court erroneously construed § 1 of the Sherman Act, which prohibits combinations in restraint of trade, as only applying where there is a violation of § 2, which prohibits monopolization.

Standard Oil Co. v. United States, 221 U. S. 1, 50, 55 L. ed. 619, 641, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376.

Resale price-fixing combinations are condemned because of their tendency to injure the public interest.

Dr. Miles Medical Co. v. John D. Park & Sons Co. supra; Thomsen v. Cayser, 243 U. S. 66, 61 L. ed. 597, 37 Sup. Ct. Rep. 353, Ann. Cas. 1917D, 322; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

Resale price-fixing combinations are not saved from condemnation by their advantages to the participants.

Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 408, 55 L. ed. 518, 31 Sup. Ct. Rep. 376.

Mr. **Frank M. Avery** argued the cause, and, with Messrs. Eugene V. Myers, Carl Everett Whitney, and Earl A. Darr, filed a brief for defendant in error:

The indictment is not sufficient in form or substance to charge the defendant with an offense.

United States v. Colgate & Co. 250 U. S. 300, 302, 63 L. ed. 992, 994, 7 A.L.R. 443, 39 Sup. Ct. Rep. 465; Board of Trade v. United States, 246 U. S. 231, 62 L. ed. 683, 38 Sup. Ct. Rep. 242, Ann. Cas. 1918D, 1207; United States v. Whiting, 212 Fed. 466; McLatchy v. King, 250 Fed. 920; United States v. Quaker Oats Co. 232 Fed. 499; United States v. Keystone Watch Case Co. 218 Fed. 502; United States v. United States Steel Corp. 223 Fed. 56; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; North Western Salt Co. v. Electrolytic Alkali Co. [1914] A. C. 461, 7 B. R. C. 530, 83 L. J. K. B. N. S. 530, 110 L. T. N. S. 852, 30 Times L. R. 313, 58 Sol. Jo. 338; Haynes v. Doman [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 80 L. T. N. S. 569, 15 Times L. R. 354; Rousillon v. Rousillon (1880) L. R. 14 Ch. Div. 364, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663.

Where a vendor has a pecuniary interest in maintaining the resale price, and no monopoly is effected, such vendor may lawfully contract with vendees who agree to adhere to fixed prices.

Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144; Rawleigh Medical Co. v. Osborne, 177 Iowa, 208, L.R.A.1917B, 803, 158 N. W. 566.

At common law such agreements as those in the case at bar are valid; nothing in the Sherman Act makes them illegal; and this court has made it clear beyond question that, in the cases heretofore decided, it has decided no more than was directly in issue in those cases respectively.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; Adams v. Burke, 17 Wall. 453, 21 L. ed. 700; Boston Stores v. American Graphophone Co. 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct.

Rep. 722; Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Motion Picture Patents Co. v. Universal Film Mfg. Co. 243 U. S. 502, 61 L. ed. 871, L.R.A.1917E, 1187, 37 Sup. Ct. Rep. 416, Ann. Cas. 1918A, 959; Straus v. Victor Talking Mach. Co. 243 U. S. 490, 61 L. ed. 866, L.R.A.1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955.

A vendor of personal property, whether patented or unpatented, can lawfully sell the same on condition that the purchaser will resell at no less than fixed prices, provided the vendor has a direct and substantial property interest in the resale price.

2 Co. Litt. § 360.

The law favors freedom of contract, and he who asserts the invalidity of a contract in restraint of trade has the burden of proof.

North Western Salt Co. v. Electrolytic Alkali Co. [1914] A. C. 461, 7 B. R. C. 530, 83 L. J. K. B. N. S. 530, 110 L. T. N. S. 852, 30 Times L. R. 313, 58 Sol. Jo. 338; Haynes v. Doman [1899] 2 Ch. 13, 68 L. J. Ch. N. S. 419, 80 L. T. N. S. 569, 15 Times L. R. 354.

Price fixing is not illegal per se.

Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 51 L.R.A.(N.S.) 522, 137 Pac. 144; Rawleigh Medical Co. v. Osborne, 177 Iowa, 208, L.R.A.1917B, 803, 158 N. W. 566.

A patentee who fixes the resale price of his goods on resales made before the royalty has been paid is doing a perfectly legal thing under the Sherman Act, and any restraint of trade thereby effected is a valid restraint.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A. (N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150; Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532; Adams v. Burke, 17 Wall. 453, 21 L. ed. 700; Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322; Straus v. Victor Talking Mach. Co. 243 U. S. 490, 61 L. ed. 866, L.R.A. 1917E, 1196, 37 Sup. Ct. Rep. 412, Ann. Cas. 1918A, 955; Motion Picture Patents Co. v. Universal Film Mfg. Co. 243 U. S. 502, 61 L. ed. 871, L.R.A. 1917E, 1187, 37 Sup. Ct. Rep. 416, Ann. Cas. 1918A, 959; Boston Store v. American Graphophone Co. 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447.

Mr. Justice **McReynolds** delivered the opinion of the court:

Defendant in error, a New York corporation, manufactured at Brooklyn, under letters patent, valves, gauges, and other accessories for use in connection with automobile tires, and regularly sold and shipped large quantities of these to manufacturers and jobbers throughout the United States. It was indicted in the district court, northern district of Ohio, for engaging in a combination rendered criminal by § 1 of the Sherman Act of July 2, 1890 (chap. 647, 26 Stat. at L. 209, Comp Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644), which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." After interpreting the indictment as indicated by quotations from its opinion which follow, the district court sustained a demurrer thereto, basing the judgment upon construction of that act (— Fed. —):

"The substantive allegations of this indictment are that defendant is engaged in manufacturing valves, valve parts, pneumatic-pressure gauges, and various other accessories; that it sells and ships large quantities of such articles to tire manufacturers and jobbers in the northern district of Ohio and throughout the United States; that these tire manufacturers and jobbers resell and reship large quantities of these products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) to the public, both within and without the respective states into which the products are shipped; that these acts have been committed within three years next preceding the presentation of this indictment and within this district; that the defendant executed, and [95] caused all the said tire manufacturers and jobbers to whom it sold its said products to execute with it, uniform contracts concerning resales of such products; that every manufacturer and jobber was informed by the defendant and well knew when executing such contracts that identical contracts were being executed and adhered to by the other manufacturers and jobbers; that these contracts thus executed purported to contain a grant of a license from the defendant to resell its said products at prices fixed by it to (a) jobbers and vehicle manufacturers similarly licensed, (b) retail dealers, and (c) the consuming public; that all these contracts provided (that the) [concerning] products thus sold to tire manu-

facturers and jobbers (provided) that they should not resell such products at prices other than those fixed by the defendant. Copies of these contracts are identified by exhibit numbers and attached to the indictment. It is further charged that the defendant furnished to the tire manufacturers and jobbers who entered into such contracts lists of uniform prices, such as are shown in said exhibits, which the defendant fixed for the resale of its said products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) the consuming public, respectively; and that the defendant uniformly refused to sell and ship its products to tire manufacturers and jobbers who did not enter into such contracts and adhere to the uniform resale prices fixed and listed by the defendant. Further, that tire manufacturers and jobbers in the northern district of Ohio and throughout the United States uniformly resold defendant's products at uniform prices fixed by the defendant and uniformly refused to resell such products at lower prices, whereby competition was suppressed and the prices of such products to retail dealers and the consuming public were maintained and enhanced.

. . . . . .

"Thus it will be observed that the contract, combination, [96] or conspiracy charged comes merely to this: That the defendant has agreed, combined, or conspired with tire manufacturers and with jobbers by the selling or agreeing to sell valves, valve parts, pneumatic pressure gauges, and various accessories, with the further understanding or agreement that in making resales thereof they will sell only at certain fixed prices. It will be further observed that the retailers, to whom the jobbers in ordinary course of trade would naturally sell rather than to the consuming public, and who in turn sell and distribute these articles to and among the ultimate consumers, are not included within the alleged combination or conspiracy.

. . . . . .

"The so-called license agreements, exhibited with the indictment, are, in my opinion, both in substance and effect, only selling agreements. The title to the valves, valve parts, pneumatic pressure gauges, and other automobile accessories passed to the so-called licensees and licensed jobbers."

The court further said:

"Defendant urges that there is a manifest inconsistency between the reasoning, if not between the holdings, of these two cases [Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376, and United States v. Colgate Co. 250 U. S. 300, 63 L. ed. 992, 7 A.L.R. 443, 39 Sup. Ct. Rep. 465]; that if the basic principles announced in the latter case are to be taken in the ordinary sense imported by the language, the present case falls within the Colgate Case, and that, properly construed, neither § 1 nor § 2 of the Sherman Anti-trust Law makes the defendant's conduct a crime. The Dr. Miles Medical Co. Case, standing alone, would seem to require that this demurrer be overruled and a holding that the Sherman Anti-trust Law is violated and a crime committed, merely upon a showing of the making by defendant and two or more jobbers of the agreements set up in the indictment; certainly if the jobbers were competitors in the [97] same territory. That case has been frequently cited as establishing this proposition. . . . The retailers are not in the present case included. They may compete freely with one another and may even give away the articles purchased by them. No restriction is imposed which prevents them from selling to the consumer at any price, even though it be at a ruinous sacrifice and less than the price made to them by the jobber. Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between the Dr. Miles Medical Co. Case and the Colgate Co. Case. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent, for all practical purposes, of an express agreement.

. . . . . .

"Granting the fundamental proposition stated in the Colgate Co. Case, that the manufacturer has an undoubted right to specify resale prices and refuse to deal with anyone who fails to maintain the same, or, as further stated, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal, and that he, of course, may announce in advance the circumstances under which he will refuse to sell, it seems to me that it is a distinction without a difference to say that he may do so by the subter-

fuges and devices set forth in the opinion, and not violate the Sherman Anti-trust Act; yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law. Manifestly, therefore, the decision in the Dr. Miles Medical Co. Case must rest upon some other ground than the mere fact that there were [98] agreements between the manufacturer and the wholesalers.

. . . . . .

"The point, however, which I wish to emphasize, is that the allegations of this indictment, not alleging any purpose, or facts from which such a purpose can be inferred, to monopolize interstate trade, within the prohibition and meaning of § 2 of the Sherman Anti-trust Act and the last clause of § 2 of the Clayton Act [October 15, 1914, 38 Stat. at L. 730, chap. 323, Comp. Stat. § 8835a, 9 Fed. Stat. Anno. 2d ed. p. 730], do not charge a crime under § 1 of the Sherman Anti-trust Act as that act should be construed."

Our opinion in United States v. Colgate Co. declared quite plainly:

That upon a writ of error under the Criminal Appeals Act (March 2, 1907, chap. 2564, 34 Stat. at L. 1246, Comp. Stat. § 1704, 6 Fed. Stat. Anno. 2d ed. p. 149) "we have no authority to revise the mere interpretation of an indictment, and are confined to ascertaining whether the court, in a case under review, erroneously construed the statute." "We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision." That we were confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language, the meaning of the opinion below being the subject of serious controversy. The "defendant maintains that, looking at the whole opinion, it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same." "The position of the defendant is more nearly in accord with the whole opinion, and must be accepted. And as counsel for the government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary." And further: "The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with [99] the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce; in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

The court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of Dr. Miles Medical Co. v. John D. Park & Sons Co. where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated "as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who fails to maintain the same."

It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different states, which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties [100] are combined through agreements designed to take away dealers' control of their own affairs, and thereby destroy competition and restrain the free and natural flow of trade amongst the states.

The principles approved in Dr. Miles Medical Co. v. John D. Park & Sons Co. should have been applied. The judgment below must be reversed and the cause

remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

Mr. Justice **Clarke** concurs in the result.

Mr. Justice **Holmes** and Mr. Justice **Brandeis** dissent.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plff. in Err.,
v.
STATE OF WISCONSIN EX REL. CITY OF MILWAUKEE.

(See S. C. Reporter's ed. 100–106.)

Constitutional law — impairing contract obligations — street railway franchise — paving ordinance.

1. A municipal ordinance requiring a street railway company to bear the cost of paving with asphalt upon a concrete foundation, like the rest of a newly paved street, that part of such street which lies between the tracks and for a distance of 1 foot outside, does not, although theretofore the street had been paved from curb to curb with macadam, impair the obligation of the street railway company's franchise contract under which its duty extends to keeping "in good repair the roadway between the rails and for 1 foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs," unless the railway company and the city shall agree upon some other material.

[For other cases, see Constitutional Law, 1435–1439, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — requiring street railway company to pave street — reducing income.

2. A street railway company's contractual duty to repave that part of a street which lies between its tracks and for 1 foot outside cannot be evaded on the theory that this additional burden will reduce its income below a reasonable return on the investment.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — inconsistent judicial decision.

3. One against whom a judicial decision has been rendered can base no rights, under the equal protection of the laws clause of the Federal Constitution, upon a later decision between strangers which is asserted to be irreconcilable on a matter of law with the earlier decision. This constitutional provision does not assure uniformity of judicial decisions.

[For other cases, see Constitutional Law, IV a, 1, in Digest Sup. Ct. 1908.]

[No. 55.]

Argued November 10, 1919. Decided March 1, 1920.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which, on a second appeal, affirmed a judgment of the Circuit Court of Milwaukee County, in that state, awarding a peremptory writ of mandamus to compel a street railway company to pave that part of a street occupied by its tracks. Affirmed.

See same case below, on first appeal, 165 Wis. 230, 161 N. W. 745; on second appeal, 166 Wis. 163, 164 N. W. 844.

The facts are stated in the opinion.

Note.—Generally, as to what laws are void as impairing the obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

As to when duty assumed by street railway to repave or repair arises—see note to Danville v. Danville R. & Electric Co. 43 L.R.A.(N.S.) 463.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to returns to which public service corporations are entitled—see note to Bellamy v. Missouri & N. A. R. Co. L.R.A.1915A, 5.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to liability of street railway for paving assessment—see note to Shreveport v. Prescott, 46 L.R.A. 193.

And see note to this case as reported in 10 A.L.R. —.

Mr. Edwin S. Mack argued the cause, and, with Messrs. George P. Miller and Arthur W. Fairchild, filed a brief for plaintiff in error:

This court determines the existence or nonexistence of a contract and its interpretation.

Detroit United R. Co. v. Michigan, 242 U. S. 238, 249, 61 L. ed. 268, 273, P.U.R.1917B, 1010, 37 Sup. Ct. Rep. 87; Southern Wisconsin R. Co. v. Madison, 240 U. S. 457, 60 L. ed. 739, 36 Sup. Ct. Rep. 400; Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 170, 59 L. ed. 175, 180, 35 Sup. Ct. Rep. 62; Russell v. Sebastian, 233 U. S. 195, 202, 58 L. ed. 912, 920, L.R.A.1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 551, 57 L. ed. 633, 638, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Stearns v. Minnesota, 179 U. S. 223, 233, 45 L. ed. 162, 170, 21 Sup. Ct. Rep. 73; Douglas v. Kentucky, 168 U. S. 488, 502, 42 L. ed. 553, 557, 18 Sup. Ct. Rep. 199; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173.

The matter involved was properly the subject of contract.

Superior v. Duluth Street R. Co. 166 Wis. 493, 165 N. W. 1081; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 151 Wis. 520, 139 N. W. 396, Ann. Cas. 1914B, 123; Madison v. Southern Wisconsin R. Co. 156 Wis. 352, — A.L.R. —, 146 N. W. 492, 240 U. S. 457, 60 L. ed. 739, 36 Sup. Ct. Rep. 400; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 157 Wis. 121, 147 N. W. 232; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 165 Wis. 230, 161 N. W. 745, 166 Wis. 163, 164 N. W. 844; State ex rel. West Allis v. Milwaukee Light, Heat & Traction Co. 166 Wis. 178, 164 N. W. 837.

A municipal corporation granting the use of its streets to a private corporation does so under delegated legislative authority, and the grant and acceptance constitute a contract which the municipal corporation cannot impair.

Superior v. Duluth Street R. Co. 166 Wis. 487, 165 N. W. 1081; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 382, 46 L. ed. 592, 605, 22 Sup. Ct. Rep. 410; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118.

The paving provision of the 1915 ordinance is not a rule or regulation, and the paving repair provision of the 1900 ordinance is a term of the franchise granted thereby.

Wright v. Milwaukee Electric R. & Light Co. 95 Wis. 29, 36 L.R.A. 47, 60 Am. St. Rep. 74, 69 N. W. 791; State ex rel. Atty. Gen. v. Portage City Water Co. 107 Wis. 441, 83 N. W. 697; Pittsburg Testing Laboratory v. Milwaukee Electric R. & Light Co. 110 Wis. 643, 84 Am. St. Rep. 948, 86 N. W. 592; Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 498, 83 N. W. 851; Re Southern Wisconsin Power Co. 140 Wis. 258, 122 N. W. 801; La Crosse v. La Crosse Gas & E. Co. 145 Wis. 420, 130 N. W. 530; Manitowoc v. Manitowoc & N. Traction Co. 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; Calumet Service Co. v. Chilton, 148 Wis. 370, 135 N. W. 131; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 151 Wis. 520, 139 N. W. 956, Ann. Cas. 1914B, 123; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; Minneapolis v. Minneapolis Street R. R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Southern Wisconsin R. Co. v. Madison, 240 U. S. 457, 60 L. ed. 739, 36 Sup. Ct. Rep. 400.

Practical construction may always be resorted to when there is ambiguity. We submit that the meaning of the language used is precisely that for which we contend. If it be said that there is any doubt as to our being right, does the opposite intent clearly appear? If it does not, then the construction becomes not merely helpful in interpretation, but conclusive.

State ex rel. Hayden v. Arnold, 151 Wis. 19, 138 N. W. 78; Harrington v. Smith, 28 Wis. 43; Scanlan v. Childs, 33 Wis. 663; Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52; State ex rel. Bashford v. Frear, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019; Re Appointment of Revisor, 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176.

The provisions of the 14th Amendment relate to and cover all the instrumentalities by which the state acts.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 36, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Chicago,

B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59, 59 L. ed. 1199, 1200, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675.

A corporation is a person within the meaning of the provision of the 14th Amendment forbidding any state to deny to any person within its jurisdiction the equal protection of the laws.

Southern R. Co. v. Greene, 216 U. S. 400, 412, 54 L. ed. 536, 539, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255.

A regulation must be reasonable; and this one, being confiscatory, is unreasonable and void.

Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 331, 85 N. W. 1036; Hayes v. Appleton, 24 Wis. 542; Le Feber v. West Allis, 119 Wis. 608, 100 Am. St. Rep. 917, 97 N. W. 203; Eastern Wisconsin R. & Light Co. v. Hackett, 135 Wis. 481, 115 N. W. 376, 1136, 1139; Denver v. Denver Union Water Co. 246 U. S. 178, 62 L. ed. 649, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278; Detroit United R. Co. v. Detroit, 248 U. S. 429, 63 L. ed. 341, P.U.R.1919A, 929, 39 Sup. Ct. Rep. 151; Shreveport Traction Co. v. Shreveport, 122 La. 1, 129 Am. St. Rep. 345, 47 So. 40; Detroit v. Ft. Wayne & B. I. R. Co. 95 Mich. 456, 20 L.R.A. 79, 35 Am. St. Rep. 580, 54 N. W. 958; State, Consolidated Traction Co., Prosecutor, v. Elizabeth, 58 N. J. L. 619, 32 L.R.A. 170, 34 Atl. 146; Cuyahoga River Power Co. v. Akron, 240 U. S. 462, 60 L. ed. 743, 36 Sup. Ct. Rep. 402; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 555, 57 L. ed. 633, 640, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1113, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869; Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, 37 Sup. Ct. Rep. 602.

The 1915 ordinance is unconstitutional even though plaintiff in error may apply to the Railroad Commission to have rates increased.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 238, 41 L. ed. 979, 985, 17 Sup. Ct. Rep. 581; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 660, 34 L. ed. 295, 303, 10 Sup. Ct. Rep. 965; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Coe v. Armour Fertilizer Works, 237 U. S. 413, 425, 59 L. ed. 1027, 1032, 35 Sup. Ct. Rep. 625; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

Mr. **Clifton Williams** argued the cause and filed a brief for defendant in error:

This case is exactly like the case of Southern Wisconsin R. Co. v. Madison, 240 U. S. 457–462, 60 L. ed. 739–743, 36 Sup. Ct. Rep. 400.

The supreme court of the state of Wisconsin has not changed its position in Superior v. Duluth Street R. Co. 166 Wis. 487, 165 N. W. 1081, since it rendered the judgment in the case at bar.

Madison v. Southern Wisconsin R. Co. 156 Wis. 352, — A.L.R. —, 146 N. W. 492; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 165 Wis. 236, 161 N. W. 745.

Mr. Justice **Brandeis** delivered the opinion of the court:

A petition for a writ of mandamus was brought by the city of Milwaukee in a lower court of the state of Wisconsin [**102**] to compel the Milwaukee Electric Railway & Light Company to pave at its own expense, with asphalt upon a concrete foundation, that portion of Centre street, called the railway zone, which lies between the tracks and for 1 foot outside of them. The paving had been specifically ordered on November 8, 1915, by a city ordinance after the city had laid such a pavement on all of the street except the railway zone.

Theretofore the street had been paved from curb to curb with macadam. The company admitted that the railway zone was in need of repaving at that time; but it insisted that, under an ordinance of January 2, 1900, which constituted its franchise to lay tracks on Centre street, it was entitled to repair with macadam, and could not be compelled to repave with asphalt.

The case was heard in the trial court on a demurrer to the amended return. The demurrer was sustained; and the decision was affirmed by the supreme court (165 Wis. 230, 161 N. W. 745). The company having failed, after remittitur, to file an amended return or take further action, judgment was entered by the trial court awarding a peremptory writ of mandamus, directing it to pave the railway zone as directed in the ordinance. This judgment also was affirmed by the supreme court (166 Wis. 163, 164 N. W. 844). The case comes here on writ of error under § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. § 1214, 5 Fed. Stat. Anno. 2d ed. p. 723]. The single question presented is whether the ordinance of November 8, 1915, is void either under § 10 of article 1 of the Federal Constitution, as impairing contract rights of the company, or under the 14th Amendment, as depriving it of property without due process of law. The ordinance of January 2, 1900, which is the contract alleged to be impaired by the later ordinance, provides as follows:

"Sec. 2. . . . It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for 1 foot on the outside of each rail [**103**] as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. . . ."

The company contends that when this section is read in connection with § 9, it clearly appears that the obligation to repave cannot be imposed.

First: The supreme court of the state held that the language of § 2 was not distinguishable from that involved in earlier cases in which it had held that a duty to keep "in proper repair," without qualification, was broad enough to require repaving and repairing with the same material with which the street was repaved. When this court is called upon to decide whether state legislation impairs the obligation of a contract, it must determine for itself whether there is a contract, and what its obligation is, as well as whether the obligation has been impaired. Detroit United R. Co. v. Michigan, 242 U. S. 238, 249, 61 L. ed. 272, 273, P.U.R.1917B, 1010, 37 Sup. Ct. Rep. 87. But, as stated in Southern Wisconsin R. Co. v. Madison, 240 U. S. 457, 461, 60 L. ed. 739, 742, 36 Sup. Ct. Rep. 400, "the mere fact that, without the state decision, we might have hesitated, is not enough to lead us to overrule that decision upon a fairly doubtful point." Among the cases relied upon by the state court is State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 151 Wis. 520, 139 N. W. 396, Ann. Cas. 1914B, 123, which was cited by this court in the Madison Case (p. 461) as a "persuasive decision [s] that the obligation to keep the space 'in proper repair' . . . extends to" repaving the railway zone with asphalt when the rest of the street is being repaved with that material. But the company points to the clause in the ordinance of January 2, 1900, which provides for repair "with the same material as the city shall have last used to pave or repair these spaces and the street," [**104**] and insists that its obligation is, in any event, limited to repaving with such material as the city had last used between the rails. This would put upon the city the burden of paving the whole street in case of any innovation in paving save by agreement of the company and the city. It is not a reasonable construction of the provision.

Second: Granted the duty to repave, and to repave with material other than that last used in the space between the tracks, was it reasonable for the city to require that the pavement be of asphalt upon a concrete foundation—a pavement which involved larger expense? The city alleged in its petition that the use of macadam by the railway was unreasonable, and that it is physically impossible to make a water-tight bond between the water-bound macadam and the asphalt, so as to prevent water from seeping through under the asphalt, causing it to deteriorate in warm weather and to be lifted by freezing in cold weather. The allegation was not expressly admitted by the return, and must be deemed to have been covered by its general denial of all allegations not expressly admitted; but neither party took steps to have this formal issue disposed

of. The case differs, therefore, in this respect from the Madison Case, where there was an express finding that repavement of the railway zone with stone would have been unsuitable when the rest of the street was of asphalt (p. 462). The difference is not material. As the ordinance did not, as a matter of contract, preclude regulation in respect to paving, it was for the city to determine, in the first instance, what the public necessity and convenience demanded. Compare Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74. We cannot say that its requirement that the railway zone be paved like the rest of the street with asphalt upon a concrete foundation was inherently arbitrary or unreasonable.

Third: The company insists that the ordinance of [**105**] November 8, 1915, is unreasonable and void, also, for an entirely different reason. It alleges in its return that for a long time prior to that date the earnings from its street railway system in Milwaukee were considerably under 6 per cent of the value of the property used and useful in the business, and were less than a reasonable return. It contends that this allegation was admitted by the demurrer; and, that to impose upon the company the additional burden of paving with asphalt will reduce its income below a reasonable return on the investment, and thus deprive it of its property in violation of the 14th Amendment. The supreme court of the state answered the contention by saying: "The company can at any time apply to the Railroad Commission and have the rate made reasonable." The financial condition of a public service corporation is a fact properly to be considered when determining the reasonableness of an order directing an unremunerative extension of facilities, or forbidding their abandonment. Mississippi R. Commission v. Mobile & O. R. Co. 244 U. S. 388, 61 L. ed. 1216, 37 Sup. Ct. Rep. 602; New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 350, 62 L. ed. 337, 341, P.U.R. 1918A, 792, 38 Sup. Ct. Rep. 122. But there is no warrant in law for the contention that merely because its business fails to earn full 6 per cent upon the value of the property used, the company can escape either obligations voluntarily assumed or burdens imposed in the ordinary exercise of the police power. Compare Missouri P. R. Co. v. Kansas, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82.

Fourth: The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that since entry of the judgment below, the supreme court of the state has decided Superior v. Duluth Street R. Co. 166 Wis. 487, 165 N. W. 1081, which the company alleges is not reconcilable with [**106**] its decision in this case. The similarity of the ordinances and conditions in the two cases does not seem to us as clear as is asserted. But, however that may be, the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 569, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445), any more than, in guaranteeing due process, it assures immunity from judicial error (Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Tracey v. Ginzberg, 205 U. S. 170, 51 L. ed. 755, 27 Sup. Ct. Rep. 461). Unlike Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520, and Muhlker v. New York, 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers, which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound.

As we conclude that there was a contractual duty to repave, arising from the acceptance of the franchise, we have no occasion to consider whether there was, as contended, also a statutory duty to do so, arising under § 1862, Wisconsin Statute, which provides that street railways shall "be subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe."

Affirmed.

Mr. Justice **Pitney** and Mr. Justice **McReynolds** dissent.

[107] FRANK P. McCLOSKEY, Plff. in Err.,
v.
JOHN W. TOBIN, Sheriff of Bexar County, Texas.

(See S. C. Reporter's ed. 107, 108.)

Constitutional law — due process of law — equal protection of the laws — punishing barratry.

Rights under U. S. Const., 14th Amend., were not violated by a state statute which made it a criminal offense for any person by personal solicitation to seek employment to prosecute or collect claims, including unliquidated claims for personal injuries, although the state may have made causes of action in tort, as well as in contract, assignable.

[For other cases, see Constitutional Law, IV. a, 5, a; IV. b, 7, in Digest Sup. Ct. 1908.]

[No. 79.]

Submitted November 12, 1919. Decided March 1, 1920.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a judgment of the County Court of Bexar County, in that state, refusing a writ of habeas corpus to a person convicted of barratry. Affirmed.

See same case below, — Tex. Crim. Rep. —, 199 S. W. 1101.

The facts are stated in the opinion.

Mr. **R. H. Ward** submitted the cause for plaintiff in error:

The act in question is unconstitutional.

Adams v. Tanner, 244 U. S. 595, 61 L. ed. 1343, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427.

Mr. **B. F. Looney**, Attorney General of Texas, and Mr. **Luther Nickels** submitted the cause for defendant in error:

A statute enacted to promote health, safety, morals, or the public welfare may be valid, although it will compel discontinuance of existing businesses in whole or in part.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 892, 1257; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; Rast v. Van Deman & L. Co. 240 U. S. 342, 368, 60 L. ed. 679, 691, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; McLean v. Arkansas, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206; Murphy v. California, 225 U. S. 623, 628, 56 L. ed. 1229, 1232, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

A closely analogous provision of a Michigan statute was upheld by this court in Brazee v. Michigan, 241 U. S. 340, 343, 60 L. ed. 1034, 1036, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522, and that provision of the Michigan statute related to an occupation recognized as highly useful.

Persons who indulge in barratry are described in Blackstone, vol. 4, p. 125, as "those pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors and officiously interfering in other men's quarrels;" and barratry is elsewhere described as "the trafficking and merchandising in quarrels; the huckstering in litigious discord." Bouvier's Law Dict. Rawle's 3d ed. In Traer v. Clews, 115 U. S. 538, 539, 29 L. ed. 467, 470, 6 Sup. Ct. Rep. 155, this court said: "The rule is that assignment of a mere right to file a bill in equity for fraud committed upon the assignor will be void, as contrary to public policy and savoring of maintenance:" if the mere assignment itself is against public policy, what can be said in favor of the personal solicitation thereof by the assignee?

The courts of the various states have generally disapproved of the practice of personal solicitation of employment in the collection of claims, etc., whether indulged in by attorneys or laymen.

Ellis v. Frawley, 165 Wis. 381, 161 N. W. 364; Holland v. Sheehan, 108 Minn. 362, 23 L.R.A.(N.S.) 510, 122 N. W. 1, 17 Ann. Cas. 687; Langdon v. Conlin, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 Ann. Cas. 834; Ingersoll v. Coal Creek Coal Co. 117 Tenn. 263, 9 L.R.A.(N.S.) 282, 119 Am.

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to acts constituting barratry—see notes to New Orleans Ins. Co. v. E. D. Albro Co. 28 L. ed. U. S. 809, and Waters v. Merchants' Louisville Ins. Co. 9 L. ed. U. S. 692.

St. Rep. 1003, 98 S. W. 178, 10 Ann. Cas. 829; Brown v. Bigne, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Huber v. Johnson, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806.

Mr. Justice **Brandeis** delivered the opinion of the court:

Article 421 of the Penal Code of Texas defined, with much detail, the offense of barratry. In McCloskey v. San Antonio Traction Co. — Tex. Civ. App. —, 192 S. W. 1116, a decree for an injunction restraining the plaintiff in error from pursuing the practice of fomenting and adjusting claims was reversed on the ground that this section had superseded the common-law offense of barratry, and that by the Code "only an attorney at law is forbidden to solicit employment in any suit himself or by an agent." Section 421 was then amended (Act of March 29, 1917, chap. 133) so as to apply to any person who "shall seek to obtain [**108**] employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment . . ." Thereafter McCloskey was arrested on an information which charged him with soliciting employment to collect two claims, one for personal injuries, the other for painting a buggy. He applied for a writ of habeas corpus, which was denied both by the county court and the court of criminal appeals. The case comes here under § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. § 1214, 5 Fed. Stat. Anno. 2d ed. p. 723], McCloskey having claimed below, as here, that the act under which he was arrested violates rights guaranteed him by the 14th Amendment.

The contention is, that since the state had made causes of action in tort as well as in contract assignable (Galveston, H. & S. A. R. Co. v. Ginther, 96 Tex. 295, 72 S. W. 166), they had become an article of commerce; that the business of obtaining adjustment of claims is not inherently evil; and that, therefore, while regulation was permissible, prohibition of the business violates rights of liberty and property, and denies equal protection of the laws. The contention may be answered briefly. To prohibit solicitation is to regulate the business, not to prohibit it. Compare Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522. The evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. Co. Litt. p. 368 (Day's ed. 1812, vol. 2, § 701 [368, b.]); 1 Hawk. P. C. 6th ed. 524; Peck v. Heurich, 167 U. S. 624, 630, 42 L. ed. 302, 305, 17 Sup. Ct. Rep. 927. Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable. Ford v. Munroe, — Tex. Civ. App. —, 144 S. W. 349. The statute is not open to the objections urged against it.

Affirmed.

[**109**] B. C. LEE, Petitioner,
v.
CENTRAL OF GEORGIA RAILWAY COMPANY et al.

(See S. C. Reporter's ed. 109-111.)

Action — misjoinder — employers' liability — concurrent negligence.

Rights conferred by Federal law are not denied by the refusal of a state court to permit the joinder in a single count which alleged concurring negligence of a cause of action against a railway company to recover damages under the Federal Employers' Liability Act, and of a common-law action against the railway employee whose concurrent negligence was alleged to have contributed in producing the injury.

[For other cases, see Action or Suit, II.; Master and Servant, II. a; Parties, II. b, in Digest Sup. Ct. 1908.]

[No. 150.]

Argued January 16, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the Court of Appeals of the State of Georgia to review a judgment which, on a second ap-

---

Note.—On the constitutionality, application, and effect of the Federal Employers' Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

Joinder of parties or causes of action in suits under the Federal Employers' Liability Act.

It was held in Ex parte Atlantic Coast Line R. Co. 190 Ala. 132, 67 So. 256, that a plaintiff may join in distinct counts in one complaint a sufficiently stated cause of action arising out of the one transaction for breach of duty un-

peal, affirmed a judgment of the City Court of Savannah, dismissing on demurrer a personal-injury action brought jointly against the railway company and an employee. Affirmed.

The facts are stated in the opinion.

See same case below, on first appeal, 21 Ga. App. 558, 94 S. E. 888; on second appeal, 22 Ga. App. 237, 95 S. E. 718.

Mr. **Alexander A. Lawrence** argued the cause, and, with Mr. William W. Osborne, filed a brief for petitioner.

Mr. **H. W. Johnson** argued the cause, and, with Mr. T. M. Cunningham, Jr., filed a brief for respondents.

Mr. Justice **Brandeis** delivered the opinion of the court:

An injured employee brought an action in a state court of Georgia jointly against a railroad and its engineer, and sought in a single count, which alleged concurring negligence, to recover damages from the company under the Federal Employers' Liability Act, and from the individual defendant under the common law. Each defendant filed a special demurrer on the ground of misjoinder of causes of action and misjoinder of parties defendant. The demurrers [**110**] were overruled by the trial court. The court of appeals—an intermediate appellate court to which the case went on exceptions—certified to the supreme court of the state the question whether such joinder was permissible. It answered in the negative (147 Ga. 428, — A.L.R. —, 94 S. E. 558). Thereupon the court of appeals reversed the judgment of the trial court (21 Ga. App. 558, 94 S. E. 888); and certiorari to the supreme court of the state was refused. The plaintiff then applied to this court for a writ of certiorari on the ground that he had been denied rights conferred by Federal law, and the writ was granted.

Whether two causes of action may be joined in a single count, or whether two persons may be sued in a single count, are matters of pleading and practice re-

---

der the state Employers' Liability Act, and for breach of duty under the Federal Employers' Liability Act, but that he cannot recover under the state act in a case governed exclusively by the national statute.

A cause of action under the Federal Employers' Liability Act may be joined with a cause of action under the state laws. Midland Valley R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214; Pelton v. Illinois C. R. Co. 171 Iowa, 91, 150 N. W. 236. This seems to have been the theory also of Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, affirming 180 Ill. App. 511.

Counts at common law and under the Federal Employers' Liability Act may be joined in the same complaint in an action to recover for alleged negligent injury to a railway employee. Bouchard v. Central Vermont R. Co. 87 Vt. 399, L.R.A.1915C, 33, 89 Atl. 475.

But plaintiff was compelled to elect whether she would proceed under the state law or under the Federal law in South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742, and Louisville & N. R. Co. v. Strange, 156 Ky. 439, 161 S. W. 239. In the latter case the petition contained an allegation in the alternative that the carrier was engaged in interstate "or" intrastate commerce, but the plaintiff did not know which.

A similar decision appears in Thompson v. Cincinnati, N. O. & T. P. R. Co. 165 Ky. 256, 176 S. W. 1006, Ann. Cas. 1917A, 1266, where it was also held that plaintiff, having elected to proceed under the Federal act, could not join coemployees as defendants.

An employee of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as a cause of the injury to the plaintiff, and where also a violation of the Safety Appliance Act of Congress is charged against the carrier. Lee v. Central of Georgia R. Co. 147 Ga. 428, — A.L.R. —, 94 S. E. 558.

In determining the removability of a cause of action, the court in Kelly v. Chesapeake & O. R. Co. 201 Fed. 602, treats as an improper joinder a suit in which a cause of action against the corporate defendant under the Federal Employers' Liability Act was joined with one against an individual defendant under a state statute.

Recovery may be had in the same action both for the injuries sustained by the deceased and for his death, even where the action is brought by the representative of the deceased, for the benefit of all the beneficiaries. Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1.

lating solely to the form of the remedy. When they arise in state courts the final determination of such matters ordinarily rests with the state tribunals, even if the rights there being enforced are created by Federal law. John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; Nevada-California-Oregon R. Co. v. Burrus, 244 U. S. 103, 61 L. ed. 1019, 37 Sup. Ct. Rep. 576. This has been specifically held in cases arising under the Federal Employers' Liability Act. Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, L.R.A.1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505; Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 61 L. ed. 476, 37 Sup. Ct. Rep. 188, 17 N. C. C. A. 349; Louisville & N. R. Co. v. Holloway, 246 U. S. 525, 62 L. ed. 867, 38 Sup. Ct. Rep. 379, 17 N. C. C. A. 578. It is only when matters nominally of procedure are actually matters of substance which affect a Federal right that the decision of the state court therein becomes subject to review by this court. Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 62 L. ed. 1167, 38 Sup. Ct. Rep. 535.

The Federal Employers' Liability Act does not modify in any respect rights of employees against one another, existing at common law. To deny to a plaintiff the right to join in one count a cause against another employee with a cause of action against the employer in no way abridges any substantive right of the plaintiff against the [111] employer. The argument that plaintiff has been discriminated against because he is an interstate employee is answered, if answer be necessary, by the fact that the supreme court of Georgia had applied the same rule in Western & A. R. Co. v. Smith, 144 Ga. 737, 87 S. E. 1082 (22 Ga. App. 437, 96 S. E. 230), where it refused, under the State Employers' Liability Act, to permit the plaintiff to join with the employer another railroad whose concurrent negligence was alleged to have contributed in producing the injury complained of. If the supreme court of Georgia had in this case permitted the joinder, we might have been required to determine whether, in view of the practice prevailing in Georgia, such decision would not impair the employer's opportunity to make the defenses to which it is entitled by the Federal law. For, as stated by its supreme court in this case (147 Ga. 428, 431): "If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damage to be recovered of each, since Civil Code, § 4512 [providing for verdicts in different amounts against the several defendants], is not applicable to personal torts."

But we have no occasion to consider this question. Refusal to permit the joinder did not deny any right of plaintiff conferred by Federal law. Cases upon which petitioner most strongly relies (Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450) are inapplicable to the situation at bar.

Affirmed.

---

[112] GRAND TRUNK WESTERN RAILWAY COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 112-125.)

Postoffice — compensation for carrying mails — overpayment — deductions.

1. The Postmaster General, having satisfied himself that overpayments had been made to a railway company for carrying the mails, might, without establishing the illegality by suit, deduct the amount of such overpayments from the moneys otherwise payable to the railway company to which the overpayments had been made.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — overpayment — deductions — time.

2. The balances due to a railway company for carrying the mails, although arising under successive quadrennial contracts, are regarded as running accounts, and moneys paid in violation of law upon balances certified by the government accounting officers may be recovered by means of a later debit in these accounts. It does not matter how long a time elapsed before the overpayment was discovered, or how long the attempt to recover it was deferred.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — overpayment — executive construction of statute.

3. The long-continued practice of the Postoffice Department to pay the full mail transportation rates to a certain railroad company, instead of the 80 per cent payable if the construction of the railroad was land-aided, will not be given effect by the courts under the rule of long-continued executive construction, where such practice was not due to any construction of the statute which the Department later sought to abandon, but to what is alleged to be a mistake of fact,—due, perhaps, to an oversight.

[For other cases, see Postoffice, IV. c; Statutes, II. e, 2, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — land-aided railroad — reduced compensation — charge on railroad property.

4. The obligation of a land-aided railroad, under the Act of July 12, 1876, § 13, to carry the mails at 80 per cent of the rates otherwise payable, affects every carrier which may thereafter use the railroad, whatever the nature of the tenure, and it is immaterial that the railroad company which later carries the mail over such road received none of the land and obtained no benefit from the grant.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — what is land-aided railroad.

5. Railroad construction cannot be said not to have been land-aided, within the meaning of the Act of July 12, 1876, § 13, governing rates for mail transportation, because in fact it may have been completed without the aid either of funds or of credits derived from public lands, where, before the road had been fully completed, the railroad company asked that certain lands be granted to it in aid of construction, and accepted from the state a patent for the lands which recited that such was the purpose of the conveyance, and expressly assented to the terms and conditions of the grant which Congress imposed, and thereafter proceeded to dispose of the lands.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — land-aided railroad — purchaser on foreclosure.

6. The charge upon a railroad with reference to compensation for carrying the mails imposed by acceptance of a land grant with its terms and conditions may not be invalidated by any illegal act of the railroad under a mortgage foreclosure, although the mortgage was executed before the railroad company had applied for the grant, and it does not appear that the mortgage purported specifically to cover public lands, where the trustee under the mortgage classed these lands as after-acquired property, and the company's interest in them was, by special proceeding, made subject to the foreclosure proceedings.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — land-aided railroad — condition subsequent — forfeiture.

7. The requirement in a congressional grant of public lands to the state in aid of railroad construction that the railroad be completed within ten years was a condition subsequently annexed to an estate in fee, and the title remained valid until the Federal government should take action by legislation or judicial proceeding to enforce a forfeiture of the estate.

[For other cases, see Postoffice, IV. c; Public Lands, I. c, 2, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — land-aided railroad — extent of aid.

8. The burden of a land-aided railroad, under the Act of June 3, 1856, § 5, to carry the mails at a price to be fixed by Congress, attached upon the acceptance of any aid whatever, no matter how disproportionate to the cost of constructing the portion of the road so aided.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — compensation for carrying mails — land-aided railroad — failure of consideration.

9. The right to have the mails carried at a price to be fixed by Congress, which was acquired by the Federal government by way of charge upon a railroad under the Act of June 3, 1856, through the railroad company's acceptance of a tract of public land therein granted to the state in aid of railroad construction, could not be invalidated by any illegal act of the authorities of the state in issuing a patent for a wholly different tract.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

[No. 153.]

Argued January 21 and 22, 1920. Decided March 1, 1920.

APPEAL from the Court of Claims to review a judgment which dismissed the petition of a railroad company to recover sums deducted by the Postoffice Department from its mail pay. Affirmed.

See same case below, 53 Ct. Cl. 473.

The facts are stated in the opinion.

Mr. T. D. Halpin argued the cause, and, with Messrs. P. G. Michener, L. T. Michener, and Harrison Geer, filed a brief for appellant:

The basis of the statute requiring land-grant railroads to transport mails at 80 per centum of the price allowed other railroads must be a valid contract.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct.

Rep. 565; Sinking Fund Cases, 99 U. S. 700, 718, 731, 25 L. ed. 496, 501, 505, 3 Hamilton's Works, 518, 519; Jacksonville, P. & M. R. Co. v. United States, 21 Ct. Cl. 155, 118 U. S. 626, 30 L. ed. 273, 7 Sup. Ct. Rep. 48; Rogers v. Port Huron & L. M. R. Co. 45 Mich. 460, 8 N. W. 46; Union P. R. Co. v. United States, 104 U. S. 662, 26 L. ed. 884; Atchison, T. & S. F. R. Co. v. United States, 225 U. S. 640, 56 L. ed. 1236, 32 Sup. Ct. Rep. 702; Eastern R. Co. v. United States, 129 U. S. 395, 32 L. ed. 731, 9 Sup. Ct. Rep. 320; United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306.

Neither Congress nor the state of Michigan attempted to, nor could they, force the lands on any person or corporation. The state of Michigan, as trustee, was acting as a proprietor in selling the lands. In that capacity it could and did treat with the purchasers precisely as any other proprietor might,—offering, agreeing upon, and accepting terms and entering into stipulations from which it would not be at liberty to depart, and to which it could not add in the smallest particular, except with the consent of the parties with whom it was dealing. The state as a sovereign could not deal with the lands otherwise than as it might between two private citizens.

Robertson v. State Land Office, 44 Mich. 278, 6 N. W. 659.

The attempted contract was void for illegality.

Bowes v. Haywood, 35 Mich. 241; Fenn v. Kinsey, 45 Mich. 446, 8 N. W. 64; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Swann v. Miller, 82 Ala. 530, 1 So. 65.

The major part of the consideration moving to the Port Huron & Lake Michigan Railroad Company for its acceptance and promise was void for illegality. The consideration was indivisible and the whole contract void.

Elliott, Contr. §§ 1076, 1077; Parsons, Contr. 456; Wald's Pollock, Contr. 321; Armstrong v. Toler, 11 Wheat. 258, 271, 6 L. ed. 468, 472; Coppell v. Hall, 7 Wall. 542, 558, 19 L. ed. 244, 248; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Wisconsin C. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45; Hazelton v. Sheckells, 202 U. S. 71, 50 L. ed. 939, 26 Sup. Ct. Rep. 567, 6 Ann. Cas. 217; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Lingle v. Snyder, 87 C. C. A. 529, 160 Fed. 627; Horseman v. Horseman, 43 Or. 83, 72 Pac. 698; M'Elyea v. Hayter, 2 Port. (Ala.) 148, 27 Am. Dec. 645; McNamara v. Gargatt, 68 Mich. 462, 13 Am. St. Rep. 355, 36 N. W. 218; La France v. Cullen, 196 Mich. 726, 163 N. W. 101; Mailhot v. Turner, 157 Mich. 167, 133 Am. St. Rep. 333, 121 N. W. 804.

The railroad between Port Huron and Flint, Michigan, was not constructed in whole or in part by a land grant made by Congress.

United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; 1 Ops. Asst. Atty. Gen. for the Postoffice Department, 777, 875, 879; 2 Ibid. 312; Coler v. Stanly County, 89 Fed. 257; De Graff v. St. Paul & P. R. Co. 23 Minn. 144; Chicago, M. & St. P. R. Co. v. United States, 14 Ct. Cl. 125, 104 U. S. 687, 689, 26 L. ed. 893, 894.

The appellant is not estopped to claim that there is no valid contract.

Jones v. United States, 96 U. S. 24, 29, 24 L. ed. 644, 646; Pickard v. Sears, 6 Ad. & El. 474, 112 Eng. Reprint, 181, 2 Nev. & P. 488, 11 Eng. Rul. Cas. 78; Hawes v. Marchant, 1 Curt. C. C. 144, Fed. Cas. No. 6,240; Ketchum v. Duncan, 96 U. S. 659, 666, 24 L. ed. 868, 871; Dickerson v. Colgrove, 100 U. S. 578, 580, 25 L. ed. 618, 619; Bank of America v. Banks, 101 U. S. 240, 25 L. ed. 850; Smythe v. Henry, 41 Fed. 706; Sims v. Everhardt, 102 U. S. 300, 26 L. ed. 87; Drury v. Foster, 2 Wall. 24, 17 L. ed. 780; Duval v. United States, 25 Ct. Cl. 46; Chicago, M. & St. P. R. Co. v. United States, 14 Ct. Cl. 125, and 104 U. S. 687, 26 L. ed. 893; Coppell v. Hall, 7 Wall. 542, 19 L. ed. 244; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

Practical application of the facts and the statutes was, and is, binding on the Department and must be maintained here, it being especially objectionable that a construction of statutes which is favorable to the citizen should be changed in such a manner as to become retroactive, and to require of him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his

contracts with the government, as in the case at bar.

United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306, affirming 25 Ct. Cl. 30; Houghton v. Payne, 194 U. S. 88, 89, 48 L. ed. 888, 889, 24 Sup. Ct. Rep. 590.

If there be doubt simply as to the soundness of that practical construction, and that is the utmost that can be asserted here by the government, the action, during so many years, of the Department charged with the execution of the statute, should be respected by the court.

United States v. Finnell, 185 U. S. 236, 243, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633; McMichael v. Murphy, 197 U. S. 304, 312, 49 L. ed. 766, 769, 25 Sup. Ct. Rep. 460.

If the statutes are ambiguous or of doubtful import, that practical construction of them was, and is, binding on the Department and must be maintained here, the courts looking with disfavor upon any sudden change such as in the case at bar, whereby parties who have contracted with the government upon faith of such construction may be prejudiced.

United States v. Alabama G. S. R. Co. 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306, affirming 25 Ct. Cl. 30; Hawley v. Diller, 178 U. S. 476, 488, 44 L. ed. 1157, 1161, 20 Sup. Ct. Rep. 986; Houghton v. Payne, 194 U. S. 88, 99, 48 L. ed. 888, 891, 24 Sup. Ct. Rep. 590.

The practice of an executive department through a series of years should not be overthrown unless such practice was obviously and clearly forbidden by the language of the statutes under which it proceeded.

Hawley v. Diller, supra; Hewitt v. Schultz, 180 U. S. 139, 156, 157, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309; McMichael v. Murphy, 197 U. S. 304, 312, 49 L. ed. 766, 769, 25 Sup. Ct. Rep. 460; United States v. Midwest Oil Co. 236 U. S. 459, 59 L. ed. 673, 35 Sup. Ct. Rep. 309.

If that practical construction of the statutes by the Department could be held with reason to be wrong, it cannot be said, in view of the language used in them, to be so plainly or palpably wrong as to justify the Department, or the Comptroller, or a court, after the lapse of so many years, in holding or adjudging that the Department had misconstrued the statutes.

Hewitt v. Schultz, 180 U. S. 139, 156, 157, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309; Hawley v. Diller, 178 U. S. 476, 488, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986; McMichael v. Murphy, 197 U. S. 304, 312, 49 L. ed. 766, 769, 25 Sup. Ct. Rep. 460.

Assistant Attorney General **Spellacy** argued the cause, and, with Messrs. Leonard B. Zeisler and Charles H. Weston, filed a brief for appellee:

Appellant's road from Port Huron to Flint, Michigan, is land-aided.

Chicago, St. P. M. & O. R. Co. v. United States, 217 U. S. 180, 54 L. ed. 721, 30 Sup. Ct. Rep. 470.

The government is not estopped by its previous treatment of the road as a non-land-grant road to now treat it as land aided.

United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306.

Mr. Justice **Brandeis** delivered the opinion of the court:

The railroad from Port Huron to Flint, in Michigan, 60 miles in length, was completed on December 12, 1871. It was built by the Port Huron & Lake Michigan Railroad Company. By foreclosure of a mortgage executed [117] by that corporation and several consolidations it became on October 31, 1900, the property of the Grand Trunk Western Railway Company, and has since been a part of its system. For forty-one years after the completion of this 60-mile road the mails were carried over it by the successive owners under the usual postal contracts, and payment was made for the service quarterly at full rates. In 1912 the Postmaster General, concluding that this was a land-aided railroad within the provisions of § 13 of the Act of July 12, 1876, chap. 179, 19 Stat. at L. 78, 82 Comp. Stat. § 7485, 8 Fed. Stat. Anno. 2d ed. p. 199,[1] restated the account for the twelve full years during which the road had been operated by the Grand Trunk Western. Twenty per cent of the mail pay for that period was found to be $50,359,70; and this amount he deducted from sums accruing to the company under the current mail contract.

[1] "Sec. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act."

He also reduced by 20 per cent the amount otherwise payable under the current contract for carrying the mail over this part of its system. Thus he deducted altogether $52,566.87 from the amount payable on June 30, 1913. The road had in fact been built without any aid through grant of public lands. None had passed to the Grand Trunk Western when it acquired the road; and, so far as appears, that company had no actual knowledge that any of its predecessors in title had acquired any public land because of its construction. The company insisted that the $52,566.87 thus deducted from its mail pay was withheld without warrant in law, and brought this suit in the court of claims to recover the amount. 53 Ct. Cl. 473. Its petition was dismissed and the case comes here on appeal. Whether the company is entitled to relief depends upon the legal effect of the following facts:

[**118**] By Act of June 3, 1856, chap. 44, 11 Stat. at L. 21, Congress granted to Michigan public land to aid in the construction of certain lines of railroad, a part extending easterly of Flint to Port Huron; another part, westerly of Flint to Grand Haven. The act contained in § 5 the usual mail provision.[2] In 1857 the legislature of Michigan granted these lands to two companies on condition that they accept the obligations of the grant within sixty days. Each company filed within the specified time a partial acceptance, refusing to accede to the taxation features of the grant. Thereupon the rights of each to any part of the public lands was declared forfeited by the state authorities for failure to comply with the state legislation. Subsequently the companies filed maps of definite location in the General Land Office of the Interior Department, which were approved by that office; and on June 3, 1863, the Secretary of the Interior certified to the governor of Michigan 30,998.76 acres of land lying west of Flint for the company which was to build the line from Grand Haven to Flint,—the Detroit & Milwaukee Railway Company. On November 1, 1864, he certified 6,428.68 acres, all but 97 49/100 acres of which lay east of Flint, for the company which was to build the line from Flint to Port Huron,—the Port Huron & Milwaukee Railway Company. Neither company constructed its line nor received any patent for land. The rights of way and other property of the Port Huron & Milwaukee Railway Company passed through a foreclosure sale to the Port Huron & Lake Michigan Railroad Company; and this corporation built the road in question during the years 1869, 1870, and 1871. [**119**] But it made no application for any part of these lands until three weeks before the completion of the road. Then, on November 18, 1871, it petitioned the state board of control, which was charged with the disposition of the public lands, to confer upon it both the 30,998.76 acres west of Flint and the 6,428.68 acres east of Flint, which the Secretary of the Interior had certified; and in so applying it asked for the land "for the purpose of aiding in the construction" of its contemplated railroad, which was described as extending from Grand Haven to Flint and thence to Port Huron. The board approved of making the grant "for the purpose of aiding in the construction of the road;" but no further action was taken until May 1, 1873, when, upon a new petition of the company which recited the former proceedings and the completion of "60 miles of the unfinished portion of said line," the board directed the transfer of all the land to it. The resolution of the board was followed on May 30, 1873, by a patent for all the land from the governor of the state, its formal acceptance by the company, subject to the provisions of the Act of Congress of June 3, 1856, and action by it to take possession of the land and to dispose of it for the benefit of the company. In 1877 the supreme court of Michigan held, in Bowes v. Haywood, 35 Mich. 241, that the patent, so far as it purported to transfer the 30,988.76 acres west of Flint, was void under the Michigan legislation, because there had not, in fact, been any claim or pretense that the company ever contemplated building the line west of Flint; and in Fenn v. Kinsey, 45 Mich. 446, 8 N. W..64 (1881), that court held that an act of the Michigan legislature passed May 14, 1877, which purported to ratify the patent, was inoperative so far as it concerned the lands west of Flint, because it impaired rights reserved to the United States by the Act of June 3, 1856. Meanwhile, Congress had relinquished to Michigan, by Joint Resolution of March 3, 1879, No. 15, 20 Stat. at L. 490, its reversionary [**120**] interest in

[2] "Sec. 5. And be it further enacted, That the United States mail shall be transported over said roads, under the direction of the Postoffice Department, at such price as Congress may, by law, direct; Provided, That until such price is fixed by law, the Postmaster General shall have the power to determine the same."

the lands;[3] and thereafter the legislature of Michigan (Act of June 9, 1881, Mich. Laws, 1881, p. 362) ratified as to the 6,000 acres east of Flint, the action theretofore taken by the state authorities, declaring also that "all deeds and conveyances heretofore executed by the Port Huron & Lake Michigan Railroad Company" "shall be deemed of full force and effect," and that "the rest and residue of said lands is vested in said company, its successors and assigns." Whether there remained then any land which had not been disposed by that company or one of its successors does not appear; but it does appear that when, in 1875, proceedings were taken to foreclose the mortgage under which the appellant claims title to the road, the trustee to whom the lands had been transferred for the company's benefit was joined for the purpose of including all such interest in the property to be sold.

The Act of June 3, 1856, had contemplated a grant of six sections (3,840 acres) per mile of road to be constructed. That would have been 230,400 acres for the 60 miles. The company which built them and those claiming under it received at most 6,428 acres. The case is one of apparent hardship. Was the judgment of the court of claims denying relief required by the applicable rules of law?

First: If the railroad was land-aided, payment of more than 80 per cent of the full rates otherwise provided by law was unauthorized; and it was the duty of the Postmaster General to seek to recover the overpayment. Revised [121] Statutes, § 4057, Comp. Stat. § 7606, 8 Fed. Stat. Anno. 2d ed. p. 252. He was under no obligation to establish the illegality by suit. Having satisfied himself of the fact, he was at liberty to deduct the amount of the overpayment from the moneys otherwise payable to the company to which the overpayment had been made. Wisconsin C. R. Co. v. United States, 164 U. S. 190, 41 L. ed. 399, 17 Sup. Ct. Rep. 45. There was no attempt to include in the deduction any alleged overpayment to any of appellant's predecessors in title. Balances due for carrying the mails, although arising under successive quadrennial contracts, are regarded as running accounts, and moneys paid in violation of law upon balances certified by the accounting officers may be recovered by means of a later debit in these accounts. It matters not how long a time elapsed before the error in making the overpayment was discovered, or how long the attempt to recover it was deferred. The Statute of Limitations does not ordinarily run against the United States, and would not present a bar to a suit for the amount. See United States v. Thompson, 98 U. S. 486, 25 L. ed. 194. It is true that when a department charged with the execution of a statute gives it a construction, and acts upon that construction uniformly for a series of years, the court will look with disfavor upon a change whereby parties who have contracted with the government upon the faith of that construction would be injured. United States v. Alabama G. S. R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306. But here the practice, long continued, of paying the full rate, instead of 80 per cent thereof, was not due to any construction of a statute which the Department later sought to abandon, but to what is alleged to be a mistake of fact,—due, perhaps, to an oversight. To such a case the rule of long-continued construction has no application. The appellant must be held to have taken the road with notice of the burdens legally imposed upon it.

Second: If the road was land-aided, it is immaterial that the company which later carried the mail over it received [122] none of the land and obtained no benefit from the grant. The obligation to carry mails at 80 per cent of rates otherwise payable attached to the road like an easement or charge; and it affects every carrier who may thereafter use the railroad, whatever the nature of the tenure. Chicago, St. P. M. & O. R. Co. v. United States, 217 U. S. 180, 54 L. ed. 721, 30 Sup. Ct. Rep. 470. The appellant expressly disclaims any contention that the mail clause should not apply because the quantity of land covered by the grant was small as compared with that contemplated by the Act of June 3, 1856, and with the cost of the road.

Third: It is contended that this rail-

[3] Resolution of March 3, 1879: "That the United States hereby releases to the state of Michigan any and all reversionary interest which may remain in the United States in such of the lands granted to, and acquired by the said state of Michigan by act of Congress of June third, eighteen hundred and fifty-six, and certified to the said state in accordance with the said act, as were granted to aid the construction of the road from Grand Haven to Flint, and then to Port Huron. This release shall not in any manner affect any legal or equitable rights in said lands, which have been acquired, but all such rights shall be and remain unimpaired."

road was not land-aided, because it had, in fact, been completed without the aid either of funds or of credit derived from these public lands. Whether the Port Huron & Lake Michigan Company, which built the railroad, was in fact aided by the land grant in so doing, is immaterial. Before the road had been fully completed it asked that the land be granted to it in aid of the construction, and for this purpose only could the grant be made under the act of Congress. It accepted from the state a patent for the land which recited that such was the purpose of the conveyance; and it expressly assented to the terms and conditions of the grant imposed by the Act of June 3, 1856. Thereafter it proceeded to dispose of the land. Throughout this period the Port Huron & Lake Michigan Company remained the owner of the railroad. It had been authorized by its charter to receive the land grant and necessarily to assent to the conditions upon which alone the grant could be made to it. It is true that the mortgage upon its property, under which appellant claims title, was executed before the company had applied for the grant; and it does not appear that the mortgage purported specifically to cover public lands; but the trustee under the mortgage claimed these lands as after-acquired property, and the company's interest in them was, by special proceeding, made subject [123] to the foreclosure proceedings. The appellant is therefore in no better position than the Port Huron & Lake Michigan Company to question the charge upon the railroad imposed by acceptance of the grant.

Fourth: Appellant points to the fact that the patent to the lands lying west of Flint was later held to be void by the supreme court of the state; and insists that thereby the charge or condition concerning the carriage of the mail must be held to have been relinquished. But the patent to the lands east of Flint never was declared void; the company's title to them never was questioned; and the objection to the patent to the western lands did not apply to them. That objection was that the Port Huron & Lake Michigan Railway Company was not a "competent party" to receive the western lands, within the meaning of the 11th section of the Michigan Act of 1857, because it did not propose to construct a line from Grand Haven to Owosso. Bowes v. Haywood, 35 Mich. 246. And the attempt by the legislature to make it a "competent party" through the Act of 1877 violated the obligations of the Federal government's grant. Fenn v. Kensey, 45 Mich. 446, 8 N. W. 64. The only flaw in the title to the lands east of Flint lay in the fact that the railway had not been completed within ten years of the Act of June 3, 1856, as required by that act. This requirement, however, was a condition subsequently annexed to an estate in fee, and the title remained valid until the Federal government should take action by legislation or judicial proceedings to enforce a forfeiture of the estate. Schulenberg v. Harriman, 21 Wall. 44, 63, 64, 22 L. ed. 551, 555, 556; Iowa R. Land Co. v. Courtright (Cedar Rapids & M. River R. Co. v. Courtright) 21 Wall. 310, 316, 22 L. ed. 582, 583. So far from doing so Congress relinquished by joint resolution its reversionary interest in the land, and thereby removed all possibility of objection on its part to the validity of the patent; and the state of Michigan later ratified the patent by legislation admitted to be valid.

Fifth: The appellant urges that the illegality of the patent [124] to the western lands constituted a failure of consideration which voided the contract with the government. The burden of the mail clause, it says, could be imposed only by contract between the government and Port Huron & Lake Michigan Company. The contract was for land west as well as east of Flint; and the land west could legally be granted only if the company contemplated building the road westward to Grand Haven. As there was not even a pretense that it contemplated such construction, the contract was illegal. The government's claim under the mail clause must fail, because no rights can be acquired under an illegal contract. So the appellant contends. Such a view is the result of regarding the transaction as a promise by the railway to the government to carry the mail at a price fixed by Congress, on consideration of 36,000 acres of public land. A contract of this sort would create a purely personal obligation attaching "to the company, and not to the property,"—clearly not to a mere licensee. However, it is settled that the obligation in question is not of this nature, but does attach to the property, even when used by a licensee. Chicago, St. P. M. & O. R. Co. v. United States, 217 U. S. 180, 54 L. ed. 721, 30

Sup. Ct. Rep. 470. The obligation of a land-aided railway to carry the mail at a price fixed by Congress is a charge upon the property. The public lands were granted to Michigan to aid the construction of certain railways upon certain conditions. The legislature of Michigan could not dispose of the lands except in accordance with the terms of the grant. By the Act of February 14, 1857, it accepted the grant and enacted legislation to give legal effect to the conditions of it. Section 4 of the act is as follows:

"Said railroads shall be and forever remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States; and the United States mail shall be transported over said railroads, [125] under the direction of the Postoffice Department, at such price as Congress may by law direct. . . ."

The order of the board of control of May 1, 1873, directing the transfer of the land to the Port Huron & Lake Michigan Company, and the patent issued by the governor, were founded upon the authority of § 11 of this act; and under date of May 30, 1873, the company accepted the lands with the burdens they imposed. The railroad, whose owners and constructors accepted aid derived from these lands, became charged by operation of law with the burden of transporting the mails. The question whether that company would have accepted the land with its burdens if it had foreseen the invalidity of the title to the western lands is wholly immaterial. The burden attached upon the acceptance of any aid whatsoever, no matter how disproportionate to the cost of constructing the portion so aided.

The transaction called illegal was one between the company and the state authorities. The United States was no party to it. It had merely supplied property which the parties to it used. The government never objected to the disposition made of it; and evidenced its approval by passage of the Joint Resolution of March 3, 1879. No reason exists why rights by way of charge upon the railroad which were acquired by the government through the acceptance of 6,000 acres of public land should be invalidated by the alleged illegality of the state authorities' action in issuing a patent to a wholly different tract.

Affirmed.

[126] MATHEW T. CHAPMAN and Mark C. Chapman, Petitioners,
v.
JOHN A. WINTROATH.

(See S. C. Reporter's ed. 126–139.)

Patents — interference — limitation.

An inventor whose parent application discloses, but does not claim, an invention which conflicts with that of a later unexpired patent, must, in the absence of laches, be deemed to have two years from the date of the conflicting patent in which to file a second application, making conflicting claims, in order to have the question of priority of invention between the two determined in an interference proceeding, in view of U. S. Rev. Stat. § 4886, as amended by the Act of March 3, 1897, which gives an inventor two years after patent has issued to another for his invention, in which he may file his own application, and the time cannot be cut down to one year on grounds of equity or public policy, or because of the one-year rule prescribed by § 4894, for further prosecution of an application after office action thereon.

[No. 117.]

Argued January 9, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia, to review a decree which reversed a decision of the Commissioner of Patents in an interference case. Reversed.

See same case below, 47 App. D. C. 428.

The facts are stated in the opinion.

Mr. **John L. Jackson** argued the cause, and, with Mr. Albert H. Adams, filed a brief for petitioners:

An application for patent is a purely statutory proceeding, and an applicant is entitled to all the rights conferred by the patent statutes.

United States v. American Bell Teleph. Co. 167 U. S. 224, 246, 42 L. ed. 144, 156, 17 Sup. Ct. Rep. 809.

Considering Chapman and Chapman's original application merely as proof of their priority over Wintroath, they are indubitably the first inventors of the issue of the interference.

Victor Talking Mach. Co. v. American Graphophone Co. 76 C. C. A. 180, 145 Fed. 351; Automatic Weighing Mach. Co. v. Pneumatic Scale Corp. 92 C. C. A. 206, 166 Fed. 288; Sundh Electric Co. v. Interborough Rapid Transit Co. 117 C. C. A. 280, 198 Fed. 94; Lemley v. Dobson-Evans Co. 156 C. C. A. 171, 243 Fed. 391.

Interferences are authorized for the

sole purpose of determining the question of priority of invention.

United States ex rel. Lowry v. Allen, 203 U. S. 476, 51 L. ed. 281, 27 Sup. Ct. Rep. 141; Ewing v. United States, 244 U. S. 1, 11, 61 L. ed. 955, 959, 37 Sup. Ct. Rep. 494.

It follows that, inasmuch as Chapman and Chapman's applications (divisional as well as original) were filed less than two years after the grant of Wintroath's patent, and their priority over Wintroath is incontrovertibly established, judgment should have been rendered in their favor. .

Ewing v. United States, supra.

Until the amendment of March 3, 1897, to U. S. Rev. Stat. § 4886, Comp. Stat. § 9430, 7 Fed. Stat. Anno. 2d ed. p. 23, which introduced the words "or more than two years prior to his application," a prior unexpired patent was never a bar to the grant of a patent to an applicant who could prove his claim to priority over it, regardless of when his application was filed.

Shreeve v. Grissinger, 202 Off. Gaz. 951; C. D. 1914, 49 (p. 51).

Section 4904 of U. S. Rev. Stat. Comp. Stat. § 9449, 7 Fed. Stat. Anno. 2d ed. p. 193, provides for the declaration of interferences between an application and any unexpired patent, so that, reading the latter section in connection with § 4886, when the Commission is of the opinion that an interference exists between an application and any unexpired patent issued not more than two years before the application was filed, the applicant has a statutory right to the declaration of such interference, and, on proving priority, to receive his patent.

Ewing v. United States, supra.

An applicant who prosecutes his application according to law and the Patent Office rules is not chargeable with laches.

United States v. American Bell Teleph. Co. 167 U. S. 224, 246, 42 L. ed. 144, 156, 17 Sup. Ct. Rep. 809; Crown Cork & Seal Co. v. Aluminum Stopper Co. 48 C. C. A. 72, 108 Fed. 845; Columbia Motor Car Co. v. C. A. Duerr & Co. 107 C. C. A. 215, 184 Fed. 895.

The time when a claim is first made is immaterial, as when made it relates back to the date of the filing of the application; and if made in a divisional application, it relates back to the date of the filing of the original or parent application.

Lotz v. Kenney, 31 App. D. C. 205; Von Recklinghausen v. Dempster, 34 App. D. C. 474.

The patent laws do not recognize such a thing as the constructive abandonment of an invention for which an applicant had lawfully filed, and is regularly prosecuting, an application for patent. Abandonment of an invention is a question of fact, and must be proven.

Ide v. Trorlicht, D. & R. Carpet Co. 53 C. C. A. 341, 115 Fed. 144; Saunders v. Miller, 33 App. D. C. 456; Miller v. Eagle Mfg. Co. 151 U. S. 186, 38 L. ed. 121, 14 Sup. Ct. Rep. 310; Rolfe v. Hoffman, 26 App. D. C. 340; Kinnear Mfg. Co. v. Wilson, 74 C. C. A. 232, 142 Fed. 973.

Abandonment of an invention is a very different thing from abandonment of an application for patent.

Western Electric Co. v. Sperry Electric Co. 7 C. C. A. 164, 18 U. S. App. 177, 58 Fed. 191; Hayes-Young Tie Plate Co. v. St. Louis Transit Co. 70 C. C. A. 1, 137 Fed. 82; General Electric Co. v. Continental Fibre Co. 168 C. C. A. 54, 256 Fed. 660.

Abandonment of an invention completed and reduced to practice by the filing of an allowable application for patent therefor inures to the benefit of the public, and not to the benefit of a later inventor.

Ex parte Grosselin, 97 Off. Gaz. 2979; Re Millett, 18 App. D. C. 186, 96 Off. Gaz. 1241.

The rule as to constructive abandonment in the case of applications for reissue, generally, though not invariably, fixes a limit of two years.

Miller v. Bridgeport Brass Co. 104 U. S. 350, 26 L. ed. 783; Mahn v. Harwood, 112 U. S. 354, 28 L. ed. 665, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451; Wollensak v. Reiher, 115 U. S. 101, 29 L. ed. 351, 5 Sup. Ct. Rep. 1137.

It was not Chapman and Chapman's duty, but the commissioner's, to ascertain if there was an interference, and to declare it.

Ewing v. United States, 244 U. S. 1, 11, 61 L. ed. 955, 959, 37 Sup. Ct. Rep. 494; Bigelow, Estoppel, 5th ed. 26, 28, 585, 594–597.

The apparent disapproval of the court of appeals of the existing statutory provisions governing the filing and prosecution of applications for patent does not justify legislation by that court to correct what it conceives to be unwise, or against public policy. Congress is the only body endowed under the Constitution with legislative power.

Boston Store v. American Grapho-

phone Co. 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447.

The question of actual priority of invention having been foreclosed by Wintroath's admission, the court of appeals was without jurisdiction on an interference appeal to hear and determine Chapman and Chapman's right to a patent.

Norling v. Hayes, 37 App. D. C. 169; United States ex rel. Lowry v. Allen, 203 U. S. 476, 51 L. ed. 281, 27 Sup. Ct. Rep. 141.

Mr. Melville Church filed a brief as amicus curiæ.

Messrs. John C. Pennie, Dean S. Edmonds, Charles J. O'Neill, and Helge Murray also filed a brief as amici curiæ.

Mr. **Paul Synnestvedt** argued the cause, and, with Mr. H. L. Lechner, filed a brief for respondent:

While the patenting of an invention is purely statutory, the statute has been uniformly construed in the light of the underlying purpose of the patent system,—the promotion of the progress of science and the useful arts.

Kendall v. Winsor, 21 How. 322–328, 16 L. ed. 165–167.

Diligence is axiomatic; and there is a time limit within which claims to a particular invention shown, but not claimed in an application, may be added.

Ex parte Dyson, 232 Off. Gaz. 901; Re Fritts, 45 App. D. C. 211; Victor Talking Mach. Co. v. Thomas A. Edison, 144 C. C. A. 281, 229 Fed. 999; Christensen v. Noyes, 15 App. D. C. 94; Bechman v. Wood, 15 App. D. C. 484; Skinner v. Carpenter, 36 App. D. C. 178.

The statute itself lays down a pre-application rule of diligence and a post-application rule.

Where an applicant has an application showing, inter alia, but not at any time claiming, a particular feature pending in the Patent Office for years, he should proceed at least within one year after the issuance of a rival patent for the same invention, to copy claims therefrom for the purpose of an interference, by analogy with U. S. Rev. Stat. § 4894, Comp. Stat. § 9438, 7 Fed. Stat. Anno. 2d ed. p. 181.

The issue of a patent is constructive notice to the public of its contents.

Boyden v. Burke, 14 How. 575–583, 14 L. ed. 548–551.

If Chapman and Chapman's divisional application be considered independently of the present application, they are out of court in their own admission of a prior public use of more than two years. If considered as a continuation of the parent application, post-application rules of diligence apply and they are guilty of lack of diligence.

Chapman and Chapman were never prosecuting an application for the invention, and there is no basis in the statute or authority for the proposition that the mere presence of a drawing or description of a feature in an application constitutes a reduction to practice thereof such as will defeat a later inventor, but earlier patentee.

Pittsburgh Water Heater Co. v. Beler Water Heater Co. 143 C. C. A. 196, 228 Fed. 683; Saunders v. Miller, 33 App. D. C. 456.

Mr. Justice **Clarke** delivered the opinion of the court:

In 1909 Mathew T. Chapman and Mark C. Chapman filed an application for a patent on an "improvement in deep well pumps." The mechanism involved was complicated, the specification intricate and long, and the claims numbered thirty-four. The application met with unusual difficulties in the Patent Office, and, although it had been regularly prosecuted, as required by law and the rules of the Office, it was still pending without having been passed to patent in 1915, when the controversy in this case arose.

In 1912 John A. Wintroath filed an application for a patent on "new and useful improvements in well mechanism," which was also elaborate and intricate, with twelve combination claims, but a patent was issued upon it on November 25, 1913.

Almost twenty months later, on June 6, 1915, the Chapmans filed a divisional application in which the claims of the Wintroath patent were copied, and on this application such proceedings were had in the Patent Office that on March 24, 1916, an interference was declared between it and the Wintroath patent.

The interference proceeding related to the combination of a fluid-operated bearing supporting a downward extending shaft, and auxiliary bearing means for sustaining any resultant downward or upward thrust of such shaft. It is sufficiently described in count three of the Notice of Interference:

[133] "3. In deep well pumping mechanism, the combination with pump means including a pump casing located beneath the surface of the earth and rotary impeller means in said casing, of a downwardly extending pow-

er shaft driven from above and adapted to drive said impeller means, a fluid-operated bearing co-operating to support said shaft, said fluid-operated bearing being located substantially at the top of said shaft so that the shaft depends from the fluid bearing and by its own weight tends to draw itself into a substantially straight vertical line, means for supplying fluid under pressure to said fluid bearing independently of the action of the pump means, auxiliary bearing means for sustaining any resultant downward thrust of said power shaft and auxiliary bearing means for sustaining any resultant upward thrust of said power shaft."

Wintroath admits that the invention thus in issue was clearly disclosed in the parent application of the Chapmans, but he contends that their divisional application, claiming the discovery, should be denied, because of their delay of nearly twenty months in filing, after the publication of his patent, and the Chapmans, while asserting that their parent application fully disclosed the invention involved, admit that the combination of the Wintroath patent was not specifically claimed in it.

Pursuant to notice and the rules of the Patent Office, Wintroath, on April 27, 1916, filed a statement, declaring that he conceived the invention contained in the claims of his patent "on or about the 1st of October, 1910," and thereupon, because this date was subsequent to the Chapman filing date, March 10, 1909, the Examiner of Interferences notified him that judgment on the record would be entered against him unless he showed cause within thirty days why such action should not be taken.

Within the rule day Wintroath filed a motion for judgment in his favor "on the record," claiming that conduct on the part of the Chapmans was shown, which estopped [134] them from making the claims involved in the interference, and which amounted to an abandonment of any rights in respect thereto which they may once have had. The Chapmans contended that such a motion for judgment could not properly be allowed "until an opportunity had been granted for the introduction of evidence." But the Examiner of Interferences, without hearing evidence, entered judgment on the record in favor of Wintroath, and awarded priority to him, on the ground that the failure of the Chapmans to make claims corresponding to the interference issue for more than one year after the date of the patent to Wintroath constituted equitable laches which estopped them from successfully making such claims. This holding, based on the earlier decision by the court of appeals in Rowntree v. Sloan, 45 App. D. C. 207, was affirmed by the Examiner in Chief, but was reversed by the Commissioner of Patents, whose decision, in turn, was reversed by the court of appeals in the judgment which we are reviewing.

In its decision the court of appeals holds that an inventor whose parent application discloses, but does not claim, an invention which conflicts with that of a later unexpired patent, may file a second application, making conflicting claims, in order to have the question of priority of invention between the two determined in an interference proceeding, but only within one year from the date of the patent, and that longer delay in filing constitutes equitable laches, which bars the later application. By this holding the court substitutes a one-year rule for a two-year rule which had prevailed in the Patent Office for many years before the Rowntree decision, rendered in 1916, and the principal reason given for this important change is that the second application should be regarded as substantially an amendment to the parent application, and that it would be inequitable to permit a longer time for filing it than the one year allowed by Rev. Stat. § 4894, Comp. Stat. § 9438, 7 Fed. Stat. Anno. 2d ed. p. 181, [135] for further prosecution of an application after office action thereon.

The question presented for decision is, whether this conclusion is justifiable and sound; and the answer must be found in the statutes and rules of the Patent Office, made pursuant to statute, prescribing the action necessary to be taken in order to obtain a patent,—for the whole subject is one of statutory origin and regulation.

The statute which is fundamental to all others in our patent law (Rev. Stat. § 4886, as amended March 3, 1897, 29 Stat. at L. 692, chap. 391, Comp. Stat. § 9430, 7 Fed. Stat. Anno. 2d ed. p. 23) provides with respect to the effect of a United States patent upon the filing of a subsequent application for a patent on the same discovery, which is all we are concerned with here, that any discoverer of a patentable invention, not known or used by others in this country before his invention or discovery, may file an application for a patent upon it, at any time within two years after it may have been patented in this country. Such a prior

patent is in no sense a bar to the granting of a second patent for the same invention to an earlier inventor, provided that his application is filed not more than two years after the date of the conflicting patent. The applicant may not be able to prove that he was the first inventor, but the statute gives him two years in which to claim that he was, and in which to secure the institution of an interference proceeding in which the issue of priority between himself and the patentee may be determined in a prescribed manner.

This section, unless it has been modified by other statutes, or, in effect, by decisions of the courts, is plainly not reconcilable with the decision of the court of appeals, and should rule it. Has it been so modified?

The section of the Revised Statutes dealing with inventions previously patented in a foreign country (Rev. Stat. § 4887, as amended March 3, 1903, 32 Stat. at L. 1225, chap. 1019, Comp. Stat. § 9431, 7 Fed. Stat. Anno. 2d ed. p. 138) provides that no patent shall be granted on an [**136**] application for a patent if the invention has been patented in this or any foreign country *more than two years* before the date of the actual filing of the application in this country.

Section 4897 of the Revised Statutes (Act of July 8, 1870, 16 Stat. at L. 202, chap. 230, § 35, Comp. Stat. § 9443, 7 Fed. Stat. Anno. 2d ed. p. 188), in dealing with the renewal of an application in case of failure to pay the final fee within six months of notice that a patent has been allowed, provides that another application may be made for the invention "the same as in the case of an original application." But such application must be made *within two years* after the allowance of the original application.

And in Rev. Stat. § 4920, Comp. Stat. § 9466, 7 Fed. Stat. Anno. 2d ed. 309, providing for pleadings and proofs in infringement suits, it is provided that when properly pleaded and noticed the defendant may prove in defense that the patent declared on had been patented prior to the plaintiff's supposed invention, "or *more than two years* prior to his application for a patent therefor," and also that the subject-matter of the patent "had been in public use or on sale in this country for *more than two years*" before the plaintiff's application for a patent.

Thus through all of these statutes runs the time limit of two years for the filing of an application, there is no modification in any of them of the like provision in Rev. Stat. § 4886, as amended, and no distinction is made between an original and a later or a divisional application, with respect to this filing right.

A brief reference to the decisions will show that, until the Rowntree Case, the courts had left the filing right under Rev. Stat. § 4886, as untouched as the statutes thus had left it.

There is no suggestion in the record that the original application of the Chapmans was not prosecuted strictly as required by the statutes and the rules of the Patent Office, and therefore, it is settled, their rights may not be denied or diminished on the ground that such delay may [**137**] have been prejudicial to either public or private interests. "A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen, had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that, in its judgment, they were unwise or prejudicial to the interests of the public." United States v. American Bell Teleph. Co. 167 U. S. 224, 246, 42 L. ed. 144, 155, 17 Sup. Ct. Rep. 809.

In reissue cases, where there was no statutory time prescribed for the making of an application for the correction of a patent, and although unusual diligence is required in such cases, this court adopted the two-year rule as reasonable by analogy to the law of public use before an application for a patent. Mahn v. Harwood, 112 U. S. 354, 363, 28 L. ed. 665, 668, 5 Sup. Ct. Rep. 174, 6 Sup. Ct. Rep. 451; Wollensak v. Reiher, 115 U. S. 96, 101, 29 L. ed. 350, 351, 5 Sup. Ct. Rep. 1137.

To this we must add that not only have later or divisional applications not been dealt with in a hostile spirit by the courts, but, on the contrary, designed as they are to secure the patent to the first discoverer, they have been favored to the extent that where an invention clearly disclosed in an application, as in this case, is not claimed therein, but is subsequently claimed in another application, the original will be deemed a constructive reduction of the invention to practice, and the later one will be given the filing date of the earlier, with all of its priority of right. Smith & G. Mfg. Co. v. Sprague, 123 U. S. 249, 250, 31 L. ed. 141, 142, 8 Sup. Ct. Rep. 122;

Von Recklinghausen v. Dempster, 34 App. D. C. 474, 476, 477.

These, a few from many, suffice to show that, prior to the Rowntree Case, the decisions did not tend to modification of the statutory two-year rule.

The court of appeals recognizes all this law as applicable to an original application, but it finds warrant for [138] cutting the time limit to one year in the case of later applications in three reasons, viz.: Because it is inequitable to allow so long a time as two years for filing a new application, claiming a discovery for which a patent has issued; because such a time allowance is contrary to public policy, as unduly extending the patent monopoly if the new application should prevail; and, finally and chiefly, as we have pointed out, because, regarding such a later application as substantially an amendment to the original application, the court discovers, in analogy to the time allowed by statute for amendment to applications (Rev. Stat. § 4894, Comp. Stat. § 9438, 7 Fed. Stat. Anno. 2d ed. p. 181), a reason for holding that the failure for more than one year to make a later, in this case a divisional, application, amounts to fatal laches.

However meritorious the first two of these grounds may seem to be, they cannot prevail against the provisions of the statutes (United States v. American Bell Teleph. Co. supra), and the third does not seem to us persuasive because of the difference in the kind of notice which is given to the applicant under Rev. Stat. § 4894 and that given him when a patent is issued conflicting with his application.

The one-year provision of Rev. Stat. § 4894, as amended March 3, 1897 (29 Stat. at L. 693, chap. 391, Comp. Stat. § 9438, 7 Fed. Stat. Anno. 2d ed. p. 181), is that an applicant for a patent, who shall fail to prosecute his application within one year after Patent Office action thereon, "of which notice shall have been given" him, shall be regarded as having abandoned his application, unless the Commissioner of Patents shall be satisfied that such delay was unavoidable. But when a conflict between inventions disclosed in applications escapes the attention of the Patent Office Examiners (Rev. Stat. § 4904, Comp. Stat. § 9449, 7 Fed. Stat. Anno. 2d ed. p. 193), and a patent is issued, with claims conflicting with the disclosures of a pending application, the applicant receives only such notice of the conflict as he is presumed to derive from the publication of the patent. In the one case the notice [139] is actual and specific; in the other it is indefinite and constructive only. When the great number of patents constantly being issued is considered, many of them of a voluminous and complicated character, such as we have in this case, with many and variously worded claims, such an implied notice must necessarily be precarious and indefinite to a degree which may well have been thought to be a sufficient justification for allowing the longer two-year period to inventors who must, at their peril, derive from such notice their knowledge of any conflict with their applications.

As has been pointed out, the Examiner of Interferences did not permit the introduction of any evidence with respect to laches or abandonment, and the court of appeals rests its judgment, as he did, wholly upon the delay of the Chapmans in filing their divisional application for more than one year after the Wintroath patent was issued, as this appeared "on the face of the record." While not intending to intimate that there may not be abandonment which might bar an application within the two-year period allowed for filing, yet upon this discussion of the statutes and decisions, we cannot doubt that upon the case disclosed in this record, the Chapmans were within their legal rights in filing their divisional application at any time within two years after the publication of the Wintroath patent, and therefore the judgment of the Court of Appeals must be reversed.

Mr. Justice **McReynolds** dissents.

---

[140] NATIONAL LEAD COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 140-147.)

Duties — drawback — following departmental construction.

1. The Federal Supreme Court will follow the long-standing ruling of the Treasury Department under which the drawback provided for by the Act of August 27, 1894, § 22, upon the exportation of articles manufactured from imported dutiable materials, to be "equal in amount to the duties paid on the materials used," less 1 per cent, is computed, where linseed oil and oil cake have both been manufactured from imported linseed paying a specific duty and the oil cake has been exported, upon the basis of the value of the two products, and

not in proportion to their respective weights.

[For other cases, see Duties, X. c; Statutes, II. e, 2, in Digest Sup. Ct. 1908.]

Statutes — re-enactment — executive construction.

2. Repeated re-enactment of a statute without substantial change amounts to an implied legislative recognition and approval of an established executive construction of the statute.

[For other cases, see Statutes, IV. in Digest Sup. Ct. 1908.]

Evidence — presumption — legislative act.

3. Congress is presumed to have legislated with knowledge of an established usage of an executive department of the government.

[For other cases, see Evidence, II. 1, 1, in Digest Sup. Ct. 1908.]

[No. 123.]

Argued January 12 and 13, 1920. Decided March 1, 1920.

APPEAL from the Court of Claims to review a judgment which dismissed a suit to recover the difference between the amount of a drawback allowed by the Federal government and the amount claimed. Affirmed.

See same case below, 53 Ct. Cl. 635.

The facts are stated in the opinion.

Mr. **Alexander Britton** argued the cause, and, with Messrs. Evans Browne and F. W. Clements, filed a brief for appellant:

The construction of the act by the Treasury Department cannot change its intent and purpose so far as the method of computation of the drawback is concerned.

Campbell v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; Dean Linseed Oil Co. v. United States, 78 Fed. 468, 31 C. C. A. 51, 57 U. S. App. 716, 87 Fed. 457; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 536, 34 L. ed. 767, 769, 11 Sup. Ct. Rep. 168; Morrill v. Jones, 106 U. S. 466, 467, 27 L. ed. 267, 268, 1 Sup. Ct. Rep. 423.

Where the language of a statute is free from ambiguity, the statute must be literally enforced.

United States v. Fisher, 2 Cranch, 358, 387, 2 L. ed. 314, 315; Denn ex dem. Scott v. Reid, 10 Pet. 524, 527, 9 L. ed. 519, 520; Lewis v. United States, 92 U. S. 618, 621, 23 L. ed. 513, 514; Thornley v. United States, 113 U. S. 310, 313, 28 L. ed. 999, 1000, 5 Sup. Ct. Rep. 491; Lake County v. Rollins, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; Bate Refrigerator Co. v. Sulzberger, 157 U. S. 1, 36, 37, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508.

Where the language of a statute is clear, executive construction in violation of its terms is entitled to no weight.

United States v. Temple, 105 U. S. 97, 99, 26 L. ed. 967, 968; Swift & C. & B. Co. v. United States, 105 U. S. 691, 695, 26 L. ed. 1108, 1109; United States v. Graham, 110 U. S. 219, 221, 20 L. ed. 126, 127, 3 Sup. Ct. Rep. 582; St. Paul, M. & M. R. Co. v. Phelps, 137 U. S. 528, 536, 34 L. ed. 767, 769, 11 Sup. Ct. Rep. 168; United States v. Alger, 152 U. S. 384, 397, 38 L. ed. 488, 489, 14 Sup. Ct. Rep. 635.

The policy underlying a statute is an uncertain guide of construction.

Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 111, 112, 18 L. ed. 518–520; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981.

It may be conceded that the primary purpose of that act was, in general, to raise revenue; but this concession does not involve an admission that every section of the act is to be construed to effectuate that purpose. With regard to imports comprehended within the drawback clause, it was certainly not the primary purpose to raise revenue by taxing them upon importation.

Campbell v. United States, 107 U. S. 407, 413, 27 L. ed. 592, 595, 2 Sup. Ct. Rep. 759.

Assistant Attorney General **Davis** argued the cause, and, with Mr. Charles F. Jones, filed a brief for appellee:

Where there is doubt as to the meaning of the law, the contemporaneous construction of those charged with its execution is conclusive.

Jacobs v. Prichard, 223 U. S. 200, 56 L. ed. 405, 32 Sup. Ct. Rep. 289; Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; United States v. Alexander (United States v. Mayes) 12 Wall. 177, 20 L. ed. 381; Peabody v. Stark (Peabody v. Draughn) 16 Wall. 240, 21 L. ed. 311; United States v. Healey, 160 U. S. 136–145, 40 L. ed. 369–372, 16 Sup. Ct. Rep. 247; United States v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; United States v. Falk, 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct. Rep. 191; Smythe v. Fiske, 23 Wall. 374, 23 L. ed. 47; United States v. Moore, 95 U. S. 760, 24 L. ed. 588; United States v. Pugh, 99 U. S. 265–269, 25 L. ed. 322, 323.

We have a right to presume that when

Congress passed the Act of 1894, it did so with the full knowledge of the construction placed upon the same provisions in other acts by the Treasury Department, and with the intention that the language employed should be construed in the same manner and with the same meaning as the provisions before mentioned had been construed.

United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; United States v. Falk, 204 U. S. 143, 51 L. ed. 411, 27 Sup. Ct. Rep. 191; United States v. Cerecedo Hermanos y Compañia, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; United States v. Whitridge, 197 U. S. 135, 49 L. ed. 696, 25 Sup. Ct. Rep. 406; Merchants' Nat. Bank v. United States, 214 U. S. 33, 53 L. ed. 900, 29 Sup. Ct. Rep. 593.

The method of the Treasury Department for apportionment of drawback duty is the only practical method.

Campbell v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759.

The underlying principle of a tariff law should be considered.

Arnold v. United States, 147 U. S. 494–497, 37 L. ed. 253–255, 13 Sup. Ct. Rep. 406; Campbell v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; Tide Water Oil Co. v. United States, 171 U. S. 210, 216, 43 L. ed. 139, 140, 18 Sup. Ct. Rep. 837; Swan & F. Co. v. United States, 190 U. S. 143, 146, 47 L. ed. 984, 986, 23 Sup. Ct. Rep. 702.

The construction of this statute and the reasonable regulation thereunder have been in effect for over half a century; where questioned they have been approved by the courts; and by constant re-enactment and failure to make any change they must be held to have been approved by Congress, and the question is no longer open.

Hahn v. United States, 107 U. S. 402, 406, 27 L. ed. 527, 528, 2 Sup. Ct. Rep. 494.

[143] Mr. Justice **Clarke** delivered the opinion of the court:

This is a suit to recover the difference between the amount of drawback allowed by the government to the appellant, a corporation, as an exporter of linseed-oil cake, and the amount to which it claims to be entitled under § 22 of the act of Congress, effective August 27, 1894 (28 Stat. at L. 509, chap. 349), which reads as follows:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties." . . .

It is further provided in the section that the drawback due thereon shall be paid to the manufacturer, producer, or exporter "under such regulations as the Secretary of the Treasury shall prescribe."

The appellant imported large quantities of linseed upon which it paid a specific duty of 20 cents per bushel of 56 pounds. This seed, when treated by a simple process, yielded about 20 pounds of linseed oil and about 36 pounds of linseed-oil cake, to the bushel. The oil was much more valuable than the oil cake, the latter being composed of the solid substance of the seed and a small amount of oil not recovered, which made it valuable as a feed for stock,—it is a by-product, and, except for the small amount of oil in it, would be mere waste.

Appellant exported large quantities of oil cake, derived from seed which it had imported, and made demand in proper form for the drawback provided for by the act of Congress.

The law providing for such drawbacks has differed in form of expression from time to time, but, since the Act of August 5, 1861 [12 Stat. at L. 292, chap. 45], it has not differed in [144] substance from the Act of 1894, as we have quoted it. The number of articles to which the law is applicable is very great, among them, notably, "refined sugar and syrup which come from imported raw sugar, and refined sugar and syrup which come from imported molasses."

The court of claims found that:

"From August 5th, 1861, to the present time, the practice of the Treasury Department, where several articles are manufactured from the same imported material, has been to calculate and to pay the drawback by distributing the duty paid on the imported material between such articles in proportion to the value, and not in proportion to their weight, as well where the imported material paid a specific as well as where it paid an ad valorem duty. Such calculation and payment had been made under Treasury Department regulations."

The claim of the appellant is that the correct construction of the section relied upon requires that the drawback should be computed on the basis of the weights of the oil and oil cake derived by the process of manufacture from the seed,

instead of on the basis of the values of the two products, as it was computed by the government, and the question for decision is whether the Department regulation is a valid interpretation of the statute.

The act quoted provides that where imported materials are used in this country in the manufacture of articles which are exported, a drawback shall be allowed *"equal in amount to the duties paid on the material used,"* less 1 per centum. What was the amount of duty paid on the small amount of oil and on the large amount of solid substance, the hull and the fiber, which made up the exported oil cake? Was it substantially two thirds of the total, determined by weight,—on 36 of 56 pounds,—or was it about one fourth of the total as determined by the relative values of the oil and of the oil cake derived from the seed?

[145] The terms of the provision show that the contingency of having one kind of dutiable material, from which two or more kinds of manufactured products might be derived, is not specifically provided for. Obviously only a part, the least valuable part, of the materials or ingredients of the linseed, were used in the making of oil cake, and therefore the problem of determining the "drawback equal in amount to the duty paid" on the part so used—the solid parts of the seed and the small amount of oil in the oil cake—was not a simple or an easy one.

The statute, thus indefinite if not ambiguous, called for construction by the Department, and the regulation adapted to cases such as we have here commends itself strongly to our judgment.

It does not seem possible that Congress could have intended that two thirds of the duty should be returned when one quarter in value of the manufactured product should be exported; or that the exporter should retain 20 pounds of oil, estimated in the findings as worth about 7½ cents a pound, derived from each bushel of seed, and recover two thirds of the duty paid when he exported 36 pounds of seed cake, worth slightly more than 1 cent a pound, derived from the same bushel of seed. Such results—they must follow the acceptance of the appellant's contention—should be allowed only under compulsion of imperative language such as is not to be found in the section we are considering.

We prefer the reasonable interpretation of the Department, which results in a refund of one quarter of the duty when one quarter of the value of the product is exported.

From Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603, to Jacobs v. Prichard, 223 U. S. 200, 56 L. ed. 405, 32 Sup. Ct. Rep. 289, it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by Department officials, who were called upon to act under the law and to carry its provisions **[146]** into effect,—especially where such construction has been long continued, as it was in this case for almost forty years before the petition was filed. United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510.

To this we must add that the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed, particularly as applied to linseed and its products.

The drawback provision, under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870, and the court of claims finds that the rule for determining the drawback on oil cake was applied during the whole of that period of almost ten years. The Tariff Act, approved July 14, 1870 (16 Stat. at L. 256, 265, chap. 255), expressly provided, in the flaxseed or linseed paragraph, "that no drawback shall be allowed on oil cake made from imported seed," and this provision was continued in the Tariff Act of March 3, 1883 (22 Stat. at L. 488, 513, chap. 121), and in the Act of October 1, 1890 (26 Stat. at L. 567, 586, chap. 1244). But in the Act of 1894 (28 Stat. at L. 509, 523, chap. 349), the prohibition was eliminated, thus restoring the law on this subject as applied to this material to what it was in substance from 1861 to 1870. United States v. Philbrick, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413. During all the intervening twenty-four years this rule of the Department with respect to drawbacks had been widely applied to many articles of much greater importance than linseed or its derivatives, and the practice was continued, linseed included after 1894, until the petition in this case was filed. The re-enacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of

the executive construction of the statute (United States v. Philbrick, supra; United States v. Falk, 204 U. S. 143, 152, 51 L. ed. 411, 414, 27 Sup. Ct. Rep. 191; United States v. Cerecedo [147] Hermanos y Compañia, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532), for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government (United States v. Bailey, 9 Pet. 238, 256, 9 L. ed. 113, 120).

This case would not deserve even the limited discussion which we thus have given it were it not for the extensive and long-continued application of the regulation of the Department to imported and exported materials other than such as are here involved. This specific case is sufficiently ruled by the clear and satisfactory decision of the circuit court of appeals for the second circuit, rendered twenty-two years ago, in United States v. Dean Linseed-Oil Co. 31 C. C. A. 51, 57 U. S. App. 716, 87 Fed. 453, in which the court of claims found authority for dismissing the plaintiff's petition. The judgment of the Court of Claims is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 147–151.)

Postoffice — carrying mails — power to penalize delays.

1. The long-continued failure of the Postmaster General to impose fines for delays of less than twenty-four hours in transporting the mails cannot be asserted as the equivalent of a departmental declaration that no such power existed in behalf of a railway company which had notice before it contracted to carry the mail that failure to maintain train schedules was regarded by Congress and by the Postoffice Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed that there was authority under the customary contracts and the law to impose such deductions.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

Postoffice — mail transportation — powers of Postmaster General — failure to exercise — abrogation.

2. Failure of the Postmaster General to exercise his power to impose fines for delays of less than twenty-four hours in transporting the mails does not make against the proper use of such power when, in the judgment of that official, adequate occasion for its use may arise.

[For other cases, see Postoffice, IV. c, in Digest Sup. Ct. 1908.]

[No. 154.]

Submitted January 19, 1920. Decided March 1, 1920.

APPEAL from the Court of Claims to review a judgment which dismissed a petition by a railway company to recover back deductions withheld by the Postoffice Department from the contract price for transporting the mail. Affirmed.

See same case below, 53 Ct. Cl. 630.

The facts are stated in the opinion.

Messrs. **Alexander Britton** and **Evans Browne** submitted the cause for appellant:

The announcement of schedules for the arrival and departure of trains does not give rise to a contract that, as to a particular train, the schedule will be complied with, the liability for not complying being one based on negligence in the proper operation of the train in connection with the business of the carrier.

6 Cyc. 587.

That rendition of a service of not less than six round trips a week was and is the limit of the absolute obligation of the railroads is recognized by the court of claims itself in the case of Texas & P. R. Co. v. United States, 53 Ct. Cl. 633, No. 31,550, decided March 25, 1918, on findings of fact without an opinion.

The decisions show:

(1) That for one year, 1879–1880, there was a law to impose fines for a mere failure of a train on any day to observe its schedule.

(2) That such law and the failures therein provided for were distinct from and in addition to the matter for which U. S. Rev. Stat. § 3962, Comp. Stat. § 7450, 8 Fed. Stat. Anno. 2d ed. p. 163, provided.

(3) That the Act of June 26, 1906, only applied to trains under contract to observe schedule time, and has no application to this case.

(4) That the Act of March 2, 1907, referred to in the petition, specifically required all contractors to maintain their regular train schedules as to time of arrival and departure; but the deductions involved in this case were made prior to the taking effect of this act, and are not affected thereby.

Jacksonville, P. & M. R. Co. v. United States, 21 Ct. Cl. 174; Chicago, M. & St.

P. R. Co. v. United States, 127 U. S. 406, 32 L. ed. 180, 8 Sup. Ct. Rep. 1194; Minneapolis & St. L. R. Co. v. United States, 24 Ct. Cl. 350.

Assistant Attorney General **Spellacy** submitted the cause for appellee. Special Assistants to the Attorney General Zeisler and Weston were on the brief:

The Postmaster General had power to enter into a contract with appellant whereby the latter was bound to maintain the train schedules published by it from time to time.

Jacksonville, P. & M. R. Co. v. United States, 21 Ct. Cl. 155.

Under the contract in question the appellant agreed, in carrying the mails, to maintain its train schedules.

Louisville & N. R. Co. v. United States, 53 Ct. Cl. 238; Minneapolis & St. L. R. Co. v. United States, 24 Ct. Cl. 350; Eastern R. Co. v. United States, 129 U. S. 396, 32 L. ed. 732, 9 Sup. Ct. Rep. 320; 27 Ops. Atty. Gen. 108.

The deductions were justified even if the appellant was not under contract to maintain its train schedules.

Allman v. United States, 131 U. S. 31, 33 L. ed. 51, 9 Sup. Ct. Rep. 632; Parker v. United States, 26 Ct. Cl. 344.

Mr. Benjamin Carter filed a brief as amicus curiæ.

Mr. Justice **Clarke** delivered the opinion of the court:

The appellant, in its petition, alleges: That in June, 1906, it entered into contracts with the Postoffice Department to transport the mails over three designated routes "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service;" that during the fiscal year 1907 (the petition was not filed until December 19, 1912), the Department withheld from its stipulated pay $3,355.48, "as a penalty imposed on account of late arrivals . . . of trains, and failure to perform service on the . . . mail routes," and that such deductions were "unlawfully withheld." The prayer was for judgment for the full amount of the deductions,—which are also designated in the record as fines or penalties. The petition was dismissed by the court of claims.

The appellant acquiesced in the deductions when they were made, accepted the reduced compensation without protest or objection, except in one instance, when the item complained of was adjusted to its satisfaction, and continued to perform the contracts to the end of their [149] four-year periods without complaint as to the reasonableness of the deductions involved. And thus it comes admitting that it freely entered into the contracts, fully performed them, and accepted pay for such performance, but asking judgment for deductions which it avers were "unlawfully withheld" more than five years before the petition was filed.

The contracts were of the type, familiar in many reported cases, evidenced by "distance circulars," orders establishing the routes, specific agreements on the part of the contractor that it would perform the service "upon the conditions prescribed by law and the regulations of the Department applicable to railroad service," and that the "adjustment" should be "subject to future orders and to fines and deductions."

Among the applicable "conditions prescribed by law" were Rev. Stat. § 3962, Comp. Stat. § 7450, 8 Fed. Stat. Anno. 2d ed. p. 163, that the Postmaster General might "make deductions from the pay of contractors, for failure to perform service according to contract, and impose fines upon them for other delinquencies;" Rev. Stat. § 4002, Comp. Stat. § 7483, 8 Fed. Stat. Anno. 2d ed. p. 195, authorizing contracts for the conveyance of the mails "with due frequency and speed;" and the Act of June 26, 1906 (34 Stat. at L. 467, 472, chap. 3546, Comp. Stat. § 7297, 8 Fed. Stat. Anno. 2d ed. p. 90), commanding the Postmaster General to require all railroads carrying mail to comply with the terms of their contracts "as to time of arrival and departure of mails," and "to impose and collect reasonable fines for delay" when not caused by unavoidable accidents or conditions.

It is conceded by the appellant that the Postmaster General had authority under Rev. Stat. § 3962, to make deductions from the pay when a "trip was not performed" within twenty-four hours of the stipulated time for performance. But it is contended that he had no authority to make deductions or impose fines for shorter delays,—and this is the sole question upon which this appeal is pursued into this court.

[150] It is argued for the appellant: That power to make the disputed deductions must be found, if at all, in the provision of Rev. Stat. § 3962, that the Postmaster General may "make deductions from the pay of contractors for failure to perform service according to contract, and impose fines upon them for other delinquencies;" that when the con-

tracts were made, long departmental construction had limited the failure to perform service, described in the act, to twenty-four hours of delay in the arrival of trains, and that failure, from 1872, when the section was enacted, to 1907, to impose fines or deductions for shorter delays, amounted to a construction by the Department that authority to impose fines upon contractors for delinquencies did not warrant deductions for failure to maintain train schedules when the delay was less than twenty-four hours.

We need consider only this last contention, and in reply it is pointed out that the findings of fact show: that the amount and rates of compensation were determined by the Department for the various routes, between the 10th and 26th of September, 1906, though effective as of the first day of the preceding July; that in October, 1905, the Postmaster General, "on account of the failure to observe schedules on routes or parts of routes," issued an order that deductions should be made, in sums stated, after December 31, 1905, when trains arrived at termini or junction points fifteen or more minutes late, a designated number of times in a quarter; and that the Act of Congress, approved June 26, 1906, referred to, declared it to be the duty of the Postmaster General to impose and collect reasonable fines for failure of railroads to comply with the terms of their contracts with respect to the time of arrival and departure of mails. This act was repealed in the following year, but the substance of it was immediately re-enacted in a more adaptable form.

Thus, the appellant had notice before it made the contracts [151] under discussion that failure to maintain train schedules was regarded by Congress and the Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed there was authority under the customary contracts and the law to impose such deductions. The Act of June 26, 1906, was not a grant of new power to the Postmaster General to impose such fines or deductions, but was an imperative direction to him to exercise the power which, it assumes, he already had for that purpose.

This action of Congress and of the Department is sufficient answer to the claim, if it were otherwise sound, that failure to exercise the power to impose fines for such a cause amounted to a departmental declaration that no such power existed.

But the contention is not sound. Failure, within moderate limits, to maintain train schedules, may well have been regarded by the Postmaster General as a necessary evil to be tolerated, and not to call for the exercise of his power to impose fines under the statute, when more flagrant neglect to maintain such schedules might very justly require him to exercise such authority in order to prevent intolerable public inconvenience. We cannot doubt that the contracts of the appellant, and the law which was a part of them, furnished ample authority for the action of the Department in this case, and that omission to exercise such power did not make against the proper use of it when, in the judgment of the Postmaster General, adequate occasion for its use should arise.

We need not pursue the subject further. The principles involved are adequately and admirably discussed by the court of claims in its opinion, rendered in the case of Louisville & N. R. Co. v. United States, 53 Ct. Cl. 238, upon authority of which this case was decided.

The judgment of the Court of Claims is affirmed.

---

[152] NEW YORK CENTRAL RAILROAD COMPANY, Petitioner,
v.
WILBUR H. MOHNEY.

(See S. C. Reporter's ed. 152–158.)

Carriers — limitation of liability — employee riding on pass — when transportation is not interstate.

1. The mental purpose of a railway employee traveling on an annual pass, good only over a line wholly within the state, to continue his journey into another state, using another carrier to a point still within the state, where he expected to find awaiting him another pass from the first carrier which would be good for the interstate part of his journey, does not make him an interstate passenger while travel-

---

Note.—On validity of stipulation in pass limiting carrier's liability—see notes to Boering v. Chesapeake Beach R. Co. 48 L. ed. U. S. 742, and Walther v. Southern P. Co. 37 L.R.A.(N.S.) 235.

On degree of care owed to free passengers in absence of stipulation upon the subject—see notes to Memphis Street R. Co. v. Caviness, 46 L.R.A.(N.S.) 142, and Indianapolis Traction & Terminal Co. v. Lawson, 5 L.R.A.(N.S.) 721.

See also note to this case as reported in 9 A.L.R. 496.

ing on the first pass, so as to validate, contrary to local public policy, a stipulation in such pass releasing the carrier from liability for negligence.

[For other cases, see Carriers, II. a; Commerce, I. b, in Digest Sup. Ct. 1908.]

Carriers — limiting liability — wilful or wanton negligence — gratuitous passenger.

2. A carrier is liable to a person traveling on a pass who is wilfully or wantonly injured by the carrier's employees, notwithstanding a stipulation in such pass releasing the carrier from liability for negligence.

[For other cases, see Carriers, II. a, in Digest Sup. Ct. 1908.]

[No. 196.]

Argued January 27, 1920. Decided March 1, 1920.

ON WRIT of Certiorari to the Court of Appeals of Lucas County in the State of Ohio to review a judgment which affirmed a judgment of the Court of Common Pleas of said county in favor of plaintiff in a personal-injury action. Affirmed.

The facts are stated in the opinion.

Mr. **Howard Lewis** argued the cause, and, with Mr. Frederick W. Gaines, filed a brief for petitioner:

The contract of carriage was interstate.

Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 490, 58 L. ed. 1055, 1061, 34 Sup. Ct. Rep. 641; Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 163, 59 L. ed. 517, 519, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275; McFadden v. Alabama G. S. R. Co. 154 C. C. A. 338, 241 Fed. 562; Railroad Commission v. Worthington, 225 U. S. 101, 108, 109, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279.

The journey being interstate, rights and liabilities thereunder are governed by the Federal laws exclusively.

Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Turman v. Seaboard Air Line R. Co. 105 S. C. 287, 89 S. E. 655; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Southern R. Co. v. Prescott, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469.

The pass was gratuitous.

Cincinnati, N. O. & T. P. R. Co. v. Rankin, supra; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. ed. 853, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494; Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 577, 58 L. ed. 1476, 1478, 34 Sup. Ct. Rep. 964.

A carrier may validly stipulate that it shall not be liable for injuries to the person to whom the pass is issued.

Charleston & W. C. R. Co. v. Thompson, supra; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 448, 48 L. ed. 742, 744, 24 Sup. Ct. Rep. 515.

It is apparent that when, on account of the fog, the engineer did not see the signals, or disregarded them, he was not guilty of negligence which was wilful and wanton. It was not a conscious failure to observe due care. This omission of duty, even though constituting negligence, did not amount to wantonness or wilfulness; and there is no evidence of wilfulness or wantonness in the record.

7 Thomp. Neg. § 22; White, Personal Injuries on Railroads, § 14; 1 Shearm. & Redf. Neg. 6th ed. § 114a; Stewart v. Burlington & M. River R. Co. 32 Iowa, 562; Fluckey v. Southern R. Co. 155 C. C. A. 244, 242 Fed. 468; Cleveland, C. C. & St. L. R. Co. v. Miller, 149 Ind. 502, 49 N. E. 445; King v. Illinois C. R. Co. 52 C. C. A. 489, 114 Fed. 855; Louisville & N. R. Co. v. Muscat & Lott, 147 Ala. 701, 41 So. 302; Louisville & N. R. Co. v. Mitchell, 134 Ala. 261, 32 So. 735; Southern R. Co. v. Fisk, 86 C. C. A. 373, 159 Fed. 373.

There being no wilful or wanton negligence pleaded, no recovery can be had therefor, even if such had been proved.

Gentry v. United States, 41 C. C. A. 185, 101 Fed. 51; Re Rosser, 41 C. C. A. 497, 101 Fed. 562; Re Wood & Henderson, 210 U. S. 246, 254, 52 L. ed. 1046, 1049, 28 Sup. Ct. Rep. 621.

Mr. **Albert H. Miller** argued the cause, and, with Messrs. A. Jay Miller and Charles H. Brady, filed a brief for respondent:

It cannot be logically contended that Mohney was on anything but an intrastate journey when he was traveling on transportation entitling him to ride only from Toledo, Ohio, to Cleveland, Ohio.

Southern P. R. Co. v. Arizona, 249 U. S. 472, 63 L. ed. 713, P.U.R.1919D, 462, 39 Sup. Ct. Rep. 313; White v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 86 S. W. 962; Judson, Interstate Commerce, p. 15, ¶ 1; Luken v. Lake

Shore & M. S. R. Co. 248 Ill. 383, 140 Am. St. Rep. 220, 94 N. E. 175, 21 Ann. Cas. 82; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, affirmed in 97 Tex. 274, 78 S. W. 495; New Jersey Fruit Exch. v. Central R. Co. 2 Inters. Com. Rep. 84; Missouri & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co. 1 Inters. Com. Rep. 607, 1 I. C. C. Rep. 30; Hope Cotton Oil Co. v. Texas & P. R. Co. 10 I. C. C. Rep. 703; St. Louis Hay & Grain Co. v. Chicago, B. & Q. R. Co. 11 Inters. Com. Rep. 82.

State law regulates state transportation.

Smith v. Atchison, T. & S. F. R. Co. 114 C. C. A. 157, 194 Fed. 79.

All passes are not free passes.

Norfolk Southern R. Co. v. Chatman, 244 U. S. 276, 61 L. ed. 1131, L.R.A. 1917F, 1128, 37 Sup. Ct. Rep. 499; Tripp v. Michigan C. R. Co. L.R.A. 1918A, 758, 151 C. C. A. 385, 238 Fed. 449; Wiley v. Grand Trunk R. Co. 227 Fed. 127.

Employment was back of the Mohney pass.

Doyle v. Fitchburg R. Co. 166 Mass. 492, 33 L.R.A. 844, 44 N. E. 611; Gill v. Erie R. Co. 151 App. Div. 131, 135 N. Y. Supp. 355; Whitney v. New York, N. H. & H. R. Co. 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850; Dugan v. Blue Hill Street R. Co. 193 Mass. 431, 79 N. E. 748; Walther v. Southern P. Co. 159 Cal. 769, 37 L.R.A.(N.S.) 235, 116 Pac. 51; Eberts v. Detroit, Mt. C. & M. C. R. Co. 151 Mich. 260, 115 N. W. 43; Harris v. Puget Sound Electric R. Co. 52 Wash. 289, 100 Pac. 838; Indianapolis Traction & Terminal Co. v. Isgrig, 181 Ind. 216, 104 N. E. 60; Palmer v. Boston & M. R. Co. 227 Mass. 493, 116 N. E. 899.

Mohney was entitled to some degree of care.

Chicago, R. I. & P. R. Co. v. Maucher, 248 U. S. 359, 63 L. ed. 294, 39 Sup. Ct. Rep. 108; St. Louis, I. M. & S. R. Co. v. Pitcock, 82 Ark. 441, 118 Am. St. Rep. 84, 101 S. W. 725, 12 Ann. Cas. 582.

In Ohio, a stipulation such as appears on the back of the Mohney pass, exempting a railroad from liability caused by the negligence of itself or its employees, when such contract is made and enforced within the state, is absolutely void.

Pittsburgh, C. C. & St. L. R. Co. v. Kinney, 95 Ohio St. 71, L.R.A.1917D, 641, 115 N. E. 505, Ann. Cas. 1918B, 286, 17 N. C. C. A. 269; Cincinnati, H. & D. R. Co. v. Pontius, 19 Ohio St. 235, 2 Am. Rep. 391; Pittsburgh, C. C. & St. L. R. Co. v. Sheppard, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61, 1 Am. Neg. Rep. 517; Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362; Knowlton v. Erie R. Co. 19 Ohio St. 263, 2 Am. Rep. 395.

The exempting clause is invalid in other states.

Gill v. Erie R. Co. 151 App. Div. 131, 135 N. Y. Supp. 355.

Even in jurisdictions wherein such a contract is held valid, to exempt a carrier from liability for ordinary negligence, it is generally held that the carrier will not be relieved from liability for gross negligence, or for wantonness or for wilfulness.

Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Illinois C. R. Co. v. O'Keefe, 63 Ill. App. 102; Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Indiana C. R. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339; Meuer v. Chicago, M. & St. P. R. Co. 5 S. D. 568, 25 L.R.A. 81, 49 Am. St. Rep. 898, 59 N. W. 945; Walther v. Southern P. Co. 159 Cal. 769, 37 L.R.A.(N.S.) 235, 116 Pac. 51; Turman v. Seaboard Air Line R. Co. 105 S. C. 287, 89 S. E. 655; Annas v. Milwaukee & N. R. Co. 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282, 10 Am. Neg. Cas. 546.

The Ohio law controls.

Smith v. Atchison, T. & S. F. R. Co. 114 C. C. A. 157, 194 Fed. 79; Knowlton v. Erie R. Co. 19 Ohio St. 260, 2 Am. Rep. 395; Pittsburgh, C. C. & St. L. R. Co. v. Sheppard, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61, 1 Am. Neg. Rep. 517; Hughes v. Pennsylvania R. Co. 202 Pa. 222, 63 L.R.A. 527, 97 Am. Am. St. Rep. 713, 51 Atl. 990, 12 Am. Neg. Rep. 185.

The exempting clause is invalid in the Federal courts.

Southern P. Co. v. Schuyler, 227 U. S. 601, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Wiley v. Grand Trunk R. Co. 227 Fed. 127.

Mr. Justice **Clarke** delivered the opinion of the court:

The respondent, whom we shall refer to as the plaintiff, brought suit against the petitioner, defendant, to recover damages for severe injuries which he sustained in a rear-end collision on defendant's railroad, which he averred was caused by the gross negligence of the engineer of the [**153**] train following that on which he was a passenger, in failing to look for and heed danger signals

which indicated that the track ahead was occupied. The plaintiff was employed by the defendant as an engineer, with a run between Air Line Junction, at Toledo, and Collinwood, a suburb of Cleveland, wholly within the state of Ohio. As an incident to his employment he was given an annual pass, good between Air Line Junction and Collinwood, which contained the release following:

"In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, and liable to him or her as such.

"And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used."

Having been informed that his mother had died at her home near Pittsburgh, Pennsylvania, the plaintiff, desiring to attend her funeral, applied to the defendant for and obtained a pass for himself and wife from Toledo to Youngstown, Ohio, via Ashtabula, and was promised that another pass for himself and wife would be left with the agent of the company at Youngstown, good for the remainder, the interstate part, of the journey to Pittsburgh. But the line of the defendant via Ashtabula to Youngstown was much longer and required a number of hours more for the journey than it did to go via Cleveland, using the Erie Railroad from that city to Youngstown, and for this reason, the record shows, the plaintiff Mohney, [154] before leaving home, decided that his wife should not accompany him, and that he would make the journey by a train of the defendant, which used its own rails to Cleveland, and from Cleveland to Youngstown used the tracks of the Erie Railroad Company, and at Youngstown returned to the road of the defendant, over which it ran to Pittsburgh. The transportation which he had received via Ashtabula could not be used over the shorter route, and therefore the plaintiff presented his annual pass for transportation from Toledo to Cleveland, intending to pay his fare from Cleveland to Youngstown over the Erie Railroad, leave the train at the Erie station at Youngstown, inquire by telephone as to the time and place of the burial of his mother, and then go to the New York Central station, a half mile away, obtain the pass which was to be left there for him, and go forward to Pittsburgh on the next convenient train.

The train on which Mohney was a passenger was wrecked between Toledo and Cleveland. It had come to a stop at a station and the second section of the train ran past two block signals, indicating danger ahead, and collided with the rear car of the first section, in which Mohney was riding, causing him serious injury.

The case was tried on stipulated facts and the testimony of the plaintiff. The trial court concluded that Mohney, at the time he was injured, was on an intrastate journey, using an intrastate pass, and that by the law of Ohio, the release upon it was void as against public policy. Thereupon, a jury being waived, the court entered judgment in plaintiff's favor.

The state court of appeals, differing with the trial court, concluded that Mohney was an interstate passenger when injured, and that the release on the pass was valid, under the ruling in Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964. But the court went further and affirmed the judgment on two grounds; by a divided [155] court, on the ground that the pass was issued to Mohney as part consideration of his employment, and, all judges concurring, for the reason that "we are clearly of the opinion that the negligence in this case, under the evidence, was wilful and wanton." For these reasons it was held that the release on the pass did not constitute a defense to the action.

The supreme court of the state denied a motion for an order requiring the court of appeals to certify the record to it for review, and the case is here on writ of certiorari.

The propriety of the use of the annual pass by Mohney for such a personal journey, and that the release on it was not valid under Ohio law, were not questioned, and the sole defense urged by the railroad company was, and now is, that his purpose to continue his journey to a destination in Pennsylvania rendered him an interstate passenger, subject to Federal law from the time he entered the train at Toledo, and that the

release on the pass was valid, under 234 U. S. 576, supra.

The three freight cases on which the defendant relies for its contention that the plaintiff was an interstate passenger when injured, all proceed upon the principle that the essential character of the transportation, and not the purpose, or mental state, of the shipper, determines whether state or national law applies to the transaction involved.

Thus, in Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, the owner's state of mind in relation to the logs, his intent to export them, and even his partial preparation to do so, did not exempt them from state taxation, because they did not pass within the domain of the Federal law until they had "been shipped, or entered with a common carrier for transportation to another state, or had been started upon such transportation in a continuous route or journey."

In Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279, the cotton-seed [156] cake and meal, although billed to Galveston, were "all destined for export, and by their delivery to the Galveston, Harrisburg, & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination. . . . The case, therefore, comes under Coe v. Errol, supra." The mental purpose of Young, and his attempted practice by intrastate billing, was to keep within the domain of the state law; but his contracts, express and implied, brought the discrimination complained of in the case within the scope of the Interstate Commerce Act.

In Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653, the Commission attempted to regulate the rate on "lake cargo-coal," because it was often billed from the mines to Huron, or other ports within the state, but this court found that the established "lake cargo-coal" rate was intended to apply, and in practice did apply, only "to such coal as was in fact placed on vessels for carriage beyond the state," and obviously, "by every fair test, transportation of this coal from the mines to upper lake ports is an interstate carriage." For this reason the enforcement of the order of the State Commission was enjoined as an attempt to regulate and control interstate commerce. Here again it was the committing of a designated kind of coal to a carrier for transportation in interstate commerce that rendered the Federal law applicable.

To what extent the analogy between the shipments of property and the transportation of passengers may profitably be pressed, we need not inquire, for in this case the only contract between the carrier defendant and the plaintiff was the annual pass issued to the latter. This written contract, with its release, is the sole reliance of the defendant. But that contract in terms was good only between Air Line Junction and Collinwood, over a line of track wholly within Ohio, and the company was charged [157] with notice when it issued the pass that the public policy of that state rendered the release upon it valueless. The purpose of the plaintiff to continue his journey into Pennsylvania would have been of no avail in securing him transportation over the Erie line to Youngstown; for that he must pay the published fare; and very surely the release on the pass to Collinwood would not have attached to the ticket to Youngstown. Whether there was a similar release on the pass to Pittsburgh, which Mohney expected to get at Youngstown, the record does not disclose, and it is of no consequence whether there was or not. The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mohney to continue his journey into another state, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms. Southern P. Co. v. Arizona, 249 U. S. 472, 63 L. ed. 713, P.U.R.1919D, 462, 39 Sup. Ct. Rep. 313. For these reasons the judgment of the trial court was right and should have been affirmed.

But the court of appeals affirmed the judgment on two grounds, one of which was that all of the judges were "clearly of the opinion that the negligence in the case, under the evidence, was wilful and wanton." This court does not weigh the evidence in such cases as we have here, but it has been looked into sufficiently to satisfy us that the argument that there is no evidence whatever in the record to support such a finding cannot be sustained.

A carrier by rail is liable to a trespasser or to a mere licensee wilfully or

wantonly injured by its servants in charge of its train (Thomp. Neg. §§ 3307, 3308, and 3309, and the same sections in White's Supplement thereto), and a sound public policy forbids that a less onerous rule should be applied to a [158] passenger injured by like negligence when lawfully upon one of its trains. This much of protection was due the plaintiff as a human being, who had intrusted his safety to defendant's keeping. Southern P. Co. v. Schuyler, 227 U. S. 601, 603, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Chicago, R. I. & P. R. Co. v. Maucher, 248 U. S. 359, 363, 63 L. ed. 294, 296, 39 Sup. Ct. Rep. 108.

The evidence in the record as to the terms and conditions upon which the pass was issued to the plaintiff is so meager that, since it is not necessary to a decision of the case, we need not and do not consider the extent to which the case of Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 58 L. ed. 1476, 34 Sup. Ct. Rep. 964, is applicable to an employee using a pass furnished to him seemingly as a necessary incident to his employment.

The judgment of the Court of Appeals is affirmed.

Mr. Justice **Day** and Mr. Justice **Van Devanter** concur in the result, being of opinion that Mohney was using the annual pass in an interstate journey, and that to such a use of the pass the Ohio law was inapplicable, but that the releasing clause on the pass did not cover or embrace his injury because the latter resulted from wilful or wanton negligence, as to which such a clause is of no force or effect.

---

[159] ASH SHEEP COMPANY, Appt.,
v.
UNITED STATES OF AMERICA. (No. 212.)

ASH SHEEP COMPANY, Plff. in Err.,
v.
UNITED STATES OF AMERICA. (No. 285.)

(See S. C. Reporter's ed. 159-170.)

Indian lands — trespass — grazing live stock.

1. Lands within that part of the Crow Indian Reservation in Montana as to which the Indians released their possessory right to the United States by an agreement ratified and amended by the Act of April 27, 1904, which contains many provisions intended to secure to the Indians the fullest possible value for what are referred to in the grant as "their lands," and to make use of the proceeds for their benefit, are Indian lands within the meaning of U. S. Rev. Stat. § 2117, forbidding the pasturing of cattle upon lands belonging to any Indian or Indian tribe without the consent of such tribe.

[For other cases, see Indians, V. in Digest Sup. Ct. 1908.]

Indian lands — trespass — grazing sheep.

2. Sheep must be regarded as cattle within the meaning of U. S. Rev. Stat. § 2117, which forbids any person to drive or otherwise convey any stock of horses, mules, or cattle to range and feed on any land belonging to any Indian or Indian tribe without the consent of such tribe, the courts and Department of Justice having so interpreted this provision for almost fifty years.

[For other cases, see Indians, V. in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — recovery in equity as bar to recovery at law.

3. The recovery of nominal damages in an equity suit to restrain a trespass does not bar the recovery at law of the statutory penalty for the same trespass, the claim for such penalty having been rejected in the equity suit because pursued in an action in which it could not be entertained.

[For other cases, see Judgment, III. j, 1, in Digest Sup. Ct. 1908.]

[Nos. 212 and 285.]

Argued January 30, 1920. Decided March 1, 1920.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the District of Montana enjoining the grazing of sheep on lands asserted to be Indian lands. Affirmed. Also

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the District of Montana in favor of the United States in a suit to recover a penalty for the same trespass. Affirmed.

Note.—On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

See same case below in No. 212, 162 C. C. A. 607, 250 Fed. 591; in No. 285, 165 C. C. A. 469, 254 Fed. 59.

The facts are stated in the opinion.

Mr. **Cornelius B. Nolan** argued the cause, and, with Mr. William Scallon, field a brief for the Ash Sheep Company:

When the act in question was passed, the title to the land was in the United States. The only right that the Indians had was a possessory right.

Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681; Spalding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360.

This right of occupancy could be terminated by act of Congress as well as by treaty or agreement with the Indians.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Buttz v. Northern P. R. Co. 119 U. S. 73, 30 L. ed. 337, 7 Sup. Ct. Rep. 100; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216.

When this right of occupancy terminated or was abandoned with the approval of the United States, all of the Indian rights were extinguished.

Buttz v. Northern P. R. Co. 119 U. S. 73, 30 L. ed. 337, 7 Sup. Ct. Rep. 100; United States v. Cook, 19 Wall. 591, 22 L. ed. 210.

It was clearly the intention that every portion of this land should at all times be accessible to the public, so that settlements might be made by those intending to do so under the homestead and other laws, and the leasing of the same by the Indian Department necessarily would interfere with this being done. If any trust arose at all, it attached to the money which was to be paid, and not to the land itself.

United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149.

This matter has been already under consideration by this court, and a conclusion reached at variance with the government's contention.

Bean v. Morris, 221 U. S. 485, 55 L. ed. 821, 31 Sup. Ct. Rep. 703.

The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769.

The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws.

Northern Lumber Co. v. O'Brien, 71 C. C. A. 598, 139 Fed. 614; United States v. Blendaur, 63 C. C. A. 636, 128 Fed. 910; Jackman v. Atchison, T. & S. F. R. Co. 24 N. M. 278, 170 Pac. 1036.

These lands became public when they were thrown open for settlement, if not before; and such being their character, the injunction was improperly issued.

Buford v. Houtz, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305.

The statute in question is a penal one, and the rule of strict construction applies. Nothing should be included that fairly does not come within the express provisions of the law.

United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625; Sarlls v. United States, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; Bircher v. United States, 95 C. C. A. 87, 169 Fed. 591; United States v. Gooding, 12 Wheat. 460, 6 L. ed. 693; Greely v. Thompson, 10 How. 225, 13 L. ed. 397; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Tiffany v. National Bank, 18 Wall. 409, 21 L. ed. 862.

The term "cattle," as generally understood, is used in reference to animals of the bovine species.

State ex rel. Esser v. District Ct. 42 Nev. 218, 174 Pac. 1023.

This is true where, in excise laws, custom duties are imposed on hides.

Rossbach v. United States, 116 Fed. 781; United States v. Schmoll, 154 Fed. 734; United States v. Ash Sheep Co. 229 Fed. 479; Keys v. United States, 2 Okla. Crim. Rep. 647, 103 Pac. 874.

In construing any part of the United States Revised Statutes, it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.

United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539; United States v. Bowen, 100 U. S. 508, 25 L. ed. 631; The Conqueror, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 Sup. Ct. Rep. 625.

In the equitable action that was instituted, the government sought to recover the statutory penalty. It is true, that no express mention is made of the fact that the damage demanded was by virtue of the law in question. It is true,

nevertheless, that the right to recover the damage under this law was asserted. In the equitable action the government insisted that, regardless of the damage that was done, the statute fixed the amount of it, and it was entitled to recover $1 per head. The trial court decided against it, and that decision stands unappealed from, and has in it the element of finality. The decision in that case, adverse to the United States, as to its right to recover this money, is determinative of its right to do so in the present action.

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct. Rep. 564.

The United States, in demanding damages, as it did, in the equitable action, should now be estopped (having recovered damages in that action for the injury done) from maintaining the present action to recover additional damages.

Kendall v. Stokes, 3 How. 87, 11 L. ed. 506; Union Cent. L. Ins. Co. v. Drake, 131 C. C. A. 82, 214 Fed. 536.

Assistant Attorney General **Nebeker** argued the cause, and, with Mr. W. W. Dyar, Special Assistant to the Attorney General, filed a brief for the United States:

By the Act of Congress of April 27, 1904, the unqualified sale and cession provided for by the agreement was converted into a cession and relinquishment in trust to sell and dispose of the lands for the benefit of the Indians, and pay over to them the proceeds. The entire beneficial interest remained in the tribe, and the lands themselves remained Indian lands until disposed of under the trust.

Frost v. Wenie, 157 U. S. 46, 50, 39 L. ed. 614, 616, 15 Sup. Ct. Rep. 532; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; United States v. Mille Lac Band, 229 U. S. 498, 57 L. ed. 1299, 33 Sup. Ct. Rep. 811.

Sheep are included in U. S. Rev. Stat. § 2117, Comp. Stat. § 4107, 3 Fed. Stat. Anno. 2d ed. p. 795, which imposes a penalty of $1 per head for grazing "any stock of horses, mules, or cattle" upon Indian lands without the consent of the tribe.

United States v. Mattock, 2 Sawy. 148, Fed. Cas. No. 15,744; Henderson v. Wabash, St. L. & P. R. Co. 81 Mo. 605; Davis v. Collier, 13 Ga. 485; United States v. Freeman, 3 How. 556, 11 L. ed. 724; United States v. Hartwell, 6 Wall. 385, 396, 18 L. ed. 830, 832; United States v. Morris, 14 Pet. 474, 10 L. ed. 548; Johnson v. Southern P. Co. 196 U. S. 1, 13, 49 L. ed. 363, 367, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Wimbish v. Tailbois, 1 Plowd. 57, 75 Eng. Reprint, 91; Stowel v. Zouch, 1 Plowd. 366, 75 Eng. Reprint, 555; United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625.

A judgment is not conclusive on any question which, from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered.

2 Black, Judgm. § 618; 23 Cyc. 1317.

There are at least three distinct reasons why the question of penalties could not have been adjudicated in the equity suit:

(a) Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.

Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. ed. 121, 122; Livingston v. Tompkins, 4 Johns. Ch. 415, 8 Am. Dec. 598; 2 Story, Eq. § 1319.

The fact that the remedy prescribed is a civil suit does not prevent § 2117 from being a criminal statute.

United States v. Stevenson, 215 U. S. 190, 54 L. ed. 153, 30 Sup. Ct. Rep. 35; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

(b) The case presented by the pleadings was solely one of civil damages for trespass. Penalties were wholly outside the issues.

Fifield v. Edwards, 39 Mich. 266.

(c) The parties were the same, but the United States sued in entirely different capacities.

Rathbone v. Hooney, 58 N. Y. 467; Sonnenberg v. Steinbach, 9 S. D. 518, 62 Am. St. Rep. 885, 70 N. W. 655; Allison v. Little, 93 Ala. 150, 9 So. 388; Landon v. Townshend, 112 N. Y. 93, 8 Am. St. Rep. 712, 19 N. E. 424, 129 N. Y. 166, 29 N. E. 71.

[**163**] Mr. Justice **Clarke** delivered the opinion of the court:

These two cases were argued and will be decided together.

No. 212 is an appeal from a decree, entered in a suit in equity, in favor of

the government, granting a permanent injunction restraining the appellant from trespassing upon described lands in Montana by grazing sheep thereon, and for nominal damages for such trespass.

No. 285 is a proceeding in error, in which reversal is sought of a judgment rendered in an action at law against plaintiff in error, appellant in the equity suit, for a penalty for the same trespass.

The validity of the right asserted by the government, in both cases, turns upon whether the lands involved were "Indian lands" or "public lands." If they were the former, the decree in the equity case should be affirmed; but in the law case there would remain the question as to whether "sheep" were within the terms of the act under which the penalty was imposed.

In both cases the government contends that the appellant violated § 2117 of the Revised Statutes of the United States (Comp. Stat. § 4107, 3 Fed. Stat. Anno. 2d ed. p. 795), which reads as follows:

"Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

The company admits that it pastured 5,000 sheep on the described lands without the consent of the Crow tribe of Indians or of the United States, but denies that they were "Indian lands," and contends that they were "public lands," upon which it was lawful for it to pasture its stock.

Whether the described lands were Indian or public lands depends upon the construction to be given the act of Congress approved April 27, 1904 (33 Stat. at L. 352, chap. 1624), entitled, [**164**] "An Act to Ratify and Amend an Agreement with the Indians of the Crow Reservation in Montana, and Making Appropriations to Carry the Same into Effect."

The agreement embodied in this act of Congress provided for a division of the Crow Indian Reservation in Montana on boundary lines which were described, and the lands involved in this case were within the part of the Reservation as to which the Indians, in terms, "ceded, granted, and relinquished" to the United States all of their "right, title, and interest."

The argument of the Sheep Company is, that the United States being owner of the fee of the land before the agreement, the effect of this grant and release of their possessory right by the Indians was to vest the complete and perfect title in the government, and thereby make the territory a part of the public lands, with the interest of the Indians transferred to the proceeds to be derived from them. For this conclusion the following cases are cited: United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149; Bean v. Morris, 86 C. C. A. 519, 159 Fed. 651, s. c. 221 U. S. 485, 55 L. ed. 821, 31 Sup. Ct. Rep. 703. But in the first of these cases the Indians parted with their possessory rights for a cash payment by the United States (p. 527), and in the second, the character of the agreement under which the Indian title was said, incidentally, to have terminated, does not appear.

Whether or not the government became trustee for the Indians, or acquired an unrestricted title by the cession of their lands, depends in each case upon the terms of the agreement or treaty by which the cession was made. Minnesota v. Hitchcock, 185 U. S. 373, 394, 398, 46 L. ed. 954, 965, 967, 22 Sup. Ct. Rep. 650; United States v. Mille Lac Band of Chippewa Indians, 229 U. S. 498, 509, 57 L. ed. 1299, 1305, 33 Sup. Ct. Rep. 811.

The agreement we have in this case is elaborate, and, in consideration of the grant by the Indians of their possessory right, the government assumed many obligations with respect to the lands and the proceeds of them,—notably, [**165**] that it would sell the land to settlers, except sections 16 and 36, for not less than $4 per acre, and would pay the proceeds to the Indians, under the direction of the Secretary of the Interior, in a manner prescribed. Thus, the government contracted to expend $90,000 of the proceeds of the land in the extension of the irrigation system on the Reservation remaining; $295,000 in the purchase of stock to be placed on the Reservation, with a further contingent purchase in contemplation of $200,000; $40,000 in fencing; $100,000 for schools; and $10,000 for a hospital for the Indians, for the maintenance of which $50,000 additional was to be held in trust. It was further provided, that to the extent that feasible irrigation prospects could be found, parts of the released lands should be withdrawn under the Reclamation Act and be disposed of within five years, but not for less than $4 an acre.

There were many other like provi-

sions, all intended to secure to the Indians the fullest possible value for what are referred to in the agreement as "their lands," and to make use of the proceeds for their benefit.

It was provided that semiannual reports should be made by the Secretary of the Interior to the Indians, showing the amounts expended from time to time and the amounts remaining in each of the several funds.

It is obvious that the relation thus established by the act between the government and the tribe of Indians was essentially that of trustee and beneficiary, and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the cestui que trust. Minnesota v. Hitchcock, supra. And that this was precisely the light in which the Congress regarded the whole transaction is clear from the terms of the concluding section, the eighth:

"That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land [**166**] herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided." 33 Stat. chap. 1624, pp. 352, 361.

Taking all of the provisions of the agreement together, we cannot doubt that while the Indians by the agreement released their possessory right to the government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made, any benefits which might be derived from the use of the lands would belong to the beneficiaries, and not to the trustee, and that they did not become "public lands" in the sense of being subject to sale or other disposition, under the General Land Laws. Union P. R. Co. v. Harris, 215 U. S. 386, 388, 54 L. ed. 246, 247, 30 Sup. Ct. Rep. 138. They were subject to sale by the government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904 (33 Stat. at L. 352, chap. 1624), and as to this point the case is ruled by the Hitchcock and Chippewa Cases, supra. Thus, we conclude that the lands described in the bill were "Indian lands" when the company pastured its sheep upon them, in violation of § 2117 of Revised Statutes (Comp. Stat. § 4107, 3 Fed. Stat. Anno. 2d ed. p. 795), and the decree in No. 212 must be affirmed.

There remains the question as to the construction of Rev. Stat. § 2117.

In the law case it is admitted in the bill of exceptions that the Sheep Company, without the permission of the Crow tribe of Indians or of the United States, drove, ranged, and grazed 5,000 head of sheep on the land described in the complaint, and that at the time no settlement [**167**] or entries thereon had been authorized under acts of Congress. The judgment against the company was for $5,000,—$1 for each sheep pastured on the land.

The company contends that the judgment should be reversed for the reason that Rev. Stat. § 2117, imposes the penalty prescribed only for ranging and feeding on the lands of an Indian tribe without permission "any stock of horses, mules, or cattle," and that "sheep" are not within its terms.

If this were a recent statute, and if we were giving it a first interpretation, we might hesitate to say that by the use of the word "cattle" Congress intended to include "sheep."

But the statute is an old one, which has been interpreted in published reports of the courts for almost fifty years, and in an opinion by the Attorney General of the United States, rendered in 1884, as fairly comprehending "sheep" within the meaning of the word "cattle" as used in it.

The statute first appears as § 2 of an "Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers," enacted in 1796, and was then applicable only to "any stock of horses or cattle," etc. (Act of May 19, 1796, 1 Stat. at L. 469, 470, chap. 30). The section was re-enacted without change in 1802 (Act of March 30, 1802, 2 Stat. at L. 139, 141, chap. 13). In 1834 it was given its present form, which was carried into the Revised Statutes, without change in the wording we are considering (Rev. Stat. § 2117).

In 1872 suit was brought in the United States district court for the district of Oregon, claiming that penalties under the section had been incurred by pasturing "sheep," as in this case, on

Indian lands without the consent of the tribe. In a carefully prepared and clearly reasoned opinion Judge Deady overruled a demurrer to the complaint, and held that "sheep" were clearly within the mischief to be remedied, and fairly within the language of the act. [**168**] This case has not been overruled or modified by any later decision. The court quotes definitions of the word "cattle" from several dictionaries, emphasizing especially this from the 1837 edition of Webster:

"In its primary sense, the word includes camels, horses, asses, all the varieties of domesticated horned beasts of the bovine genus, sheep of all kinds, and goats, and perhaps swine. . . . Cattle in the United States, in common usage, signifies only beasts of the bovine genus."

Upon this authority, and applying the rule that, in determining the legislative intent, the mischief to be prevented should be looked to, and saying that "it will not be denied that sheep are as much within the mischief to be remedied as horses or oxen," the court concludes:

"I have no hesitation in coming to the conclusion that the word cattle, as used in the Indian Intercourse Act of 1834 (Act of June 30, 1834, 4 Stat. at L. 729, chap. 161), includes, and was intended to include, sheep as well as cows and oxen." United States v. Mattock, 2 Sawy. 148, Fed. Cas. No. 15,744.

Twelve years later, in 1884, the Attorney General of the United States, in an opinion to the Secretary of War, regarded the question as so little doubtful that he disposed of it in this single sentence:

"The standard lexicographers place sheep under the head of cattle, and it would seem to be in derogation of the manifest intention of Congress to take the word in a more confined sense." 18 Ops. Atty. Gen. p. 91.

In 1875, in First Nat. Bank v. Home Sav. Bank, 21 Wall. 294, 22 L. ed. 560, this court held that the word "cattle" in a letter of credit guaranteeing "drafts on shipments of cattle" was comprehensive enough to justify the giving of credit on shipments of "hogs." This pertinent paragraph is from the opinion:

"That stock of some kind formed part of the guaranty is quite plain, but is the word 'cattle' in this connection to be confined to neat cattle alone, that is, cattle of the bovine genus? It is often so applied, but it is [quoting [**169**] from Worcester's Dictionary] 'also a collective name for domestic quadrupeds, generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats and swine.' In its limited sense it is used to designate the different varieties of horned animals, but it is also frequently used with a broader signification as embracing animals in general which serve as food for man. In England, even in a criminal case, where there is a greater strictness of construction than in a civil controversy, 'pigs' were held to be included within the words 'any cattle.'"

The most recent definitions of the dictionaries are as follows:

Webster's New International Dictionary defines "cattle" thus: "Collectively, live animals held as property or raised for some use, now usually confined to quadrupeds of the bovine family, but sometimes including all domestic quadrupeds, as sheep, goats, horses, mules, asses, and swine, etc."

The Standard Dictionary defines the word as meaning: "Domesticated bovine animals, as oxen, cows, bulls, and calves; also, tho seldom now, as compared with former times, any live stock, kept for use or profit, as horses, camels, sheep, goats, swine, etc."

Thus, although the word "sheep" is not in the section, and although in present-day usage the word "cattle" would rarely be used with a signification sufficiently broad to include them, nevertheless: since the pasturing of sheep is plainly within the mischief at which this section aimed; since the word "cattle," which is used, may be given, say all the authorities, a meaning comprehensive enough to include them; and since the courts and the Department of Justice for almost fifty years have interpreted the section as applicable to "sheep," we accept this as the intended meaning of the section; for, had it been otherwise, Congress, we must assume, would long since have corrected it.

[**170**] It is argued that the rule that penal statutes must be strictly construed forbids such latitude of construction. But this is sufficiently and satisfactorily answered by repeated decisions of this court.

"The admitted rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature." United

States v. Hartwell, 6 Wall. 385, 18 L. ed. 830; United States v. Freeman, 3 How. 556, 565, 11 L. ed. 724, 728; United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625.

It is also contended, far from confidently, that the recovery of nominal damages in the equity suit is a bar to the recovery of the penalty in the case at law. While the amount of the statutory penalty for the trespass was prayed for in the equity suit, yet the trial court, saying that equity never aids the collection of such penalties (Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. ed. 121, 122), and that no evidence of substantial damage had been introduced, limited the recovery to $1 and costs. Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the court of appeals that "a judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered."

It results that the decree in No. 212 and the judgment in No. 285 must both be affirmed.

---

[171] ROBERTO GAYON, Appt. and Plff. in Err.,
v.
THOMAS D. McCARTHY, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York.

(See S. C. Reporter's ed. 171–178.)

Criminal law — removal to another Federal district — prima facie case.

1. The introduction in evidence of the indictment, together with the admission of the accused that he is the person named therein, establishes a prima facie case, in the absence of other evidence, for the removal of the accused to the district in which the indictment was returned.

[For other cases, see Criminal Law, VII. in Digest Sup. Ct. 1908.]

Neutrality — violations — procuring enlistment in foreign service.

2. One may be retained in the sense of the Criminal Code, § 10, providing for the punishment of whoever, within the territory or jurisdiction of the United States, hires or retains another to go beyond such limits or jurisdiction with intent to be enlisted in the service of another foreign people, as effectively by a verbal as by a written promise, by a prospect for payment in the future as by immediate payment of cash.

[For other cases, see Neutrality, IV. b, in Digest Sup. Ct. 1908.]

Criminal law — removal to another Federal district — sufficiency of evidence.

3. Substantial evidence before the United States commissioner and the court, tending to show that a penal statute of the United States had been violated, and that there was probable cause for believing the accused guilty of conspiracy to compass that violation within the district in which the indictment charging such conspiracy was returned, justifies an order for the removal of the accused to that district.

[For other cases, see Criminal Law, VII. in Digest Sup. Ct. 1908.]

[No. 540.]

Argued January 6, 1920. Decided March 1, 1920.

APPEAL from and IN ERROR to the District Court of the United States for the Southern District of New York to review an order for the removal to another Federal district of a person there charged with an offense against the United States. Affirmed.

The facts are stated in the opinion.

Mr. **William S. Bennet** argued the cause, and, with Mr. A. M. Wattenberg, filed a brief for appellant and plaintiff in error:

The indictment is not conclusive; it is merely prima facie evidence of probable cause under U. S. Rev. Stat. § 1014, Comp. Stat. § 1674, 2 Fed. Stat. Anno. 2d ed. p. 654.

Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430.

There was no hiring or retaining by defendant within the meaning of § 10 of the Penal Code.

United States v. Kazinski, Fed. Cas. No. 15,508; United States v. Hertz, Fed. Cas. No. 15,357; United States v. Blair-Murdock Co. 228 Fed. 77.

Assistant Attorney General **Stewart** argued the cause, and, with Mr. W. C. Herron, filed a brief for appellees and defendants in error:

The entire case is determined adversely to the plaintiff in error by the decision of this court in Henry v. Henkel, 235 U. S. 219, 59 L. ed. 203, 35 Sup. Ct. Rep. 54. See also Daeche v.

Note.—On removal to another Federal district for trial of persons there charged with an offense against the United States—see note to Greene v. Henkel, 46 L. ed. U. S. 177.

Bollschweiler, 241 U. S. 641, 60 L. ed. 1217, 36 Sup. Ct. Rep. 446; Rumely v. McCarthy, 250 U. S. 283, 288, 289, 63 L. ed. 983, 986, 987, 39 Sup. Ct. Rep. 483; Harlan v. McGourin, 218 U. S. 442, 448, 54 L. ed. 1101, 1105, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849; Re Gregory, 219 U. S. 210, 214, 55 L. ed. 184, 189, 31 Sup. Ct. Rep. 143; Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 536, 59 L. ed. 705, 707, 708, 35 Sup. Ct. Rep. 29.

Mr. Justice **Clarke** delivered the opinion of the court:

The appellant, Gayon, was indicted in the southern district of Texas for conspiring (§ 37 of the Criminal Code [35 Stat. at L. 1096, chap. 321, Comp. Stat. § 10,201, 7 Fed. Stat. Anno. 2d ed. p. 534]) with one Naranjo, of San Antonio, Texas, and with one Mendoza, of Laredo, Texas, about January 1st, 1919, to hire and retain Foster Averitt, a citizen of the United States, to go to Mexico, there to enlist in military forces organized in the interest of Felix Diaz, then in revolt against the government of Mexico, with which the United [172] States was at peace, in violation of § 10 of the Criminal Code, as amended May 7, 1917 (40 Stat. at L. 39, chap. 11, Comp. Stat. § 10,174, Fed. Stat. Anno. Supp. 1918, p. 579).

Gayon was arrested in New York, and, after a full hearing before a commissioner of the United States, was held subject to the order of the district court for his removal to Texas.

Thereupon, by petition for writs of habeas corpus and certiorari, the case was removed to the district court for the southern district of New York, and, upon a hearing on a transcript of the evidence before the commissioner, that court discharged the writ of habeas corpus and entered an order that a warrant issue for the removal of the appellant to Texas. An appeal brings this order here for review.

The principles and practice applicable to this case are abundantly settled: Greene v. Henkel, 183 U. S. 249, 261, 46 L. ed. 177, 189, 22 Sup. Ct. Rep. 218; Beavers v. Haubart, 198 U. S. 77, 49 L. ed. 950, 25 Sup. Ct. Rep. 573; Hyde v. Shine, 199 U. S. 62, 84, 50 L. ed. 90, 97, 25 Sup. Ct. Rep. 760; Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430; Haas v. Henkel, 216 U. S. 462, 475, 54 L. ed. 569, 575, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112; Price v. Henkel, 216 U. S. 488, 490, 54 L. ed. 581, 585, 30 Sup. Ct. Rep. 257; Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614; Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136, 32 Sup. Ct. Rep. 812; Henry v. Henkel, 235 U. S. 219, 59 L. ed. 203, 35 Sup. Ct. Rep. 54.

Of many errors assigned only two are argued, viz.: That the court erred in holding: (1) That the acts committed by the appellant "of which there was any evidence before the commissioner" constituted a crime under § 10 of the Penal Code, and (2) that the evidence before the commissioner showed probable cause for believing the defendant guilty of the crime charged in the indictment.

By these assignments of error the correct rule of decision is recognized, that if there was before the commissioner or district court evidence showing probable cause for believing the defendant guilty of having conspired with Naranjo or Mendoza, when either was in the southern district of Texas, to hire or retain Averitt to go to Mexico to enlist in the insurgent forces operating under General Diaz against the Mexican government, the order of the district court must be affirmed.

[173] The evidence before the commissioner, carried to the district court, may be summarized as follows:

The government introduced the indictment, and, with the admission by Gayon that he was the person named therein, rested. This established a prima facie case in the absence of other evidence. Tinsley v. Treat, 205 U. S. 20, 31, 51 L. ed. 689, 694, 27 Sup. Ct. Rep. 430, and cases cited.

Thereupon the testimony of the accused and of one Del Villar was introduced by appellant, and that of Averitt by the government, which we condense into narrative form:

For five years before the arrest, Del Villar, a political exile from Mexico, had maintained offices in New York, from which he had conducted a systematic propaganda in the interest of Felix Diaz and against the Mexican government.

The accused, Gayon, is a Mexican citizen, and during several administrations prior to that of Carranza had served as consul for the Mexican government at Roma, Texas, and at other places within and without the United States. For about two years he had been secretary to Del Villar, and for some time prior to his arrest was in the joint service and pay of Del Villar and General Au-

relio Blanquet, the latter then in Mexico, serving with the forces of Diaz.

Naranjo was editor and publisher of a newspaper at San Antonio, Texas, called "Revista Mexicana" (Mexican Review), which was opposed to the established Mexican government, and favorable to the revolutionists operating in the interest of Diaz.

On December 12, 1918, Gayon wrote from New York to Naranjo at San Antonio to secure an advertisement in the Review for "my work 'El General Blanquet,'" saying: "There are some reasons that you may know in the next few days why I want a big circulation of the book," asking if he might send some copies to be sold at the newspaper [174] office, and concluding: "I will await your letters, hoping to give you good news in my next letter."

On December 23, 1918, Gayon wrote Naranjo, addressing him as "My dear Friend," and saying that he had received his letter of the 18th instant. In this letter a discussion of the sale of his book, "El General Blanquet," is followed by comment on the activities of other persons, in which he discourages new projects and urges joining "with the National Union Committees," which he states had already passed the embryonic state and now constitute a reality. He concludes: "God grant us, now that we are on the threshold of success, we may leave aside our obstinate custom of projecting, and go ahead to produce results exclusively."

On January 14, and again on January 21, 1919, he addressed Naranjo as "My dear Friend," and discussed further advertising and circulating of his book.

This correspondence makes it clear enough that Gayon, although in New York, in December, 1918, and January, 1919, was in close association with Naranjo, and that the two were actively engaged in promoting opposition to the established Mexican government.

On January 5, 1919, Foster Averitt, an American citizen, whose home was in Texas, called at the office of Gayon, and what passed between them is derived from the testimony of the two, as follows:

Averitt had recently resigned from the United States Naval Academy at Annapolis, and, being without employment, says that he called at the office of Gayon, for the purpose of securing, if possible, a position in Mexico or Central America as an engineer. He was wearing his uniform as midshipman of the United States Navy, and he first showed Gayon some official papers, which the latter did not read, and then said that he was of the United States Navy, and that he must go at once to Mexico to see Generals Diaz and Blanquet personally. He did not give [175] any reason for desiring to see these men, but asked for letters of introduction to them, which Gayon refused until he could confer with Del Villar. Averitt returned the next day, and, after discussing with Gayon conditions in Mexico, the location of the several armed forces near the border, and whether he should go by sea to Vera Cruz or overland, he again left for the day. On returning the next day he received from Gayon two letters, one addressed to Naranjo, at San Antonio, and one to "General Aurelio Blanquet, General Headquarters, Mexico."

Gayon had no knowledge of or acquaintance with Averitt before his first call at his office, and he did not present any letters of introduction, but in the letter to Naranjo Gayon introduced him as "undertaking a trip to Mexico on special mission to General Felix Diaz and Aurelio Blanquet," and requested that he "supply him the necessary information to enable him to make his trip as quickly as possible."

The letter which he gave to Averitt addressed to General Blanquet opens with this paragraph:

"The bearer, Mr. Foster Averitt, Marine Guard of the United States, will inform you about the reasons for his trip and of the work we are undertaking here. I kindly request from you, after meeting Mr. Foster [sic], to be good enough to introduce him to General Felix Diaz, as he wants to take up some matters with both of you."

The remainder of the letter explains how he had given publicity to "the recent successful arrival" of the General in Mexico and the motives inspiring the movement of reorganization under the leadership of General Diaz. It predicts early recognition by our government of the belligerency of the Diaz insurgents, and urges the General to write as often as possible to enable "us to continue our campaign of propaganda."

Supplied with these letters, Averitt straightway went to San Antonio and presented his letter to Naranjo, who, [176] after some conferences with him, gave him a letter to General Santiago Mendoza, at Laredo, on the border. This letter was presented to Mendoza, and through him arrangements were made for Averitt's crossing into Mexico with two or three others, but they were ar-

rested by customs guards and the proceedings we are considering followed.

In the interviews in New York there was suggestion of payment of expenses and a commission for Averitt, but Gayon, saying that the furnishing of either would violate the neutrality laws of the United States, told him there would be no difficulty in his getting a commission from General Blanquet on his arrival in Mexico, and the last thing he said to him when leaving was "that he expected that he should be at least a colonel when he saw him again down there." He told him it might be possible to have his expenses made up to him when he arrived in Mexico, and, as a matter of fact, he received $15 from General Mendoza at Laredo.

The statute which Gayon is charged with violating provides that "whoever within the territory or jurisdiction of the United States . . . hires or retains another . . . to go beyond the limits or jurisdiction of the United States with intent to be enlisted . . . in the service of any foreign . . . people" shall be punished as provided. And the overt acts charged in the indictment are: that Gayon delivered to Averitt at New York a letter addressed to Naranjo, and at the same time gave him instructions with respect to presenting it, and impliedly promised Averitt that upon his arrival in Mexico he would be given a commission in the army of General Blanquet; that at the same time he delivered to Averitt a letter addressed to General Blanquet, who was then in Mexico, in command of revolutionary forces; that Averitt visited and held conferences with Naranjo, who gave him a letter to Mendoza, at Laredo, in the southern district of [177] Texas; and that Averitt, under instructions received from Naranjo, called upon and conferred with Mendoza at Laredo, and with him arranged to enter Mexico with others, with intent to join the forces of Diaz under General Blanquet.

While the narration of what took place between Gayon and Averitt does not show a hiring of the latter in the ordinary sense of the word, yet, when taken with the conduct of Averitt in going immediately to Texas, and in attempting to cross into Mexico, plainly, it tends to show that Gayon retained Averitt in the sense of engaging him to go to Mexico, that he was induced to enter into that engagement by the promise that he would be given a commission in the forces of Diaz when he arrived there, and that he would probably be reimbursed for his expenses.

There was also evidence tending to show that by communication and concerted action between Gayon, Naranjo, and Mendoza, Averitt was induced to go from New York to the border, and would have succeeded in reaching Mexico and joining the insurgent forces but for the vigilance of the United States officers who arrested him. The evidence also is that Mendoza conferred with Averitt and acted in promotion of the conspiracy when in the southern district of Texas, thus establishing the jurisdiction of the court to which the indictment was returned, under Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614, and Brown v. Elliott, 225 U. S. 392, 56 L. ed. 1136, 32 Sup. Ct. Rep. 812.

The word "retain" is used in the statute as an alternative to "hire," and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash. As stated long ago by a noted Attorney General, in an opinion dealing with this statute:

[178] "A party may be retained by verbal promise or by invitation for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting . . . it would be idle to pass acts of Congress for the punishment of this or any other offense." 7 Ops. Atty. Gen. pp. 367, 378, 379.

This discussion of the record makes it sufficiently clear that there was substantial evidence before the commissioner and the court, tending to show that § 10 of the Criminal Code had been violated, and that there was probable cause for believing the appellant guilty of conspiring with Naranjo and Mendoza to compass that violation, as charged in the indictment, and therefore the order of the District Court must be affirmed.

UNITED STATES EX REL. KANSAS CITY SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
INTERSTATE COMMERCE COMMISSION.

(See S. C. Reporter's ed. 178–188.)

Interstate Commerce Commission — physical valuation of railway property — present cost of condemnation or purchase — disregard of command of Congress.

The refusal of the Interstate Commerce Commission, when making the physical valuation of railway properties ordered by the Act of March 1, 1913, § 19a, to obey the command of that statute to investigate and find the present cost of condemnation and damages or of purchase in excess of original cost or present value of the railway company's lands, cannot be justified on the theory that such command involves a consideration by the Commission of matters "beyond the possibility of rational determination," and calls for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," even if it be conceded that the subject-matter of the valuations in question, which the statute expressly directed to be made, necessarily opened a wide range of proof, and called for the exercise of close scrutiny and of scrupulous analysis and application.

[Matters as to Interstate Commerce Commission, see Interstate Commerce Commission.]

[No. 413.]

Argued December 10, 1919. Decided March 8, 1920.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, refusing to compel the Interstate Commerce Commission by mandamus to investigate and find the present cost of condemnation and damages, or of purchase in excess of original cost or present value of railway property of which the Commission was making a physical valuation. Reversed with directions to reverse the judgment of the trial court and to direct that court to grant the mandamus.

The facts are stated in the opinion.

Messrs. **Louis Marshall** and **Samuel W. Moore** argued the cause, and, with Mr. Samuel Untermyer, filed a brief for plaintiff in error:

Where, as in this case, a plain duty is imposed upon the Interstate Commerce Commission, and it declines to proceed with its performance, mandamus lies to require it to act.

Interstate Commerce Commission v. United States, 224 U. S. 474, 56 L. ed. 849, 32 Sup. Ct. Rep. 556; Lane v. Hoglund, 244 U. S. 174, 61 L. ed. 1066, 37 Sup. Ct. Rep. 558; Re Simons, 247 U. S. 231, 62 L. ed. 1094, 38 Sup. Ct. Rep. 497; United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 62 L. ed. 914, 38 Sup. Ct. Rep. 408; Ex parte Metropolitan Water Co. 220 U. S. 539, 55 L. ed. 575, 31 Sup. Ct. Rep. 600; Ex parte United States, 242 U. S. 27, 61 L. ed. 129, L.R.A.1917E, 1178, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355; Ex parte Connaway, 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 951; Ketchum Coal Co. v. District Ct. 48 Utah, 342, 4 A.L.R. 619, 159 Pac. 737; 26 Cyc. 190.

The fact that there is no other remedy available to the plaintiff justifies its right to seek relief by mandamus.

Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324; Ex parte Park Square Automobile Station, 244 U. S. 412, 61 L. ed. 1231, 37 Sup. Ct. Rep. 732; Ex parte Roe, 234 U. S. 70, 58 L. ed. 1217, 34 Sup. Ct. Rep. 722; Ex parte Slater, 246 U. S. 128, 62 L. ed. 621, 38 Sup. Ct. Rep. 265; Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176.

The action of the Interstate Commerce Commission in deliberately disregarding the mandate of Congress which required the Commission, in express terms, to investigate and report separately the original and present cost of condemnation and damages or of purchase in excess of the original cost or present value of all lands, right of way, and terminals owned or used for the purposes of a common carrier, offends the fundamental canons of statutory construction.

Lewis's Sutherland, Stat. Constr. § 85; Cope v. Cope, 137 U. S. 682, 685, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222; Dewey v. United States, 178 U. S. 510, 521, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981; Washington Market Co. v. Hoffman, 101 U. S. 115, 25 L. ed. 782; United States v. Lexington Mills & Elevator Co. 232 U. S. 399, 58 L. ed. 658, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; Palmer v. Van Santvoord, 153 N. Y. 616, 38 L.R.A. 402, 47 N. E. 915; United States v. Gooding, 12 Wheat. 460, 6 L. ed. 693; Early v. Doe, 16 How. 616, 14 L. ed. 1081; Rice v. Minnesota & N. W. R. Co. 1 Black, 379, 17 L. ed. 153; Platt v. Union P. R. Co. 99 U. S. 59, 25 L. ed. 427; United States v. Fisher, 109 U. S. 143, 27 L. ed. 885, 3 Sup. Ct. Rep. 154; Knight v. United Land Asso. 142 U. S.

161, 177, 35 L. ed. 974, 979, 12 Sup. Ct. Rep. 258; Petri v. Commercial Nat. Bank, 142 U. S. 649, 650, 35 L. ed. 1145, 1146, 12 Sup. Ct. Rep. 325; United States v. Oregon & C. R. Co. 164 U. S. 540, 41 L. ed. 545, 17 Sup. Ct. Rep. 165; Barrett v. United States, 169 U. S. 228, 42 L. ed. 726, 18 Sup. Ct. Rep. 327; Brunswick Terminal Co. v. National Bank, 192 U. S. 386, 396, 48 L. ed. 491, 495, 24 Sup. Ct. Rep. 314; United States v. United Verde Copper Co. 196 U. S. 207, 213, 49 L. ed. 449, 451, 25 Sup. Ct. Rep. 222; Blair v. Chicago, 201 U. S. 400, 466, 467, 50 L. ed. 801, 828, 829, 26 Sup. Ct. Rep. 427; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Klauber v. San Diego Street Car Co. 95 Cal. 353, 30 Pac. 556; The Harriman, 9 Wall. 172, 19 L. ed. 633; Reid v. Alaska Packing Co. 43 Or. 429, 73 Pac. 339; Hare, Contr. 639.

The Commission having found the average acreage market value of adjacent lands, and having applied it to the plaintiff's right of way, and the plaintiff having accepted this finding, it is an easy and simple process to find the present cost of condemnation and damages or of purchase, and the Commission should be required to do so.

United States v. Grizzard, 219 U. S. 180, 183, 184, 55 L. ed. 165, 166, 31 L.R.A. (N.S.) 1135, 31 Sup. Ct. Rep. 162; Bauman v. Ross, 167 U. S. 548, 574, 42 L. ed. 270, 283, 17 Sup. Ct. Rep. 966; United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 320; South Buffalo R. Co. v. Kirkover, 176 N. Y. 304, 68 N. E. 366; Lincoln v. Com. 164 Mass. 368, 41 N. E. 489; Hamilton County v. Garrett, 62 Tex. 602; Kansas City Southern R. Co. v. Second Street Improv. Co. 256 Mo. 386, 166 S. W. 296; St. Louis, I. M. & S. R. Co. v. Theodore Maxfield Co. 94 Ark. 135, 26 L.R.A.(N.S.) 1111, 126 S. W. 83; Wichita Falls & N. W. R. Co. v. Munsell, 38 Okla. 256, 132 Pac. 906; Kansas Postal Teleg. Cable Co. v. Leavenworth Terminal R. & Bridge Co. 89 Kan. 418, 131 Pac. 143.

Problems much more serious have been overcome.

Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; Schell v. Plumb, 55 N. Y. 592; Dennis v. Maxfield, 10 Allen, 138; Simpson v. London & N. W. R. Co. L. R. 1 Q. B. Div. 274, 45 L. J. Q. B. N. S. 182, 33 L. T. N. S. 805, 24 Week. Rep. 294.

Messrs. W. G. Brantley, Sanford Robinson, and Leslie Craven filed a brief as amici curiæ:

The Commission cannot question the wisdom of Congress, nor can it refuse to perform the duty imposed unless such performance is absolutely impossible.

The Harriman, 9 Wall. 172, 19 L. ed. 633; Beebe v. Johnson, 19 Wend. 500, 32 Am. Dec. 518; Hare, Contr. 639.

The ruling in the Minnesota Rate Cases, considered as a ruling upon a principle of constitutional law, does not affect the duty of the Commission to perform the acts specified in the Valuation Act.

Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Kansas City Southern R. Co. v. United States, 231 U. S. 423, 58 L. ed. 296, 52 L.R.A.(N.S.) 1, 34 Sup. Ct. Rep. 125; Northern P. R. Co. v. North American Teleg. Co. L.R.A.1916E, 572, 144 C. C. A. 489, 230 Fed. 347.

The present cost of condemnation and damages or of purchase of railroad lands can be readily and accurately ascertained in accordance with established legal precedents.

Lewis, Em. Dom. 3d ed. chap. 20; United States v. Grizzard, 219 U. S. 180. 183, 184, 55 L. ed. 165, 166, 31 L.R.A. (N.S.) 1135, 31 Sup. Ct. Rep. 162; Lincoln v. Com. 164 Mass. 368, 41 N. E. 489; Rock Island & E. I. R. Co. v. Gordon, 184 Ill. 456, 56 N. E. 810; 15 Cyc. 722, 723; Lewis, Em. Dom. 3d ed. 705; Sutherland, Damages, ¶ 1083; Faulk v. Missouri River & N. W. R. Co. 28 S. D. 1, 132 N. W. 233, Ann. Cas. 1913E, 1130; Blue Earth County v. St. Paul & S. C. R. Co. 28 Minn. 503, 11 N. W. 73.

Mr. **P. J. Farrell** argued the cause and filed a brief for defendant in error:

To estimate the present cost of condemnation and damages or of purchase of lands included in appellant's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do.

Silsby Mfg. Co. v. Allentown, 153 Pa. 319, 26 Atl. 646.

The decision of this court in the Minnesota Rate Cases is directly in point, and should be given controlling influence.

Chicago & N. W. R. Co. v. Smith, 210 Fed. 632; Louisville & N. R. Co. v. Railroad Commission, 208 Fed. 42; Ann Arbor R. Co. v. Fellows, P.U.R.1917B, 523, 236 Fed. 392.

This court has approved the Commission's interpretation of the court's decision in the Minnesota Rate Cases.

Denver v. Denver Union Water Co. 246 U. S. 178, 62 L. ed. 649, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278.

Mr. Chief Justice White delivered the opinion of the court:

The Act of Congress of March 1, 1913 (37 Stat. at L. 701, chap. 92, Comp. Stat. § 8591, 4 Fed. Stat. Anno. 2d ed. p. 495), amending the Act to Regulate Commerce, imposed the duty upon the Interstate Commerce Commission (§ 19a) to "investigate, ascertain, and report the value of all property owned or used by every common carrier subject to the provisions of this act." Specifying the steps to be taken in the performance of the general duties thus imposed, the same section commanded as follows:

"First. In such investigation said Commission shall ascertain and report in detail as to each piece of property owned or used by said carrier for its purposes as a common carrier . . . the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reasons for their differences, if any . . . . . .

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

. . . . . .

"Fifth. . . . [7th and 8th par.] Whenever the Commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the Commission shall give notice by registered letter to the said carrier, . . . stating the valuation placed upon the several [183] classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the Commission. . . .

"If notice of protest is filed the Commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto . . . All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to Regulate Commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the act approved February 4th, 1887, commonly known as 'the Act to Regulate Commerce,' and the various acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Pursuant to these requirements the Commission proceeded to investigate and report the value of the property of the Kansas City Southern Railway Company. Upon completing a tentative valuation, the Commission gave the notice required by the statute to the railway company, which thereupon filed a protest against such valuation on the ground that in making it the Commission had failed to consider and include the "present cost of condemnation and damages or of purchase in excess of such original cost or present value." Upon the subject of the protest, the railway company took a large amount of testimony, and much was also taken by the Commission, both parties having incurred considerable expense in the matter.

Pending this situation, in order that the excessive expense of taking each individual parcel and showing what it would cost to acquire it or a right of way over it by purchase or condemnation might be avoided, an agreement [184] was entered into between the Director of the Bureau of Valuation of the Commission, C. A. Prouty, and the railway company, that in the event the Commission should decide that evidence upon the cost of acquiring land by purchase or condemnation would be received by it, the Bureau of Valuation would recommend to the Commission the percentage or multiplier of the naked value of the land, to be used for the purpose of reaching the railway cost of acquiring the same.

At that time there was also pending a protest concerning a tentative valuation made by the Commission as to the property of the Texas Midland Railroad Company, raising the same ques-

tion as to error committed in failing to carry out the provisions of the statute concerning the present cost of condemnation, etc., in which case the Commission overruled the protest, holding that the provision of the statute in question was not susceptible of being enforced or acted upon for reasons stated by the Commission in part as follows (1 Val. Rep. pp. 54 et seq.):

"However, the direction in paragraph entitled 'Second' for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of reproduction of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again, it is to be taken as not existent. It seems sophistry to contend that the lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

"Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier to pay sums in excess of the value of [185] the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes, and various incidental rights.

. . . . . .

"We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court [in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18] as beyond the possibility of rational determination; nor is there any essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment is clear.

. . . . . .

"Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto."

Applying the ruling thus made to the protest which was pending in this case, the Commission gave notice to the railway that the agreement made with the Director of the Bureau of Valuation concerning the method of proof would be treated as not further operative; and thereafter, when an offer was made by the railway before an examiner [186] of the Commission of further testimony concerning the subject in hand, it was excluded because in conflict with the ruling announced in the Midland Case. The Commission sustained this action of the examiner on the ground that that officer had rightly held that the ruling in the Midland Case was controlling; and the Commission therefore decided that no further testimony on the particular subject would be heard in this case, and that it would make no report concerning that subject.

This suit was then brought to obtain a mandamus to compel the Commission to hear the proof and act upon it under the statute. The amended petition, after reciting the facts as we have outlined them and making the appropriate formal averments to justify resort to mandamus, alleged:

"That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but $60,000 with respect to parcels of land acquired by relator by judicial award in condemnation proceedings during four years immediately preceding such valuation at an actual cost to relator of $180,000; and in the aggregate will result in a finding with respect to said lands at least $5,000,000 less than the value so directed by the act of Congress above mentioned to be found."

It was further averred, with consid-

erable elaboration, that the petitioner stood ready to produce proof to meet the requirements of the statute which was neither speculative nor impossible to be acted upon, since it would conform to the character of proof usually received in judicial proceedings involving the exercise of eminent domain.

The Commission in its answer, either stating or conceding [187] the history of the case as we have recited it, and summarily reiterating the grounds for the refusal by the Commission to receive the proof or report concerning it, challenged the right to the relief sought. A demurrer to the answer as stating no defense was overruled by the trial court, which denied relief without opinion. In the court of appeals, two judges sitting, the judgment of the trial court was affirmed by a divided court, also without opinion, and the case is here on writ of error to review that judgment.

It is obvious from the statement we have made, as well as from the character of the remedy invoked,—mandamus,—that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the nonaction of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.

It is true that the Commission held that its nonaction was caused by the fact that the command of the statute involved a consideration by it of matters "beyond the possibility of rational determination," and called for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," and that such conclusions were the necessary consequence of the Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken [188] conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the Minnesota Rate Cases, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the Minnesota Rate ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest though it be borne in mind that the Minnesota Rate Cases were decided after the passage of the act in question.

Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof, and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise.

The judgment of the Court of Appeals is therefore reversed with directions to reverse that of the Supreme Court, and direct the Supreme Court to grant a writ of mandamus in conformity with this opinion.

---

[189] MARK EISNER, as Collector of United States Internal Revenue for the Third District of the State of New York, Plff. in Err.,

v.

MYRTLE H. MACOMBER.

(See S. C. Reporter's ed. 189–238.)

Internal revenue — income tax — stock dividends.

1. Congress was given no power by the income tax amendment to the Federal Constitution to tax, without apportionment, as income of a stockholder in a cor-

poration, a stock dividend made lawfully and in good faith against accumulated profits earned by the corporation since the adoption of such amendment. Such dividends are not income.

[For other cases, see Internal Revenue, I. b; III. b, in Digest Sup. Ct. 1908.]

Internal revenue — construction of income tax amendment — apportionment of direct tax.

2. The income tax amendment to the Federal Constitution should not be extended by loose construction so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal.

[For other cases, see Internal Revenue, I. b; III. b, in Digest Sup. Ct. 1908.]

Internal revenue — apportionment of direct tax — stockholder's interest in undivided profits.

3. The constitutional inhibition against the taxation by Congress without apportionment of a stockholder's interest in the undivided accumulated earnings of a corporation is not removed by the adoption of the income tax amendment.

[For other cases, see Internal Revenue, I. b; III. b, in Digest Sup. Ct. 1908.]

[No. 318.]

Argued April 16, 1919. Restored to docket for reargument May 19, 1919. Reargued October 17 and 20, 1919. Decided March 8, 1920.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action against a collector of internal revenue to recover back the amount of an income tax paid on a stock dividend. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Frierson argued the cause and filed a brief for plaintiff in error:

Income, in general, as used in both the Corporation Excise Tax Law of 1909 and the Income Tax Law of 1913, has been defined as the gain derived from capital, from labor, or from both combined.

Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 183, 185, 62 L. ed. 1058, 1059, 38 Sup. Ct. Rep. 467.

Stockholders have such an interest in the earnings and profits of a corporation that the same are within the power of Congress to tax as income even before they are divided.

Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. 1, 20 L. ed. 272; Southern P. Co. v. Lowe, 247 U. S. 330, 336, 62 L. ed. 1142, 1147, 38 Sup. Ct. Rep. 540; Lynch v. Turrish, 247 U. S. 221, 228, 62 L. ed. 1087, 1092, 38 Sup. Ct. Rep. 537; Bailey v. New York C. & H. R. R. Co. 22 Wall. 604, 635, 636, 22 L. ed. 840, 848, 849; Lynch v. Hornby, 247 U. S. 339, 343, 62 L. ed. 1149, 1151, 38 Sup. Ct. Rep. 543.

Congress having the right to tax undivided profits, this right cannot be destroyed by the issuance of stock certificates to represent such undivided profits, and since the certificates of stock issued in this case represent earnings of the corporation accruing subsequent to March 1, 1913, they are clearly made taxable as income by the Act of 1916.

Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152, 38 Sup. Ct. Rep. 546; Bailey v. New York C. & H. R. R. Co. 22 Wall. 604, 635, 22 L. ed. 840, 848; Swan Brewery Co. v. Rex [1914] A. C. 234, 83 L. J. P. C. N. S. 134, 110 L. T. N. S. 211, 30 Times L. R. 199.

Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158, does not control this case.

(1) That case merely decides that the stock dividends then before the court, paid out of earnings accruing prior to March 1, 1913, were not income within the meaning of the Act of 1913. Nothing said in the opinion can be construed as challenging the power of Congress to tax, as the income of stockholders, the profits of a corporation even before they are divided, and much less to tax a certificate of stock issued to represent such profits.

(2) The most that can be said of the opinion is that it holds that the term "dividend," in its ordinary acceptation, does not include stock dividends, and that since the Act of 1913 used the term "dividend" without qualification, stock dividends were not taxable under it.

Gibbons v. Mahon, 136 U. S. 549, 559, 560, 34 L. ed. 525, 527, 528, 10 Sup. Ct. Rep. 1057.

(3) The Act of 1916, however, expressly taxes stock dividends, and hence Towne v. Eisner, supra, is not controlling.

Note.—On stock dividends as income—see notes to Towne v. Eisner, L.R.A. 1918D, 254; Trefry v. Putnam, L.R.A. 1917F, 814; Re Heaton, L.R.A.1916D, 211; Re Osborne, 50 L.R.A.(N.S.) 510; Newport Trust Co. v. Van Rensselaer, 35 L.R.A.(N.S.) 563; and Holbrook v. Holbrook, 12 L.R.A.(N.S.) 768.

See also note to this case as reported in 9 A.L.R. 1594.

The case of Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543, holding that cash dividends are to be treated as income for the year in which received, whether paid out of earnings accruing before or after March 1, 1913, in view of the reasons stated for the holding, would not have been inconsistent with a holding that stock dividends were taxable when representing earnings accruing after March 1, 1913, but not taxable when representing earnings accruing before that date. But whether such holdings would have been inconsistent or not, the holding in Lynch v. Hornby, supra, is not controlling in this case, since the Act of 1916 makes it plain that dividends, whether paid in cash or stock, are to be taxed only when they represent earnings accruing after March 1, 1913.

While Gibbons v. Mahon, supra, holds that, as between a life tenant and a remainderman, stock dividends are not income, that case arose in the District of Columbia, involves no Federal question, and is not controlling in similar cases arising in the state courts. As a matter of fact, most of the state courts have adopted a different ruling and hold that stock dividends are income. In the Act of 1916, therefore, Congress was clearly within its power when it declared that by "dividends" it meant either cash or stock dividends, in accordance with the meaning of the term as understood and construed by the courts of most of the states.

Pritchitt v. Nashville Trust Co. 96 Tenn. 472, 33 L.R.A. 856, 36 S. W. 1064; Thomas v. Gregg, 78 Md. 545, 28 Atl. 565; McLouth v. Hunt, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548; Pabst's Will, 146 Wis. 330, 131 N. W. 739; Lord v. Brooks, 52 N. H. 72; Hite v. Hite, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; Moss's Appeal, 83 Pa. 264, 24 Am. Rep. 164; Paris v. Paris, 10 Ves. Jr. 185, 32 Eng. Reprint, 815; Tax. Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904; Re Osborne, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298; Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6.

Mr. Charles E. Hughes argued the cause, and, with Mr. George Welwood Murray, filed a brief for defendant in error:

The tax is sought to be laid upon the property in question solely by reason of ownership, and cannot be sustained unless it is authorized by the 16th Amendment.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 637, 39 L. ed. 1108, 1125, 15 Sup. Ct. Rep. 912; Brushaber v. Union P. R. Co. 240 U. S. 1, 18, 19, 60 L. ed. 493, 501, 502, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 182, 183, 62 L. ed. 1054, 1058, 1059, 38 Sup. Ct. Rep. 467; Hays v. Gauley Mountain Coal Co. 247 U. S. 189, 191, 192, 62 L. ed. 1061–1063, 38 Sup. Ct. Rep. 470; Stanton v. Baltic Min. Co. 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278; William E. Peck & Co. v. Lowe, 247 U. S. 165, 172, 62 L. ed. 1049, 1050, 38 Sup. Ct. Rep. 432; Southern P. Co. v. Lowe, 247 U. S. 330, 335, 62 L. ed. 1142, 1147, 38 Sup. Ct. Rep. 540.

The fundamental fact is that there was no gain or income to the defendant in error by virtue of the receipt of the additional shares constituting the stock dividend. The value of the shares held by the defendant in error was not increased by the increase in the number of shares. The shareholder was no richer than before.

Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

The tax cannot be sustained as a tax laid upon the shareholder's interest in the undivided profits of the corporation. Apart from the serious question of the validity of such a tax, as an income tax, that was not the scheme of the act. It is sought to lay the tax in question upon the so-called "stock dividend" per se; that is, upon the mere readjustment of the evidence of a capital interest already owned.

Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. 1, 20 L. ed. 272; Gibbons v. Mahon, 136 U. S. 549, 560, 34 L. ed. 525, 527, 10 Sup. Ct. Rep. 1057; Michigan C. R. Co. v. Collector (Michigan C. R. Co. v. Slack) 100 U. S. 595, 598, 25 L. ed. 647, 648; United States v. Erie R. Co. 106 U. S. 327, 329–331, 27 L. ed. 151, 154, 1 Sup. Ct. Rep. 223; Barnes v. Philadelphia & R. R. Co. 17 Wall. 294, 309, 319, 21 L. ed. 544, 548, 551; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 329, 337, 22 L. ed. 348, 350, 353; Bailey v. New York C. & H. R. R. Co. 22 Wall.

604, 22 L. ed. 840; Bailey v. New York C. & H. R. R. Co. 106 U. S. 109, 27 L. ed. 81, 1 Sup. Ct. Rep. 62; Memphis & C. R. Co. v. United States, 108 U. S. 228, 234, 27 L. ed. 711, 713, 2 Sup. Ct. Rep. 482; United States v. Louisville & N. R. Co. 33 Fed. 831; Pollock v. Farmers' Loan & T. Co. 157 U. S. 578, 636, 639, 39 L. ed. 818, 838, 839, 15 Sup. Ct. Rep. 673; Southern P. Co. v. Lowe, 247 U. S. 330, 336, 62 L. ed. 1142, 1147, 38 Sup. Ct. Rep. 540; Hylton v. United States, 3 Dall. 171, 1 L. ed. 556; Pacific Ins. Co. v. Soule, 7 Wall. 433, 443, 19 L. ed. 95, 98; Veazie Bank v. Fenno, 8 Wall. 533, 541, 546, 19 L. ed. 482, 485, 487; Brushaber v. Union P. R. Co. 240 U. S. 1, 19, 60 L. ed. 493, 502, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

So far as the present question is concerned, the word "income" in the 16th Amendment has no broader meaning than the word "income" in the Income Tax Act of 1913, under which the question arose in the Towne Case.

Towne v. Eisner, supra; Lynch v. Hornby, 247 U. S. 344, 345, 62 L. ed. 1151, 1152, 38 Sup. Ct. Rep. 543; Swan Brewery Co. v. Rex [1914] A. C. 231, 83 L. J. P. C. N. S. 134, 110 L. T. N. S. 211, 30 Times L. R. 199; Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904.

Stock dividends of the sort here in question are not income within the meaning of the 16th Amendment.

People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 438, 12 L.R.A. 762, 27 N. E. 818; Kaufman v. Charlottesville Woolen Mills Co. 93 Va. 675, 25 S. E. 1003; Williams v. Western U. Teleg. Co. 93 N. Y. 189; De Koven v. Alsop, 205 Ill. 309, 63 L.R.A. 587, 68 N. E. 930; Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789; Spooner v. Phillips, 62 Conn. 68, 16 L.R.A. 461, 24 Atl. 524; Green v. Bissell, 79 Conn. 551, 8 L.R.A.(N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1056, 9 Ann. Cas. 287; Terry v. Eagle Lock Co. 47 Conn. 141; Brinley v. Grou, 50 Conn. 66, 47 Am. Rep. 617; Bouch v. Sproule, L. R. 12 App. Cas. 385, 56 L. J. Ch. N. S. 1037, 57 L. T. N. S. 345, 36 Week. Rep. 193; Jones v. Evans [1913] 1 Ch. 23, 82 L. J. Ch. N. S. 12, 107 L. T. N. S. 604, 57 Sol. Jo. 60, 19 Manson, 397; Carson v. Carson [1915] 1 Ir. R. 321; Guinness v. Guinness, 6 Sc. Sess. Cas. 5th series, 104; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Davis v. Jackson, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; D'Ooge v. Leeds, 176 Mass. 558, 57 N. E. 1025; Hyde v. Holmes, 198 Mass. 287, 84 N. E. 318; Brown's Petition, 14 R. I. 373, 51 Am. Rep. 397; Billings v. Warren, 216 Ill. 281, 74 N. E. 1050; Lancaster Trust Co. v. Mason, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235; Great Western Min. & Mfg. Co. v. Harris, 63 C. C. A. 51, 128 Fed. 326; Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; Latimer v. United States, 223 U. S. 501, 504, 56 L. ed. 526, 527, 32 Sup. Ct. Rep. 242.

A genuine dividend constitutes a debt between the corporation and the shareholders.

King v. Paterson & H. R. R. Co. 29 N. J. L. 504; Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Stoddard v. Shetucket Foundry Co. 34 Conn. 542.

Once declared, it may not be rescinded.

Beers v. Bridgeport Spring Co. 42 Conn. 17; Staats v. Biograph Co. L.R.A. 1917B, 728, 149 C. C. A. 506, 236 Fed. 454.

And an action may be brought on the debt.

King v. Paterson & H. R. R. Co. 29 N. J. L. 504; Hunt v. O'Shea, 69 N. H. 600, 45 Atl. 480; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Stoddard v. Shetucket Foundry Co. 34 Conn. 542.

There has been a general agreement that stock dividends declared during a trust life estate, which are based on earnings made by the corporation prior to the creation of the trust, are not income, —a position fatal to the contention that stock dividends are income per se.

Re Osborne, 209 N. Y. 477, 50 L.R.A. (N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298; Day v. Faulks, 81 N. J. Eq. 173, 88 Atl. 384.

When the cash dividend is declared and the amount is received, the shareholder obtains something which he owns and which he may reinvest or not, as he pleases. He receives property in his exclusive ownership, and he exercises the freedom of choice. In the case of a stock dividend he obtains nothing but an evidence of what he already owns; he has no freedom to invest or not invest; and the investment is permanently capitalized.

Davis v. Jackson, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21.

Income may be defined as the gain derived from capital, from labor, or from both combined.

Stratton's Independence v. Howbert,

231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 185, 62 L. ed. 1054, 1059, 38 Sup. Ct. Rep. 467; Seligman, Income Tax, p. 19.

Of course it is not denied that income may be in the form of property, although it is well settled that, in construing an Income Tax Act, income is taken to mean money in the absence of any special provision of law to the contrary, and not the mere expectation of receiving it (United States v. Schillinger, 14 Blatchf. 71, Fed. Cas. No. 16,228). If, however, the act reaches property, and not simply money, it must still be property that constitutes gain or income. It is not income simply because it is property.

The courts have always recognized that mere appreciation in value of capital assets is not to be called income.

Gray v. Darlington, 15 Wall. 63, 66. 21 L. ed. 45, 46; Lynch v. Turrish, 247 U. S. 221, 231, 62 L. ed. 1087, 1093, 38 Sup. Ct. Rep. 537; Baldwin Locomotive Works v. McCoach, 136 C. C. A. 660, 221 Fed. 59; Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543; Tebrau (Johore) Rubber Syndicate v. Farmer, S. T. 5 Income Tax Cas. 658; Stevens v. Hudson Bay Co. 5 Income Tax Cas. 424; Assets Co. v. Inland Revenue, 4 Sc. Sess. Cas. 4th series, p. 578.

Messrs. George W. Wickersham and Charles Robinson Smith filed a brief as amici curiæ:

The principle laid down by this court in two well-considered cases (Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057, and Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158), that stock dividends represent capital, and do not constitute income, is based on sound economic reasoning.

Seligman, Principles of Economics, 7th ed. pp. 16, 17; Fisher, Nature of Capital & Income, p. 103; Seligman, Are Stock Dividends Income? reprinted from September. 1919, number of American Economic Review; 3 Bulletin of National Tax Asso. April-June, 1918, pp. 161, 237, 240.

If gains in general and paper gains may properly be considered income, then this would hold true of mere appreciation in value of real estate or of personal property that is not sold,—a gain that is not realized. But this sort of appreciation or gain in capital value can never constitute income within the 16th Amendment.

Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Lynch v. Turrish, 247 U. S. 221, 231, 62 L. ed. 1087, 1093, 38 Sup. Ct. Rep. 537; Baldwin Locomotive Works v. McCoach, 136 C. C. A. 660, 221 Fed. 59; Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

It cannot be doubted that the sort of gain referred to by this court as constituting income was a realized gain,—not the gain of mere appreciation in value.

Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 183, 185, 62 L. ed. 1058, 1059, 38 Sup. Ct. Rep. 467.

In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.

Gould v. Gould, 245 U. S. 151, 153, 62 L. ed. 211, 213, 38 Sup. Ct. Rep. 53.

Language used in a statute which has a settled and well-known meaning sanctioned by judicial decision is presumed to be used in that sense by the legislative body.

Latimer v. United States, 223 U. S. 501, 504, 56 L. ed. 526, 527, 32 Sup. Ct. Rep. 242; Kepner v. United States, 195 U. S. 100, 124, 49 L. ed. 114, 122, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; The Abbottsford, 98 U. S. 440, 25 L. ed. 168.

Mr. Justice **Pitney** delivered the opinion of the court:

This case presents the question whether, by virtue of the 16th Amendment, Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.

It arises under the Revenue Act of September 8, 1916 (chap. 463, 39 Stat. at L. 756 et seq., Comp. Stat. § 6336a, Fed. Stat. Anno. Supp. 1918, p. 312), which, in our opinion (notwithstanding a contention of the government that will be [200] noticed), plainly evinces the purpose of Congress to tax stock dividends as income.[1]

[1] Title I.—Income Tax.

Part I.—On Individuals.

Sec. 2 (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income de-

The facts, in outline, are as follows: On January 1, 1916, the Standard Oil Company of California, a corporation of that state, out of an authorized capital stock of $100,000,000, had shares of stock outstanding, par value $100 each, amounting in round figures to $50,000,000. In addition, it had surplus and undivided profits invested in plant, property, and business, and required for the purposes of the corporation, amounting to about $45,000,000, of which about $20,000,000 had been earned prior to March 1, 1913, the balance thereafter. In January, 1916, in order to readjust the capitalization, the board of directors decided to issue additional shares sufficient to constitute a stock dividend of 50 per cent of the outstanding stock, and to transfer from surplus account to capital stock account an amount equivalent to such issue. Appropriate resolutions were adopted, an amount equivalent to the par value of the proposed new stock was transferred accordingly, and the new stock duly issued against it and divided among the stockholders.

Defendant in error, being the owner of 2,200 shares of the old stock, received certificates for 1,100 additional [201] shares, of which 18.07 per cent, or 198.77 shares, par value $19,877, were treated as representing surplus earned between March 1, 1913, and January 1, 1916. She was called upon to pay, and did pay under protest, a tax imposed under the Revenue Act of 1916, based upon a supposed income of $19,877 because of the new shares; and an appeal to the commissioner of internal revenue having been disallowed, she brought action against the collector to recover the tax. In her complaint she alleged the above facts, and contended that in imposing such a tax the Revenue Act of 1916 violated art. 1, § 2, cl. 3, and art. 1, § 9, cl. 4, of the Constitution of the United States, requiring direct taxes to be apportioned according to population, and that the stock dividend was not income within the meaning of the 16th Amendment. A general demurrer to the complaint was overruled upon the authority of Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158; and, defendant having failed to plead further, final judgment went against him. To review it, the present writ of error is prosecuted.

The case was argued at the last term, and reargued at the present term, both orally and by additional briefs.

We are constrained to hold that the judgment of the district court must be affirmed: First, because the question at issue is controlled by Towne v. Eisner, supra; secondly, because a re-examination of the question, with the additional light thrown upon it by elaborate arguments, has confirmed the view that the underlying ground of that decision is sound, that it disposes of the question here presented, and that other fundamental considerations lead to the same result.

In Towne v. Eisner, the question was whether a stock dividend made in 1914 against surplus earned prior to January 1, 1913, was taxable against the stockholder under the Act of October 3, 1913 (chap. 16, 38 Stat. at L. 114, 166, Comp. Stat. § 5291, 2 Fed. Stat. Anno. 2d ed. p. 724), which provided (§ B, p. 167) that net income should include "dividends," and also "gains or profits and income derived [202] from any source whatever." Suit having been brought by a stockholder to recover the tax assessed against him by reason of the dividend, the district court sustained a demurrer to the complaint. 242 Fed. 702. The court treated the construction of the act as inseparable from the interpretation of the 16th Amendment; and, having referred to Income Tax Cases (Pollock v. Farmers' Loan & T. Co.) 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, and quoted the Amendment, proceeded very properly to say (p. 704): "It is manifest that the stock dividend in question cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income." It declined, however, to accede to the contention that in Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057, "stock dividends" had received a definition sufficiently clear to be controlling, treated the language of this court in that case as obiter dictum in respect of the matter then before it (p. 706), and examined the question as res nova, with the result

rived . . . , also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: Provided, That the term "dividends" as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, . . . which stock dividend shall be considered income, to the amount of its cash value.

stated. When the case came here, after overruling a motion to dismiss, made by the government upon the ground that the only question involved was the construction of the statute, and not its constitutionality, we dealt upon the merits with the question of construction only, but disposed of it upon consideration of the essential nature of a stock dividend, disregarding the fact that the one in question was based upon surplus earnings that accrued before the 16th Amendment took effect. Not only so, but we rejected the reasoning of the district court, saying (245 U. S. p. 426): "Notwithstanding the thoughtful discussion that the case received below, we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. 'A stock dividend really takes nothing from the property of the corporation, and adds nothing to the [203] interests of the shareholders. Its property is not diminished, and their interests are not increased. . . . The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones. Gibbons v. Mahon, 136 U. S. 549, 559, 560, 34 L. ed. 525, 527, 528, 10 Sup. Ct. Rep. 1057. In short, the corporation is no poorer and the stockholder is no richer than they were before. Logan County v. United States, 169 U. S. 255, 261, 42 L. ed. 737, 739, 18 Sup. Ct. Rep. 361. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. . . . What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new."

This language aptly answered not only the reasoning of the district court, but the argument of the Solicitor General in this court, which discussed the essential nature of a stock dividend. And if, for the reasons thus expressed, such a dividend is not to be regarded as "income" or "dividends" within the meaning of the Act of 1913, we are unable to see how it can be brought within the meaning of "incomes" in the 16th Amendment; it being very clear that Congress intended in that act to exert its power to the extent permitted by the Amendment. In Towne v. Eisner it was not contended that any construction of the statute could make it narrower than the constitutional grant; rather the contrary.

The fact that the dividend was charged against profits earned before the Act of 1913 took effect, even before the Amendment was adopted, was neither relied upon nor alluded to in our consideration of the merits in that case. Not only so, but had we considered that a stock dividend constituted income in any true sense, it would have been held taxable under the Act of 1913 notwithstanding it was [204] based upon profits earned before the Amendment. We ruled at the same term, in Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543, that a cash dividend extraordinary in amount, and in Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152, 38 Sup. Ct. Rep. 546, that a dividend paid in stock of another company, were taxable as income although based upon earnings that accrued before adoption of the Amendment. In the former case, concerning "corporate profits that accumulated before the act took effect," we declared (pp. 343, 344): "Just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a pre-existing surplus. . . . Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing." In Peabody v. Eisner (pp. 349, 350), we observed that the decision of the district court in Towne v. Eisner had been reversed "only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest;" and we distinguished the Peabody Case from the Towne Case upon the ground

that "the dividend of Baltimore & Ohio shares was not a stock dividend, but a distribution in specie of a portion of the assets of the Union Pacific."

Therefore, Towne v. Eisner cannot be regarded as turning [205] upon the point that the surplus accrued to the company before the act took effect and before adoption of the Amendment. And what we have quoted from the opinion in that case cannot be regarded as obiter dictum, it having furnished the entire basis for the conclusion reached. We adhere to the view then expressed, and might rest the present case there; not because that case in terms decided the constitutional question, for it did not; but because the conclusion there reached as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense.

Nevertheless, in view of the importance of the matter, and the fact that Congress in the Revenue Act of 1916 declared (39 Stat. at L. 757, chap. 463, Comp. Stat. § 6336b, Fed. Stat. Anno. Supp. 1918, p. 312) that a "stock dividend shall be considered income, to the amount of its cash value," we will deal at length with the constitutional question, incidentally testing the soundness of our previous conclusion.

The 16th Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. In Income Tax Cases (Pollock v. Farmers Loan & T. Co.) 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, under the Act of August, 27, 1894 (chap. 349, § 27, 28 Stat. at L. 509, 553), it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by art. 1, § 2, cl. 3, and § 9, cl. 4, of the original Constitution.

Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the 16th Amendment was adopted, in words lucidly expressing the object to be accomplished: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among [206] the several states, and without regard to any census or enumeration." As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income. Brushaber v. Union P. R. Co. 240 U. S. 1, 17–19, 60 L. ed. 493, 501, 502, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Stanton v. Baltic Min. Co. 240 U. S. 103, 112 et seq., 60 L. ed. 546, 553, 36 Sup. Ct. Rep. 278; William E. Peck & Co. v. Lowe, 247 U. S. 165, 172, 173, 62 L. ed. 1049–1051, 38 Sup. Ct. Rep. 432.

A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

In order, therefore, that the clauses cited from article 1 of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not "income," as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term "income," [207] as used in common speech, in order to determine its meaning in the Amendment; and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

After examining dictionaries in common use (Bouvier's Law Dict.; Standard Dict.; Webster's Int. Dict.; Century Dict.), we find little to add to the suc-

cinct definition adopted in two cases arising under the Corporation Tax Act of August 5, 1909 [36 Stat. at L. 11, chap. 6], (Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; Doyle v. Mitchell Bros. Co. 247 U. S. 179, 185, 62 L. ed. 1054, 1059, 38 Sup. Ct. Rep. 467): "Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case (pp. 183, 185).

Brief as it is, it indicates the characteristic and distinguishing attribute of income, essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived,—*"derived—from—capital,"*—*"the gain—derived—from—capital,"* etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being *"derived,"* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit, and disposal; *that* is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the 16th Amendment —"incomes, *from* whatever *source derived,*"—the essential thought being expressed [208] with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.

Can a stock dividend, considering its essential character, be brought within the definition? To answer this, regard must be had to the nature of a corporation and the stockholder's relation to it. We refer, of course, to a corporation such as the one in the case at bar, organized for profit, and having a capital stock divided into shares to which a nominal or par value is attributed.

Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole,—entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects,—entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself [209] from the company, he can do so only by disposing of his stock.

For bookkeeping purposes, the company acknowledges a liability in form to the stockholders equivalent to the aggregate par value of their stock, evidenced by a "capital stock account." If profits have been made and not divided, they create additional bookkeeping liabilities under the head of "profit and loss," "undivided profits," "surplus account," or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only (excluding, of course, a possible advantageous sale of his stock or winding-up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested.

In the present case, the corporation had surplus and undivided profits invested in plant, property, and business, and required for the purposes of the corporation, amounting to about $45,000,000, in addition to outstanding capital stock of $50,000,000. In this the case is not extraordinary. The profits of a corporation, as they appear upon the balance sheet at the end of the year, need not be in the form of money on hand in excess of what is required to meet current liabilities and finance current operations of the company. Often, especially in a growing business, only a part, sometimes a small part, of the year's profits, is in property capable of division; the remainder having been absorbed in the acquisition of increased plant, [210] equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities. When only a part is available for dividends, the balance of the year's profits is carried to the credit of undivided profits, or surplus, or some other account having like significance. If thereafter the company finds itself in funds beyond current needs, it may declare dividends out of such surplus or undivided profits; otherwise it may go on for years conducting a successful business, but requiring more and more working capital because of the extension of its operations, and therefore unable to declare dividends approximating the amount of its profits. Thus the surplus may increase until it equals or even exceeds the par value of the outstanding capital stock. This may be adjusted upon the books in the mode adopted in the case at bar—by declaring a "stock dividend." This, however, is no more than a book adjustment, in essence not a dividend but rather the opposite; no part of the assets of the company is separated from the common fund, nothing distributed except paper certificates that evidence an antecedent increase in the value of the stockholder's capital interest resulting from an accumulation of profits by the company, but profits so far absorbed in the business as to render it impracticable to separate them for withdrawal and distribution. In order to make the adjustment, a charge is made against surplus account with corresponding credit to the capital stock account, equal to the proposed "dividend;" the new stock is issued against this and the certificates delivered to the existing stockholders in proportion to their previous holdings. This, however, is merely bookkeeping that does not affect the aggregate assets of the corporation or its outstanding liabilities; it affects only the form, not the essence, of the "liability" acknowledged by the corporation to its own shareholders, and this through a readjustment of accounts on one side of the balance sheet only, increasing "capital stock" at the expense of [211] "surplus;" it does not alter the pre-existing proportionate interest of any stockholder, or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before. The new certificates simply increase the number of the shares, with consequent dilution of the value of each share.

A "stock dividend" shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance, and not to form, he has received nothing that answers the definition of income within the meaning of the 16th Amendment.

Being concerned only with the true character and effect of such a dividend when lawfully made, we lay aside the question whether in a particular case a stock dividend may be authorized by the local law governing the corporation, or whether the capitalization of profits may be the result of correct judgment and proper business policy on the part of its management, and a due regard for the interests of the stockholders. And we are considering the taxability of bona fide stock dividends only.

[212] We are clear that not only does a stock dividend really take nothing from the property of the corporation and add

nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not realized or received any income in the transaction.

It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the 16th Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit. But if a shareholder sells dividend stock, he necessarily disposes of a part of his capital interest, just as if he should sell a part of his old stock, either before or after the dividend. What he retains no longer entitles him to the same proportion of future dividends as before the sale. His part in the control of the company likewise is diminished. Thus, if one holding $60,000 out of a total $100,000 of the capital stock of a corporation should receive, in common with other stockholders, a 50 per cent stock dividend, and should sell his part, he thereby would be reduced from a majority to a minority stockholder, having six fifteenths instead of six tenths of the total stock outstanding. A corresponding and proportionate decrease in capital interest and in voting power would befall a minority holder should he sell dividend stock; it being in the nature of things impossible for one to dispose of any part of such an issue without a proportionate disturbance of the distribution of the entire capital stock, and a like diminution of the seller's comparative voting power,—that "right preservative of rights" in the control of a corporation. [213] Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax.

Throughout the argument of the government, in a variety of forms, runs the fundamental error already mentioned,—a failure to appraise correctly the force of the term "income" as used in the 16th Amendment, or at least to give practical effect to it. Thus, the government contends that the tax "is levied on income derived from corporate earnings," when in truth the stockholder has "derived" nothing except paper certificates which, so far as they have any effect, deny him present participation in such earnings. It contends that the tax may be laid when earnings "are received by the stockholder," whereas he has received none; that the profits are "distributed by means of a stock dividend," although a stock dividend distributes no profits; that under the Act of 1916 "the tax is on the stockholder's share in corporate earnings," when in truth a stockholder has no such share, and receives none in a stock dividend; that "the profits are segregated from his former capital, and he has a separate certificate representing his invested profits or gains," whereas there has been no segregation of profits, nor has he any separate certificate representing a personal gain, since the certificates, new and old, are alike in what they represent,—a capital interest in the entire concerns of the corporation.

We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment. But, looking through the form, [214] we cannot disregard the essential truth disclosed; ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal; look upon stockholders as partners, when they are not such; treat them as having in equity a right to a partition of the corporate assets, when they have none; and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized. We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact, but because it is only by recognizing such separateness that any dividend —even one paid in money or property— can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it; and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately and additionally taxed with respect to their several shares even when divided, since if

there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to another.

Conceding that the mere issue of a stock dividend makes the recipient no richer than before, the government nevertheless contends that the new certificates measure the extent to which the gains accumulated by the corporation have made him the richer. There are two insuperable difficulties with this: In the first place, it would depend upon how long he had held the stock whether the stock dividend indicated the extent to which he had been enriched by the operations of the company; unless he had held it throughout such operations, the measure would not hold true. Secondly, and more important for present purposes, enrichment through increase in value [**215**] of capital investment is not income in any proper meaning of the term.

The complaint contains averments respecting the market prices of stock such as plaintiff held, based upon sales before and after the stock dividend, tending to show that the receipt of the additional shares did not substantially change the market value of her entire holdings. This tends to show that in this instance market quotations reflected intrinsic values,—a thing they do not always do. But we regard the market prices of the securities as an unsafe criterion in an inquiry such as the present, when the question must be, not what will the thing sell for, but what is it in truth and in essence.

It is said there is no difference in principle between a simple stock dividend and a case where stockholders use money received as cash dividends to purchase additional stock contemporaneously issued by the corporation. But an actual cash dividend, with a real option to the stockholder either to keep the money for his own or to reinvest it in new shares, would be as far removed as possible from a true stock dividend, such as the one we have under consideration, where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal.

The government's reliance upon the supposed analogy between a dividend of the corporation's own shares and one made by distributing shares owned by it in the stock of another company calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders, while the former does not; and for no citation of authority except Peabody v. Eisner, 247 U. S. 347, 349, 350, 62 L. ed. 1152, 1154, 38 Sup. Ct. Rep. 546.

Two recent decisions, proceeding from courts of high jurisdiction, are cited in support of the position of the government.

[**216**] Swan Brewery Co. v. Rex [1914] A. C. 231, 83 L. J. P. C. N. S. 134, 110 L. T. N. S. 211, 30 Times L. R. 199, arose under the Dividend Duties Act of western Australia, which provided that "dividend" should include "every dividend, profit, advantage, or gain intended to be paid or credited to or distributed among any members or directors of any company," except, etc. There was a stock dividend, the new shares being allotted among the shareholders pro rata; and the question was whether this was a distribution of a dividend within the meaning of the act. The Judicial Committee of the Privy Council sustained the dividend duty upon the ground that, although "in ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend," yet, within the meaning of the act, such new shares were an "advantage" to the recipients. There being no constitutional restriction upon the action of the lawmaking body, the case presented merely a question of statutory construction, and manifestly the decision is not a precedent for the guidance of this court when acting under a duty to test an act of Congress by the limitations of a written Constitution having superior force.

In Tax Comrs. v. Putnam (Trefry v. Putnam) (1917) 227 Mass. 522, L.R.A. 1917F, 806, 116 N. E. 904, it was held that the 44th Amendment to the Constitution of Massachusetts, which conferred upon the legislature full power to tax incomes, "must be interpreted as including every item which by any reasonable understanding can fairly be regarded as income" (pp. 526, 531); and that under it a stock dividend was taxable as income, the court saying (p. 535): "In essence the thing which has been done is to distribute a symbol representing an accumulation of profits, which, instead of being paid out in cash, is invested in the business, thus augmenting its durable assets. In this aspect of the case the substance of the transaction is no different from what it would be if a cash dividend had been declared, with the privilege of subscription to an equivalent amount of new

shares." [217] We cannot accept this reasoning. Evidently, in order to give a sufficiently broad sweep to the new taxing provision, it was deemed necessary to take the symbol for the substance, accumulation for distribution, capital accretion for its opposite; while a case where money is paid into the hand of the stockholder with an option to buy new shares with it, followed by acceptance of the option, was regarded as identical in substance with a case where the stockholder receives no money and has no option. The Massachusetts court was not under an obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction.

Upon the second argument, the government, recognizing the force of the decision in Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158, and virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that, by the true construction of the Act of 1916, the tax is imposed not upon the stock dividend, but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits become manifest through the stock dividend. If so construed, would the act be constitutional?

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court.

The government relies upon The Collector v. Hubbard (Brainard v. Hubbard) (1870) 12 [218] Wall. 1, 17, 20 L. ed. 272, 278, which arose under § 117 of the Act of June 30, 1864 (chap. 173, 13 Stat. at L. 223, 282, Comp. Stat. § 6368, 4 Fed. Stat. Anno. 2d ed. p. 324), providing that "the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise." The court held an individual taxable upon his proportion of the earnings of a corporation although not declared as dividends, and although invested in assets not in their nature divisible. Conceding that the stockholder for certain purposes had no title prior to dividend declared, the court nevertheless said (p. 18): "Grant all that, still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends; that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation they serve to increase the market value of the shares, whether held by the original subscribers or by assignees." In so far as this seems to uphold the right of Congress to tax without apportionment a stockholder's interest in accumulated earnings prior to dividend declared, it must be regarded as overruled by Income Tax Cases (Pollock v. Farmers Loan & T. Co.) 158 U. S. 601, 627, 628, 637, 39 L. ed. 1108, 1122, 1125, 15 Sup. Ct. Rep. 912. Conceding The Collector v. Hubbard was inconsistent with the doctrine of that case, because it sustained a direct tax upon property not apportioned [219] among the states, the government nevertheless insists that the 16th Amendment removed this obstacle, so that now the Hubbard Case is authority for the power of Congress to levy a tax on the stockholder's share in the accumulated profits of the corporation even before division by the declaration of a dividend of any kind. Manifestly this argument must be rejected, since the Amendment applies to income only, and what is called the stockholder's share in the accumulated profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in accumulated profits, nor in any particular part of the

assets of the corporation, prior to dividend declared.

Thus, from every point of view, we are brought irresistibly to the conclusion that neither under the 16th Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend, contravenes the provisions of article 1, § 2, cl. 3, and article 1, § 9, cl. 4, of the Constitution, and to this extent is invalid notwithstanding the 16th Amendment.

Judgment affirmed.

Mr. Justice **Holmes**, dissenting:

I think that Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158, was right in its reasoning and result, and that on sound principles the stock dividend was not income. But it was clearly intimated in that case that the construction of the statute then before the court might be different from that of the Constitution. 245 U. S. 425. I think that the word "incomes" in the 16th Amendment should be read in [**220**] "a sense most obvious to the common understanding at the time of its adoption." Bishop v. State, 149 Ind. 223, 230, 39 L.R.A. 278, 63 Am. St. Rep. 279, 48 N. E. 1038; State ex rel. West v. Butler, 70 Fla. 102, 133, 69 So. 771. For it was for public adoption that it was proposed. M'Culloch v. Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601. The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax. See Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, 532, 533, L.R.A. 1917F, 806, 116 N. E. 904.

Mr. Justice **Day** concurs in this opinion.

Mr. Justice **Brandeis** delivered the following dissenting opinion:

Financiers, with the aid of lawyers, devised long ago two different methods by which a corporation can, without increasing its indebtedness, keep for corporate purposes accumulated profits, and yet, in effect, distribute these profits among its stockholders. One method is a simple one. The capital stock is increased; the new stock is paid up with the accumulated profits; and the new shares of paid-up stock are then distributed among the stockholders pro rata as a dividend. If the stockholder prefers ready money to increasing his holding of the stock in the company, he sells the new stock received as a dividend. The other method is slightly more complicated. Arrangements are made for an increase of stock to be offered to stockholders pro rata at par, and, at the same time, for the payment of a cash dividend equal to the amount which the stockholder will be required to pay to [**221**] the company, if he avails himself of the right to subscribe for his pro rata of the new stock. If the stockholder takes the new stock, as is expected, he may indorse the dividend check received to the corporation and thus pay for the new stock. In order to insure that all the new stock so offered will be taken, the price at which it is offered is fixed far below what it is believed will be its market value. If the stockholder prefers ready money to an increase of his holdings of stock, he may sell his right to take new stock pro rata, which is evidenced by an assignable instrument. In that event the purchaser of the rights repays to the corporation, as the subscription price of the new stock, an amount equal to that which it had paid as a cash dividend to the stockholder.

Both of these methods of retaining accumulated profits while in effect distributing them as a dividend had been in common use in the United States for many years prior to the adoption of the 16th Amendment. They were recognized equivalents. Whether a particular corporation employed one or the other method was determined sometimes by requirements of the law under which the corporation was organized; sometimes it was determined by preferences of the individual officials of the corporation; and sometimes by stock market conditions. Whichever method was employed, the resultant distribution of the new stock was commonly referred to as a stock dividend. How these two methods have been employed may be illustrated by the action in this respect (as reported in Moodys Manual, 1918 Industrial, and the Commercial & Financial Chronicle) of some of the Standard Oil companies, since the disintegration pursuant to the decision of this court in 1911. Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.

(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

(a) Standard Oil Co. (of Indiana), an Indiana corporation. It had on December 31, 1911, $1,000,000 capital stock (all common), and a large surplus. On May 15, 1912, [222] it increased its capital stock to $30,000,000, and paid a simple stock dividend of 2,900 per cent in stock.[1]

(b) Standard Oil Co. (of Nebraska), a Nebraska corporation. It had on December 31, 1911, $600,000 capital stock (all common), and a substantial surplus. On April 15, 1912, it paid a simple stock dividend of 33⅓ per cent, increasing the outstanding capital to $800,000. During the calendar year 1912 it paid cash dividends aggregating 20 per cent; but it earned considerably more, and had at the close of the year again a substantial surplus. On June 20, 1913, it declared a further stock dividend of 25 per cent, thus increasing the capital to $1,000,000.[2]

(c) The Standard Oil Co. (of Kentucky), a Kentucky corporation. It had on December 31, 1913, $1,000,000 capital stock (all common) and $3,701,710 surplus. Of this surplus $902,457 had been earned during the calendar year 1913, the net profits of that year having been $1,002,457 and the dividends paid only $100,000 (10 per cent). On December 22, 1913, a cash dividend of $200 per share was declared payable on February 14, 1914, to stockholders of record January 31, 1914; and these stockholders were offered the right to subscribe for an equal amount of new stock at par, and to apply the cash dividend in payment therefor. The outstanding stock was thus increased to $3,000,000. During the calendar years 1914, 1915, and 1916, quarterly dividends were paid on this stock at an annual rate of between 15 per cent and 20 per cent, but the company's surplus increased by $2,347,614, so that on December 31, 1916, it had a large surplus over its $3,000,000 capital stock. On December 15, 1916, the company issued a circular to the stockholders, saying:

"The company's business for this year has shown a [223] very good increase in volume and a proportionate increase in profits, and it is estimated that by January 1, 1917, the company will have a surplus of over $4,000,000. The board feels justified in stating that if the proposition to increase the capital stock is acted on favorably, it will be proper in the near future to declare a cash dividend of 100 per cent; and to allow the stockholders the privilege pro rata according to their holdings, to purchase the new stock at par, the plan being to allow the stockholders, if they desire, to use their cash dividend to pay for the new stock."

The increase of stock was voted. The company then paid a cash dividend of 100 per cent, payable May 1, 1917, again offering to such stockholders the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor.

Moodys Manual, describing the transaction with exactness, says first that the stock was increased from $3,000,000 to $6,000,000, "a cash dividend of 100 per cent, payable May 1, 1917, being exchanged for one share of new stock, the equivalent of a 100 per cent stock dividend." But later in the report, giving, as customary in the Manual, the dividend record of the company, the Manual says: "A stock dividend of 200 per cent was paid February 14, 1914, and one of 100 per cent on May 1, 1917." And in reporting specifically the income account of the company for a series of years ending December 31, covering net profits, dividends paid, and surplus for the year, it gives, as the aggregate of dividends for the year 1917, $660,000 (which was the aggregate paid on the quarterly cash dividend—5 per cent January and April; 6 per cent July and October); and adds in a note: "In addition a stock dividend of 100 per cent was paid during the year."[3] The Wall Street Journal of [224] May 2, 1917, p. 2, quotes the 1917 "high" price for Standard Oil of Kentucky as "375 ex. stock dividend."

It thus appears that among financiers and investors the distribution of the stock by whichever method effected is called a stock dividend; that the two methods by which accumulated profits are legally retained for corporate purposes and at the same time distributed

[1] Moodys, p. 1544; Commercial & Financial Chronicle, vol. 94, p. 831; vol. 98, pp. 1005, 1076.

[2] Moodys, p. 1548; Commercial & Financial Chronicle, vol. 94, p. 771; vol. 96, p. 1428; vol. 97, p. 1434; vol. 98, p. 1541.

[3] Moodys, p. 1547; Commercial & Financial Chronicle, vol. 97, pp. 1589, 1827, 1903; vol. 98, pp. 76, 457; vol. 103, p. 2348. Poor's Manual of Industrials (1918), p. 2240, in giving the "Comparative Income Account" of the company, describes the 1914 dividend as "Stock dividend paid (200 per cent)—$2,000,000;" and describes the 1917 dividend as "$3,000,000 special cash dividend."

as dividends are recognized by them to be equivalents; and that the financial results to the corporation and to the stockholders of the two methods are substantially the same—unless a difference results from the application of the Federal Income Tax Law.

Mrs. Macomber, a citizen and resident of New York, was, in the year 1916, a stockholder in the Standard Oil Company (of California), a corporation organized under the laws of California and having its principal place of business in that state. During that year she received from the company a stock dividend representing profits earned since March 1, 1913. The dividend was paid by direct issue of the stock to her according to the simple method described above, pursued also by the Indiana and Nebraska companies. In 1917 she was taxed under the Federal law on the stock dividend so received at its par value of $100 a share, as income received during the year 1916. Such a stock dividend is income as distinguished from capital, both under the law of New York and under the law of California; because in both states every dividend representing profits is deemed to be income, whether paid in cash or in stock. It had been so held in New York, where the question arose as between life tenant and remainderman (Lowery v. Farmers' Loan & T. Co. 172 N. Y. 137, 64 N. E. 796; Re Osborne, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298); and also, where the question arose in matters of taxation (People ex rel. Pullman Co. v. Glynn, 130 [225] App. Div. 332, 114 N. Y. Supp. 460, 198 N. Y. 605, 92 N. E. 1097). It has been so held in California, where the question appears to have arisen only in controversies between life tenant and remainderman. Re Duffill, — Cal. —, 183 Pac. 337.

It is conceded that if the stock dividend paid to Mrs. Macomber had been made by the more complicated method pursued by the Standard Oil Company of Kentucky, that is, issuing rights to take new stock pro rata and paying to each stockholder simultaneously a dividend in cash sufficient in amount to enable him to pay for this pro rata of new stock to be purchased, the dividend so paid to him would have been taxable as income, whether he retained the cash or whether he returned it to the corporation in payment for his pro rata of new stock. But it is contended that, because the simple method was adopted of having the new stock issued direct to the stockholders as paid-up stock, the new stock is not to be deemed income, whether she retained it or converted it into cash by sale. If such a different result can flow merely from the difference in the method pursued, it must be because Congress is without power to tax as income of the stockholder either the stock received under the latter method or the proceeds of its sale; for Congress has, by the provisions in the Revenue Act of 1916, expressly declared its purpose to make stock dividends, by whichever method paid, taxable as income.

The 16th Amendment, proclaimed February 25, 1913, declares:

"The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

The Revenue Act of September 8, 1916, chap. 463, 39 Stat. at L. 756, 757, Comp. Stat. §§ 6336a, 6336b, Fed. Stat. Anno. Supp. 1918, pp. 312, 314, provided:

"That the term 'dividends,' as used in this title, shall [226] be held to mean any distribution made or ordered to be made by a corporation, . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, . . . which stock dividend shall be considered income, to the amount of its cash value."

Hitherto powers conferred upon Congress by the Constitution have been liberally construed, and have been held to extend to every means appropriate to attain the end sought. In determining the scope of the power the substance of the transaction, not its form, has been regarded. Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102; M'Culloch v. Maryland, 4 Wheat. 316, 407, 415, 4 L. ed. 579, 601, 603; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. ed. 678, 688; Craig v. Missouri, 4 Pet. 410, 433, 7 L. ed. 903, 911; Jarrolt v. Moberly, 103 U. S. 580, 585, 587, 26 L. ed. 492-494; Legal Tender Case, 110 U. S. 421, 444, 28 L. ed. 204, 213, 4 Sup. Ct. Rep. 122; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 58, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; United States v. Realty Co. 163 U. S. 427, 440, 441, 442, 41 L. ed. 215, 219, 220, 16 Sup. Ct. Rep. 1120; South Carolina v. United States, 199 U. S. 437, 448, 449, 50 L. ed. 261, 264, 265, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737. Is there anything in the phraseology of

the 16th Amendment or in the nature of corporate dividends which should lead to a departure from these rules of construction and compel this court to hold that Congress is powerless to prevent a result so extraordinary as that here contended for by the stockholder?

First: The term "income," when applied to the investment of the stockholder in a corporation, had, before the adoption of the 16th Amendment, been commonly understood to mean the returns from time to time received by the stockholder from gains or earnings of the corporation. A dividend received by a stockholder from a corporation may be either in distribution of capital assets or in distribution of profits. Whether it is the one or the other is in no way affected by the medium in which it is paid, nor by the method or means through which the particular thing distributed as a dividend was procured. If the [227] dividend is declared payable in cash, the money with which to pay it is ordinarily taken from surplus cash in the treasury. But (if there are profits legally available for distribution, and the law under which the company was incorporated so permits) the company may raise the money by discounting negotiable paper; or by selling bonds, scrip, or stock of another corporation then in the treasury; or by selling its own bonds, scrip, or stock then in the treasury; or by selling its own bonds, scrip, or stock issued expressly for that purpose. How the money shall be raised is wholly a matter of financial management. The manner in which it is raised in no way affects the question whether the dividend received by the stockholder is income or capital; nor can it conceivably affect the question whether it is taxable as income.

Likewise, whether a dividend declared payable from profits shall be paid in cash or in some other medium is also wholly a matter of financial management. If some other medium is decided upon, it is also wholly a question of financial management whether the distribution shall be, for instance, in bonds, scrip, or stock of another corporation or in issues of its own. And if the dividend is paid in its own issues, why should there be a difference in result dependent upon whether the distribution was made from such securities then in the treasury or from others to be created and issued by the company expressly for that purpose? So far as the distribution may be made from its own issues of bonds, or preferred stock created expressly for the purpose, it clearly would make no difference in the decision of the question whether the dividend was a distribution of profits, that the securities had to be created expressly for the purpose of distribution. If a dividend paid in securities of that nature represents a distribution of profits, Congress may, of course, tax it as income of the stockholder. Is the result different where the security distributed is common stock?

[228] Suppose that a corporation having power to buy and sell its own stock purchases, in the interval between its regular dividend dates, with moneys derived from current profits, some of its own common stock as a temporary investment, intending at the time of purchase to sell it before the next dividend date, and to use the proceeds in paying dividends, but later, deeming it inadvisable either to sell this stock or to raise by borrowing the money necessary to pay the regular dividend in cash, declares a dividend payable in this stock:—Can anyone doubt that in such a case the dividend in common stock would be income of the stockholder, and constitutionally taxable as such? See Green v. Bissell, 79 Conn. 547, 8 L.R.A.(N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1056, 9 Ann. Cas. 287; Leland v. Hayden, 102 Mass. 542. And would it not likewise be income of the stockholder, subject to taxation, if the purpose of the company in buying the stock so distributed had been from the beginning to take it off the market and distribute it among the stockholders as a dividend, and the company actually did so? And proceeding a short step further: Suppose that a corporation decided to capitalize some of its accumulated profits by creating additional common stock and selling the same to raise working capital, but, after the stock has been issued and certificates therefor are delivered to the bankers for sale, general financial conditions make it undesirable to market the stock, and the company concludes that it is wiser to husband, for working capital, the cash which it had intended to use in paying stockholders a dividend, and, instead, to pay the dividend in the common stock which it had planned to sell: Would not the stock so distributed be a distribution of profits, and hence, when received, be income of the stockholder, and taxable as such? If this be conceded, why should it not be equally income of the stockholder, and taxable as such, if the common stock created by capitalizing profits had been originally

created for the express purpose of being distributed [229] as a dividend to the stockholder who afterwards received it?

Second: It has been said that a dividend payable in bonds or preferred stock created for the purpose of distributing profits may be income and taxable as such, but that the case is different where the distribution is in common stock created for that purpose. Various reasons are assigned for making this distinction. One is that the proportion of the stockholder's ownership to the aggregate number of the shares of the company is not changed by the distribution. But that is equally true where the dividend is paid in its bonds or in its preferred stock. Furthermore, neither maintenance nor change in the proportionate ownership of a stockholder in a corporation has any bearing upon the question here involved. Another reason assigned is that the value of the old stock held is reduced approximately by the value of the new stock received, so that the stockholder, after receipt of the stock dividend, has no more than he had before it was paid. That is equally true whether the dividend be paid in cash or in other property; for instance, bonds, scrip, or preferred stock of the company. The payment from profits of a large cash dividend, and even a small one, customarily lowers the then market value of stock because the undivided property represented by each share has been correspondingly reduced. The argument which appears to be most strongly urged for the stockholders is, that when a stock dividend is made, no portion of the assets of the company is thereby segregated for the stockholder. But does the issue of new bonds or of preferred stock created for use as a dividend result in any segregation of assets for the stockholder? In each case he receives a piece of paper which entitles him to certain rights in the undivided property. Clearly, segregation of assets in a physical sense is not an essential of income. The year's gains of a partner are taxable as income, although there, likewise, no [230] segregation of his share in the gains from that of his partners is had.

The objection that there has been no segregation is presented also in another form. It is argued that until there is a segregation, the stockholder cannot know whether he has really received gains; since the gains may be invested in plant or merchandise or other property and perhaps be later lost. But is not this equally true of the share of a partner in the year's profits of the firm, or, indeed, of the profits of the individual who is engaged in business alone? And is it not true, also, when dividends are paid in cash? The gains of a business, whether conducted by an individual, by a firm, or by a corporation, are ordinarily reinvested in large part. Many a cash dividend honestly declared as a distribution of profits proves later to have been paid out of capital, because errors in forecast prevent correct ascertainment of values. Until a business adventure has been completely liquidated, it can never be determined with certainty whether there have been profits unless the returns have at least exceeded the capital originally invested. Business men, dealing with the problem practically, fix necessarily periods and rules for determining whether there have been net profits,—that is, income or gains. They protect themselves from being seriously misled by adopting a system of depreciation charges and reserves. Then, they act upon their own determination whether profits have been made. Congress in legislating has wisely adopted their practices as its own rules of action.

Third: The government urges that it would have been within the power of Congress to have taxed as income of the stockholder his pro rata share of undistributed profits earned, even if no stock dividend representing it had been paid. Strong reasons may be assigned for such a view. See Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. 1, 20 L. ed. 272. The undivided share of a partner in the year's undistributed profits of his firm [231] is taxable as income of the partner, although the share in the gain is not evidenced by any action taken by the firm. Why may not the stockholder's interest in the gains of the company? The law finds no difficulty in disregarding the corporate fiction whenever that is deemed necessary to attain a just result. Linn & L. Timber Co. v. United States, 236 U. S. 574, 59 L. ed. 725, 35 Sup. Ct. Rep. 440; see Morawetz, Priv. Corp. 2d ed. §§ 227-231; Cook, Corp. 7th ed. §§ 663, 664. The stockholder's interest in the property of the corporation differs, not fundamentally but in form only, from the interest of a partner in the property of the firm. There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as

is a corporation.[4] No reason appears why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court. But we have no occasion to decide the question whether Congress might have taxed to the stockholder his undivided share of the corporation's earnings. For Congress has in this act limited the income tax to that share of the stockholder in the earnings which is, in effect, distributed by means of the stock dividend paid. In other words, to render the stockholder taxable there must be both earnings made *and* a dividend paid. Neither earnings without dividend, nor a dividend without earnings, subjects the [232] stockholder to taxation under the Revenue Act of 1916.

Fourth: The equivalency of all dividends representing profits, whether paid in cash or in stock, is so complete that serious question of the taxability of stock dividends would probably never have been made if Congress had undertaken to tax only those dividends which represented profits earned during the year in which the dividend was paid, or in the year preceding. But this court, construing liberally not only the constitutional grant of power, but also the Revenue Act of October 3, 1913 [38 Stat. at L. 114, chap. 16, Comp. Stat. § 5291, 2 Fed. Stat. Anno. 2d ed. p. 724], held that Congress might tax, and had taxed, to the stockholder, dividends received during the year, although earned by the company long before, and even prior to the adoption of the 16th Amendment. Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543.[5] That rule, if indiscriminatingly applied to all stock dividends representing profits earned, might, in view of corporate practice, have worked considerable hardship, and have raised serious questions. Many corporations, without legally capitalizing any part of their profits, had assigned definitely some part or all of the annual balances remaining after paying the usual cash dividends, to the uses to which permanent capital is ordinarily applied. Some of the corporations doing this transferred such balances on their books to "Surplus" account,—distinguishing between such permanent "Surplus" and the "Undivided Profits" account. Other corporations, without this formality, had assumed that the annual accumulating balances carried as undistributed profits were to be treated as capital permanently invested in the business. And still others, without definite assumption of any kind, had [233] so used undivided profits for capital purposes. To have made the revenue law apply retroactively so as to reach such accumulated profits, if and whenever it should be deemed desirable to capitalize them legally by the issue of additional stock distributed as a dividend to stockholders, would have worked great injustice. Congress endeavored in the Revenue Act of 1916 to guard against any serious hardship which might otherwise have arisen from making taxable stock dividends representing accumulated profits. It did not limit the taxability to stock dividends representing profits earned within the tax year or in the year preceding; but it did limit taxability to such dividends representing profits earned since March 1, 1913. Thereby stockholders were given notice that their share also in undistributed profits accumulating thereafter was at some time to be taxed as income. And Congress sought by § 3 to discourage the postponement of distribution for the illegitimate purpose of evading liability to surtaxes.

Fifth: The decision of this court, that earnings made before the adoption of the 16th Amendment, but paid out in cash dividend after its adoption, were taxable as income of the stockholder, involved a very liberal construction of the Amendment. To hold now that earnings both made and paid out after the adoption of the 16th Amendment cannot be taxed as income of the stockholder, if paid in the form of a stock dividend, involves an exceeding narrow construc-

[4] See "Some Judicial Myths," by Francis M. Burdick, 22 Harvard L. Rev. 393, 394–396; The Firm as a Legal Person, by William Hamilton Cowles, 57 Cent. L. J. 343, 348; The Separate Estates of Nonbankrupt Partners, by J. D. Brannan, 20 Harvard L. Rev. 589–592; compare 7 Harvard L. Rev. p. 426; vol. 14, p. 222; vol. 17, p. 194.

[5] The hardship supposed to have resulted from such a decision has been removed in the Revenue Act of 1916, as amended, by providing in § 31 (b) that such cash dividends shall thereafter be exempt from taxation if, before they are made, all earnings made since February 28, 1913, shall have been distributed. Act of October 3, 1917, chap. 63, § 1211, 40 Stat. at L. 338; Act of February 24, 1919, chap. 18, § 201 (b), 40 Stat. at L. 1059, Comp. Stat. § 6336½ b.

496, 501 (1879). See also Legal Tender Cases, 12 Wall. 457, 531, 20 L. ed. 287, 305 (1871); Trade Mark Cases, 100 U. S. 82, 96, 25 L. ed. 550, 553 (1879). See American Doctrine of Constitutional Law, by James B. Thayer, 7 Harvard L. Rev. 129, 142.

"With the exception of the extraordinary decree rendered in the Dred Scott Case, . . . all of the acts or the portions of the acts of Congress invalidated by the courts before 1868 related to the organization of courts. Denying the power of Congress to make notes legal tender seems to be the first departure from this rule." Haines, American Doctrine of Judicial Supremacy, p. 288. The first legal tender decision was overruled in part two years later (1871), Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287, and again in 1884, Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122.

---

[239] CLINTON H. PIERCE, Angelo Creo, Charles Z. Zeilman, and Charles Nelson, Plffs. in Err.,

v.

UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 239–273.)

Error to district court — extending review beyond Federal question.

1. Jurisdiction of a direct writ of error from the Federal Supreme Court to a district court once having attached because of the presence of constitutional questions continues, although such questions have since been decided in other cases to be without merit, for the purpose of disposing of other questions raised in the record.

[For other cases, see Appeal and Error, 4297–4300, in Digest Sup. Ct. 1908.]

Conspiracy — to violate Espionage Act — failure to agree upon methods in advance.

2. A conspiracy to violate the Espionage Act of June 15, 1917, made criminal by § 4, provided one or more of the conspirators do any act to effect the object of the conspiracy, is none the less criminal, if thus attempted to be carried into effect, merely because the conspirators failed to agree in advance upon the precise method in which the law shall be violated.

[For other cases, see Conspiracy, II. in Digest Sup. Ct. 1908.]

Conspiracy — overt act — necessity of criminality — aiding averments by allegations respecting overt acts.

3. While the averment of a conspiracy cannot be aided by allegations respecting the overt acts, and while under the Espionage Act of June 15, 1917, § 4, as under the Criminal Code, § 37, a mere conspiracy without overt act done in pursuance of it is not punishable criminally, yet the overt act need not be, in and of itself, a criminal act, still less need it constitute the very crime that is the object of the conspiracy.

[For other cases, see Conspiracy, II.; Indictment, II. e, 3, b, in Digest Sup. Ct. 1908.]

Indictment — conspiracy — violating Espionage Act — unlawful motive.

4. Averments in an indictment that defendants, charged with committing and conspiring to commit acts forbidden by the Espionage Act of June 15, 1917, unlawfully, wilfully, or feloniously committed such forbidden acts, fairly import an unlawful motive.

[For other cases, see Indictment, II. e, 8, b, in Digest Sup. Ct. 1908.]

Criminal law — indictment — sufficiency — question for jury.

5. Whether the statements contained in a pamphlet, the distribution of which is charged to amount to a violation of the Espionage Act of June 15, 1917, had a natural tendency to produce the forbidden consequences as alleged, was a question to be determined, not upon demurrer, but by the jury at the trial.

[For other cases, see Criminal Law, III. d; Trial, VI. c, 23, in Digest Sup. Ct. 1908.]

Evidence — sufficiency to support convictions — conspiring to violate Espionage Act.

6. Evidence that defendants, acting in concert, with full understanding of its contents, distributed publicly a highly colored and sensational pamphlet fairly to be construed as a protest against the further prosecution by the United States of the war with Germany, is sufficient to support convictions of conspiring, contrary to the Espionage Act of June 15, 1917, to cause insubordination, disloyalty, and refusal of duty in the military or naval forces, and to obstruct the recruiting and enlistment service of the United States.

[For other cases, see Evidence, XII. n, in Digest Sup. Ct. 1908.]

Trial — question for jury — prosecution for violating Espionage Act.

7. What interpretation ought to be placed upon a pamphlet, the distribution of which by the defendants is alleged to have violated the Espionage Act of June 15, 1917, and what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing

---

Note.—On direct review by Federal Supreme Court of district court judgments or decrees—see notes to Berkman v. United States, 63 L. ed. U. S. 877, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

For a review of decisions under the Espionage Act of June 15, 1917, see note to United States v. Krafft, L.R.A.1918F, 410.

On the validity of legislation directed against social or industrial propaganda deemed to be of a dangerous tendency—see note to State v. Moilen, 1 A.L.R. 336.

this, were questions for the jury, not the court, to decide.

[For other cases, see Trial, VI. c, 23, in Digest Sup. Ct. 1908.]

Trial — question for jury — prosecution for violating Espionage Act.

8. Whether the printed words of a pamphlet, the distribution of which was alleged to have violated the Espionage Act of June 15, 1917, would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the United States forces, was a question for the jury to decide in view of all the circumstances of the time, and considering the place and manner of distribution.

[For other cases, see Trial, VI. c, 23, in Digest Sup. Ct. 1908.]

Evidence — sufficiency to support conviction — violation of Espionage Act.

9. A conviction of making or conveying false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, contrary to the Espionage Act of June 15, 1917, is sustained by evidence which warranted the jury in finding that the statements in a pamphlet distributed by defendants during the war with Germany were false in fact, and known to be so by the defendants, or else were distributed recklessly without effort to ascertain the truth, and were circulated wilfully in order to interfere with the success of the forces of the United States.

[For other cases, see Evidence, XII. n, in Digest Sup. Ct. 1908.]

Trial — province of court and jury — criminal prosecution — weight of evidence.

10. There being substantial evidence in support of the charges in an indictment, the trial court would have erred had it peremptorily directed an acquittal upon any of the counts, and the question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

[For other cases, see Trial, VI. c, 23, in Digest Sup. Ct. 1908.]

War — violations of Espionage Act — false statements intended to interfere with war operations.

11. A construction cannot be given to the provision of the Espionage Act of June 15, 1917, making it criminal, when the United States is at war, wilfully to make or convey false reports or false statements with intent to interfere with the success of the military or naval forces of the United States, or to promote the success of its enemies, which will exclude statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge, or will excuse statements, however false, and with whatever evil purpose circulated, if accompanied with a pretense of comment upon them as matters of public concern.

Appeal — insufficiency of one count in indictment — validity of sentence under good counts.

12. The conceded insufficiency of one of the counts in an indictment does not warrant a reversal of a conviction where the sentence imposed upon the defendants does not exceed that which might lawfully have been imposed under the good counts upon which they were also found guilty.

[For other cases, see Appeal and Error, VIII. m, 2; Trial, IX. b, in Digest Sup. Ct. 1908.]

[No. 234.]

Argued November 18 and 19, 1919. Decided March 8, 1920.

IN ERROR to the District Court of the United States for the Northern District of New York to review convictions for violating or conspiring to violate the Espionage Act. Affirmed.

See same case below on demurrer, 245 Fed. 878.

The facts are stated in the opinion.

Mr. Frederick A. Mohr argued the cause and filed a brief for plaintiffs in error:

The time of the conspiracy should at least be laid before the time of the overt act.

United States v. Milner, 36 Fed. 890.

Under this indictment should other proceedings be taken against defendants for a similar offense, from this record they would be unable to plead a former acquittal or conviction.

Cochran v. United States, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. Rep. 628; Sheridan v. United States, 149 C. C. A. 437, 236 Fed. 305.

The whole structure of the alleged conspiracy rests upon the overt act, and consists of speculative deductions from that admitted fact. The charge cannot be aided or established by setting forth the overt act.

United States v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531.

The indictment should set forth the facts and circumstances upon which the allegations of conspiracy rest.

Haynes v. United States, 42 C. C. A. 34, 101 Fed. 818; Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

In cases like this, where the act itself is, apart from the intent, colorless, the color of the intent must be proved as any other element of criminality is proved.

Hibbard v. United States, 96 C. C. A. 554, 172 Fed. 66, 18 Ann. Cas. 1040.

Assuming the presence of the forbidden aims in the minds of the defendants, this court has ruled that such a mental

state must concur with a situation in which the logical and natural effect of the written or spoken words would precipitate the conduct and consequences set forth in the statute.

Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; Herman v. United States, 168 C. C. A. 551, 257 Fed. 601; Wells v. United States, 168 C. C. A. 555, 257 Fed. 605; Wolf v. United States, 170 C. C. A. 364, 259 Fed. 388. See also Balbas v. United States, 168 C. C. A. 229, 257 Fed. 17.

Admitting the presence of a criminal purpose, coupled with such juxtaposition of circumstances as will permit Congress to limit the right to freedom of speech and escape the constitutional prohibition, the language itself must possess such character as will clearly show it to be calculated to produce the effects contemplated in the law.

Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; Wolf v. United States, 170 C. C. A. 364, 259 Fed. 388.

Construed in the light most favorable to the prosecution, it is submitted that the nature of the article is as consistent with innocence as with guilt, as a matter of law.

Scoggins v. United States, 3 A.L.R. 1093, 167 C. C. A. 153, 255 Fed. 825.

The statute is highly penal, and requires a high degree of clear and convincing testimony.

People v. Davis, 1 Wheeler, C. C. 235.

Assistant Attorney General **Stewart** argued the cause, and, with Mr. W. C. Herron, filed a brief for defendant in error:

The jury was justified in finding that such circulation of this pamphlet constituted an attempt to cause insubordination and disloyalty in the military forces, and an obstruction of recruiting and enlistment under the second and sixth counts.

Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249; Debs v. United States, 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252; United States v. Eastman, 252 Fed. 233.

A mental attitude of indifference to the truth or falsity of the statement is the legal equivalent of knowledge of its falsity.

Rex. v. Long, 4 Car. & P. 440.

A jury may take judicial notice of facts of general knowledge and interest, equally, within their sphere, with the judge.

Thayer, Ev. p. 296; Com. v. Peckham, 2 Gray, 514.

It was immaterial whether any person who had been accepted for the Army received one of the pamphlets or not.

O'Hare v. United States, 165 C. C. A. 208, 253 Fed. 538; Doe v. United States, 166 C. C. A. 3, 253 Fed. 903; United States v. Krafft, L.R.A.1918F, 402, 162 C. C. A. 117, 249 Fed. 924; Rhuberg v. United States, 167 C. C. A. 185, 255 Fed. 870; Coldwell v. United States, 168 C. C. A. 151, 256 Fed. 811; Schenck v. United States, 249 U. S. 47, 52, 63 L. ed. 470, 474, 39 Sup. Ct. Rep. 247.

If the verdict and sentence are good as to any one count, the judgment must be affirmed.

Kirkman v. McClaughry, 152 Fed. 258; Buessel v. United States, 170 C. C. A. 105, 258 Fed. 821.

Mr. Justice **Pitney** delivered the opinion of the court:

Plaintiffs in error were jointly indicted October 2, 1917, in the United States district court for the northern district of New York, upon 6 counts, of which the 4th and 5th were struck out by agreement at the trial and the 1st is now abandoned by the government.

The 2d count charged that throughout the period from [**241**] April 6, 1917, to the date of the presentation of the indictment, the United States being at war with the Imperial German Government, defendants, at the city of Albany, in the northern district of New York, and within the jurisdiction, etc., unlawfully and feloniously conspired together and with other persons to the grand jurors unknown to commit an offense against the United States; to wit: "The offense of unlawfully, feloniously, and wilfully attempting to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States when the United States was at war, and to the injury of the United States in, through, and by personal solicitations, public speeches, and distributing and publicly circulating throughout the United States certain articles printed in pamphlets called 'The Price We Pay,' which said pamphlets were to be distributed publicly throughout the northern district of New York, and which said solicitations, speeches, articles, and pamphlets would and should persistently urge insubordination, disloyalty, and refusal of duty in the said military and naval forces of

the United States, to the injury of the United States and its military and naval service, and failure and refusal on the part of available persons to enlist therein, and should and would, through and by means above mentioned, obstruct the recruiting and enlistment service of the United States when the United States was at war, to the injury of that service and of the United States." For overt acts it was alleged that certain of the defendants, in the city of Albany, at times specified, made personal solicitations and public speeches, and especially that they published and distributed to certain persons named and other persons to the grand jurors unknown certain pamphlets headed "The Price We Pay," a copy of which was annexed to the indictment and made a part of it.

The 3d count charged that during the same period and on August 26, 1917, the United States being at war, etc., [242] defendants, at the city of Albany, etc., wilfully and feloniously made, distributed, and conveyed to certain persons named and others to the grand jurors unknown, certain false reports and false statements in certain pamphlets attached to and made a part of the indictment and headed "The Price We Pay," which false statements were in part, as shown by certain extracts quoted from the pamphlet, with intent to interfere with the operation and success of the military and naval forces of the United States.

The 6th count charged that at the same place, during the same period, and on August 27, 1917, while the United States was at war, etc., defendants wilfully and feloniously attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval service of the United States by means of the publication, circulation, and distribution of "The Price We Pay" to certain persons named and others to the grand jurors unknown.

A general demurrer was overruled, whereupon defendants pleaded not guilty and were put on trial together, with the result that Pierce, Creo, and Zeilman were found guilty upon the 1st, 2d, 3d, and 6th counts, and Nelson upon the 3d count only. Each defendant was separately sentenced to a term of imprisonment upon each count on which he had been found guilty; the several sentences of Pierce, Creo, and Zeilman, however, to run concurrently.

The present direct writ of error was sued out under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. 794], because of contentions that the Selective Draft Act and the Espionage Act were unconstitutional. These have since been set at rest. Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 352, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 806; Schenck v. United States, 249 U. S. 47, 51, 63 L. ed. 470, 473, 39 Sup. Ct. Rep. 247; Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249; Debs v. United States, 249 U. S. 211, 215, 63 L. ed. 566, 569, 39 Sup. Ct. Rep. 252. But our jurisdiction continues for the purpose of disposing of other questions raised in the record. Brolan v. United States, 236 U. S. 216, 59 L. ed. 544, 35 Sup. Ct. Rep. 285.

[243] It is insisted that there was error in refusing to sustain the demurrer, and this on the ground that (1) the facts and circumstances upon which the allegation of conspiracy rested were not stated; (2) there was a failure to set forth facts or circumstances showing unlawful motive or intent; (3) there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act; and (4) that the statements contained in the pamphlet were not such as would naturally produce the forbidden consequences.

What we have recited of the 2d count shows a sufficiently definite averment of a conspiracy and overt acts under the provisions of title I. of the Espionage Act.[1] The 4th section makes criminal

[1] Extract from Act of June 15, 1917, chap. 30, 40 Stat. at L. 217, 219, Comp. Stat. §§ 10,212a, 10,212c, 10,212d, Fed. Stat. Anno. Supp. 1918, p. 120.

Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the

a conspiracy "to violate the provisions of sections two or three of this title," provided one or more of the conspirators do any act to [244] effect the object of the conspiracy. Such a conspiracy, thus attempted to be carried into effect, is none the less punishable because the conspirators fail to agree in advance upon the precise method in which the law shall be violated. It is true the averment of the conspiracy cannot be aided by the allegations respecting the overt acts. United States v. Britton, 108 U. S. 199, 205, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; Joplin Mercantile Co. v. United States, 236 U. S. 531, 536, 59 L. ed. 705, 708, 35 Sup. Ct. Rep. 291. On the other hand, while under § 4 of the Espionage Act, as under § 37 of the Criminal Code [35 Stat. at L. 1096, chap. 321, Comp. Stat. § 10,201, 7 Fed. Stat. Anno. 2d ed. p. 534], a mere conspiracy, without overt act done in pursuance of it, is not punishable criminally, yet the overt act need not be, in and of itself, a criminal act; still less need it constitute the very crime that is the object of the conspiracy. United States v. Rabinowich, 238 U. S. 78, 86, 59 L. ed. 1211, 1214, 35 Sup. Ct. Rep. 682; Goldman v. United States, 245 U. S. 474, 477, 62 L. ed. 410, 413, 38 Sup. Ct. Rep. 166.

As to the second point: Averments that defendants unlawfully, wilfully, or feloniously committed the forbidden acts fairly import an unlawful motive; the 3d count specifically avers such a motive; the conspiracy charged in the 2d and the wilful attempt charged in the 6th necessarily involve unlawful motives.

The third and fourth objections point to no infirmity in the averments of the indictment. Whether the statements contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial. There was no error in overruling the demurrer.

Upon the trial, defendants' counsel moved that the jury be directed to acquit the defendants, upon the ground that the evidence was not sufficient to sustain a conviction. Under the exceptions taken to the refusal of this motion it is urged that there was no proof (a) of conspiracy, (b) of criminal purpose or intent, (c) of the falsity of the statements contained in the pamphlet circulated, [245] (d) of knowledge on defendants' part of such falsity, or (e) of circumstances creating a danger that its circulation would produce the evils which Congress sought to prevent; and further (f) that the pamphlet itself could not legitimately be construed as tending to produce the prohibited consequences.

The pamphlet—"The Price We Pay" —was a highly colored and sensational document, issued by the national office of the Socialist party at Chicago, Illinois, and fairly to be construed as a protest against the further prosecution of the war by the United States. It contained much in the way of denunciation of war in general, the pending war in particular; something in the way of assertion that under Socialism things would be better; little or nothing in the way of fact or argument to support the assertion. It is too long to be quoted in full. The following extracts will suffice, those indicated by italics being the same that were set forth in the body of the 3d count:

"Conscription is upon us; the draft law is a fact!

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the Army;

"Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

"Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

"Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

"Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

"Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.

[246] "Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

"And still the recruiting officers will come; seizing age after age, mounting up

doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-

seven of the act to codify, revise, and amend the penal laws of the United States, approved March fourth, nineteen hundred and nine.

to the elder ones and taking the younger ones as they grow to soldier size;

"And still the toll of death will grow.

. . . . . .

"The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say 'Must we—be that!'

"You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;

"It is the price you pay for your stupidity—you who have rejected Socialism.

. . . . . .

"Food prices go up like skyrockets; and show no sign of bursting and coming down.

. . . . . .

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.

. . . . . .

"This war began over commercial routes and ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain:

"'Get ready for the commercial war that will follow this war.'

"Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

. . . . . .

[247] "This, you say, is a war for the rights of small nations; and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

"But go to it! Believe everything you are told—you always have, and doubtless always will, believe them.

. . . . . .

"For this war,—as everyone who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—this war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

"It is to determine whether interest, dividends and profits shall be paid to investors speaking German or those speaking English and French.

"Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked."

These expressions were interspersed with suggestions that the war was the result of the rejection of Socialism, and that Socialism was the "salvation of the human race."

It was in evidence that defendants were members of the Socialist party,—a party "organized in locals throughout the country,"—and affiliated with a local branch in the city of Albany. There was evidence that at a meeting of that branch, held July 11, 1917, at which Pierce was present, the question of distributing "The Price We Pay" was brought up, sample copies obtained from the national organization at Chicago having been produced for examination and consideration; that the pamphlet was discussed, as well as the question of ordering a large number of copies from the national organization for distribution; it was stated that criminal proceedings [248] were pending in the United States district court for the district of Maryland against parties indicted for distributing the same pamphlet; some of the members present, one of them an attorney, advised against its distribution, and a motion was adopted not to distribute it until it was known to be legal. However, some action appears to have been taken towards procuring copies for distribution, for on July 17th a large bundle of them, said to have been 5,000 copies, was delivered at Pierce's house by the literature agent of the Albany local. At a meeting held July 25 the subject was again brought up, it having become known that in the criminal proceedings before mentioned the court had directed a verdict of acquittal; thereupon the resolution of July 11 was rescinded and distributers were called for. On July 29, defendants Pierce, Creo, and Zeilman met at Pierce's house about half past 5 o'clock in the morning, and immediately began distributing the pamphlets in large numbers throughout the city of Albany. Each of them took about 500 copies, and having agreed among themselves about the division of the territory, they went from house to house, leaving a copy upon each doorstep. They repeated this on successive Sundays until August 26, when they were arrested. Nelson acted with them as a distributer on the latter date, and perhaps on one previous occasion.

There was evidence that in some instances a leaflet entitled "Protect Your

Rights," and bearing the Chicago address of the national office of the Socialist party, was folded between the pages of the pamphlet. The leaflet was a fervid appeal to the reader to join the Socialist party, upon the ground that it was the only organization that was opposing the war. It declared, among other things: "This organization has opposed war and conscription. It is still opposed to war and conscription. . . . Do you want to help in this struggle? . . . The party needs you now as it never needed you before. You [249] need the party now as you never needed it before. Men are going to give up their lives for a cause which you are convinced is neither great or noble; will you then begrudge your best efforts to the cause that you feel certain is both great and noble and in which lives the only hope and promise of the future?" And there was evidence of declarations made by Pierce on the 16th and 17th of August, amounting to an acknowledgment of a treasonable purpose in opposing the draft, which he sought to excuse on the ground that he had "no use for England."

It was shown without dispute that defendants distributed the pamphlet—"The Price We Pay"—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution. If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged. Evidently it was intended, as the jury found, to interfere with the conscription and recruitment services; to cause men eligible for the service to evade the draft; to bring home to them, and especially to their parents, sisters, wives, and sweethearts, a sense of impending personal loss, calculated to discourage the young men from entering the service; to arouse suspicion as to whether the chief law officer of the government was not more concerned in enforcing the strictness of military discipline than in protecting the people against improper speculation in their food supply; and to produce a belief that our [250] participation in the war was the product of sordid and sinister motives, rather than a design to protect the interests and maintain the honor of the United States.

What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. Defendants took the witness stand and severally testified, in effect, that their sole purpose was to gain converts for Socialism, not to interfere with the operation or success of the naval or military forces of the United States. But their evidence was far from conclusive, and the jury very reasonably might find—as evidently they did—that the protestations of innocence were insincere, and that the real purpose of defendants—indeed, the real object of the pamphlet—was to hamper the government in the prosecution of the war.

Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time, and considering the place and manner of distribution. Schenck v. United States, 249 U. S. 47, 52, 63 L. ed. 470, 473, 39 Sup. Ct. Rep. 247; Frohwerk v. United States, 249 U. S. 204, 208, 63 L. ed. 561, 564, 39 Sup. Ct. Rep. 249; Debs v. United States, 249 U. S. 211, 215, 63 L. ed. 566, 569, 39 Sup. Ct. Rep. 252.

Concert of action on the part of Pierce, Creo, and Zeilman clearly appeared, and, taken in connection with the nature of the pamphlet and their knowledge of its contents, furnished abundant evidence of a conspiracy and overt acts to sustain their conviction upon the second count.

The validity of the conviction upon the third count (the only one that includes Nelson) depends upon whether there was lawful evidence of the falsity of the statements contained in the pamphlet, and tending to show that, [251] knowing they were false, or disregarding their probable falsity, defendants wilfully circulated it, with intent to interfere with the operation or success of the military or naval forces of the

United States. The criticism of the evidence admitted to show the untruth of the statements about the Attorney General and about J. P. Morgan's loans to the Allies is not well founded; the evidence was admissible; but we hardly see that it was needed to convince a reasonable jury of the falsity of these and other statements contained in the pamphlet. Common knowledge (not to mention the President's Address to Congress of April 2, 1917, and the Joint Resolution of April 6 [40 Stat. at L. 1, chap. 1], declaring war, which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false; and such common knowledge went to prove also that defendants knew they were untrue. That they were false if taken in a literal sense hardly is disputed. It is argued that they ought not to be taken literally. But when it is remembered that the pamphlet was intended to be circulated, and, so far as defendants acted in the matter, was circulated, among readers of all classes and conditions, it cannot be said as matter of law that no considerable number of them would understand the statements in a literal sense and take them seriously. The jury was warranted in finding the statements false in fact, and known to be so by the defendants, or else distributed recklessly, without effort to ascertain the truth (see Cooper v. Schlesinger, 111 U. S. 148, 155, 28 L. ed. 382, 384, 4 Sup. Ct. Rep. 360), and circulated wilfully in order to interfere with the success of the forces of the United States. This is sufficient to sustain the conviction of all of the defendants upon the third count.

There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal upon any of the counts. The [252] question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

It is suggested that the clause of § 3 —"Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies"—cannot be construed to cover statements that, on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge; and that however false the statements, and with whatever evil purpose circulated, they are not punishable if accompanied with a pretense of commenting upon them as matters of public concern. We cannot accept such a construction; it unduly restricts the natural meaning of the clause, leaves little for it to operate upon, and disregards the context and the circumstances under which the statute was passed. In effect, it would allow the professed advocate of disloyalty to escape responsibility for statements however audaciously false, so long as he did but reiterate what had been said before; while his ignorant dupes, believing his statements, and thereby persuaded to obstruct the recruiting or enlistment service, would be punishable by fine or imprisonment under the same section.

Other assignments of error pointing to rulings upon evidence and instructions given or refused to be given to the jury are sufficiently disposed of by what we have said.

The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce, Creo, and Zeilman did not exceed that which lawfully might have been imposed under the 2d, 3d, or 6th counts, so that the concurrent sentence under the 1st count adds nothing to their punishment. [253] Claassen v. United States, 142 U. S. 140, 146, 35 L. ed. 966, 968, 12 Sup. Ct. Rep. 169; Evans v. United States (2 Cases) 153 U. S. 584, 595, 608, 38 L. ed. 830, 834, 839, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Putnam v. United States, 162 U. S. 687, 714, 40 L. ed. 1118, 1128, 16 Sup. Ct. Rep. 923; Abrams v. United States, 250 U. S. 616, 619, 63 L. ed. 1173, 1175, 40 Sup. Ct. Rep. 28.

Judgments affirmed.

Mr. Justice **Brandeis** delivered the following dissenting opinion, in which Mr. Justice **Holmes** concurs:

What is called "distributing literature" is a means commonly used by the Socialist party to increase its membership and otherwise to advance the cause it advocates. To this end the national organization, with headquarters at Chicago, publishes such "literature" from time to time and sends sample copies to the local organizations. These, when they approve, purchase copies and call upon members to volunteer for service in making the distribution locally. Some time before July 11, 1917, a local of the

Socialist party at Albany, New York, received from the national organization sample copies of a four-page leaflet entitled "The Price We Pay," written by Irwin St. John Tucker, an Episcopal clergyman and a man of sufficient prominence to have been included in the 1916–1917 edition of "Who's Who in America." The proposal to distribute this leaflet came up for action at a meeting of the Albany local held on July 11, 1917. A member who was a lawyer called attention to the fact that the question whether it was legal to distribute this leaflet was involved in a case pending in Baltimore in the district court of the United States; and it was voted "not to distribute 'The Price We Pay' until we know if it is legal." The case referred to was an indictment under the Selective Draft Act for conspiracy to obstruct recruiting by means of distributing the leaflet. Shortly after the July 11th meeting it became known that District Judge Rose had directed an acquittal in that case; and at the next meeting [254] of the local, held July 25th, it was voted to rescind the motion "against distributing 'The Price We Pay' and call for distributers." Four members of the local, two of them native Americans, one a naturalized citizen, and the fourth a foreigner who had filed his first naturalization papers, volunteered as distributers. They distributed about five thousand copies by hand in Albany.

District Judge Rose, in directing an acquittal, had said of the leaflet in the Baltimore case:

"I do not think there is anything to go to the jury in this case.

"You may have your own opinions about that circular: I have very strong individual opinions about it, and as to the wisdom and fairness of what is said there; but so far as I can see it is principally a circular intended to induce people to subscribe to Socialist newspapers and to get recruits for the Socialist party. I do not think that we ought to attempt to prosecute people for that kind of thing. It may be very unwise in its effect, and it may be unpatriotic at that particular time and place, but it would be going very far indeed,—further, I think, than any law that I know of would justify,—to hold that there has been made out any case here even tending to show that there was an attempt to persuade men not to obey the law."

In New York a different view was taken; and an indictment in six counts was found against the four distributers. Two of the counts were eliminated at the trial. On the other four there were convictions, and on each a sentence of fine and imprisonment. But one of the four counts was abandoned by the government in this court. There remain for consideration count 3, which charges a violation of § 3 of the Espionage Act [Act of June 15, 1917, 40 Stat. at L. 219, chap. 30, Comp. Stat. § 10,212c, Fed. Stat. Anno. Supp. 1918, p. 120] by making false reports and false statements, with the intent "to interfere with the operation and success of the military and naval forces;" and counts 2 and 6, also involving § 3 of the Espionage Act, the one for conspiring, the other for attempting, [255] "to cause insubordination, disloyalty, and refusal of duty in the military and naval forces." Demurrers to the several counts and motions that a verdict be directed for the several defendants were overruled.

In considering the several counts it is important to note that three classes of offenses are included in § 3 of the Espionage Act, and that the essentials of liability under them differ materially. The first class, under which count 3 is drawn, is the offense of making or conveying false statements or reports with intent to interfere with the operations or success of the military and naval forces. The second, involved in counts 2 and 6, is that of attempting to cause insubordination, disloyalty, mutiny, or refusal of duty. With the third, that of obstructing the recruiting and enlistment service, we have, since the abandonment of the first count, no concern here. Although the uttering or publishing of the words charged be admitted, there necessarily arises in every case—whether the offense charged be of the first class or of the second—the question whether the words were used "under such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent" (Schenck v. United States, 249 U. S. 47, 52, 63 L. ed. 470, 473, 39 Sup. Ct. Rep. 247); and also the question whether the act of uttering or publishing was done wilfully; that is, with the intent to produce the result which the Congress sought to prevent. But in cases of the first class three additional elements of the crime must be established, namely:

(1) The statement or report must be of something capable of being proved false in fact. The expression of an opinion, for instance, whether sound or un-

sound, might conceivably afford a sufficient basis for the charge of attempting to cause insubordination, disloyalty, or refusal of duty, or for the charge of obstructing recruiting; but, because an opinion is not capable of being proved [256] false in fact, a statement of it cannot be made the basis of a prosecution of the first class.

(2) The statement or report must be proved to be false.

(3) The statement or report must be known by the defendant to be false when made or conveyed.

In the case at bar the alleged offense consists wholly in distributing leaflets which had been written and published by others. The fact of distribution is admitted. But every other element of the two classes of crime charged must be established in order to justify conviction. With unimportant exceptions, to be discussed later, the only evidence introduced to establish the several elements of both of the crimes charged is the leaflet itself; and the leaflet is unaffected by extraneous evidence which might give to words used therein special meaning or effect. In order to determine whether the leaflet furnishes any evidence to establish any of the above enumerated elements of the offenses charged, the whole leaflet must necessarily be read. It is as follows:

The Price We Pay.

By Irwin St. John Tucker.

I.

Conscription is upon us; the draft law is a fact!

Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the Army;

Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

Into that seething, heaving swamp of torn flesh and [257] floating entrails they will be plunged, in regiments, divisions, and armies, screaming as they go.

Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.

Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts, will know the weight of that awful vacancy left by the bullet which finds its mark.

And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

And still the toll of death will grow.

Let them come! Let death and desolation make barren every home! Let the agony of war crack every parent heart! Let the horrors and miseries of the world-downfall swamp the happiness of every hearthstone!

Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!

II.

Yesterday I saw moving pictures of the Battle of the Somme. A company of Highlanders was shown, young and handsome in their kilts and brass helmets and bright plaids.

They laughed and joked as they stood on the screen in their ranks at ease, waiting the command to advance.

The camera shows rank after rank, standing strong and erect, smoking and chaffing with one another;

Then it shows a sign: "Less than 20 per cent of these soldiers were alive at the close of the day."

Only one in five remained of all those laddies, when sunset came; the rest were crumpled masses of carrion under their torn plaids.

Many a Highland home will wail and croon for many a [258] year, because of these crumpled masses of carrion, wrapped in their plaids, upon a far French hillside.

I saw a regiment of Germans charging downhill against machine gunfire. They melted away like snowflakes falling into hot water.

The hospital camps were shown, with hundreds and thousands of wounded men in all stages of pain and suffering, herded like animals, milling around like cattle in the slaughter pens.

All the horror and agony of war were exhibited; and at the end a flag was thrown on the screen and a proclamation said: "Enlist for your Country!" The applause was very thin and scattering; and as we went out, most of the men shook their heads and said:

"That's a hell of a poor recruiting scheme!"

Subscribe to The American Socialist, published weekly by the National Office, Socialist party, 803 West Madison street, Chicago, Illinois, 50 cents per year, 25 cents for six months. It is a paper without a muzzle.

. . . . . .

Cut this out or copy it and send it to us. We will see that you promptly receive the desired information.

. . . . . .

To the National Office, Socialist party, 803 W. Madison street, Chicago, Illinois.

I am interested in the Socialist party and its principles. Please send me samples of its literature.

Name .....

Address .....

City..... State.....

First: From this leaflet, which is divided into six [264] chapters, there are set forth in count 3, five sentences as constituting the false statements or reports wilfully conveyed by defendants with the intent to interfere with the operation and success of the military and naval forces of the United States.

(a) Two sentences are culled from the first chapter. They follow immediately after the words: "Conscription is upon us; the draft law is a fact"—and a third sentence culled follows a little later. They are:

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the Army. . . . And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."

To prove the alleged falsity of these statements the government gravely called as a witness a major in the regular army with twenty-eight years' experience, who has been assigned since July 5, 1917, to recruiting work. He testified that "recruiting" has to do with the volunteer service and has nothing to do with the drafting system, and that the word "impress" has no place in the recruiting service. The subject of his testimony was a matter not of fact, but of law; and as a statement of law it was erroneous. That "recruiting is gaining fresh supplies for the forces, as well by draft as otherwise," had been assumed by the circuit court of appeals for that circuit in Masses Pub. Co. v. Patten, L.R.A.1918C, 79, 158 C. C. A. 250, 246 Fed. 24, Ann. Cas. 1918B, 999 (decided eleven days before this testimony was given), and was later expressly held by this court in Schenck v. United States, 249 U. S. 47, 53, 63 L. ed. 470, 474, 39 Sup. Ct. Rep. 247. The third of the sentences charged as false was obviously neither a statement nor a report, but a prediction; and it was later verified.[1] That the prediction [265] made in the leaflet was later verified is, of course, immaterial; but the fact shows the danger of extending beyond its appropriate sphere the scope of a charge of falsity.

(b) The fourth sentence set forth in the 3d count as a false statement was culled from the third chapter of the leaflet and is this:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has not time to protect the food supply from gamblers."

To prove the falsity of this statement the government called the United States attorney for that district, who testified that no Federal law makes it a crime not to stand up when the "Star Spangled Banner" is played, and that he has no knowledge of anyone being prosecuted for failure to do so. The presiding judge supplemented this testimony by a ruling that the Attorney General, like every officer of the government, is presumed to do his duty and not to violate his duty, and that this presumption should obtain unless evidence to the contrary was adduced. The Regulations of the Army (No. 378, Edition of 1913, p. 88) provide that if the National Anthem is played in any place, those present, whether in uniform or in

[1] On May 20, 1918, chap. 79, 40 Stat. at L. 557, Congress, by joint resolution, extended the draft to males who had, since June 5, 1917, attained the age of twenty-one, and authorized the President to extend it to those thereafter attaining that age. Under this act, June 5, 1918, was fixed as the date for the Second Registration. Subsequently, August 24, 1918, was fixed for the supplemental registration of all coming of age between June 5, 1918, and August 24, 1918. August 13, 1918, 40 Stat. at L. 1834; May 20, 1918, 40 Stat. at L. 1781. By Act of August 31, 1918, chap. 166, 40 Stat. at L. 955, Comp. Stat. § 2044b, the provisions of the draft law were extended to persons between the ages of eighteen and forty-five. Under this act, September 12, 1918, was fixed as the date for the Third Registration. August 31, 1918, 40 Stat. at L. 1840.

civilian clothes, shall stand until the last note of the anthem. The regulation is expressly limited in its operation to those belonging to the military service, although the practice was commonly observed by civilians throughout the war. [266] There was no Federal law imposing such action upon them. The Attorney General, who does not enforce Army Regulations, was, therefore, not engaged in sending men to prison for that offense. But when the passage in question is read in connection with the rest of the chapter, it seems clear that it was intended, not as a statement of fact, but as a criticism of the Department of Justice for devoting its efforts to prosecutions for acts or omissions indicating lack of sympathy with the war, rather than to protecting the community from profiteering by prosecuting violators of the Food Control Act. August 10, 1917, chap. 53, 40 Stat. at L. 276, Comp. Stat. § 3115¼e, Fed. Stat. Anno. Supp. 1918, p. 181. Such criticism of governmental operations, though grossly unfair as an interpretation of facts, or even wholly unfounded in fact, are not "false reports and false statements with intent to interfere with the operation or success of the military or naval forces."

(c) The remaining sentence, set forth in count 3 as a false statement, was culled from the sixth chapter of the leaflet, and is this:

"Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked."

To prove the falsity of this statement the government introduced the address made by the President to Congress on April 2, 1917, which preceded the adoption of the Joint Resolution of April 6, 1917, declaring that a state of war exists between the United States and the Imperial German Government (chap. 1, 40 Stat. at L. 1). This so-called statement of fact—which is alleged to be false—is merely a conclusion or a deduction from facts. True it is the kind of conclusion which courts call a conclusion of fact, as distinguished from a conclusion of law; and which is sometimes spoken of as a finding of ultimate fact as distinguished from an evidentiary fact. But, in its essence, it is the expression of a judgment—like the [267] statements of many so-called historical facts. To such conclusions and deductions the declaration of this court in American School v. McAnnulty, 187 U. S. 94, 104, 40 L. ed. 90, 94, 23 Sup. Ct. Rep. 33, is applicable:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity."

The cause of a war—as of most human action—is not single. War is ordinarily the result of many co-operating causes, many different conditions, acts, and motives. Historians rarely agree in their judgment as to what was the determining factor in a particular war, even when they write under circumstances where detachment and the availability of evidence from all sources minimizes both prejudice and other sources of error. For individuals, and classes of individuals, attach significance to those things which are significant to them. And, as the contributing causes cannot be subjected, like a chemical combination in a test tube, to qualitative and quantitative analysis so as to weigh and value the various elements, the historians differ necessarily in their judgments. One finds the determining cause of war in a great man, another in an idea, a belief, an economic necessity, a trade advantage, a sinister machination, or an accident. It is for this reason largely that men seek to interpret anew in each age, and often with each new generation, the important events in the world's history.

That all who voted for the Joint Resolution of April 6, 1917, [268] did not do so for the reasons assigned by the President in his address to Congress on April 2 is demonstrated by the discussions in the House and in the Senate.[2] That debate discloses also that both in the Senate and in the House the loans to the Allies and the desire to insure their repayment in full were declared to have been instrumental in bringing about in our country the sentiment in favor of

[2] See 55 Cong. Rec. 253, 254, 344, 354, 357, 407.

Subscribe to The American Socialist, published weekly by the National Office, Socialist party, 803 West Madison street, Chicago, Illinois, 50 cents per year, 25 cents for six months. It is a paper without a muzzle.

. . . . . .

Cut this out or copy it and send it to us. We will see that you promptly receive the desired information.

. . . . . .

To the National Office, Socialist party,
803 W. Madison street, Chicago, Illinois.

I am interested in the Socialist party and its principles. Please send me samples of its literature.

Name .....
Address .....
City..... State.....

First: From this leaflet, which is divided into six [264] chapters, there are set forth in count 3, five sentences as constituting the false statements or reports wilfully conveyed by defendants with the intent to interfere with the operation and success of the military and naval forces of the United States.

(a) Two sentences are culled from the first chapter. They follow immediately after the words: "Conscription is upon us; the draft law is a fact"—and a third sentence culled follows a little later. They are:

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the Army. . . . And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."

To prove the alleged falsity of these statements the government gravely called as a witness a major in the regular army with twenty-eight years' experience, who has been assigned since July 5, 1917, to recruiting work. He testified that "recruiting" has to do with the volunteer service and has nothing to do with the drafting system, and that the word "impress" has no place in the recruiting service. The subject of his testimony was a matter not of fact, but of law; and as a statement of law it was erroneous. That "recruiting is gaining fresh supplies for the forces, as well by draft as otherwise," had been assumed by the circuit court of appeals for that circuit in Masses Pub. Co. v. Patten, L.R.A.1918C, 79, 158 C. C. A. 250, 246 Fed. 24, Ann. Cas. 1918B, 999 (decided eleven days before this testimony was given), and was later expressly held by this court in Schenck v. United States, 249 U. S. 47, 53, 63 L. ed. 470, 474, 39 Sup. Ct. Rep. 247. The third of the sentences charged as false was obviously neither a statement nor a report, but a prediction; and it was later verified.[1] That the prediction [265] made in the leaflet was later verified is, of course, immaterial; but the fact shows the danger of extending beyond its appropriate sphere the scope of a charge of falsity.

(b) The fourth sentence set forth in the 3d count as a false statement was culled from the third chapter of the leaflet and is this:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has not time to protect the food supply from gamblers."

To prove the falsity of this statement the government called the United States attorney for that district, who testified that no Federal law makes it a crime not to stand up when the "Star Spangled Banner" is played, and that he has no knowledge of anyone being prosecuted for failure to do so. The presiding judge supplemented this testimony by a ruling that the Attorney General, like every officer of the government, is presumed to do his duty and not to violate his duty, and that this presumption should obtain unless evidence to the contrary was adduced. The Regulations of the Army (No. 378, Edition of 1913, p. 88) provide that if the National Anthem is played in any place, those present, whether in uniform or in

[1] On May 20, 1918, chap. 79, 40 Stat. at L. 557, Congress, by joint resolution, extended the draft to males who had, since June 5, 1917, attained the age of twenty-one, and authorized the President to extend it to those thereafter attaining that age. Under this act, June 5, 1918, was fixed as the date for the Second Registration. Subsequently, August 24, 1918, was fixed for the supplemental registration of all coming of age between June 5, 1918, and August 24, 1918. August 13, 1918, 40 Stat. at L. 1834; May 20, 1918, 40 Stat. at L. 1781. By Act of August 31, 1918, chap. 166, 40 Stat. at L. 955, Comp. Stat. § 2044b, the provisions of the draft law were extended to persons between the ages of eighteen and forty-five. Under this act, September 12, 1918, was fixed as the date for the Third Registration. August 31, 1918, 40 Stat. at L. 1840.

civilian clothes, shall stand until the last note of the anthem. The regulation is expressly limited in its operation to those belonging to the military service, although the practice was commonly observed by civilians throughout the war. [266] There was no Federal law imposing such action upon them. The Attorney General, who does not enforce Army Regulations, was, therefore, not engaged in sending men to prison for that offense. But when the passage in question is read in connection with the rest of the chapter, it seems clear that it was intended, not as a statement of fact, but as a criticism of the Department of Justice for devoting its efforts to prosecutions for acts or omissions indicating lack of sympathy with the war, rather than to protecting the community from profiteering by prosecuting violators of the Food Control Act. August 10, 1917, chap. 53, 40 Stat. at L. 276, Comp. Stat. § 3115¼e, Fed. Stat. Anno. Supp. 1918, p. 181. Such criticism of governmental operations, though grossly unfair as an interpretation of facts, or even wholly unfounded in fact, are not "false reports and false statements with intent to interfere with the operation or success of the military or naval forces."

(c) The remaining sentence, set forth in count 3 as a false statement, was culled from the sixth chapter of the leaflet, and is this:

"Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked."

To prove the falsity of this statement the government introduced the address made by the President to Congress on April 2, 1917, which preceded the adoption of the Joint Resolution of April 6, 1917, declaring that a state of war exists between the United States and the Imperial German Government (chap. 1, 40 Stat. at L. 1). This so-called statement of fact—which is alleged to be false—is merely a conclusion or a deduction from facts. True it is the kind of conclusion which courts call a conclusion of fact, as distinguished from a conclusion of law; and which is sometimes spoken of as a finding of ultimate fact as distinguished from an evidentiary fact. But, in its essence, it is the expression of a judgment—like the [267] statements of many so-called historical facts. To such conclusions and deductions the declaration of this court in American School v. McAnnulty, 187 U. S. 94, 104, 40 L. ed. 90, 94, 23 Sup. Ct. Rep. 33, is applicable:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity."

The cause of a war—as of most human action—is not single. War is ordinarily the result of many co-operating causes, many different conditions, acts, and motives. Historians rarely agree in their judgment as to what was the determining factor in a particular war, even when they write under circumstances where detachment and the availability of evidence from all sources minimizes both prejudice and other sources of error. For individuals, and classes of individuals, attach significance to those things which are significant to them. And, as the contributing causes cannot be subjected, like a chemical combination in a test tube, to qualitative and quantitative analysis so as to weigh and value the various elements, the historians differ necessarily in their judgments. One finds the determining cause of war in a great man, another in an idea, a belief, an economic necessity, a trade advantage, a sinister machination, or an accident. It is for this reason largely that men seek to interpret anew in each age, and often with each new generation, the important events in the world's history.

That all who voted for the Joint Resolution of April 6, 1917, [268] did not do so for the reasons assigned by the President in his address to Congress on April 2 is demonstrated by the discussions in the House and in the Senate.[2] That debate discloses also that both in the Senate and in the House the loans to the Allies and the desire to insure their repayment in full were declared to have been instrumental in bringing about in our country the sentiment in favor of

[2] See 55 Cong. Rec. 253, 254, 344, 354, 357, 407.

the war.[3] However strongly we may believe [269] that these loans were not the slightest makeweight, much less a determining factor, in the country's decision, the fact that some of our representatives in the Senate and the House declared otherwise on one of the most solemn occasions in the history of the nation should help us to understand that statements like that here charged to be false are in essence matters of opinion and judgment, not matters of fact, to be determined by a jury upon or without evidence; and that even the President's address, which set forth high moral grounds justifying our entry into the war, may not be accepted as establishing beyond a reasonable doubt that a statement ascribing a base motive was criminally false. All the alleged false statements were an interpretation and discussion of public facts of public interest. If the proceeding had been for libel, the defense of privilege might have been interposed. Gandia v. Pettingill, 222 U. S. 452, 56 L. ed. 267, 32 Sup. Ct. Rep. 127. There is no reason to believe that Congress, in prohibiting a special class of false statements, intended to interfere with what was obviously comment as distinguished from a statement.

The presiding judge ruled that expressions of opinion were not punishable as false statements under the act; but he left it to the jury to determine whether the five sentences in question were statements of facts or expressions of opinion. As this determination was to be made from the reading of the leaflet, unaffected by any extrinsic evidence, the question was one for the court. To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false, would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental. [270] There is nothing in the act compelling or indeed justifying such a construction of it; and I cannot believe that Congress in passing, and the President in approving, it, conceived that such a construction was possible.

Second: But, even if the passages from the leaflet set forth in the third count could be deemed false statements within the meaning of the act, the convictions thereon were unjustified because evidence was wholly lacking to prove any one of the other essential elements of the crime charged. Thus, there was not a particle of evidence that the defendants knew that the statements were false. They were mere distributers of the leaflet. It had been prepared by a man of some prominence. It had been published by the national organization. Not one of the defendants was an officer, even, of the local organization. One of them, at least, was absent from the meetings at which the proposal to distribute the leaflet was discussed. There is no evidence that the truthfulness of the statements contained in the leaflet had ever been questioned before this indictment was found. The statement

[3] Discussion in the Senate April 4, 1917:

". . . there is no doubt in any mind but the enormous amount of money loaned to the Allies in this country has been instrumental in bringing about a public sentiment in favor of our country taking a course that would make every debt bond worth a hundred cents on the dollar, and making the payment of every debt certain and sure." 55 Cong. Rec. p. 213.

Discussion in the House April 5, 1917.

"Since the loan of $500,000,000 was made by Morgan to the Allies, their efforts have been persistent to land our soldiers in the French trenches." 55 Cong. Rec. p. 342.

"Already we have loaned the Allies, through our banking system, up to December 31, 1916, the enormous sum of $2,325,900,000 in formal loans. Other huge sums have been loaned and billions have been added since that date. 'Where your treasures are, there will be your heart also.' That is one of the reasons why we are about to enter this war. No wonder the Morgans and the munition makers desire war. . . . Our financiers desire that Uncle Sam underwrite these and other huge loans and fight to defend their financial interests, that there may be no final loss." 55 Cong. Rec. p. 362.

"I believe that all Americans, except that limited although influential class which is willing to go on shedding other men's blood to protect its investments and add to its accursed profits, have abhorred the thought of war." 55 Cong. Rec. p. 386.

"Likewise, Mr. Chairman, the J. Pierpoint Morgans, and their associates, who have floated war loans running into the millions which they now want the United States to guarantee by entering the European war. . . ." 55 Cong. Rec. p. 372.

"These war germs are both epidemic and contagious. They are in the air, but somehow or other they multiply faster in the fumes about the munition factories. You will not find many in our climate. They also multiply pretty fast in Wall Street and other money centers. I am opposed to declaring war to save the speculators." 55 Cong. Rec. p. 376.

mainly relied upon to sustain the conviction—that concerning the effect of our large loans to the Allies—was merely a repetition of what had been declared with great solemnity and earnestness in the Senate and in the House while the Joint Resolution was under discussion. The fact that the President had set forth in his noble address worthy grounds for our entry into the war was not evidence that these defendants knew to be false the charge that base motives had also been operative. The assertion that the great financial interests exercise a potent, subtle, and sinister influence in the important decisions of our government had often been made by men high in authority. Mr. Wilson, himself a historian, said before he was President, and repeated in the New Freedom, that "the masters of the government of the United States are the combined capitalists and manufacturers of the United [271] States."[4] We may be convinced that the decision to enter the great war was wholly free from such base influences, but we may not, because such is our belief, permit a jury to find, in the absence of evidence, that it was proved beyond a reasonable doubt that these defendants *knew* that a statement in this leaflet to the contrary was false.

Nor was there a particle of evidence that these statements were made with intent to interfere with the operation or success of the military and naval forces. So far as there is any evidence bearing on the matter of intent, it is directly to the contrary. The fact that the local refused to distribute the pamphlet until Judge Rose had directed a verdict of acquittal in the Baltimore case shows that its members desired to do only that which the law permitted. The tenor of the leaflet itself shows that the intent of the writer and of the publishers was to advance the cause of Socialism; and each defendant testified that this was his only purpose in distributing the pamphlet. Furthermore, the nature of the words used and the circumstances under which they were used showed affirmatively that they did not "create a clear and present danger" that thereby the operations or success of our military and naval forces would be interfered with.

The gravamen of the third count is the charge of wilfully conveying, in time of war, false statements with the intent to interfere with the operation and success of our military or naval forces. One who did that would be called a traitor to his country. The defendants, humble members of the Socialist party, performed as distributers of the leaflet what would ordinarily be deemed merely a menial service. To hold them guilty under the 3d [272] count is to convict not them alone, but, in effect, their party, or at least its responsible leaders, of treason, as that word is commonly understood. I cannot believe that there is any basis in our law for such a condemnation on this record.

Third: To sustain a conviction on the 2d or on the 6th count it is necessary to prove that by co-operating to distribute the leaflet the defendants conspired or attempted wilfully to "cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces." No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the 3d count as to the total lack of evidence of evil intent is equally applicable here.

A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such a nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces. The leaflet contains lurid and perhaps exaggerated pictures of the horrors of war. Its arguments as to the causes of this war may appear to us shallow and grossly unfair. The remedy proposed may seem to us worse than the evil which, it is argued, will be thereby removed. But the leaflet, far from counseling disobedience to law, points to the hopelessness of protest, under the existing system, pictures the irresistible power of the military arm of the government, and indicates that acquiescence is a necessity. Insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces are very serious crimes. It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them and thereby risk the severe punishment prescribed for such offenses. Certainly

[4] Page 57. Then follows: "It is written over every intimate page of the records of Congress, it is written all through the history of conferences at the White House, that the suggestions of economic policy in this country have come from one source, not many sources."

there was no clear and present danger that such would be the result. [273] The leaflet was not even distributed among those in the military or the naval service. It was distributed among civilians; and since the conviction on the 1st count has been abandoned here by the government, we have no occasion to consider whether the leaflet might have discouraged voluntary enlistment or obedience to the provisions of the Selective Draft Act.

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning, or intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in "the Price We Pay."

STATE OF MINNESOTA, Complainant,
v.
STATE OF WISCONSIN, Defendant.

(See S. C. Reporter's ed. 273-285.)

Boundaries — between states — navigable waters — mouth of river.

1. The mouth of the St. Louis river within the meaning of the provision in the Wisconsin Enabling Act of August 6, 1846, describing the state boundary in part as "thence [westwardly] through the center of Lake Superior to the mouth of the St. Louis river," is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin points.—"The Entry."

[For other cases, see Boundaries, III. b, in Digest Sup. Ct. 1908.]

Boundaries — between states — navigable waters — thalweg.

2. The middle of the principal channel of navigation—not necessarily the deepest channel—is commonly accepted as the boundary line where navigable water constitutes the boundary between two states.

[For other cases, see Boundaries, III. b, in Digest Sup. Ct. 1908.]

Boundaries — between states — conditions existing at time of erection of state.

3. The boundary line between Wisconsin and Minnesota in Upper and Lower St. Louis bays must be ascertained upon a consideration of the situation existing at the time of the enactment of the Wisconsin Enabling Act of August 6, 1846, and accurately disclosed by the Meade chart.

[For other cases, see Boundaries, III. b, in Digest Sup. Ct. 1908.]

Boundaries — between Wisconsin and Minnesota — navigable waters.

4. That part of the boundary line between Wisconsin and Minnesota described in the Wisconsin Enabling Act of August 6, 1846, as proceeding from the mouth of the St. Louis river "up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map," is adjudged to run midway between Rice's point and Connor's point and through the middle of Lower St. Louis bay to and with the deep channel leading into Upper St. Louis bay, and to a point therein immediately south of the southern extremity of Grassy point, thence westward along the most direct course, through water not less than 8 feet deep, eastward of Fisherman's island and approximately 1 mile to the deep channel and immediately west of the bar therein, thence with such channel north and west of Big island, up stream to the falls.

[For other cases, see Boundaries, III. b, in Digest Sup. Ct. 1908.]

[No. 16, Original.]

Argued October 16 and 17, 1919. Decided March 8, 1920.

ORIGINAL SUIT in equity to establish a part of the boundary line between Wisconsin and Minnesota. Boundary line adjudged to run midway between Rice's point and Connor's point and through the middle of Lower St. Louis bay to and with the deep channel leading into Upper St. Louis bay, and to a point therein immediately south of the southern extremity of Grassy point, thence westward along the most direct course, through water not less than 8 feet deep, eastward of Fisherman's island and approximately 1 mile to the deep channel and immediately west of the bar therein, thence with such channel north and west of Big island up stream to the falls.

The facts are stated in the opinion.

Messrs. **W. D. Bailey** and **H. B. Fryberger** argued the cause, and, with Messrs. Oscar Mitchell and Louis Hanitch, and Mr. Clifford L. Hilton,

---

Note.—As to judicial settlement of state boundaries—see note to Nebraska v. Iowa, 36 L. ed. U. S. 798.

On rivers and lakes as state boundary—see note to Buck v. Ellenbolt, 15 L.R.A. 187.

On change of channel as change of state boundary—see note to State v. Bowen, 39 L.R.A.(N.S.) 200.

Attorney General of Minnesota, filed a brief for complainant:

The mouth of the river is where the waters thereof cease to descend, and reach the level of the waters of the lake, and become a part thereof. This point is at the head of Big island.

Johnson v. State, 74 Ala. 537; Ball v. Slack, 2 Whart. 508, 30 Am. Dec. 278; Alabama v. Georgia, 23 How. 505, 16 L. ed. 556; United States v. Rodgers, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 109; People v. Featherly, 35 N. Y. S. R. 156, 12 N. Y. Supp. 389; Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61, 123 N. W. 803; Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. 661; Jones v. Lee, 77 Mich. 35, 43 N. W. 855; Chamberlain v. Hemingway, 63 Conn. 1, 22 L.R.A. 45, 38 Am. St. Rep. 330, 27 Atl. 239.

As between the states of the Union, long acquiescence in the assertion of a particular boundary, and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive as to such boundary, and due weight will be given to maps in common use or published by the authority of the respective states, and other evidence of such acquiescence.

Louisiana v. Mississippi, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571; Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728; Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; Rhode Island v. Massachusetts, 4 How. 591, 11 L. ed. 1116.

The rule is settled beyond question (assuming, for the purpose of argument, that the waters westerly of Grassy point are river, and not bay) that the state line follows the center of the main, navigable and navigated channel at this point.

Iowa v. Illinois, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239; Arkansas v. Mississippi, 250 U. S. 39, 63 L. ed. 832, 39 Sup. Ct. Rep. 422; Rowe v. Smith, 51 Conn. 266, 50 Am. Rep. 16.

Bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times and in all directions, and border on different nations or states or people, and find their outlet in the ocean, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because, by local custom, they may be so called.

United States v. Rodgers, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 109.

Practically all, if not all, the cases which this court has decided to the effect that a state line was not changed by avulsion, have been cases where the matter involved was the sudden change of a river channel so that the dry land formed on one side of the main channel was thereby placed on the other side of the main channel. In practically all, if not all, of the cases decided by this court which fixed a state boundary as through the main navigated and navigable channel of a river, the decision was made on the facts as they existed at the time of the determination by this court, except where a different line was necessitated by an avulsion which so suddenly changed the course of the stream as to set off dry land on the other side of the stream.

Iowa v. Illinois, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239; Franzini v. Layland, 120 Wis. 72, 97 N. W. 499; Arkansas v. Tennessee, 246 U. S. 158, 62 L. ed. 638, L.R.A.1918D, 258, 38 Sup. Ct. Rep. 301; Washington v. Oregon, 214 U. S. 215, 53 L. ed. 971, 29 Sup. Ct. Rep. 631.

The argument of counsel for Wisconsin, that the problem before the court is to determine the state line fixed in 1846, is true only with some such limitation as: "Subject to whatever changes therein that may have been caused, in the absence of avulsion, by subsequent variations in the navigable and navigated channel;" otherwise the argument is misleading, and ignores the holdings of this court.

Franzini v. Layland, 120 Wis. 72, 97 N. W. 499.

Mr. M. B. Olbrich argued the cause, and, with Mr. John J. Blaine, Attorney General of Wisconsin, filed a brief for defendant:

"The mouth of the St. Louis river" was an unambiguous term, definitely understood, and intended to describe the space between Wisconsin and Minnesota points, or the so-called "entry," prior to the adoption of the Enabling Act in 1846; and continuous practical construction of the term since then has confirmed this to be its meaning.

Wisconsin v. Duluth, 96 U. S. 379, 380, 24 L. ed. 668, 669; Norton v. Whiteside, 239 U. S. 144, 155, 60 L. ed. 186, 190, 36 Sup. Ct. Rep. 97; Norton v. Whiteside, 188 Fed. 358, 45 L.R.A.(N.S.) 112, 123 C. C. A. 313, 205 Fed. 5; Gridley v. Northern P. R. Co. 111 Minn. 281, 126 N. W. 897; Bright v. Superior, 163 Wis. 12, 156 N. W. 600.

The object of the present inquiry is not to fix the boundary between Wisconsin and Minnesota, but by such competent, relevant evidence as may be obtained, to ascertain where Congress fixed it in 1846.

Moore v. McGuire, 142 Fed. 792; Missouri v. Kentucky, 11 Wall. 395, 20 L. ed. 116; Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; Moore v. McGuire, 205 U. S. 214, 219, 51 L. ed. 776, 777, 27 Sup. Ct. Rep. 483; Arkansas v. Tennessee, 246 U. S. 158, 177, 62 L. ed. 638, 649, L.R.A.1918D, 258, 38 Sup. Ct. Rep. 301; Washington v. Oregon, 211 U. S. 127, 136, 53 L. ed. 118, 120, 29 Sup. Ct. Rep. 47; Iowa v. Illinois, 147 U. S. 1, 13, 37 L. ed. 55, 59, 13 Sup. Ct. Rep. 239; Twiss, Nations, p. 207; 1 Halleck, International Law, p. 182; Reynolds v. M'Arthur, 2 Pet. 417, 440, 7 L. ed. 470, 478.

There being no evidence of the course of actual navigation north of Big island in 1846, the line of deepest soundings governs.

Washington v. Oregon, 211 U. S. 127, 135, 53 L. ed. 118, 120, 29 Sup. Ct. Rep. 47.

There is a presumption that the condition in 1861 was the same as in 1846.

Laplante v. Warren Cotton Mills, 165 Mass. 489, 43 N. E. 294; Scott v. Lattig, 227 U. S. 229, 241, 57 L. ed. 490, 495, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242; United States v. Hutchings, 252 Fed. 845; Wigmore, Ev. 437; Washington, A. & Mt. V. R. Co. v. Vaughan, 111 Va. 785, 69 S. E. 1037; Rex v. Burdett, 4 Barn. & Ald. 124, 106 Eng. Reprint, 884, 22 Revised Rep. 539; Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. Supp. 80; Somerville v. New York, 78 Misc. 203, 137 N. Y. Supp. 924; Adams v. Junger, 158 Iowa, 449, 139 N. W. 1100.

The line of deepest soundings, hence, the main channel, conforms to the course of the curving shore line.

Missouri v. Kentucky, 11 Wall. 395, 410, 20 L. ed. 116, 121; Davis v. Anderson-Tully Co. 164 C. C. A. 521, 252 Fed. 681.

In the absence of prior avulsion or change of traffic, the middle of the main channel in 1893 would coincide with the state line.

Arkansas v. Tennessee, 246 U. S. 158, 173, 62 L. ed. 638, 647, L.R.A.1918D, 258, 38 Sup. Ct. Rep. 301; A. G. Wineman & Sons v. Reeves, — A.L.R. —, 157 C. C. A. 446, 245 Fed. 254; Whiteside v. Norton, 45 L.R.A.(N.S.) 112, 123 C. C. A. 313, 205 Fed. 5; Norton v. Whiteside, 239 U. S. 144, 60 L. ed. 186, 36 Sup. Ct. Rep. 97.

The mere fact that a proposed channel would be more convenient, and result in less confusion if now adopted as the state line, is a consideration quite beside the point.

Indiana v. Kentucky, 136 U. S. 479, 509, 34 L. ed. 329, 332, 10 Sup. Ct. Rep. 1051.

The main channel of the river, as used in acts determining the boundaries between states, has come to mean something possessed of pre-existing identity, characterized or described as a channel, to which has been added the element, from the terminology of the mariner, of navigation. In other words, to constitute a boundary line there must be a combination of these two things: first, a channel; second, navigation in that channel. And, as pointed out, the deepest channel may exist, and yet be unsuited to navigation and be not navigated. This would not constitute a boundary. On the other hand, navigation outside of or apart from the existence of a channel in the river would fall equally short of constituting a boundary. The two elements must concur.

Buttenuth v. St. Louis Bridge Co. 123 Ill. 535, 5 Am. St. Rep. 545, 17 N. E. 439; Keokuk & H. Bridge Co. v. People, 145 Ill. 596, 34 N. E. 482; Washington v. Oregon, 214 U. S. 205, 216, 53 L. ed. 969, 971, 29 Sup. Ct. Rep. 631.

By "main track" is meant the main artery for the movement of traffic between any two points.

Chicago, P. & St. L. R. Co. v. Jacksonville R. & Light Co. 245 Ill. 155, 91 N. E. 1027.

For the most part, the information outside the record is presented to the court under the full sanction of the rules laid down.

Rhode Island v. Massachusetts, 14 Pet. 210, 257, 262, 10 L. ed. 423, 445, 447; Tempel v. United States, 248 U. S. 121, 63 L. ed. 162, 39 Sup. Ct. Rep. 56; Alaska Pacific Fisheries v. United States, 248 U. S. 78, 86, 89, 63 L. ed. 138, 140, 141, 39 Sup. Ct. Rep. 40; International News Service v. Associated Press, 248 U. S. 215, 63 L. ed. 211, 2 A.L.R. 293, 39 Sup. Ct. Rep. 68; The Habana, 175 U. S. 677, 712, 44 L. ed. 320, 333, 20 Sup. Ct. Rep. 290; Moore v. McGuire, 205 U. S. 214, 224, 51 L. ed. 776, 779, 27 Sup. Ct. Rep. 483; Trenier v. Stewart, 101 U. S. 797, 25 L. ed. 1021; Trenier v. Stewart, 55 Ala. 465.

Mr. Justice **McReynolds** delivered the opinion of the court:

We are asked to ascertain and establish the boundary line between the parties in Upper and Lower St. Louis bays. Complainant claims to the middle of each bay—halfway between the shores. The defendant does not seriously question this claim as to the lower bay, but earnestly maintains that in the upper one the line follows a sinuous course near complainant's shore. Since 1893 a deep channel has been dredged through these waters and harbor lines have been established. According to Wisconsin's insistence, its border crosses and recrosses this channel and intersects certain docks extending from the Minnesota shore, leaving portions of them in each state. See Wisconsin v. Duluth, 96 U. S. 379, 24 L. ed. 668; Norton v. Whiteside, 239 U. S. 144, 60 L. ed. 186, 36 Sup. Ct. Rep. 97.

"An Act to Enable the People of Wisconsin Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union," approved August 6, 1846 (chap. 89, 9 Stat. at L. 56), described the boundary in part as follows: "Thence [with the northwesterly boundary of Michigan] down the main channel of the Montreal river to the middle of Lake Superior; thence [westwardly] through the center of Lake Superior to the mouth of the St. Louis river; thence up the main channel [**276**] of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the River St. Croix," etc., etc. With the boundaries described by the Enabling Act, Wisconsin entered the Union May 29, 1848 (chap. 50, 9 Stat. at L. 233).

"An Act to Authorize the People of the Territory of Minnesota to Form a Constitution and State Government, Preparatory to Their Admission in the Union," approved February 26, 1857 (chap. 60, 11 Stat. at L. 166), specifies a portion of the boundary thus: "Thence by a due south line to the north line of the state of Iowa; thence east along the northern boundary of said state to the main channel of the Mississippi river; thence up the main channel of said river, and following the boundary line of the state of Wisconsin, until the same intersects the Saint Louis river; *thence down said river to and through Lake Superior, on the boundary line of Wisconsin* and Michigan, until it intersects the dividing line between the United States and the British possessions." With boundaries as therein described, Minnesota became a state May 11, 1858 (chap. 31, 11 Stat. at L. 285).

The present controversy arises from conflicting interpretations of the words —"thence [westwardly] through the center of Lake Superior *to the mouth of the St. Louis river;* thence up *the main channel of said river* to the first rapids in the same, above the Indian village, according to Nicollet's map." The situation disclosed by an accurate survey gives much room for differences concerning the location of the "mouth of the St. Louis river" and "the main channel of said river." Nicollet's Map of the "Hydrographical Basin of the Upper Mississippi River," published in 1843, and drawn upon a scale of 1:1,200,000,—approximately 20 miles to the inch,—is too small either to reveal or to give material aid in solving the difficulties. A sketch from it—approximately on original scale—is printed on page 562.

[**277**] During 1823-1825 Lieutenant Bayfield of the British Navy surveyed and sounded the westerly end of Lake Superior and the lower waters of St. Louis river. A chart compiled from data so obtained (1:49,300,—4,108 feet to the inch), and published in 1828, shows the general configuration and lays the proper sailing course southward of [**278**] Big island. Prior to 1865 this was the only available chart and navigators often used it.

The first accurate map of these waters was drawn from surveys and soundings made under direction of Captain George W. Meade in 1861, and is now on file in the Lake Survey Office at Detroit. After being reduced one half,—to a scale of 1:32,000, or approximately 2 inches to a mile,—it was engraved and published in 1865 or 1866. Known as the Meade chart, this reproduction is accepted by both parties as adequately disclosing conditions existing in 1846. A rough sketch based upon the chart,—about one third of its size,—and also a photographic reproduction of a portion of the original map, are printed on succeeding pages [565, 566].

Minnesota and Wisconsin points are low, narrow strips of sand,—the former 6 miles in length, the latter approximately 3. Between them there is a narrow opening known as "The Entry," and inside lies a bay (Allouez and Superior), 9 miles long and a mile and a half wide. A narrow channel between Rice's point and Connor's point leads into Lower St. Louis bay, approximately a mile and a half wide and 3 miles long. Passing

For the men of this land have been fed full with horror during the past three years; and tho the call for volunteers has become wild, frantic, desperate; tho the posters scream from every billboard, and tho parades and red fire inflame the atmosphere in every town;

The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say "Must we—be that!"

You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;

It is the price you pay for your stupidity—you who have rejected Socialism.

III.

Food prices go up like skyrockets; and show no sign of bursting and coming down.

Wheat, corn, potatoes, are far above the Civil War mark; eggs, butter, meat—all these things are almost beyond a poor family's reach.

[259] The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.

Starvation begins to stare us in the face—and we, people of the richest and most productive land on earth, are told to starve ourselves yet further because our allies must be fed.

Submarines are steadily sending to the fishes millions of tons of food stuffs; and still we build more ships, and send more food, and more and more is sunk;

Frantically we grub in the earth and sow and tend, and reap; and then as frantically load the food in ships, and then as frantically sink with them—

We, the "civilized nations" of the world!

While the children of the poor clamor for their bread and the well to do shake their heads and wonder what on earth the poor folks are doing;

The poor folks are growling and muttering with savage sidelong glances, and are rolling up their sleeves.

For the price they pay for their stupidity is getting beyond their power to pay!

IV.

Frightful reports are being made of the ravages of venereal diseases in the army training camps, and in the barracks where the girl munition workers live.

One of the great nations lost more men thru loathsome immoral diseases than on the firing line, during the first eighteen months of the war.

Back from the Mexican border our boys came, spreading the curse of the great Black Plague among hundreds of thousands of homes; blasting the lives of innocent women and unborn babes;

Over in Europe ten millions of women are deprived of their husbands, and fifty millions of babies can never be;

[260] Of those women who will have their mates given back to them, there are twenty millions who will have ruined wrecks of men; mentally deranged, physically broken, morally rotten;

Future generations of families are made impossible; blackness and desolation instead of happiness and love will reign where the homes of the future should be;

And all because you believed the silly lie, that "Socialism would destroy the home!"

Pound on, guns of the embattled host; wreck yet more homes, kill yet more husbands and fathers, rob yet more maidens of their sweethearts, yet more babies of their fathers;

That is the price the world pays for believing the monstrous, damnable, outrageous lie that Socialism would destroy the home!

Now the homes of the world are being destroyed; every one of them would have been saved by Socialism. But you would not believe. Now pay the price!

V.

This war, you say, is all caused by the Kaiser; and we are fighting for democracy against autocracy. Once dethrone the Kaiser and there will be permanent peace.

That is what they said about Napoleon. And in the century since Napoleon was overthrown there has been more and greater wars than the world ever saw before.

There were wars before Germany ever existed; before Rome ruled; before Egypt dominated the ages.

War has been universal; and the cause of war is always the same. Somebody wanted something somebody else possessed and they fought over the ownership of it.

This war began over commercial routes and ports and rights; and underneath all the talk about democracy ver-

sus autocracy, you hear a continual note, and undercurrent, a subdued refrain:

[261] "Get ready for the commercial war that will follow this war."

Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

And as soon as the guns are stilled and the dead are buried, commercial forces will prepare for the next bloody struggle over routes and ports and rights, coal mines and railroads;

For these are the essence of this, as of all other wars!

This, you say, is a war for the rights of small nations; and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

But go to it! Believe everything you are told—you always have and doubtless always will, believe them.

Only do retain this much reason; when you have paid the price, the last and uttermost price; and have not received what you were told you were fighting for—namely, Democracy—

Then remember that the price you paid was not the purchase price for justice, but the penalty price for your stupidity!

VI.

We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely, killing.

Every man, every woman, every child, must "do his bit" in the service of destruction.

We have been telling you for, lo, these many years that the whole nation could be mobilized and every man, woman, and child induced to do his bit for the service of humanity, but you have laughed at us.

Now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of killing; and you [262] have turned the whole energy of the nations of the world into the service of their kings for the purpose of killing—killing—killing.

Why would you not believe us when we told you that it was possible to cooperate for the saving of life?

Why were you not interested when we begged you to work all together to build, instead to destroy? To preserve, instead of to murder?

Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellow workers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man?

Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded—you are paying for them now.

—Lo, the price you pay! Lo, the price your children will pay. Lo, the agony the death, the blood, the unforgettable sorrow,—

The price of your stupidity!

For this war—as everyone who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—this war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

It is to determine whether interest, dividends, and profits shall be paid to investors speaking German or those speaking English and French.

Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked.

Socialism would have settled that question; it would determine that to every producer shall be given all the value of what he produces; so that nothing would be left over for exploiters or investors.

[263] With that great question settled there would be no cause for war.

Until the question of surplus profits is settled that way, wars will continue; each war being the prelude to a still vaster and greater outburst of hell;

Until the world becomes weary of paying the stupendous price for its own folly;

Until those who are sent out to maim and murder one another for the profit of bankers and investors determine to have and to hold what they have fought for;

Until money is no more sacred than human blood;

Until human life refuses to sacrifice itself for private gain;

Until by the explosion of millions of tons of dynamite the stupidity of the human race is blown away, and Socialism is known for what it is, the salvation of the human race;

Until then—you will keep on paying the price!

IF THIS INTERESTS YOU, PASS IT ON.

. . . . . .

Subscribe to The American Socialist, published weekly by the National Office, Socialist party, 803 West Madison street, Chicago, Illinois, 50 cents per year, 25 cents for six months. It is a paper without a muzzle.

. . . . . .

Cut this out or copy it and send it to us. We will see that you promptly receive the desired information.

. . . . . .

To the National Office, Socialist party,
803 W. Madison street, Chicago, Illinois.

I am interested in the Socialist party and its principles. Please send me samples of its literature.

Name .....
Address .....
City..... State.....

First: From this leaflet, which is divided into six [264] chapters, there are set forth in count 3, five sentences as constituting the false statements or reports wilfully conveyed by defendants with the intent to interfere with the operation and success of the military and naval forces of the United States.

(a) Two sentences are culled from the first chapter. They follow immediately after the words: "Conscription is upon us; the draft law is a fact"—and a third sentence culled follows a little later. They are:

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the Army. . . . And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."

To prove the alleged falsity of these statements the government gravely called as a witness a major in the regular army with twenty-eight years' experience, who has been assigned since July 5, 1917, to recruiting work. He testified that "recruiting" has to do with the volunteer service and has nothing to do with the drafting system, and that the word "impress" has no place in the recruiting service. The subject of his testimony was a matter not of fact, but of law; and as a statement of law it was erroneous. That "recruiting is gaining fresh supplies for the forces, as well by draft as otherwise," had been assumed by the circuit court of appeals for that circuit in Masses Pub. Co. v. Patten, L.R.A.1918C, 79, 158 C. C. A. 250, 246 Fed. 24, Ann. Cas. 1918B, 999 (decided eleven days before this testimony was given), and was later expressly held by this court in Schenck v. United States, 249 U. S. 47, 53, 63 L. ed. 470, 474, 39 Sup. Ct. Rep. 247. The third of the sentences charged as false was obviously neither a statement nor a report, but a prediction; and it was later verified.[1] That the prediction [265] made in the leaflet was later verified is, of course, immaterial; but the fact shows the danger of extending beyond its appropriate sphere the scope of a charge of falsity.

(b) The fourth sentence set forth in the 3d count as a false statement was culled from the third chapter of the leaflet and is this:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has not time to protect the food supply from gamblers."

To prove the falsity of this statement the government called the United States attorney for that district, who testified that no Federal law makes it a crime not to stand up when the "Star Spangled Banner" is played, and that he has no knowledge of anyone being prosecuted for failure to do so. The presiding judge supplemented this testimony by a ruling that the Attorney General, like every officer of the government, is presumed to do his duty and not to violate his duty, and that this presumption should obtain unless evidence to the contrary was adduced. The Regulations of the Army (No. 378, Edition of 1913, p. 88) provide that if the National Anthem is played in any place, those present, whether in uniform or in

[1] On May 20, 1918, chap. 79, 40 Stat. at L. 557, Congress, by joint resolution, extended the draft to males who had, since June 5, 1917, attained the age of twenty-one, and authorized the President to extend it to those thereafter attaining that age. Under this act, June 5, 1918, was fixed as the date for the Second Registration. Subsequently, August 24, 1918, was fixed for the supplemental registration of all coming of age between June 5, 1918, and August 24, 1918. August 13, 1918, 40 Stat. at L. 1834; May 20, 1918, 40 Stat. at L. 1781. By Act of August 31, 1918, chap. 166, 40 Stat. at L. 955, Comp. Stat. § 2044b, the provisions of the draft law were extended to persons between the ages of eighteen and forty-five. Under this act, September 12, 1918, was fixed as the date for the Third Registration. August 31, 1918, 40 Stat. at L. 1840.

civilian clothes, shall stand until the last note of the anthem. The regulation is expressly limited in its operation to those belonging to the military service, although the practice was commonly observed by civilians throughout the war. [266] There was no Federal law imposing such action upon them. The Attorney General, who does not enforce Army Regulations, was, therefore, not engaged in sending men to prison for that offense. But when the passage in question is read in connection with the rest of the chapter, it seems clear that it was intended, not as a statement of fact, but as a criticism of the Department of Justice for devoting its efforts to prosecutions for acts or omissions indicating lack of sympathy with the war, rather than to protecting the community from profiteering by prosecuting violators of the Food Control Act. August 10, 1917, chap. 53, 40 Stat. at L. 276, Comp. Stat. § 3115¼e, Fed. Stat. Anno. Supp. 1918, p. 181. Such criticism of governmental operations, though grossly unfair as an interpretation of facts, or even wholly unfounded in fact, are not "false reports and false statements with intent to interfere with the operation or success of the military or naval forces."

(c) The remaining sentence, set forth in count 3 as a false statement, was culled from the sixth chapter of the leaflet, and is this:

"Our entry into it was determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked."

To prove the falsity of this statement the government introduced the address made by the President to Congress on April 2, 1917, which preceded the adoption of the Joint Resolution of April 6, 1917, declaring that a state of war exists between the United States and the Imperial German Government (chap. 1, 40 Stat. at L. 1). This so-called statement of fact—which is alleged to be false—is merely a conclusion or a deduction from facts. True it is the kind of conclusion which courts call a conclusion of fact, as distinguished from a conclusion of law; and which is sometimes spoken of as a finding of ultimate fact as distinguished from an evidentiary fact. But, in its essence, it is the expression of a judgment—like the [267] statements of many so-called historical facts. To such conclusions and deductions the declaration of this court in American School v. McAnnulty, 187 U. S. 94, 104, 40 L. ed. 90, 94, 23 Sup. Ct. Rep. 33, is applicable:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity."

The cause of a war—as of most human action—is not single. War is ordinarily the result of many co-operating causes, many different conditions, acts, and motives. Historians rarely agree in their judgment as to what was the determining factor in a particular war, even when they write under circumstances where detachment and the availability of evidence from all sources minimizes both prejudice and other sources of error. For individuals, and classes of individuals, attach significance to those things which are significant to them. And, as the contributing causes cannot be subjected, like a chemical combination in a test tube, to qualitative and quantitative analysis so as to weigh and value the various elements, the historians differ necessarily in their judgments. One finds the determining cause of war in a great man, another in an idea, a belief, an economic necessity, a trade advantage, a sinister machination, or an accident. It is for this reason largely that men seek to interpret anew in each age, and often with each new generation, the important events in the world's history.

That all who voted for the Joint Resolution of April 6, 1917, [268] did not do so for the reasons assigned by the President in his address to Congress on April 2 is demonstrated by the discussions in the House and in the Senate.[2] That debate discloses also that both in the Senate and in the House the loans to the Allies and the desire to insure their repayment in full were declared to have been instrumental in bringing about in our country the sentiment in favor of

[2] See 55 Cong. Rec. 253, 254, 344, 354, 357, 407.

the war.[3] However strongly we may believe [269] that these loans were not the slightest makeweight, much less a determining factor, in the country's decision, the fact that some of our representatives in the Senate and the House declared otherwise on one of the most solemn occasions in the history of the nation should help us to understand that statements like that here charged to be false are in essence matters of opinion and judgment, not matters of fact, to be determined by a jury upon or without evidence; and that even the President's address, which set forth high moral grounds justifying our entry into the war, may not be accepted as establishing beyond a reasonable doubt that a statement ascribing a base motive was criminally false. All the alleged false statements were an interpretation and discussion of public facts of public interest. If the proceeding had been for libel, the defense of privilege might have been interposed. Gandia v. Pettingill, 222 U. S. 452, 56 L. ed. 267, 32 Sup. Ct. Rep. 127. There is no reason to believe that Congress, in prohibiting a special class of false statements, intended to interfere with what was obviously comment as distinguished from a statement.

The presiding judge ruled that expressions of opinion were not punishable as false statements under the act; but he left it to the jury to determine whether the five sentences in question were statements of facts or expressions of opinion. As this determination was to be made from the reading of the leaflet, unaffected by any extrinsic evidence, the question was one for the court. To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false, would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental. [270] There is nothing in the act compelling or indeed justifying such a construction of it; and I cannot believe that Congress in passing, and the President in approving, it, conceived that such a construction was possible.

Second: But, even if the passages from the leaflet set forth in the third count could be deemed false statements within the meaning of the act, the convictions thereon were unjustified because evidence was wholly lacking to prove any one of the other essential elements of the crime charged. Thus, there was not a particle of evidence that the defendants knew that the statements were false. They were mere distributers of the leaflet. It had been prepared by a man of some prominence. It had been published by the national organization. Not one of the defendants was an officer, even, of the local organization. One of them, at least, was absent from the meetings at which the proposal to distribute the leaflet was discussed. There is no evidence that the truthfulness of the statements contained in the leaflet had ever been questioned before this indictment was found. The statement

[3] Discussion in the Senate April 4, 1917:

". . . there is no doubt in any mind but the enormous amount of money loaned to the Allies in this country has been instrumental in bringing about a public sentiment in favor of our country taking a course that would make every debt bond worth a hundred cents on the dollar, and making the payment of every debt certain and sure." 55 Cong. Rec. p. 213.

Discussion in the House April 5, 1917.

"Since the loan of $500,000,000 was made by Morgan to the Allies, their efforts have been persistent to land our soldiers in the French trenches." 55 Cong. Rec. p. 342.

"Already we have loaned the Allies, through our banking system, up to December 31, 1916, the enormous sum of $2,325,900,000 in formal loans. Other huge sums have been loaned and billions have been added since that date. 'Where your treasures are, there will be your heart also.' That is one of the reasons why we are about to enter this war. No wonder the Morgans and the munition makers desire war. . . . Our financiers desire that Uncle Sam underwrite these and other huge loans and fight to defend their financial interests, that there may be no final loss." 55 Cong. Rec. p. 362.

"I believe that all Americans, except that limited although influential class which is willing to go on shedding other men's blood to protect its investments and add to its accursed profits, have abhorred the thought of war." 55 Cong. Rec. p. 386.

"Likewise, Mr. Chairman, the J. Pierpoint Morgans, and their associates, who have floated war loans running into the millions which they now want the United States to guarantee by entering the European war. . . ." 55 Cong. Rec. p. 372.

"These war germs are both epidemic and contagious. They are in the air, but somehow or other they multiply faster in the fumes about the munition factories. You will not find many in our climate. They also multiply pretty fast in Wall Street and other money centers. I am opposed to declaring war to save the speculators." 55 Cong. Rec. p. 376.

mainly relied upon to sustain the conviction—that concerning the effect of our large loans to the Allies—was merely a repetition of what had been declared with great solemnity and earnestness in the Senate and in the House while the Joint Resolution was under discussion. The fact that the President had set forth in his noble address worthy grounds for our entry into the war was not evidence that these defendants knew to be false the charge that base motives had also been operative. The assertion that the great financial interests exercise a potent, subtle, and sinister influence in the important decisions of our government had often been made by men high in authority. Mr. Wilson, himself a historian, said before he was President, and repeated in the New Freedom, that "the masters of the government of the United States are the combined capitalists and manufacturers of the United [271] States."[4] We may be convinced that the decision to enter the great war was wholly free from such base influences, but we may not, because such is our belief, permit a jury to find, in the absence of evidence, that it was proved beyond a reasonable doubt that these defendants *knew* that a statement in this leaflet to the contrary was false.

Nor was there a particle of evidence that these statements were made with intent to interfere with the operation or success of the military and naval forces. So far as there is any evidence bearing on the matter of intent, it is directly to the contrary. The fact that the local refused to distribute the pamphlet until Judge Rose had directed a verdict of acquittal in the Baltimore case shows that its members desired to do only that which the law permitted. The tenor of the leaflet itself shows that the intent of the writer and of the publishers was to advance the cause of Socialism; and each defendant testified that this was his only purpose in distributing the pamphlet. Furthermore, the nature of the words used and the circumstances under which they were used showed affirmatively that they did not "create a clear and present danger" that thereby the operations or success of our military and naval forces would be interfered with.

The gravamen of the third count is the charge of wilfully conveying, in time of war, false statements with the intent to interfere with the operation and success of our military or naval forces. One who did that would be called a traitor to his country. The defendants, humble members of the Socialist party, performed as distributers of the leaflet what would ordinarily be deemed merely a menial service. To hold them guilty under the 3d [272] count is to convict not them alone, but, in effect, their party, or at least its responsible leaders, of treason, as that word is commonly understood. I cannot believe that there is any basis in our law for such a condemnation on this record.

Third: To sustain a conviction on the 2d or on the 6th count it is necessary to prove that by co-operating to distribute the leaflet the defendants conspired or attempted wilfully to "cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces." No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the 3d count as to the total lack of evidence of evil intent is equally applicable here.

A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such a nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces. The leaflet contains lurid and perhaps exaggerated pictures of the horrors of war. Its arguments as to the causes of this war may appear to us shallow and grossly unfair. The remedy proposed may seem to us worse than the evil which, it is argued, will be thereby removed. But the leaflet, far from counseling disobedience to law, points to the hopelessness of protest, under the existing system, pictures the irresistible power of the military arm of the government, and indicates that acquiescence is a necessity. Insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces are very serious crimes. It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them and thereby risk the severe punishment prescribed for such offenses. Certainly

[4] Page 57. Then follows: "It is written over every intimate page of the records of Congress, it is written all through the history of conferences at the White House, that the suggestions of economic policy in this country have come from one source, not many sources."

the war.[3] However strongly we may believe [269] that these loans were not the slightest makeweight, much less a determining factor, in the country's decision, the fact that some of our representatives in the Senate and the House declared otherwise on one of the most solemn occasions in the history of the nation should help us to understand that statements like that here charged to be false are in essence matters of opinion and judgment, not matters of fact, to be determined by a jury upon or without evidence; and that even the President's address, which set forth high moral grounds justifying our entry into the war, may not be accepted as establishing beyond a reasonable doubt that a statement ascribing a base motive was criminally false. All the alleged false statements were an interpretation and discussion of public facts of public interest. If the proceeding had been for libel, the defense of privilege might have been interposed. Gandia v. Pettingill, 222 U. S. 452, 56 L. ed. 267, 32 Sup. Ct. Rep. 127. There is no reason to believe that Congress, in prohibiting a special class of false statements, intended to interfere with what was obviously comment as distinguished from a statement.

The presiding judge ruled that expressions of opinion were not punishable as false statements under the act; but he left it to the jury to determine whether the five sentences in question were statements of facts or expressions of opinion. As this determination was to be made from the reading of the leaflet, unaffected by any extrinsic evidence, the question was one for the court. To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false, would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental. [270] There is nothing in the act compelling or indeed justifying such a construction of it; and I cannot believe that Congress in passing, and the President in approving, it, conceived that such a construction was possible.

Second: But, even if the passages from the leaflet set forth in the third count could be deemed false statements within the meaning of the act, the convictions thereon were unjustified because evidence was wholly lacking to prove any one of the other essential elements of the crime charged. Thus, there was not a particle of evidence that the defendants knew that the statements were false. They were mere distributers of the leaflet. It had been prepared by a man of some prominence. It had been published by the national organization. Not one of the defendants was an officer, even, of the local organization. One of them, at least, was absent from the meetings at which the proposal to distribute the leaflet was discussed. There is no evidence that the truthfulness of the statements contained in the leaflet had ever been questioned before this indictment was found. The statement

[3] Discussion in the Senate April 4, 1917:

". . . there is no doubt in any mind but the enormous amount of money loaned to the Allies in this country has been instrumental in bringing about a public sentiment in favor of our country taking a course that would make every debt bond worth a hundred cents on the dollar, and making the payment of every debt certain and sure." 55 Cong. Rec. p. 213.

Discussion in the House April 5, 1917.

"Since the loan of $500,000,000 was made by Morgan to the Allies, their efforts have been persistent to land our soldiers in the French trenches." 55 Cong. Rec. p. 342.

"Already we have loaned the Allies, through our banking system, up to December 31, 1916, the enormous sum of $2,325,900,000 in formal loans. Other huge sums have been loaned and billions have been added since that date. 'Where your treasures are, there will be your heart also.' That is one of the reasons why we are about to enter this war. No wonder the Morgans and the munition makers desire war. . . . Our financiers desire that Uncle Sam underwrite these and other huge loans and fight to defend their financial interests, that there may be no final loss." 55 Cong. Rec. p. 362.

"I believe that all Americans, except that limited although influential class which is willing to go on shedding other men's blood to protect its investments and add to its accursed profits, have abhorred the thought of war." 55 Cong. Rec. p. 386.

"Likewise, Mr. Chairman, the J. Pierpoint Morgans, and their associates, who have floated war loans running into the millions which they now want the United States to guarantee by entering the European war. . . ." 55 Cong. Rec. p. 372.

"These war germs are both epidemic and contagious. They are in the air, but somehow or other they multiply faster in the fumes about the munition factories. You will not find many in our climate. They also multiply pretty fast in Wall Street and other money centers. I am opposed to declaring war to save the speculators." 55 Cong. Rec. p. 376.

mainly relied upon to sustain the conviction—that concerning the effect of our large loans to the Allies—was merely a repetition of what had been declared with great solemnity and earnestness in the Senate and in the House while the Joint Resolution was under discussion. The fact that the President had set forth in his noble address worthy grounds for our entry into the war was not evidence that these defendants knew to be false the charge that base motives had also been operative. The assertion that the great financial interests exercise a potent, subtle, and sinister influence in the important decisions of our government had often been made by men high in authority. Mr. Wilson, himself a historian, said before he was President, and repeated in the New Freedom, that "the masters of the government of the United States are the combined capitalists and manufacturers of the United [271] States."[4] We may be convinced that the decision to enter the great war was wholly free from such base influences, but we may not, because such is our belief, permit a jury to find, in the absence of evidence, that it was proved beyond a reasonable doubt that these defendants *knew* that a statement in this leaflet to the contrary was false.

Nor was there a particle of evidence that these statements were made with intent to interfere with the operation or success of the military and naval forces. So far as there is any evidence bearing on the matter of intent, it is directly to the contrary. The fact that the local refused to distribute the pamphlet until Judge Rose had directed a verdict of acquittal in the Baltimore case shows that its members desired to do only that which the law permitted. The tenor of the leaflet itself shows that the intent of the writer and of the publishers was to advance the cause of Socialism; and each defendant testified that this was his only purpose in distributing the pamphlet. Furthermore, the nature of the words used and the circumstances under which they were used showed affirmatively that they did not "create a clear and present danger" that thereby the operations or success of our military and naval forces would be interfered with.

The gravamen of the third count is the charge of wilfully conveying, in time of war, false statements with the intent to interfere with the operation and success of our military or naval forces. One who did that would be called a traitor to his country. The defendants, humble members of the Socialist party, performed as distributers of the leaflet what would ordinarily be deemed merely a menial service. To hold them guilty under the 3d [272] count is to convict not them alone, but, in effect, their party, or at least its responsible leaders, of treason, as that word is commonly understood. I cannot believe that there is any basis in our law for such a condemnation on this record.

Third: To sustain a conviction on the 2d or on the 6th count it is necessary to prove that by co-operating to distribute the leaflet the defendants conspired or attempted wilfully to "cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces." No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the 3d count as to the total lack of evidence of evil intent is equally applicable here.

A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such a nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces. The leaflet contains lurid and perhaps exaggerated pictures of the horrors of war. Its arguments as to the causes of this war may appear to us shallow and grossly unfair. The remedy proposed may seem to us worse than the evil which, it is argued, will be thereby removed. But the leaflet, far from counseling disobedience to law, points to the hopelessness of protest, under the existing system, pictures the irresistible power of the military arm of the government, and indicates that acquiescence is a necessity. Insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces are very serious crimes. It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them and thereby risk the severe punishment prescribed for such offenses. Certainly

[4] Page 57. Then follows: "It is written over every intimate page of the records of Congress, it is written all through the history of conferences at the White House, that the suggestions of economic policy in this country have come from one source, not many sources."

where this was a mere inadvertence and did not mislead or prejudice anyone.

[For other cases, see Mines, I. g, in Digest Sup. Ct. 1908.]

Internal revenue — validity of unstamped deeds — admissibility in evidence.

10. The absence of the internal revenue stamps required on deeds by the Act of October 22, 1914, § 22, neither invalidated the deeds nor made them inadmissible as evidence.

[For other cases, see Internal Revenue, III. 1; Evidence, IV. b, 1, in Digest Sup. Ct. 1908.]

Appeal — reversible error — refusal to direct verdict.

11. The refusal of the trial court to direct a verdict for defendant will not be disturbed by the Federal Supreme Court where that court is of the opinion that the evidence presented several disputable questions of fact which it was the province of the jury to determine, and this was the view, not only of the judge who presided at the trial, but of another judge who overruled a motion for a new trial.

[For other cases, see Appeal and Error, VIII. m, 6; Trial, VII. d, 3, in Digest Sup. Ct. 1908.]

Evidence — admissions by locator of mining claim — mistake in posting notice.

12. Placer claimants, by mistakenly posting a notice stating that they had relocated the ground as a lode claim, did not thereby admit the validity of a prior conflicting lode location, where the mistake was promptly corrected the next day by the substitution of another notice stating that the ground was located as a placer claim, and no one was misled by the mistake.

[For other cases, see Evidence, IX. in Digest Sup. Ct. 1908.]

Evidence — self-serving declarations — recitals in notice of mining location.

13. Recitals of discovery in the recorded notices of location of lode mining claims are mere ex parte self-serving declarations on the part of the locators, and are not evidence of discovery.

[For other cases, see Evidence, X. d, in Digest Sup. Ct. 1908.]

Appeal — errors waived or cured below — evidence.

14. Defendant in a suit by placer mining claimants against a conflicting lode claimant has no right to complain that he was not permitted, on cross-examination of a witness for the plaintiffs, to show the contents of certain assay reports, where, though some of these reports were at first excluded, they were all produced under a new ruling of the court except two, which covered samples taken from openings made after the placer claims were located, and defendant did not call for them when the witness was recalled, or reserve any exceptions to the new ruling, and it is more than inferable from the record that he acquiesced in it.

[For other cases, see Appeal and Error, VIII. k, 3, in Digest Sup. Ct. 1908.]

Mines — lode location — necessity of discovery — effect of holding and working.

15. The necessity of a discovery to sustain a lode mining location is not dispensed with nor may its absence be cured by virtue of the provisions of U. S. Rev. Stat. § 2332, that evidence of holding and working a mining claim for a period equal to the time prescribed by the Statute of Limitations for mining claims of the state or territory where the same may be situated shall be sufficient to establish a right to a patent thereto in the absence of any adverse claim.

[For other cases, see Mines, I. b, in Digest Sup. Ct. 1908.]

[Nos. 172 and 173.]

Argued December 8, 1919. Decided March 15, 1920.

TWO WRITS of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review judgments which reversed judgments of the District Court for the District of Nevada in favor of plaintiffs in adverse suits, and ordered a new trial. Judgments of the Circuit Court of Appeals reversed. Judgments of the District Court affirmed.

See same case below, 161 C. C. A. 133, 249 Fed. 81.

The facts are stated in the opinion.

Mr. George B. Thatcher argued the cause, and, with Mr. William C. Prentiss, filed a brief for petitioners:

It was only necessary for the defendant to prove discovery to the satisfaction of the jury; if the jury had returned a special verdict in favor of discovery on any of the lode claims, the ground therein would have belonged to defendant without further finding of any other fact.

Overman Silver Min. Co. v. Corcoran, 15 Nev. 147, 1 Mor. Min. Rep. 691.

U. S. Rev. Stat. § 2322, Comp. Stat. § 4618, 6 Fed. Stat. Anno. 2d ed. p. 523, is not a statute of limitations. It is a part of the chapter on mining and mineral resources, and merely dispenses with acts of location and claim, other than discovery, in the absence of an adverse claim. It does not dispense with the necessity of complying with § 2320, which requires discovery as a necessary prerequisite to the location or appropriation of mining ground.

Reavis v. Fianza, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1; Belk v.

Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; McCowan v. MacLay, 16 Mont. 234, 40 Pac. 602; Humphreys v. Idaho Gold Mines Development Co. 21 Idaho, 126, 40 L.R.A. (N.S.) 817, 120 Pac. 826; Upton v. Santa Rita Min. Co. 14 N. M. 96, 89 Pac. 282; United States v. Midway Northern Oil Co. 232 Fed. 634.

Location can rest only on actual discovery, and without discovery no right can be acquired save the right to retain possession while diligently seeking discovery.

McLemore v. Express Oil Co. 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59; King v. Amy & S. Consol. Min. Co. 152 U. S. 222, 227, 38 L. ed. 419, 421, 14 Sup. Ct. Rep. 510, 18 Mor. Min. Rep. 76; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel, Min. & Transp. Co. 196 U. S. 337, 345, 49 L. ed. 501, 507, 25 Sup. Ct. Rep. 266; Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 666, 4 Mor. Min. Rep. 411; Steele v. Tanana Mines R. Co. 78 C. C. A. 412, 148 Fed. 678; Garibaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 426; Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 611; Book v. Justice Min. Co. 58 Fed. 111, 17 Mor. Min. Rep. 617; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. 36 Nev. 543, 560, 138 Pac. 71; United States v. M'Cutchen, 238 Fed. 575; United States v. Midway Northern Oil Co. 232 Fed. 626; Multnomah Min. Mill. & Development Co. v. United States, 128 C. C. A. 28, 211 Fed. 102; Overman S. Min. Co. v. Corcoran, 15 Nev. 147, 152, 1 Mor. Min. Rep. 691; Gleeson v. Martin White Min. Co. 13 Nev. 457.

A locator without discovery is a mere licensee upon the public domain; his appropriation and possession vest only when he has complied with the requirements of the statute. He has no possession of the mining claim as a whole, and the most that he can have in the absence of discovery is pedis possessio (Gemmell v. Swain, 28 Mont. 331, 98 Am. St. Rep. 570, 72 Pac. 662, 22 Mor. Min. Rep. 716), and that only while he is with diligence prosecuting work for the purpose of making a discovery.

Ophir S. Min. Co. v. Carpenter, 4 Nev. 538, 97 Am. Dec. 550, 4 Mor. Min. Rep. 640; McLemore v. Express Oil Co. 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 59; United States v. Midway Oil Co. 232 Fed. 626.

The Nevada Statute of Limitations does not undertake to dispense with the requirements of U. S. Rev. Stat. § 2320, Comp. Stat. § 4615, 6 Fed. Stat. Anno. 2d ed. p. 512, as to discovery, but, if it does so, or such construction be given it, it is void.

Butte City Water Co. v. Baker, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211; McTarnahan v. Pike, 91 Cal. 540, 27 Pac. 784; McDonald v. Fox, 20 Nev. 368, 22 Pac. 234; Pickett v. Doe, 74 Ala. 131; Pioneer Wood Pulp Co. v. Chandos, 78 Wis. 526, 47 N. W. 662; Ivy v. Yancey, 129 Mo. 501, 31 S. W. 937, 938; Union Consol. S. Min. Co. v. Taylor, 100 U. S. 37, 25 L. ed. 541, 5 Mor. Min. Rep. 323.

Neither recitals in location notices nor mere possession and claim for any period can create a presumption of discovery.

Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632, 33 Land Dec. 660, 34 Land Dec. 401; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. 36 Nev. 543, 138 Pac. 71; 2 Lindley, Mines, 3d ed. § 392; Childers v. Lahann, 19 N. M. 301, 142 Pac. 924; Thomas v. South Butte Min. Co. 128 C. C. A. 33, 211 Fed. 107; Brophy v. O'Hare, 34 Land Dec. 596; Purtle v. Steffee, 31 Land Dec. 400; Multnomah Min. Mill. & Development Co. v. United States, 128 C. C. A. 28, 211 Fed. 101; Fox v. Myers, 29 Nev. 186, 86 Pac. 793.

So long as one or more of the adverse claimants and plaintiffs showed an interest in the title, it was immaterial to the respondent whether or not all of the plaintiffs could show interest in the title, or whether the whole title was represented by the plaintiffs or by some of them.

Nesbitt v. Delamar's Nevada Gold Min. Co. 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178, 19 Mor. Min. Rep. 286.

One co-owner of a mining claim may maintain an action for possession, and recover for his own benefit as well as for the benefit of his co-owner.

Erhardt v. Boaro, 113 U. S. 527, 537, 28 L. ed. 1113, 1116, 5 Sup. Ct. Rep. 560, 15 Mor. Min. Rep. 472.

The question of misjoinder was not raised by demurrer, answer, or separate preliminary answer, and the rule is well settled, both in the state and Federal courts, that failure to raise the question by demurrer, answer, or separate preliminary answer, and pleading to the merits, waives all pleas in abatement.

Ronnow v. Delmue, 23 Nev. 33, 41 Pac. 1074; Historical Pub. Co. v. Jones Bros. Pub. Co. 145 C. C. A. 524, 231 Fed. 638.

The validity of the lode claim was not admitted by the relocation notice.

Zeiger v. Dowdy, 13 Ariz. 331, 114 Pac. 565.

It is unnecessary in an adverse suit to allege specially each step taken to acquire a location, or for the plaintiff to point out the defects in the claim of the applicant for patent.

Tonopah Fraction Min. Co. v. Douglass, 123 Fed. 936; Rose v. Richmond Min. Co. 17 Nev. 25, 27 Pac. 1105; Richmond Min. Co. v. Rose, 114 U. S. 576, 29 L. ed. 273, 5 Sup. Ct. Rep. 1055; Ralph v. Cole, 161 C. C. A. 133, 249 Fed. 84.

The answer may be taken to aid the complaint, especially after verdict, and it appears specifically from the answer that the defendant is in possession.

Cavender v. Cavender, 114 U. S. 464, 29 L. ed. 212, 5 Sup. Ct. Rep. 955; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 431; Provisional Municipality v. Lehman, 6 C. C. A. 349, 13 U. S. App. 411, 57 Fed. 329; McManus v. Ophirs S. Min. Co. 4 Nev. 15; Waples v. Hays, 108 U. S. 6, 27 L. ed. 632, 1 Sup. Ct. Rep. 80; Bank of Metropolis v. Guttschlitz, 14 Pet. 19, 10 L. ed. 335; Hagan v. Walker, 14 How. 29, 14 L. ed. 312; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 431; Meadow Valley Min. Co. v. Dodds, 6 Nev. 264; Treadway v. Wilder, 8 Nev. 91.

The Revenue Act of October 22, 1914, contains no provision that an unstamped instrument shall be void, or shall not be admitted as evidence in the courts. In any event, it is established by the authorities that the stamps may be affixed at the time.

Henderson, War Revenue Law & Income Tax, p. 30; Wingert v. Zeigler, 91 Md. 318, 51 L.R.A. 316, 80 Am. St. Rep. 453, 46 Atl. 1074; Bryan v. First Nat. Bank, 205 Pa. 7, 54 Atl. 480; Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636; Killip v. Empire Mill Co. 2 Nev. 42; United States v. Griswold, 8 Fed. 556; Dowell v. Applegate, 7 Fed. 881; Dowell v. Applegate, 7 Sawy. 232, 8 Fed. 698.

The question of nonsuit when the plaintiffs rested is foreclosed by the defendant having gone on with his evidence.

Cœur D'Alene Lumber Co. v. Goodwin, 144 C. C. A. 413, 181 Fed. 951; Simkins, Fed. Eq. Suit, 65; Wilson v. Haley Live Stock Co. 153 U. S. 39, 43, 38 L. ed. 627, 628, 14 Sup. Ct. Rep. 768; Bogk v. Gassert, 149 U. S. 17, 23, 37 L. ed. 631, 13 Sup. Ct. Rep. 738.

Messrs. **Samuel Herrick** and **P. G. Ellis** argued the cause and, with Mr. Edwin W. Senior, filed a brief for respondent:

The question on review is whether the judgment complained of is correct, not as to the grounds announced therefor by the court below.

M'Clung v. Silliman, 6 Wheat. 598, 5 L. ed. 340; Pennsylvania R. Co. v. Wabash, St. L. & P. R. Co. 157 U. S. 225, 39 L. ed. 682, 15 Sup. Ct. Rep. 576; Silsby v. Foote, 14 How. 218, 14 L. ed. 394; 4 C. J. § 2557, p. 663, notes, 92, 99, p. 665, notes 1–11; Young v. Duncan, 218 Mass. 351, 106 N. E. 1; Randall v. Peerless Motor Car Co. 212 Mass. 352, 99 N. E. 221.

Possession alone and a recorded location raise a prima facie presumption of title, validity, and due legal compliance, such as will uphold and sustain a mining claim until something is alleged and proved against it. This presumption includes, of course, the element of mineral discovery.

Campbell v. Rankin, 99 U. S. 261, 25 L. ed. 435, 12 Mor. Min. Rep. 257; Risch v. Wiseman, 36 Or. 484, 78 Am. St. Rep. 783, 59 Pac. 1111, 20 Mor. Min. Rep. 409; White v. Martin, 2 Alaska, 496; Harris v. Equator Min. & Smelting Co. 3 McCrary, 14, 8 Fed. 863, 12 Mor. Min. Rep. 178; Cheesman v. Hart, 42 Fed. 102, 16 Mor. Min. Rep. 263; Vogel v. Warsing, 77 C. C. A. 199, 146 Fed. 949; Ware v. White, 81 Ark. 220, 108 S. W. 834; Gropper v. King, 4 Mont. 367, 1 Pac. 756; Thomas v. South Butte Min. Co. 128 C. C. A. 33, 211 Fed. 105; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. 14 Idaho, 516, 95 Pac. 18; Walker v. Southern P. R. Co. 24 Land Dec. 172; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. 114 Cal. 100, 45 Pac. 1047, 18 Mor. Min. Rep. 410; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111, 17 Mor. Min. Rep. 28; Jantzon v. Arizona Copper Co. 3 Ariz. 6, 20 Pac. 94; Buffalo Zinc & Copper Co. v. Crump. 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 576, 22 Mor. Min. Rep. 276; Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 109; Golden Fleece Gold & S. Min. Co. v. Cable Consol. Gold & S. Min. Co. 12 Nev. 312, 1 Mor. Min. Rep. 120; Lebanon Min. Co. v. Consolidated Republican Min. Co. 6 Colo. 371; McGinnis v. Egbert, 8 Colo. 46, 15 Mor. Min. Rep. 329, 5 Pac. 652; Golden v. Murphy, 31 Nev. 395, 103 Pac. 397, 105 Pac. 99.

The element of a mineral discovery is included and implied in the term "valid location."

Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U.

S. 342, 343, 49 L. ed. 505, 506, 25 Sup. Ct. Rep. 266; McLemore v. Express Oil Co. 158 Cal. 559, 139 Am. St. Rep. 147, 112 Pac. 60.

And absence of discovery cannot be proved at the trial unless tendered as an issue in the complaint.

Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25.

When possession and working for the period of limitations under U. S. Rev. Stat. § 2332, Comp. Stat. § 4631, 6 Fed. Stat. Anno. 2d ed. p. 580, have been superadded to age, record, and transfers, the presumption of mineral discovery and valid location must become conclusive, or the statute has no operation or effect at all, and would never be pleaded or relied upon.

Belk v. Meagher, 104 U. S. 279, 287, 26 L. ed. 735, 738, 1 Mor. Min. Rep. 510; Glacier Mountain S. Min. Co. v. Willis, 127 U. S. 471, 32 L. ed. 172, 8 Sup. Ct. Rep. 1217, 17 Mor. Min. Rep. 127; Reavis v. Fianza, 215 U. S. 16, 25, 54 L. ed. 72, 77, 30 Sup. Ct. Rep. 1; Costigan, Min. Law, § 153, note 52; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 576, 22 Mor. Min. Rep. 276; Harris v. Equator Min. & Smelting Co. 3 McCrary, 14, 8 Fed. 863, 12 Mor. Min. Rep. 178; 420 Min. Co. v. Bullion Min. Co. 3 Sawy. 634, Fed. Cas. No. 4,989; Lindley, Mines, § 865, note 3, § 688, p. 1722; Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 105 Pac. 99; Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1046, 22 Mor. Min. Rep. 610; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. 114 Cal. 100, 45 Pac. 1048, 18 Mor. Min. Rep. 410; Upton v. Santa Rita Min. Co. 14 N. M. 96, 89 Pac. 284; Vogel v. Warsing, 77 C. C. A. 199, 146 Fed. 949; Risch v. Wiseman, 36 Or. 484, 78 Am. St. Rep. 783, 59 Pac. 1111, 20 Mor. Min. Rep. 409; Snyder, Mines, §§ 353, 672; Thomas v. South Butte Min. Co. 128 C. C. A. 33, 211 Fed. 107.

In the following cases the statute was applied against the jumper, and the adverse holding occurred before he arrived:

Reavis v. Fianza, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1; Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 32 L. ed. 172, 8 Sup. Ct. Rep. 1217, 17 Mor. Min. Rep. 127; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. 14 Idaho, 516, 95 Pac. 14; Flynn Group Min. Co. v. Frank Murphy, 18 Idaho, 266, 138 Am. St. Rep. 201, 109 Pac. 856; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 576, 22 Mor. Min. Rep. 276; Harris v. Equator Min. & Smelting Co. 3 McCrary, 14, 8 Fed. 863, 12 Mor. Min. Rep. 178; Golden v. Murphy, 31 Nev. 395, 103 Pac. 396, 105 Pac. 99; Upton v. Santa Rita Min. Co. 14 N. M. 96, 89 Pac. 275; Vogel v. Warsing, 77 C. C. A. 199, 146 Fed. 949; Rich v. Wiseman, 36 Or. 484, 78 Am. St. Rep. 783, 59 Pac. 1111, 20 Mor. Min. Rep. 409; Gropper v. King, 4 Mont. 367, 1 Pac. 755.

Publication of notice of an adverse claim in the land office is in the nature of a summons, and if default be made, all claims will be cut off, both valid and invalid.

People ex rel. Darby v. District Ct. 19 Colo. 347, 35 Pac. 731; Wolfley v. Lebanon Min. Co. 4 Colo. 112, 13 Mor. Min. Rep. 282; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. 36 Nev. 543, 138 Pac. 73; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 353, 355, 49 L. ed. 501, 510, 511, 25 Sup. Ct. Rep. 266; Lawson v. United States Min. Co. 207 U. S. 1, 15, 52 L. ed. 65, 76, 28 Sup. Ct. Rep. 15.

All that respondent claims for U. S. Rev. Stat. § 2332, is that compliance therewith is the equivalent of a valid location under §§ 2319, 2320, as held in Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510.

Possession of a mineral patent is conclusive proof or adjudication of the fact of prior mineral discovery

Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 342, 343, 49 L. ed. 505, 506, 25 Sup. Ct. Rep. 266.

The right to a thing that gives title is a right to the thing itself.

Reavis v. Fianza, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1.

Petitioners have no title or right of action.

Omar v. Soper, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443, 15 Mor. Min. Rep. 496; Healey v. Rupp, 37 Colo. 25, 86 Pac. 1016; Ferris v. McNally, 45 Mont. 20, 121 Pac. 893; Lavagnino v. Uhlig, 26 Utah, 1, 99 Am. St. Rep. 808, 71 Pac. 1049, 22 Mor. Min. Rep. 610; Moffat v. Blue River Gold Excavating Co. 33 Colo. 142, 80 Pac. 139; McMillen v. Ferrum, Min. Co. 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 21 Mor. Min. Rep. 393; Lalande v. McDonald, 2 Idaho, 307, 13 Pac. 347; McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538.

All the petitioners are out of court on the Guy Davis claim by the form of their relocation notice.

Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510; Wills v. Blain, 5 N. M. 238, 20 Pac. 798; Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641, 19 Mor. Min. Rep. 625; Golden v. Murphy, 31 Nev. 395, 103 Pac. 398, 105 Pac. 99; Shattuck v. Costello, 8 Ariz. 22, 68 Pac. 529, 22 Mor. Min. Rep. 136; Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 666, 4 Mor. Min. Rep. 411; Zerres v. Vanina, 134 Fed. 614, 80 C. C. A. 366, 150 Fed. 564; Lindley, Mines, § 404; Quigley v. Gillett, 101 Cal. 462, 35 Pac. 1040, 18 Mor. Min. Rep. 68; Ware v. White, 81 Ark. 220, 108 S. W. 832; Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329; Jackson v. Prior Hill Min. Co. 19 S. D. 453, 104 N. W. 207; Zeiger v. Dowdy, 13 Ariz. 331, 114 Pac. 565.

Possession, which implies title, also implies every evidential fact necessary to title, and in the case of a mining claim this includes the discovery and possession of mineral, without which there can be no title. This presumption is greatly emphasized and strengthened to the point almost of conclusiveness by long-continued possession, repeated transfers and conveyances, and substantial improvement or development (Jantzon v. Arizona Copper Co. 3 Ariz. 6, 20 Pac. 93; Cheesman v. Shreeve, 40 Fed. 787; Cheesman v. Hart, 42 Fed. 98, 16 Mor. Min. Rep. 263; Thomas v. South Butte Min. Co. 128 C. C. A. 33, 211 Fed. 107; Harris v. Equator Min. & Smelting Co. 3 McCrary, 14, 8 Fed. 863, 12 Mor. Min. Rep. 178; Vogel v. Warsing, 77 C. C. A. 199, 146 Fed. 950; Bevis v. Markland, 130 Fed. 226), and is rendered absolutely irrebuttable by the running of time under U. S. Rev. Stat. § 2332, Comp. Stat. § 4631, 6 Fed. Stat. Anno. 2d ed. p. 580. But, prior thereto, the presumption of validity, if and when rebuttable, must be met by a specific allegation and proof of the existence of some recognized statutory ground of invalidity or of legal noncompliance.

Renshaw v. Switzer, 6 Mont. 464, 13 Pac. 128, 15 Mor. Min. Rep. 345; White v. Martin, 2 Alaska, 496; Garfield M. & M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153; Farrell v. Lockhart, 210 U. S. 148, 52 L. ed. 997, 16 L.R.A.(N.S.) 162, 28 Sup. Ct. Rep. 681; Willison v. Ringwood, 111 C. C. A. 401, 190 Fed. 549; Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25.

Nonsuit also should have been allowed.

Moffat v. Blue River Gold Excavating Co. 33 Colo. 148, 80 Pac. 139; McMillen v. Ferrum Min. Co. 32 Colo. 38, 105 Am. St. Rep. 64, 74 Pac. 461; Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633, 21 Mor. Min. Rep. 393; McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538; Lalande v. McDonald, 2 Idaho, 307, 13 Pac. 347; Boghk v. Gassert, 149 U. S. 17, 23, 37 L. ed. 631, 634, 13 Sup. Ct. Rep. 738; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 39, 35 L. ed. 55, 61, 11 Sup. Ct. Rep. 478; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 264, 26 L. ed. 539, 541; Southern P. Co. v. Kelley, 109 C. C. A. 659, 187 Fed. 937; United States v. Baltimore & O. R. Co. 107 C. C. A. 586, 185 Fed. 486; Meehan v. Valentine, 145 U. S. 618, 36 L. ed. 839, 12 Sup. Ct. Rep. 972; Coughran v. Bigelow, 164 U. S. 308, 41 L. ed. 466, 17 Sup. Ct. Rep. 117; Laird v. Morris, 23 Nev. 34, 42 Pac. 11; Tonopah & G. R. Co. v. Fellanbaum, 32 Nev. 278, L.R.A. 1918D, 584, 107 Pac. 882; Fries-Breslin Co. v. Bergen, 168 Fed. 360.

There was no evidence disproving prior mineral discovery in the senior locations.

Cheesman v. Hart, 42 Fed. 98, 16 Mor. Min. Rep. 263; Clark Montana Realty Co. v. Ferguson, 218 Fed. 959; Alameda Min. Co. v. Success Min. Co. 29 Idaho, 618, 161 Pac. 865; Iron S. Min. Co. v. Cheesman, 116 U. S. 529, 535, 29 L. ed. 712, 714, 6 Sup. Ct. Rep. 481; Book v. Justice Min. Co. 58 Fed. 122, 17 Mor. Min. Rep. 617; Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 675, 4 Mor. Min. Rep. 411; Eureka Consol. Min. Co. v. Richmond Min. Co. 4 Sawy. 311, 9 Mor. Min. Rep. 578; Hyman v. Wheeler, 29 Fed. 353, 15 Mor. Min. Rep. 519; Burke v. McDonald, 3 Idaho, 296, 29 Pac. 98; Grand Central Min. Co. v. Mammoth Min. Co. 29 Utah, 490, 83 Pac. 677; Snyder, Mines, §§ 345, 348, 349; Golden v. Murphy, 31 Nev. 395, 103 Pac. 402, 105 Pac. 99; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; Castle v. Womble, 19 Land Dec. 457; Lindley, Mines, § 336, notes 29, 30; Bonner v. Meikle, 82 Fed. 703, 19 Mor. Min. Rep. 83; Madison v. Octave Oil Co. 154 Cal. 768, 99 Pac. 178; Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co. 143 U. S. 394, 404, 430, 36 L. ed. 201, 204, 213, 12 Sup. Ct. Rep. 543, 17 Mor. Min. Rep. 436; King v. Amy & S. Consol. Min. Co. 9 Mont. 543, 24 Pac. 200, 16 Mor. Min. Rep. 38; Cheesman v. Shreeve, 40 Fed. 787; Shreve v. Copper Bell Min. Co. 11 Mont. 309, 28 Pac. 320; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 575, 22 Mor.

Min. Rep. 276; North Noonday Min. Co. v. Orient Min. Co. 6 Sawy. 299, 1 Fed. 531, 9 Mor. Min. Rep. 529; Golden Terra Min. Co. v. Mahler, 4 Mor. Min. Rep. 390; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59; Upton v. Larkin, 7 Mont. 449, 17 Pac. 728, 15 Mor. Min. Rep. 404; Wenner v. McNulty, 7 Mont. 30, 14 Pac. 643; Overman S. Min. Co. v. Corcoran, 15 Nev. 147; 1 Mor. Min. Rep. 691; Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 807, 19 Mor. Min. Rep. 356; Fox v. Myers, 29 Nev. 169, 86 Pac. 793; Lange v. Robinson, 148 Fed. 802; Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 113; McShane v. Kenkle, 18 Mont. 208, 33 L.R.A. 851, 56 Am. St. Rep. 578, 44 Pac. 979; Montana C. R. Co. v. Migeon, 68 Fed. 811, affirmed in 23 C. C. A. 156, 44 U. S. App. 724, 77 Fed. 255, 18 Mor. Min. Rep. 446; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. 544, 18 Mor. Min. Rep. 113; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 673, 20 Mor. Min. Rep. 283; Cascaden v. Bortolis, 89 C. C. A. 247, 162 Fed. 271, 15 Ann. Cas. 625; Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362; Hays v. Lavagnino, 17 Utah, 185, 53 Pac. 1029, 19 Mor. Min. Rep. 485; 27 Cyc. p. 556, note 47; Score v. Griffin, 9 Ariz. 295, 80 Pac. 331; Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 21 Mor. Min. Rep. 678; Armstrong v. Lower, 6 Colo. 393, 15 Mor. Min. Rep. 631; McShane v. Kenkle, 18 Mont. 208, 33 L.R.A. 851, 56 Am. St. Rep. 579, 44 Pac. 979; Walsh v. Mueller, 16 Mont. 180, 40 Pac. 292; Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075; Meydenbauer v. Stevens, 78 Fed. 787, 18 Mor. Min. Rep. 578; 34 Century Dig. "Mines and Minerals," § 24; Murray v. White, 42 Mont. 423, 113 Pac. 756, Ann. Cas. 1912A, 1297; Mason v. Washington Butte Min. Co. 130 C. C. A. 426, 214 Fed. 32; Muldrick v. Brown, 37 Or. 185, 61 Pac. 429; Barringer & A. Mines, § 214; Cascaden v. Bartolis, 77 C. C. A. 496, 146 Fed. 740; Charlton v. Kelly, 84 C. C. A. 295, 156 Fed. 436, 13 Ann. Cas. 518.

The trial court erred in excluding cross-examination, and in reversing the legal presumptions and burden of proof.

Southern Cross Gold & S. Min. Co. v. Europa Min. Co. 15 Nev. 383, 9 Mor. Min. Rep. 513; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 345, 348, 352, 49 L. ed. 501, 507, 509, 25 Sup. Ct. Rep. 266; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759; Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749, 22 Mor. Min. Rep. 11; Erwin v. Perego, 35 C. C. A. 482, 93 Fed. 608; Jupiter Min. Co. v. Bodie Consol. Min. Co. 7 Sawy. 96, 11 Fed. 666, 4 Mor. Min. Rep. 411; Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. 57 C. C. A. 200, 119 Fed. 169, 22 Mor. Min. Rep. 445; Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583, 66 Pac. 863, 21 Mor. Min. Rep. 678; Treasury Tunnel Min. & Reduction Co. v. Boss, 32 Colo. 27, 105 Am. St. Rep. 60, 74 Pac. 888; Sharkey v. Candiana, 48 Or. 112, 7 L.R.A.(N.S.) 791, 85 Pac. 219; Whiting v. Straup, 17 Wyo. 1, 129 Am. St. Rep. 1093, 95 Pac. 849; McShane v. Kenkle, 18 Mont. 208, 33 L.R.A. 851, 56 Am. St. Rep. 578, 44 Pac. 979; Alameda Min. Co. v. Success Min. Co. 29 Idaho, 618, 161 Pac. 862; 27 Cyc. 556; Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015; Erhardt v. Boaro, 113 U. S. 528, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, 16 Mor. Min. Rep. 472; Grand Central Min. Co. v. Mammoth Min. Co. 29 Utah, 490, 83 Pac. 649; Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 111; Lindley, Mines, §§ 335, 336; Harrington v. Chambers, 3 Utah, 94, 1 Pac. 362, 111 U. S. 350, 28 L. ed. 452, 4 Sup. Ct. Rep. 428; Cascaden v. Bortolis, 89 C. C. A. 247, 162 Fed. 267, 15 Ann. Cas. 625.

Assays do not have to be taken to establish the existence of a vein, or warrant a location thereon.

Muldrick v. Brown, 37 Or. 185, 61 Pac. 429; Lange v. Robinson, 148 Fed. 801; Shreve v. Copper Bell Min. Co. 11 Mont. 309, 23 Pac. 320; Bevis v. Markland, 130 Fed. 226; Book v. Justice Min. Co. 58 Fed. 106, 17 Mor. Min. Rep. 617; Migeon v. Montana C. R. Co. 23 C. C. A. 156, 44 U. S. App. 724, 77 Fed. 249, 18 Mor. Min. Rep. 446, 68 Fed. 811; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; Madison v. Octave Oil Co. 154 Cal. 768, 99 Pac. 178; Cascaden v. Bartolis, 77 C. C. A. 496, 146 Fed. 740; Charlton v. Kelly, 84 C. C. A. 295, 156 Fed. 436, 13 Ann. Cas. 518; Davidson v. Bordeaux, 15 Mont. 252, 38 Pac. 1075; Iron Silver Min. Co. v. Cheesman, 116 U. S. 529, 535, 29 L. ed. 712, 714, 6 Sup. Ct. Rep. 481; Iron Silver Min. Co. v. Mike & S. Gold & S. Min. Co. 143 U. S. 404, 36 L. ed. 204, 12 Sup. Ct. Rep. 543, 17 Mor. Min. Rep. 436; Snyder, Mines, § 349; Eureka Consol. Min. Co. v. Richmond Min. Co. 4 Sawy. 302, Fed. Cas. No. 4,548, 9 Mor. Min. Rep. 578; Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 59 U. S. App. 538, 87 Fed. 807, 19 Mor. Min. Rep. 356; Score v. Griffin, 9 Ariz. 295, 80 Pac. 332.

Federal courts must observe and enforce the acts of Congress which require revenue stamps.

Sackett v. McCaffrey, 65 C. C. A. 205, 131 Fed. 219.

The accepted rule in the community-property states (derived from the civil law) is that the husband may convey to his wife, either for a consideration or as a gift, his interest in the community property, and it thereupon becomes her separate estate and loses its community character.

21 Cyc. 1664, notes 42, 43, p. 1665, notes 46 and 1901, 1919 Cyc.

The question presented upon a challenge to the evidence, as this court held in Coughran v. Bigelow, 164 U. S. 308, 41 L. ed. 446, 17 Sup. Ct. Rep. 117, is not whether there was literally no evidence or testimony, but whether there is any upon which the jury can lawfully proceed to render a verdict in favor of the party having the burden of the issue.

Mr. Justice **Van Devanter** delivered the opinion of the court:

These suits relate to conflicting mining locations in Nevada and are what are commonly called adverse suits. [289] The locations set up on one side are lode and those on the other placer, the former being designated as Salt Lake No. 3, Midas, and Evening Star, and the latter as Guy Davis and Homestake. Joseph Ralph is the lode claimant and the other parties are the placer claimants.

Ralph made application at the local land office for the issue to him of a patent for the three lode claims, along with thirteen others not here in question, and in due time two adverse claims were filed in that proceeding, one based upon the Guy Davis and covering most of the ground within the Salt Lake No. 3, and the other based upon the Homestake and covering a considerable portion of the ground within the Midas and Evening Star. These suits were brought in a state court in support of the adverse claims, and Ralph, the sole defendant, caused them to be removed into the Federal court, the parties being citizens of different states. Afterwards some of the original plaintiffs were eliminated and others brought in, but the citizenship remained diverse as before.

The cases were tried together to the court and a jury, the latter returning general verdicts for the plaintiffs and special verdicts finding that when the placer locations were made no lode had been discovered within the limits of any of the lode locations. Judgments for the plaintiffs were entered upon the verdicts, and motions by the defendant for a new trial were overruled. Upon writs of error the circuit court of appeals reversed the judgments and ordered a new trial, one judge dissenting. 161 C. C. A. 133, 249 Fed. 81. The cases are here upon writs of certiorari which were granted because the ground upon which the circuit court of appeals put its decision—the construction and application of some of the mineral land laws—was deemed of general interest in the regions where those laws are operative.

The defendant does not rely entirely upon the ground of decision advanced by the circuit court of appeals, [290] but urges at length that, if it be not well taken, the record discloses other grounds, not considered by that court, for reversing the judgments and ordering a new trial. And he further urges that, if the decision of the circuit court of appeals be right, it is not sufficiently comprehensive to serve as a guide to the court and the parties upon another trial. The plaintiffs insist that the judgments in the district court were right and should be affirmed.

In the circumstances it is open to us to deal only with the matter considered by the circuit court of appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better, inasmuch as counsel have united in presenting to us all questions thought to arise upon the record, and the litigation already has covered a considerable period.

Criticism is made of the complaints. As presented in the state court they fully met the requirements of the local code, Rev. Laws 1912, § 5526, and there was no request after the removal into the Federal court that they be recast to meet any further requirements prevailing there. Apart from the local code, each sufficiently stated a cause of action in the nature of ejectment, save as some allegations were wanting in precision, and it was left uncertain whether the defendant was in possession. The latter defect was cured by an affirmative statement in the answer that the defendant was in possession. Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 416, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534. If the other defects embarrassed the defendant he should have interposed

a timely objection, which doubtless would have resulted in appropriate amendments. Instead, he permitted the matter to pass until the trial was in progress, and then sought to obtain some advantage from it. This he could not do; by his failure to make timely objection the defects had been waived. We here dispose of a related question by saying that, in our opinion, the [291] complaints, with the answers, put in issue the validity of the lode locations, including the requisite mineral discovery.

The defendant insists that necessary parties did not join in filing the adverse claims in the land office, that in the suits there was a misjoinder of plaintiffs and a failure to join essential plaintiffs, and that deeds showing title in some of the plaintiffs were erroneously admitted in evidence, in that they were without the requisite revenue stamps. We think this insistence is untenable in all its phases.

As respects the Guy Davis placer, Davis and Faubert were the original locators, and Faubert soon conveyed a fraction of his interest to Thatcher. These three filed the adverse claim and brought the suit, the title being in them at the time. Thereafter Faubert transferred his remaining interest to Cole, Malley, and Ross, and Thatcher conveyed a fraction of his interest to Healey. Because of these transfers, and with the court's approval, Faubert was eliminated as a party and Cole, Malley, Ross, and Healey came in as plaintiffs. Thus the changes in title pending the suit were followed by corresponding changes in the parties plaintiff.

At all the times mentioned the title was in a sense affected by an outstanding contract, executed by the original locators, which invested Thatcher and Forman with a right to a specified share in the output or proceeds of the claim, and possibly with a right to have it worked and thereby made productive. The contract was not recorded, but this is not material, for the contract was good between the parties and no subsequent purchaser is calling it in question. See Rev. Laws 1912, §§ 1038–1040. Unlike Thatcher, Forman had no interest in the claim other than under this contract. He did not join in filing the adverse claim or in bringing the suit, but, with the court's approval, came in as a plaintiff before the trial. We think his interest [292] was not such as to make him an essential party to the adverse claim or to the suit, and yet was such as to make him an admissible party to either. Of course, the acts of those having the title in filing the adverse claim and bringing the suit inured to his benefit. And had they proceeded in his absence to a judgment in their favor, the same would have been true of it. But this does not prove that he could not be admitted as a plaintiff. He had an interest—a real interest—in the maintenance and protection of the claim which was the subject of the suit, and in view of the liberal provisions of the local statute, Rev. Laws 1912, §§ 4998, 5000, we think the court did not err in allowing him to come in as a plaintiff. It is not asserted that his presence was prejudicial to the defendant, and we perceive no ground for thinking it could have been.

As respects the Homestake placer, Murray Scott and John J. Healey were the original locators and the title was still in them when the adverse claim was filed and when the suit was begun, unless there be merit in the defendant's contention that Scott's interest had then passed to others under attachment proceedings, and that Healey's interest had then passed to his wife. Neither branch of the contention is, in our opinion, well grounded. The attachment proceedings, although commenced before the adverse claim was filed, did not result in a transfer of Scott's title until after the present suit was begun. The purported conveyance of Healey's interest to his wife, to which the defendant directs attention, recites that it was made upon a consideration paid in money at the time, and this is in no wise explained. There is no evidence that the consideration was paid out of any separate property of the wife, or that the conveyance was intended as a gift to her, or that she ever listed the subject of the conveyance as her separate property. In these circumstances, according to the laws of the state, the Healey interest was community property, of which the husband had the "entire [293] management and control" and the "absolute power of disposition." He could lease or convey it without the wife's concurrence, and could sue in respect of it in his name alone. Rev. Laws 1912, §§ 2155–2160; Crow v. Van Sickle, 6 Nev. 146; Lake v. Bender, 18 Nev. 361, 384, 385, 4 Pac. 711, 7 Pac. 74; Adams v. Baker, 24 Nev. 375, 55 Pac. 362; Malstrom v. People's Drain Ditch Co. 32 Nev. 246, 260, 107 Pac. 98.

There was here a contract with Thatcher and Forman like that relating to the Guy Davis, and this gave them a

real interest in the claim, as already explained.

The adverse claim was filed and the suit was brought by Scott, Healey, Thatcher, and Forman. Afterwards, and following the consummation of the attachment proceedings, the entire interest of Scott was transferred to Cole, Malley, Ross, and Davis, and by reason of this, and with the court's approval, Scott was eliminated as a party, and Cole, Malley, Ross, and Davis came in as plaintiffs. Thus there was no misjoinder of plaintiffs, nor any failure to join an essential party. Of course, those who succeeded to Scott's interest pending the suit were entitled to the benefit of what he had done while he held the title.

In one of the adverse claims Healey's name was given as Frank J. instead of John J., but this was a mere inadvertence, did not mislead or prejudice anyone, and rightly was disregarded by the district court.

As to the absence of revenue stamps, it is true that the deeds showing title in some of the plaintiffs—they were produced in evidence over the defendant's objection—were without the stamps required by the Act of October 22, 1914, chap. 331, § 22, Schedule A, 38 Stat. at L. 762. But this neither invalidated the deeds nor made them inadmissible as evidence. The relevant provisions of that act, while otherwise following the language of earlier acts, do not contain the words of those acts which made such an instrument invalid and inadmissible as evidence while not [**294**] properly stamped. Those words were carefully omitted, as will be seen by contrasting §§ 6, 11, 12, and 13 of the Act of 1914 with §§ 7, 13, 14, and 15 of the Act of June 13, 1898, chap. 448, 30 Stat. at L. 454, Comp. Stat. §§ 6318i, 6318j, 6318k. From this and a comparison of the acts in other particulars it is apparent that Congress in the later act departed from its prior practice of making such instruments invalid or inadmissible as evidence while remaining unstamped, and elected to rely upon other means of enforcing this stamp provision, such as the imposition of money penalties, fines, and imprisonment. The decisions upon which the defendant relies arose under the earlier acts, and were based upon the presence in them of what studiously was omitted from the later one.

As a preliminary to considering other contentions it will be helpful to refer to some features of the Mineral Land Laws, Rev. Stat. §§ 2318 et seq. Comp. Stat. § 4613, 6 Fed. Stat. Anno. 2d ed. p. 508, about which there can be no controversy, and also to what actually was in dispute at the trial and what not in dispute.

By those laws public lands containing valuable mineral deposits are opened to exploration, occupation, and acquisition for mining purposes; and as an inducement to effective exploration the discoverer is given the right to locate a substantial area embracing his discovery, to hold the same and extract the mineral without payment of rent or royalty, so long as he puts one hundred dollars' worth of labor or improvements —called assessment work—upon the claim each year, and to demand and receive a patent at a small sum per acre after he has put five hundred dollars' worth of labor or improvements upon the claim.

In advance of discovery an explorer in actual occupation and diligently searching for mineral[1] is treated as a licensee or tenant at will, and no right can be initiated or [**295**] acquired through a forcible, fraudulent, or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly. Belk v. Meagher, 104 U. S. 279, 287, 26 L. ed. 735, 738, 1 Mor. Min. Rep. 510; Union Oil Co. v. Smith, 249 U. S. 337, 346-348, 63 L. ed. 635, 640, 641, 39 Sup. Ct. Rep. 308, and cases cited.

A location based upon discovery gives exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and, so long as it is kept alive by performance of the required annual assessment work, prevents any adverse location of the land. Gwillim v. Donnellan, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; Swanson v. Sears, 224 U. S. 180, 56 L. ed. 721, 32 Sup. Ct. Rep. 455.

[1] As to the status of an explorer or locator on oil-bearing land in advance of discovery, see the special provisions in Acts of June 25, 1910, chap. 421, § 2, 36 Stat. at L. 847, Comp. Stat. § 4524, 8 Fed. Stat. Anno. 2d ed. p. 657, and March 2, 1911, chap. 201, 36 Stat. at L. 1015, Comp. Stat. § 4637, 6 Fed. Stat. Anno. 2d ed. p. 610.

While the two kinds of location—lode and placer—differ in some respects,[2] a discovery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place, bearing valuable mineral (§ 2320 [Comp. Stat. § 4615, 6 Fed. Stat. Anno. 2d ed. p. 512]); and to sustain a placer location it must be of some other form of valuable mineral deposit (§ 2329 [Comp. Stat. § 4628, 6 Fed. Stat. Anno. 2d ed. p. 575]), one such being scattered particles of gold found in the softer covering of the earth. A placer discovery will not sustain a lode location, nor a lode discovery a placer location. As is said by Mr. Lindley,[3] § 323: "Gold occurs in veins of rock in place, and when so found the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found the land containing it must be appropriated under the laws applicable to [**296**] placers;" and again, § 419: "It is the mode of occurrence, whether in place or not in place [meaning in rock in place], which determines the manner in which it should be located."

Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim. Waskey v. Hammer, 223 U. S. 85, 90, 91, 56 L. ed. 359, 362, 363, 32 Sup. Ct. Rep. 187; Beals v. Cone, 27 Colo. 473, 484, 495, 83 Am. St. Rep. 92, 62 Pac. 948, 20 Mor. Min. Rep. 591; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. 36 Nev. 543, 560, 138 Pac. 71; New England & C. Oil Co. v. Congdon, 152 Cal. 211, 213, 92 Pac. 180. Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has "nothing to do with locating or holding a claim before discovery." Union Oil Co. v. Smith, supra, p. 350. In practice, discovery usually precedes location, and the statute treats it as the initial act. But, in the absence of an intervening right, it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. Creede & C. Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 348-351, 49 L. ed. 501, 508, 509, 25 Sup. Ct. Rep. 266, and cases cited; Union Oil Co. v. Smith, supra, p. 347.

When an application for a patent to mineral land is presented at the local land office and an adverse claim is filed in response to the notice required by the statute (§ 2325 [Comp. Stat. § 4622, 6 Fed. Stat. Anno. 2d ed. p. 555]), further proceedings upon the application must be suspended to await the determination by a court of competent jurisdiction of the question whether either party, and, if so, which, has the exclusive right to the possession arising from a valid and subsisting location. A suit appropriate to the occasion must be brought by the adverse claimant, and in that suit each party is deemed an [**297**] actor and must show his own title, for the suit is "in aid of the Land Department." If neither establishes the requisite title the judgment must so declare. Rev. Stat. § 2326, Comp. Stat. § 4623, 6 Fed. Stat. Anno. 2d ed. p. 563, Act March 3, 1881, chap. 140, 21 Stat. at L. 505, Comp. Stat. § 4625, 6 Fed. Stat. Anno. 2d ed. p. 599; Jackson v. Roby, 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. Rep. 301; Perego v. Dodge, 163 U. S. 160, 167, 41 L. ed. 113, 118, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364; Brown v. Gurney, 201 U. S. 184, 190, 50 L. ed. 717, 720, 26 Sup. Ct. Rep. 509; Healey v. Rupp, 37 Colo. 25, 28, 80 Pac. 1015; Tonopah Fraction Min. Co. v. Douglass, 123 Fed. 936, 941. If final judgment be given in favor of either party,—whether the applicant for patent or the adverse claimant,—he may file in the land office a certified copy of the judgment, and then will be entitled, as respects the area awarded to him, to go forward with the patent proceedings and to have the judgment recognized and respected as a binding adjudication of his exclusive right to the possession. Rev. Stat. § 2336, Comp. Stat. § 4644, 6 Fed. Stat. Anno. 2d ed. p. 587; Richmond Min. Co. v. Rose, 114 U. S. 576, 585, 29 L. ed. 273, 276, 5 Sup. Ct. Rep. 1055; Wolverton v. Nichols, 119 U. S. 485, 489, 30 L. ed. 474, 475, 7 Sup. Ct. Rep. 289, 15 Mor. Min. Rep. 309; Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 299, 34 L. ed. 155, 160, 10 Sup. Ct.

[2] Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 229, 48 L. ed. 944, 951, 24 Sup. Ct. Rep. 632; Webb v. American Asphaltum Min. Co. 84 C. C. A. 651, 157 Fed. 203; San Francisco Chemical Co. v. Duffield, 120 C. C. A. 160, 201 Fed. 830; Re Harry Lode Min. Claim, 41 Land Dec. 403.

[3] Lindley, Mines, 3d ed.

Rep. 765, 16 Mor. Min. Rep. 218; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 694, 39 L. ed. 859, 864, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205; Perego v. Dodge, 163 U. S. 160, 167, 41 L. ed. 113, 118, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364; Clipper Min. Co. v. Eli Min. Co. 194 U. S. 220, 232, 48 L. ed. 944, 952, 24 Sup. Ct. Rep. 632.

The situation developed by the evidence presented and admissions made in the course of the trial was as follows: At the outset the land was public and unappropriated, and it remained such save as the locations in question or some of them may have changed its status. The lode locations were made, one in 1897 and the other two in 1907, and the placer locations in September, 1913. The title under the latter already has been sufficiently traced. That under the lode locations passed to the Glasgow & Western Exploration Company soon after they were made, and the defendant, Ralph, claims under a deed executed by that company's liquidator in 1914. The principal controversy was over the presence or absence of essential discoveries within the lode locations, it being denied on one hand and affirmed on the other that a vein or lode of rock in place, bearing valuable mineral, was discovered [298] in each location before the placer locations were made. It was not controverted, but, on the contrary, conceded, that that point of time was the important one in the inquiry. Thus, when the presiding judge indicated his view by saying, "My idea is that you can't take advantage of any discoveries made since the placer locations; and I don't believe there can be any dispute about that," counsel for the defendant responded, "No, your Honor, there is none;" and on another occasion counsel said: "We are undoubtedly limited to proving that there was a discovery of mineral in place on each of our lode claims prior to the location of the placer claims." In all particulars other than discovery the regularity and perfection of the lode locations were conceded. Closely connected with the controversy over lode discoveries was another over the applicability and effect of § 2332 of the Revised Statutes (Comp. Stat. § 4631, 6 Fed. Stat. Anno. 2d ed. p. 580), but it will be passed for the moment and separately considered later. As to the placer claims, it was shown that they were based upon adequate discoveries of placer gold within their limits, and counsel for the defendant announced, "We don't deny this ground is of placer character." Their boundaries were properly marked and the requisite notices were posted and certificates recorded. The only questions respecting their validity that were presented and need present mention were, first, whether, at the time the placer locations were made, the lode locations had become valid and effective claims, thereby precluding any adverse location of the same ground, and next, if the lode locations had not then become valid and effective, whether the placer locations were initiated and made through wrongful intrusions or trespasses upon any actual possession of the lode claimant. The defendant, as is admitted in his brief in this court, did not claim that any lode or vein was or should be excepted from the placer claims, but only that they were of no effect for the reasons just indicated.

[299] The evidence bearing upon the presence or absence of lode discoveries[4] was conflicting. That for the plaintiffs tended persuasively to show the absence of any such discovery before the placer claims were located, while that for the defendant tended the other way. Separately considered, some portions of the latter were persuasive, but it was not without noticeable infirmities, among them the following: The defendant testified that no ore was ever mined upon any of the lode claims, and that "there was no mineral exposed to the best of my [his] knowledge which would stand the cost of mining, transportation, and reduction at a commercial profit." In the circumstances this tended to discredit the asserted discoveries; and of like tendency was his unexplained statement, referring to the claims

[4] The following extracts from Chrisman v. Miller, 197 U. S. 313, 322, 49 L. ed. 770, 773, 25 Sup. Ct. Rep. 468, show what constitutes an adequate discovery:

"The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral."

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

"The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

grouped in this patent application, that "some of them have not a smell of ore, but they can be located and held on the principle of being contiguous to adjacent claims,"—an obviously mistaken view of the law,—and his further statement, referring to vein material particularly relied upon as a discovery, that he "would hate to try to mine it and ship it."

As respects the initiation and working of the placer [300] claims the plaintiffs' evidence indicated that the locators entered openly, made placer discoveries, performed the requisite acts of location, excavated several shafts in the "wash" from 35 to 57 feet in depth, ran drifts from the bottom along the bed-rock, and mined a considerable amount of placer gold; and that these acts covered a period of between two and three months. None of this was contradicted; and there was no evidence that the locators met with any resistance or resorted to any hostile, fraudulent, or deceptive acts. But there was evidence of such ownership of buildings, comparatively recent prospecting, and maintenance of a watchman, on the part of the lode claimant,[5] as made it a fair question whether he was in actual possession when the placer locators entered. That he was in possession of the buildings and the ground where they stood was made certain, but that he had any actual possession beyond that was reasonably debatable under the evidence.

The buildings were all on the same claim and covered only a part of it. One was a mill formerly in use, but then dismantled and stripped of its machinery. All had been used in connection with mining operations upon other claims, but the operations had then been suspended. The buildings were not disturbed by the placer locators, nor was there any attempt to appropriate them. A watchman was in charge, but, so far as appears, he made no objection to what was done. Although a witness for the defendant and in his employ, he was not interrogated upon this point. Of course, ownership of the buildings did not in itself give the lode claimant any right in the land, or prevent others from entering peaceably and in good faith to avail themselves of privileges accorded by the Mineral Land Laws; but the presence of the buildings [301] and his relation to them did have a bearing upon the question of actual possession,—a pronounced bearing as respects the place where the buildings stood, and a lesser bearing as respects the other ground.

Even if the lode claimant was in actual possession of all, it still was a disputable question under the evidence whether there had not been such acquiescence in the acts of the placer locators in going upon the ground, making placer discoveries, and marking their locations, as gave them the status of lawful discoverers and locators rather than wrongful intruders or trespassers; that is to say, the status of explorers entering by permission and then making discoveries. See Crossman v. Pendery, 2 McCrary, 139, 8 Fed. 693, 4 Mor. Min. Rep. 431.

The questions of fact to which we have adverted were all submitted to the jury under a charge which was comprehensive, couched in plain terms, and in substantial accord with the legal principles hereinbefore stated. And, while the defendant criticizes some portions of the charge, we think they neither included nor omitted anything of which he rightly can complain. As has been said, the jury returned general verdicts for the plaintiffs, and also special verdicts finding that no lode had been discovered within any of the lode locations before the placer ones were made.

But it is objected that the court, instead of requiring the plaintiffs to take the burden of proving the absence of essential lode discoveries, subjected the defendant to the burden of proving that there were such discoveries. This is not in accord with the record. It there appears that the plaintiffs undertook at the outset to establish the absence of any lode discovery, and persisted in that course, a large, if not the larger, part of their case in chief being directed to that point. When they rested the defendant moved that the evidence produced by them "as to the absence of lodes, or the failure or inability of the witnesses to find or discover lodes or mineral-bearing [302] rock in place" within the lode locations, be stricken out because not within the issues tendered by the plaintiffs' complaints. The motion was denied, and in that connection the court observed that the burden "undoubtedly" was on the plaintiffs not only to show their own placer discoveries, acts of location, etc., but also "that the ground in dispute was open to location;" and the court added: "Plaintiffs have, so far as the record discloses, always insisted that

[5] The lode claimant at that time was either the liquidator of the Glasgow & Western Exploration Company or the company itself.

there was no lode discovery, and that the only discovery was of placer." There was also an admission in the defendant's requested instructions that the plaintiffs "in their case in chief" introduced evidence tending to show that "the ground comprised in the lode mining claims . . . contained no lodes, veins, or mineral-bearing rock in place and . . . that said lode locations were therefore invalid." And the court, in charging the jury, said: "The burden is on the plaintiffs in the first instance to show that when they went on these claims to locate the placers the ground was open to location, and that there was at the time no valid, subsisting locations where their discoveries were made." It therefore is plain that the burden of proof was dealt with and carried in a manner which does not admit of criticism by the defendant.

It is objected also that the court refused to direct verdicts for the defendant. But what has been said sufficiently shows that, in our opinion, the evidence presented several disputable questions of fact which it was the province of the jury to determine. This was the view not only of the judge who presided at the trial, but of another judge, who, in overruling the motion for a new trial, said: "I think that not only is there substantial evidence to support the verdict, but the preponderance is upon that side." Were we less satisfied than we are upon the point, we should hesitate to disturb the concurring conclusions of those judges.

[303] It is urged that the court erred in not holding that the placer claimants had admitted the validity of one of the lode locations by relocating the ground as a lode claim. A short statement of what was done will show, as we think, that it did not involve any such admission. After the placer claimants made their placer discovery a representative of theirs posted on the ground a notice stating that they had relocated it as a lode claim. The next day he substituted another notice stating that they had located it as a placer claim. The first notice did not accord with their discovery and the other did. Nothing was done or claimed under the first, and all the subsequent steps were in accord with the other. Evidently the first was posted by mistake and the other as the true notice. No one was misled by the mistake and it was promptly corrected. In these circumstances, the first notice was of no effect and no admission could be predicated of it. Zeiger v. Dowdy, 13 Ariz. 331, 114 Pac. 565.

The further objection is made that no probative force was given to recitals of discovery in the recorded notices of location of the lode claims. The notices were admitted in evidence and no instruction was asked or given respecting the recitals. In one nothing is said about discovery, and what is said in the other two is meager. But, passing this, the objection is not tenable. The general rule is that such recitals are mere ex parte, self-serving declarations on the part of the locators, and not evidence of discovery. Creede & C. Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 352, 49 L. ed. 501, 509, 25 Sup. Ct. Rep. 266; Lindley, Mines, 3d ed. § 392: Mutchmor v. McCarty, 149 Cal. 603, 607, 87 Pac. 85; Strepey v. Stark, 7 Colo. 614, 619, 5 Pac. 111, 17 Mor. Min. Rep. 28; Magruder v. Oregon & C. R. Co. 28 Land Dec. 174. This rule is recognized and applied in Nevada. Fox v. Myers, 29 Nev. 169, 186, 86 Pac. 793; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. 36 Nev. 543, 560, 138 Pac. 71.

Complaint is made because the defendant was not permitted, [304] on the cross-examination of a witness for the plaintiffs, to show the contents of certain assay reports. In his examination in chief the witness told of taking twelve samples from openings made by the lode claimant in the lode locations, and of having the samples assayed. Seven of the assay reports were produced at the plaintiffs' request and put in evidence. They attributed to one sample a mineral value of 63 cents per ton and to the other six only a trace of mineral. In cross-examining the witness the defendant called for the remaining reports or their contents, but the plaintiffs objected and the objection was sustained. In other respects the cross-examination proceeded without restriction and included a full interrogation of the witness about the points from which each of the twelve samples was taken. This interrogation disclosed that one of the reports put in evidence covered a sample taken from an opening made after the location of the placer claims: and because of this that report was stricken out at the defendant's request and with the plaintiffs' consent. Near the close of the trial the court recalled its prior ruling and announced another more favorable to the defendant. The witness was then recalled and, after some further examination, three of the remaining reports were put in evidence. They attributed to one sample a min-

eral value of $1.34 per ton and to the other two only a trace of mineral. Thus of the twelve reports all but two were produced. These two, like the one stricken out, covered samples taken from openings made after the placer claims were located. The defendant did not call for them when the witness was recalled or reserve any exception to the new ruling, and it is more than inferable from the record that he acquiesced in it. Of course, there is no merit in the present complaint.

What we have said sufficiently disposes of all questions other than that before mentioned respecting the applicability [305] and effect of § 2332 of the Revised Statutes (Comp. Stat. § 4631, 6 Fed. Stat. Anno. 2d ed. p. 580), which provides:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the Statute of Limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

The defendant, conceiving that the section could be invoked in the absence of a mineral discovery, requested the court to instruct the jury that if the lode claimant held and worked the lode claims for a period of two years—the local prescriptive period for adverse possession, Rev. Laws 1912, § 4951—before the placer claims were initiated, such holding and working were the full equivalent of all that was essential to the validity of the lode claims, including discovery. That request was refused and others were then presented which differed from it only in that they treated discovery as essential by coupling it with holding and working. These were also refused, but no complaint is made of this,—obviously because the jury were told that, under the evidence, the lode claims should be regarded as valid, if only the requisite discoveries were made at any time before the placer claims were initiated. The jury, as we have seen, found as matter of fact that there was no such discovery.

The effect which must be given to § 2332 in circumstances such as are here disclosed—whether it substitutes something else in the place of discovery or cures its absence—is the matter we have to consider. That the section is a remedial provision and designed to make proof of holding and working for the prescribed period the legal equivalent of proof of acts of location, recording, and transfer, and thereby to relieve against possible loss or [306] destruction of the usual means of establishing such acts, is attested by repeated rulings in the Land Department and the courts. But those rulings give no warrant for thinking that it disturbs or qualifies important provisions of the Mineral Land Laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent, and the purchase price to be paid before the patent can be issued. Indeed, the rulings have been to the contrary.

The view entertained and applied in the Land Department is shown in the following excerpt from a decision by the Secretary of the Interior:

"One purpose of § 2332, . . . clearly shown in the history of the proceedings in Congress attending its consideration and passage, was to lessen the burden of proving the location and transfers of old claims concerning which the possessory right was not controverted, but the record title to which had in many instances been destroyed by fire, or otherwise lost because of the insecurity and difficulty necessarily attending its preservation during the early days of mining operations. . . .

"The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining claim. As carried forward into the Revised Statutes it relates to both lode and placer claims, and, being in pari materia with the other sections of the Revision concerning such claims, is to be construed together with them, and so as, if possible, that they may all stand together, forming a harmonious body of mining law." Barklage v. Russell, 29 Land Dec. 401, 405, 406.

The views entertained by the courts in the mining regions are shown in Harris v. Equator Min. & Smelting Co. 3 McCrary, 14, 8 [307] Fed. 863, 866, 12 Mor. Min. Rep. 178, where the court ruled that holding and working a claim for a long period were the equivalent of necessary acts of location, but added that "this, of course, was subject to proof of a lode in the Ocean Wave ground, of which there

was evidence;" in Humphreys v. Idaho Gold Mines, Development Co. 21 Idaho, 126, 140, 40 L.R.A.(N.S.) 817, 120 Pac. 823, where the section was held to obviate the necessity for proving the posting etc., of a location notice, but not to dispense with proof of discovery; in Upton v. Santa Rita Min. Co. 14 N. M. 96, 89 Pac. 275, where the court held that the section should be construed in connection with other provisions of the Mineral Land Laws, and that it did not relieve a claimant coming within its terms from continuing to do the assessment work required by another section; and in Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26, where the section was held not to change the class who may acquire mineral lands or to dispense with proof of citizenship.

As respects discovery, the section itself indicates that no change was intended. Its words, "have held and worked their claims," presuppose a discovery; for to "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. Certainly it was not intended that a right to a patent could be founded upon nothing more than holding and prospecting, for that would subject nonmineral land to acquisition as a mining claim. Here, as the verdicts show, there was no discovery, so the working relied upon could not have been of the character contemplated by Congress.

The defendant places some reliance upon the decisions of this court in Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, 1 Mor. Min. Rep. 510, and Reavis v. Fianza, 215 U. S. 16, 54 L. ed. 72, 30 Sup. Ct. Rep. 1, but neither contains any statement or suggestion that the section dispenses with a mineral discovery or cures its absence. The opinion in the first shows affirmatively that there was a discovery, and that in the other shows that the controversy, although of [**308**] recent origin, related to "gold mines" which had been worked for many years.

The only real divergence of opinion respecting the section has been as to whether it is available in an adverse suit, such as these are, or is addressed merely to the Land Department. Some of the courts have held it available only in proceedings in the Department (McCowan v. Maclay, 16 Mont. 234, 40 Pac. 602), and others in greater number have held it available in adverse suits (Upton v. Santa Rita Min. Co. supra, and cases cited). The latter view has received the approval of this court (Reavis v. Fianza and Belk v. Meagher, supra).

We conclude that the defendant was not entitled to any instruction whereby he could receive the benefit of § 2332 in the absence of a discovery, and therefore that the district court rightly refused to give the one in question. The circuit court of appeals held that the instruction should have been given, and in this we think it erred.

Judgments of Circuit Court of Appeals reversed. Judgments of District Court affirmed.

PANAMA RAILROAD COMPANY, Plff. in Err.,
v.
JOSEPH T. TOPPIN.

(See S. C. Reporter's ed. 308-313.)

Master and servant — liability of master for criminal act of servant — rule in Panama — private action.

1. A railway company is not relieved from liability in damages under the law of the Republic of Panama for injuries resulting from the negligence of an employee merely because the negligent act was also punishable as a crime.

[For other cases, see Master and Servant, III. a, in Digest Sup. Ct. 1908.]

Master and servant — master's liability for negligence of servant — care in selecting employee — rule in Panama.

2. The exercise by a railway company of care in the selection of an employee does not relieve it, under the law of the Republic of Panama, from liability in damages for injuries resulting from the negligence of such employee.

[For other cases, see Master and Servant, III. a, in Digest Sup. Ct. 1908.]

Damages — for physical pain — rule in Panama and in Canal Zone.

3. Damages for physical pain could be allowed in a personal-injury action by the district court of the Canal Zone, irrespective of whether the law of the Republic of Panama, the lex loci, or that of the Canal Zone, the lex fori, controls.

[For other cases, see Damages, VI. j, in Digest Sup. Ct. 1908.]

[No. 147.]

Argued and submitted January 16, 1920. Decided March 15, 1920.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court of the Canal Zone in favor of plaintiff in a personal-injury action. Affirmed.

See same case below, 163 C. C. A. 239, 250 Fed. 989.

The facts are stated in the opinion.

Messrs. **Frank Feuille** and **Walter F. Van Dame** submitted the cause for plaintiff in error:

Corporations under laws and decisions of the Republic of Panama are not liable for the penal acts of their servants.

26 Gaceta Judicial of Republic of Colombia, No. 1340, p. 61.

The decision of the trial court was based on common-law principles, and not on laws of Panama, as applied by courts of that country.

Northern P. R. Co. v. Freeman, 174 U. S. 379, 383, 43 L. ed. 1014, 1016, 19 Sup. Ct. Rep. 763; Panama R. Co. v. Beckford, 145 C. C. A. 430, 231 Fed. 436; Bosse v. Panama R. Co. (Canal Zone).

Responsibility of the superior for the acts of his servants is limited to those cases in which the superior has failed to exercise due authority and care over and in the selection of such servant.

Manresa's Commentaries on the Civil Code of Spain, vol. 12, pp. 617, 618; Orozco v. Panama Electric Co. (Panama Supreme Ct. Oct. 5, 1918).

Even if the development of a latent disease from a physical injury may be treated as an element in assessing damages, it must appear that the germs of the disease were in the injured person's system at the time he received the injuries.

3 Whart. & S. Med. Jur. p. 195; Larson v. Boston Elev. R. Co. 212 Mass. 262, 98 N. E. 1048; Baldwin v. People's R. Co. 7 Penn. (Del.) 81, 76 Atl. 1088; Neff v. Cameron, 213 Mo. 350, 18 L.R.A. (N.S.) 320, 127 Am. St. Rep. 606, 111 S. W. 1139.

Physical pain and mental anguish are not elements of damages under the laws and decisions of the Republic of Panama.

Estudio sobre el Derecho Civil Colombiano, por Fernando Velez, vol. 9, pp. 13, 14; Marcelo v. Velasco, 11 Philippine, 287; Orozco v. Panama Electric Co. (Panama Supreme Ct. Oct. 5, 1918); Villaveces v. Municipality of Bogota (Sentence of Superior Ct. of Cundinamarca, Republic of Colombia, May 23, 1918).

Mr. **William C. MacIntyre** argued the cause, and, with Messrs. W. C. Todd and T. C. Hinckley, filed a brief for defendant in error:

The defendant in error, in the instant case, has a good right of action against the plaintiff in error, the empresario of the railroad, for damage which he received in his person by reason of the service of the railroad, and which damage was imputable to neglect, want of care, or violation of the regulations of the Police Code.

Cancino v. Railroad of North, 13 Judicial Gazette of Colombia, Nos. 652, 653, Aug. 16, 1899; Panama R. Co. v. Bosse, 249 U. S. 41, 63 L. ed. 466, 39 Sup. Ct. Rep. 211; Jurisprudencia Colombiana, p. 561, art. 356; J. V. Concha, Tratado de Derecho Penal, p. 116, ¶ 145.

The Panama Railroad Company, by having in its employ a man who would act in such negligent manner, makes itself responsible for his acts, even under Colombian law, on account of having employed a man who does not possess the necessary qualifications for a proper discharge of his duty as a locomotive engineer.

Jurisprudencia Colombiana, p. 561, art. 356; J. V. Concha, Tratado de Derecho Penal, p. 116, ¶ 145.

The fact that a person is predisposed to tuberculosis, or that his physical condition is such as to yield more readily to the germs of such disease, so that an injury caused by a sprained ankle is greater or different in degree than is usually to be expected from such a cause, will not relieve from liability the person whose negligence caused the injury.

Thomas v. St. Louis, I. M. & S. Co. 187 Mo. App. 420, 173 S. W. 728, 9 N. C. C. A. 92.

If a person injured is feeble, sick, or diseased, and the negligence or wrongful act aggravates the illness or disease, or produces conditions that would not ordinarily or reasonably have existed or occurred except for the negligence or wrongful act, and which are directly attributable to it, the injured party may recover all the damages that flow from the negligence or wrongful act, including such as result from illness, sickness, or disease aggravated by or that are produced by it, although the person inflicting the injury may not at the time know that the person injured is laboring under any infirmity, sickness, or disability.

Louisville & N. R. Co. v. Daugherty, 32 Ky. L. Rep. 1392, 15 L.R.A.(N.S.) 740, 108 S. W. 336.

A child having a latent tubercular tendency in its knees, which is injured by a bruise thereon from a defective sidewalk, may hold the municipality liable for any aggravation of such tendency which is directly caused in natural and reasonable sequence by the bruise.

Neff v. Cameron, 213 Mo. 350, 18 L.R.A.(N.S.) 320, 127 Am. St. Rep. 606, 111 S. W. 139.

In a cause of action arising within the Canal Zone, and tried in the district

court for the Canal Zone, pain and suffering are proper elements of damage.

Panama R. Co. v. Bosse, 152 C. C. A. 219, 239 Fed. 303; Panama R. Co. v. Beckford, 145 C. C. A. 430, 231 Fed. 436; Panama R. Co. v. Toppin, 163 C. C. A. 239, 250 Fed. 989; Panama R. Co. v. Curran, 168 C. C. A. 114, 256 Fed. 768; Panama R. Co. v. Robert, 168 C. C. A. 119, 256 Fed. 773; Panama R. Co. v. Pigott, 168 C. C. A. 183, 256 Fed. 837; J. V. Concha, Tratado de Derecho Penal, p. 114, ¶ 142; Ramirez v. Panama R. Co. Supreme Ct. of Justice of Colombia, 1 Gaceta Judicial, No. 22, p. 170 (June 10, 1887); Hanna v. New Oleans R. & Light Co. 126 La. 634, 52 So. 855; Lee v. Powell Bros. & S. Co. 126 La. 51, 52 So. 214; Englert v. New Orleans R. & Light Co. 128 La. 477, 54 So. 963; Borrero v. Cia Anonyma de Luz Electrica de Ponce, 1 P. R. R. 144; Martinez v. American R. Co. 5 Porto Rico Fed. Rep. 311; Wood v. Valdes, 4 Porto Rico Fed. Rep. 165; Guzman v. Herencia, 4 Porto Rico Fed. Rep. 105, s. c. 219 U. S. 44, 55 L. ed. 81, 31 Sup. Ct. Rep. 135.

If plaintiff had a clear right of action under the lex loci, then the trial court did not err in applying the law of the forum as to the elements to be considered in the measure of damages.

Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; 38 Cyc. 551; Davis v. Mills, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692.

Mr. Justice **Brandeis** delivered the opinion of the court:

Toppin was struck by a locomotive of the Panama Railroad Company while riding a horse in the city of Colon. He sued the company for damages in the district court of the Canal Zone, alleging negligence, and recovered a verdict. The judgment entered thereon was affirmed by the circuit court of appeals for the fifth circuit (163 C. C. A. 239, 250 Fed. 989), and the case is here on writ of error.

The main contentions of the company are here, as in Panama R. Co. v. Bosse, 249 U. S. 41, 63 L. ed. 466, 39 Sup. Ct. Rep. 211, that the trial court erred in holding applicable the rule of respondeat superior and the rule permitting recovery for physical pain suffered. The important difference in the two cases is this: There the accident occurred in the Canal Zone; here, in the Republic of Panama. The company insists that the Bosse Case is not controlling, because the questions affecting liability must here be determined by the law of that Republic,—the place where the accident occurred. Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581; Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. ed. 274, 38 L.R.A. (N.S.) 40, 32 Sup. Ct. Rep. 132. The law [**310**] of Panama is pleaded by both parties and evidence thereon was introduced by both; but we are not limited to this evidence, as they agree that we may take judicial notice of the law of Panama existing February 26, 1904, when the Canal Treaty was proclaimed [33 Stat. at L. 2234], and that, in the absence of evidence to the contrary, the law then prevailing there will be presumed to have continued in force.

First: The company contends that the jury should have been instructed that under the law of Panama the company was not liable if the accident resulted from a criminal act of its employees, there being evidence that it was due to running the locomotive at a rate of speed prohibited under penalty by the Police Code of Panama. That code, known as Ordinance No. 87 of the year 1896, provides (articles 488, 489):

"When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not travel at a greater speed than that of a wagon drawn by horses at a moderate trot; in case of an infraction the conductor or the administrator of the company subsidiarily shall pay a fine of 10 to 100 pesos, without prejudice to the responsibility, civil or penal, to which he may be subject by reason of the damage, fault, or tort. . . ."

"This article . . . shall be applied to railroads when they enter cities or towns."

The Panama Law No. 62, of 1887, had provided in article 5:

"Railroad companies are responsible for the wrongs and injuries which are caused to persons and properties by reason of the service of said railroads and which are imputable to want of care, neglect or violation of the respective police regulations which shall be issued by the government as soon as the law is promulgated."

And article 2341 of the Civil Code provides:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, [**311**] without prejudice to the principal penalty which the law imposes for the fault or offense committed."

It would seem clear from a reading of

these provisions that the company would not be relieved from liability in damages for injuries resulting from the negligence of its employee, merely because the negligent act was also punishable as a crime. And the Colombian authorities to which our attention has been called tend to confirm this construction.[1] There seems to have been a rule of practice under the Colombian Judicial Code (art. 1501[2]) by which, if the civil action and the criminal action arising out of the same acts are not brought at the same time, the civil action cannot be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent. But such rule obviously can have no application here; among other reasons, because it refers to the case where the same person is liable both civilly and criminally. Here it is the engineer who is liable criminally under the Police Code and the company against whom civil liability is being enforced.

Second: The company contends that by the law of Panama it cannot be held liable for the injury caused by the negligence of its engineer if it was careful in selecting him, because the law of Panama does not recognize liability without fault. This contention was made and rejected by the supreme court of Colombia in a case similar to the case at bar.[3] There suit was brought against the empresario of a railway to recover for the loss of a house by fire due to the negligent operation of a locomotive. [312] The court rested the liability upon § 2347 of the Civil Code,[4] declaring that all doubt as to the existence of the necessary dependency was removed by article 5 of Law 62 of 1887, which, "without in any way mentioning the dependents, employees, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the service of the said roads." The court continues: "And there is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient in the opinion of the court, because the diligence and care here treated of is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen."[5] This case seems to overrule in effect the principal authority to which the plaintiff in error has referred us,[6]—in fact, it is not unlikely that such was the object of article 5 of Law 62 of 1887.

[313] Third: The contention that the lower courts erred in allowing recovery for physical pain was made and overruled in Panama R. Co. v. Bosse, supra, p. 47. As the decision there rested upon article 2341 of the Civil Code of Panama it is applicable whether the lex loci, or the lex fori should be held controlling as to such damages. Exception was also taken to the ruling that "if the plaintiff has developed tuberculosis of the spine as a result of the injuries received" the tuberculosis may be considered as an element of damages. The instruction was given with such explanations as to have been clearly unobjectionable.

Affirmed.

---

[1] Cecilia Jaramillo de Cancino v. Railroad of the North. Supreme Court of Justice of the Republic of Colombia, XIII. Judicial Gazette, Nos. 652, 653. Decided December 16, 1897.

[2] Ruperto Restrepo v. Sabana R. Co. Supreme Court of Justice of the Republic of Colombia, III. Judicial Gazette, No. 353, pp. 332–334. Decided July 19, 1892.

[3] Cancino v. Railroad of the North, supra, note 1.

[4] Article 2347. "Every person is responsible not only for his own actions, for the purpose of making good the damage, but for the act of those who may be under his care.

"Thus, the father, and failing him the mother, is responsible for the act of the minor children who live in the same house.

"Thus the tutor or guardian is responsible for the conduct of the pupil who lives under his protection and care.

"Thus the husband is responsible for the conduct of his wife.

"Thus the directors of colleges and schools respond for the acts of students while they are under their care, and artisans and empresarios for the acts of their apprentices and dependents in like cases.

"But this responsibility will cease if with the exercise of the authority and care which their respective characters prescribe for and confer on them they could not prevent the act."

[5] See also Panama R. Co. v. Bosse, 249 U. S. 41, 47, 63 L. ed. 466, 470, 39 Sup. Ct. Rep. 211.

[6] Ramirez v. Panama R. Co. Supreme Court of Justice of Colombia, 1 Gaceta Judicial, No. 22, p. 170 (June 10, 1887).

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner,[1]
v.
AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.

(See S. C. Reporter's ed. 313–316.)

Shipping — charter parties — arbitration of disputes.

1. The refusal of the owner to begin the voyage is not a "dispute" of the kind referred to in a clause in the charter party that "if any dispute arises, the same to be settled by two referees, one to be appointed by the captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an umpire. The decision . . . shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other or others, as liquidated damages, the estimated amount of chartered freight."

[For other cases, see Shipping, IV. a, 2; Arbitration, I. in Digest Sup. Ct. 1908.]

Pleading — foreign laws — scope or construction of contract.

2. The allegation in the answer to a libel in admiralty, brought by a Danish against a Swedish corporation, that by the laws of both Denmark and Sweden an arbitration clause in the charter party is binding, and that arbitration is a condition precedent to the right to sue by reason of any dispute arising under the charter, means no more than that arbitration agreements will be enforced according to their intent. It does not extend the scope or affect the construction of an agreement which, if construed apart from that allegation, has no application to the present case.

[For other cases, see Pleading, I. j, in Digest Sup. Ct. 1908.]

Shipping — charter party — limitation of liability — penalty.

3. The liability of the Swedish owner of a vessel to answer in damages to the Danish charterer for a wilful, unexcused failure to begin the voyage, is not affected by a provision in the charter party, "penalty for nonperformance of this agreement to be proved damages, not exceeding estimated amount of freight," even if such clause can be construed to be a limitation of liability, and not, as held under the English law, and probably on the Continent, merely a penal provision, leaving the ordinary liability upon the undertakings of the contract unchanged.

[For other cases, see Shipping, IV. a, 2; Damages, V. in Digest Sup. Ct. 1908.]

[No. 171.]

Argued March 10, 1920. Decided March 22, 1920.

ON WRIT of Certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York in favor of the libellant in a suit founded on a breach of the charter party. Affirmed.

See same case below, 163 C. C. A. 185, 250 Fed. 935, Ann. Cas. 1918E, 491.

The facts are stated in the opinion.

Mr. **Clarence Bishop Smith** argued the cause and filed a brief for petitioner:

The court should have refused jurisdiction on the ground that the case should have been arbitrated before resort was had to the decision of the court.

United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co. 222 Fed. 1006; Clark v. Hamburg-American Packet Co. (Unreported; D. C. N. Y. Apr. 15, 1913); Fox v. Hempfield R. Co. 3 Wall. Jr. 243, Fed. Cas. No. 5,010; Mittenthal v. Mascagni, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; Daley v. People's Bldg. Loan & Sav. Asso. 178 Mass. 13, 59 N. E. 452; Hamlyn v. Talisker Distillery [1894] A. C. 202, 6 Reports, 188, 71 L. T. N. S. 1, 58 J. P. 540.

Liability should be limited to the estimated amount of freight.

Watts, W. & Co. v. Mitsui & Co. [1917] A. C. 227, 86 L. J. K. B. N. S. 873, 116 L. T. N. S. 353, 22 Com. Cas. 242, 33 Times L. R. 262, 61 Sol. Jo. 382; Scrutton, Charter Parties, 8th ed. p. 90; Winch v. Mutual Ben. Ice Co. 9 Daly, 181, affirmed in 86 N. Y. 618; Davis v. Alpha Portland Cement Co. 134 Fed. 280, affirmed in 73 C. C. A. 388, 142 Fed. 74; United States v. Bethlehem Steel Co. 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. Rep. 450; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; Wise v. United States, 249 U. S. 361, 63 L. ed. 647, 39 Sup. Ct. Rep. 303.

Every sentence in the charter party should be given effect.

9 Cyc. 580; 17 Am. & Eng. Enc. Law, 2d ed. p. 7; Bowes v. Shand, L. R. 2 App. Cas. 463, 46 L. J. Q. B. N. S. 561, 36 L. T. N. S. 857, 25 Week. Rep. 730; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Cleveland-

[1] Reported by the Official Reporter under the title of "The Atlanten."

Note.—On agreements to arbitrate—see note to Kinney v. Baltimore & O. Employees Asso. 15 L.R.A. 142.

On law governing limitation of liability of shipowner—see note to Oceanic Steam Nav. Co. v. Mellor, L.R.A.1916B, 642.

Cliffs Iron Co. v. East Itsaca Min. Co. 76 C. C. A. 598, 146 Fed. 235.

Special attention should be given to new matter.

W. K. Niver Coal Co. v. Cheronea S. S. Co. 5 L.R.A.(N.S.) 126, 73 C. C. A. 502, 142 Fed. 404.

Mr. Julius Henry Cohen filed a brief as amicus curiæ:

If the court should be convinced that public policy favors agreements for the submission of a commercial controversy to arbitration, and that the rule of revocability rests neither in reason nor in sound precedent, the court should correct the error.

The Genesee Chief v. Fitzhugh, 12 How. 433, 13 L. ed. 1058; Cohen, Commercial Arbitration and the Law, chap. 4, p. 39; Klein v. Maravelas, 219 N. Y. 383, L.R.A.1917E, 549, 114 N. E. 809, Ann. Cas. 1917B, 273; People v. Charles Schweinler Press, 214 N. Y. 395, L.R.A. 1918A, 1124, 108 N. E. 639, Ann. Cas. 1916D, 1059; Pakas v. United States, 245 U. S. 467, 62 L. ed. 406, 38 Sup. Ct. Rep. 148; Holmes, Common Law, pp. 35, 36, 41; Hertz v. Woodman, 218 U. S. 205, 212, 54 L. ed. 1001, 1005, 30 Sup. Ct. Rep. 621; Thurston v. Fritz, 91 Kan. 468, 50 L.R.A.(N.S.) 1167, 138 Pac. 625, Ann. Cas. 1915D, 212.

The doctrine of revocability is based upon judicial error.

Halfhide v. Fenning, 2 Bro. Ch. 336, 29 Eng. Reprint, 187; Scott v. Avery, 5 H. L. Cas. 843, 10 Eng. Reprint, 1134, 25 L. J. Exch. N. S. 308, 2 Jur. N. S. 815, 4 Week. Rep. 746; Drew v. Drew, 2 Macq. H. L. Cas. 4, 27 Scot. Jur. 237; Russell v. Pellegrini, 6 El. & Bl. 1020, 119 Eng. Reprint, 1144, 26 L. J. Q. B. N. S. 75, 3 Jur. N. S. 184, 5 Week. Rep. 71; Horton v. Sayer, 4 Hurlst. & N. 650, 157 Eng. Reprint, 996, 29 L. J. Exch. N. S. 28, 5 Jur. N. S. 989, 7 Week. Rep. 735; Dimsdale v. Robertson, 2 Jones & L. 58, 7 Ir. Eq. Rep. 536; Waters v. Taylor, 15 Ves. Jr. 10, 33 Eng. Reprint, 658, 13 Revised Rep. 91; Harcourt v. Ramsbottom, 1 Jac. & W. 505, 37 Eng. Reprint, 460; Norton v. Mascall, 2 Vern. 24, 23 Eng. Reprint, 626; Browne v. Downing, 2 Rolle, Rep. 194; Brode v. De Ripple, Y. B. 49 Edw. III. 8, 9; Hamlyn & Co. v. Talisker Distillery, 21 Sc. Sess. Cas. 4th series, 21, 31 Scot. L. R. 642, 2 Scot. L. T. 12, [1904] A. C. 202, 6 Reports, 201, 71 L. T. N. S. 1, 58 J. P. 540; Caledonian Ins. Co. v. Gilmour [1893] A. C. 85, 1 Reports, 110, 57 J. P. 228; Trainor v. Phœnix Fire Assur. Co. 65 L. T. N. S. 825; Walmsley v. White, 40 Week. Rep. 675, 67 L. T. N. S. 433; Joplin v. Postlethwaite, 61 L. T. N. S. 629; Russell v. Russell, L. R. 14 Ch. Div. 471, 49 L. J. Ch. N. S. 268, 42 L. T. N. S. 112; Vawdrey v. Simpson, 65 L. J. Ch. N. S. 369, [1896] 1 Ch. 167, 44 Week. Rep. 123; Belfield v. Bourne, 8 Reports, 61, [1894] 1 Ch. 521, 63 L. J. Ch. N. S. 104, 69 L. T. N. S. 786, 42 Week. Rep. 189; Belcher v. Roedean School Site & Buildings, 85 L. T. N. S. 468; Jackson v. Barry R. Co. [1893] 1 Ch. 247, 2 Reports, 207, 68 L. T. N. S. 472; Austrian-Lloyd S. S. Co. v. Gresham Life Assur. Soc. [1903] 1 K. B. 249, 72 L. J. K. B. N. S. 211, 51 Week. Rep. 402, 88 L. T. N. S. 6, 19 Times L. R. 155; Gaw v. British Law Fire Ins. Co. [1908] 1 Ir. R. 245; The Cap Blanco [1913] Prob. 130, 83 L. J. Prob. N. S. 23, 109 L. T. N. S. 672, 29 Times L. R. 557, 12 Asp. Mar. L. Cas. 399; Cameron v. Cuddy [1914] A. C. 656, 83 L. J. P. C. N. S. 70, 110 L. T. N. S. 89, 51 Scot. L. R. 591, Ann. Cas. 1914D, 484; Bright v. Gibson, 32 Times L. R. 533; Smith, Coney, & Barrett v. Becker, G. & Co. [1916] 2 Ch. 86, 8 B. R. C. 432, 84 L. J. Ch. N. S. 865, 112 L. T. N. S. 914, 31 Times L. R. 151; Produce Brokers Co. v. Olympia Oil & Cake Co. [1916] 1 A. C. 314, 85 L. J. K. B. N. S. 160, 114 L. T. N. S. 94, 32 Times L. R. 115, 60 Sol. Jo. 74; Clough v. County Live Stock Ins. Asso. 85 L. J. K. B. N. S. 1185, 32 Times L. R. 526, 60 Sol. Jo. 642; Stebbing v. Liverpool & L. & G. Ins. Co. [1917] 2 K. B. 433, 33 Times L. R. 395, 117 L. T. N. S. 247, 86 L. J. K. B. N. S. 1155; Clements v. Devon County Ins. Committee [1918] 1 K. B. 94, 87 L. J. K. B. N. S. 203, 118 L. T. N. S. 89, 82 J. P. 71; Re Lobitos Oilfields [1917] W. N. 227, 86 L. J. K. B. N. S. 1444, 117 L. T. N. S. 28, 33 Times L. R. 472, 14 Asp. Mar. L. Cas. 97; Brodie v. Cardiff Corp. [1919] A. C. 337, 88 L. J. K. B. N. S. 609, 120 L. T. N. S. 417, 83 J. P. 77, 17 L. G. R. 65; Wulff v. Dreyfus & Co. 117 L. T. N. S. 583, 86 L. J. K. B. N. S. 1368, 61 Sol. Jo. 693; Woodall v. Pearl Assur. Co. [1919] 1 K. B. 593, 88 L. J. K. B. N. S. 706, 120 L. T. N. S. 556, 83 J. P. 125, 63 Sol. Jo. 352; Toledo S. S. Co. v. Zenith Transp. Co. 106 C. C. A. 501, 184 Fed. 391.

The provision in the ordinary contract of merchants that, in the event of dispute or controversy, there shall be submission to arbitration, is not intended to oust the courts of jurisdiction, but is merely expressive of the intent of the parties to keep out of court if they can, and to endeavor to compose their dif-

ferences either through conciliation or arbitration.

Scott v. Avery, 5 H. L. Cas. 849, 10 Eng. Reprint, 1136, 25 L. J. Exch. N. S. 303, 2 Jur. N. S. 815, 4 Week. Rep. 746; Waters v. Taylor, 15 Ves. Jr. 17, 33 Eng. Reprint, 661, 13 Revised Rep. 91; Hamlyn & Co. v. Talisker Distillery [1894] A. C. 202, 6 Reports, 201, 71 L. T. N. S. 1, 58 J. P. 540, 21 Sc. Sess. Cas. 4th series, 21, 31 Scot. L. R. 642, 2 Scot. L. T. 12; Daley v. People's Bldg. Loan & Sav. Asso. 178 Mass. 13, 59 N. E. 452; Delaware & H. Canal Co. v. Pennsylvania Coal Co. 50 N. Y. 258; McAllister v. Smith, 17 Ill. 334, 65 Am. Dec. 651; Dyke v. Erie R. Co. 45 N. Y. 116, 6 Am. Rep. 43; Grand v. Livingston, 4 App. Div. 593, 38 N. Y. Supp. 490; Union Nat. Bank v. Chapman, 169 N. Y. 545, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672; Le Breton v. Miles, 8 Paige, 261; The Oranmore, 24 Fed. 922; Penn v. Baltimore, 1 Ves. Sr. 444, 27 Eng. Reprint, 1132; Wiseman v. Roper, 1 Rep. in Ch. 158, 21 Eng. Reprint, 537; Barlow v. Ocean Ins. Co. 4 Met. 270; Stapilton v. Stapilton, 1 Atk. 3, 26 Eng. Reprint, 2; Zane v. Zane, 6 Munf. 406; Taylor v. Patrick, 1 Bibb, 168; Fisher v. May. 2 Bibb, 448; Brown v. Sloan, 6 Watts, 421; Stoddard v. Mix, 14 Conn. 12; Rice v. Bixler, 1 Watts & S. 456; Parsons, Contr. pp. 438, 439; Ex parte Lucy, 21 Eng. L. & Eq. Rep. 199; Mills v. Lee, 6 T. B. Mon. 91, 17 Am. Dec. 118; Moore v. Fitzwater, 2 Rand. (Va.) 442; Bennet v. Paine, 5 Watts, 259; Pierson v. McCahill, 21 Cal. 122; Clark v. Gamwell, 125 Mass. 428; Flannagan v. Kilcome, 58 N. H. 443; 5 C. J. p. 53, note 12a; Fox v. Hempfield R. Co. 3 Wall. Jr. 247, Fed. Cas. No. 5,010; Northampton Gaslight Co. v. Parnell, 15 C. B. 645, 139 Eng. Reprint, 572, 3 C. L. R. 409, 24 L. J. C. P. N. S. 60, 1 Jur. N. S. 211, 3 Week. Rep. 179; Greve v. Ætna Live Stock Ins. Co. 81 Hun, 30, 30 N. Y. Supp. 668; Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 465, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696; Re New York, L. & W. R. Co. 98 N. Y. 453.

Mr. **Roscoe H. Hupper** argued the cause, and, with Mr. George H. Terriberry, filed a brief for respondent:

This suit does not properly involve the arbitration clause of the charter party because the petitioner canceled the charter party and made no demand for arbitration.

Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 267, 268, 24 L. ed. 693, 695, 696; Empire Implement Mfg. Co. v. Hench, 219 Pa. 135, 67 Atl. 995; Braithwaite v. Foreign Hardwood Co. [1905] 2 K. B. 543, 3 B. R. C. 580, 74 L. J. K. B. N. S. 688, 92 L. T. N. S. 637, 21 Times L. R. 413, 10 Com. Cas. 189, 10 Asp. Mar. L. Cas. 52; Knickerbocker L. Ins. Co. v. Pendleton, 112 U. S. 696, 20 L. ed. 866, 5 Sup. Ct. Rep. 314; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617; Clarkson v. Western Assur. Co. 92 Hun, 535, 37 N. Y. Supp. 53; Hicks v. British America Assur. Co. 13 App. Div. 448, 43 N. Y. Supp. 623; Robinson v. Frank, 107 N. Y. 656, 14 N. E. 413; Smith v. Wetmore, 167 N. Y. 234, 60 N. E. 419; Honesdale Ice Co. v. Lake Lodore Improv. Co. 232 Pa. 293, 81 Atl. 306; Jureidini v. National British & I. Millers Ins. Co. [1915] A. C. 505 [1915] W. N. 6, 84 L. J. K. B. N. S. 640, 112 L. T. N. S. 531, 31 Times L. R. 132, 59 Sol. Jo. 205, Ann. Cas. 1915D, 327; O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 422, 57 Atl. 463, 1 Ann. Cas. 422; Ströms Bruks Aktie Bolag v. Hutchison, 6 Sc. Sess. Cas. 5th series, 486, 41 Scot. L. R. 274, 11 Scot. L. T. 664, 10 Asp. Mar. L. Cas. 138 [1905] A. C. 515, 74 L. J. P. C. N. S. 130, 93 L. T. N. S. 562, 21 Times L. R. 718, 11 Com. Cas. 13; Scrutton, Charter Parties, 8th ed. p. 250; Thorley v. Orchis S. S. Co. [1907] 1 K. B. 660, 2 B. R. C. 565, 76 L. J. K. B. N. S. 595, 96 L. T. N. S. 488, 23 Times L. R. 338, 12 Com. Cas. 251, 7 Ann. Cas. 281; James Morrison & Co. v. Shaw Savill & A. Co. [1916] 2 K. B. 783, 115 L. T. N. S. 508, 32 Times L. R. 712; Balian v. Joly, V. & Co. 6 Times L. R. 345; Nash v. Towne, 5 Wall. 689, 701, 702, 18 L. ed. 527, 529, 530.

Abritration affects the remedy only, and therefore the procedure that might have been followed in Sweden or Denmark is immaterial in this case, our law being that arbitration agreements do not bar or oust the jurisdiction of our courts.

Hamilton v. Home Ins. Co. 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. Rep. 133; United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co. 222 Fed. 1006; Meacham v. Jamestown, F. & C. R. Co. 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851.

The courts below correctly decided that the petitioner's liability was not limited to the estimated amount of freight.

Tayloe v. Sandiford, 7 Wheat. 13, 17, 5 L. ed. 384, 385; Watts v. Camors, 115 U. S. 353, 361, 29 L. ed. 406, 408, 6 Sup.

Ct. Rep. 91; Wall v. Rederiaktiebolaget Luggude [1915] 3 K. B. 73, [1915] W. N. 248, 84 L. J. K. B. N. S. 1663, 31 Times L. R. 487; Watts, W. & Co. v. Mitsui Co. [1917] A. C. 227, 86 L. J. K. B. N. S. 873, 116 L. T. N. S. 353, 33 Times L. R. 262, 22 Com. Cas. 242, 61 Sol. Jo. 382, [1916] 2 K. B. 826, 85 L. J. K. B. N. S. 1721, 115 L. T. N. S. 248, 32 Times L. R. 622; Ströms Bruks Aktie Bolag v. Hutchison, 6 Sc. Sess. Cas. 5th series, 486, 41 Scot. L. R. 274, 11 Scot. L. T. 664, 10 Asp. Mar. L. Cas. 139, [1905] A. C. 515, 74 L. J. P. C. N. S. 130, 93 L. T. N. S. 562, 21 Times L. R. 718, 11 Com. Cas. 13; Lines v. Atlantic Transport Co. 139 C. C. A. 170, 223 Fed. 624; Clink v. Radford [1891] 1 Q. B. 627, 60 L. J. Q. B. N. S. 388, 64 L. T. N. S. 491, 39 Week. Rep. 355, 7 Asp. Mar. L. Cas. 10; Hansen v. Harrold Bros. [1894] 1 Q. B. 612, 63 L. J. Q. B. N. S. 744, 9 Reports, 315, 70 L. T. N. S. 475, 7 Asp. Mar. L. Cas. 464; Crossman v. Burrill, 179 U. S. 100, 45 L. ed. 106, 21 Sup. Ct. Rep. 38; Elvers v. W. R. Grace & Co. 157 C. C. A. 153, 244 Fed. 705.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a libel in admiralty by a Danish corporation, the respondent here, against a Swedish corporation, owner of the steamship Atlanten, for breach of a charter party made in Denmark, on September 30, 1914. The voyage was to be from a southern port in the United States to Danish ports to be named. On January 8, 1915, the owner (the petitioner) wrote to the charterers that, owing to the increased war risk and other difficulties, "we are compelled to cancel the Atlanten's charter party Pensacola to Scandinavia, and are ready to take all the consequences the court after clause No. 24 in the charter party will compel us to pay, not exceeding the estimated amount of freight." It offered to proceed, however, if the charterers would pay a higher rate. This libel was brought five months later. The owner, in its answer, admitted the breach, but set up the clause 24 of the charter, [**315**] "penalty for nonperformance of this agreement to be proved damages, not exceeding estimated amount of freight," and clause 21, "If any dispute arises, the same to be settled by two referees, one to be appointed by the captain and one by charterers or their agents, and, if necessary, the arbitrators to appoint an umpire. The decision . . . shall be final, and any party attempting to revoke this submission to arbitration without leave of a court shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight." It is alleged that by the laws of both Denmark and Sweden such a provision is binding, and that arbitration is a condition precedent to the right to sue by reason of any dispute arising under the charter. The case was heard on exceptions to the answer. The district court made a decree for the libellant for full damages (232 Fed. 403), and this decision was affirmed by the circuit court of appeals. 163 C. C. A. 185, 250 Fed. 935, Ann. Cas. 1918E, 491.

With regard to the arbitration clause we shall not consider the general question whether a greater effect should not be given to such clauses than formerly was done, since it is not necessary to do so in order to decide the case before us. For this case it is enough that we agree substantially with the views of Judge Learned Hand in the district court and Judge Hough in the circuit court of appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply. It is true that it would be inaccurate to say that the owner repudiated the contract in toto, for the letter that we have quoted assumed that the contract was binding, and referred to it as fixing the liability incurred. It meant simply that the owner would not proceed with the voyage. United States v. McMullen, 222 U. S. 460, 471, 56 L. ed. 269, 273, 32 Sup. Ct. Rep. 128. But we agree that such a refusal was not a "dispute" of the kind referred to in the arbitration clause.

As Judge Hand remarked, the withdrawal was before [**316**] the voyage began, and it is absurd to suppose that the captain, who might be anywhere in the world, was to be looked up and to pick an arbitrator in such a case. The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract,—not to a repudiation of the substance of the contract, as it is put by Lord Haldane in Jureidini v. National British & I. M. Ins. Co. [1915] A. C. 499, 505, [1915] W. N. 6, 84 L. J. K. B. N. S. 640, 112 L. T. N. S. 531, 31 Times L. R. 132, 59 Sol. Jo. 205. The allegation in the answer as to the law of Denmark and Sweden we do not understand to mean more than that arbitration agreements will be enforced according to their intent. It does not extend the scope or affect the construction of an agreement which, as we should construe it apart

from that allegation, does not apply to the present case.

Paragraph 24 of the charter, supposed to limit liability, may be met in similar and other ways. If it were a limitation of liability, it hardly could be taken to apply to a case of wilful, unexcused refusal to go on with the voyage. It obviously was not intended to give the owner an option to go on or stop at that price. But, furthermore, as was fully pointed out below, the clause is a familiar modification of a very old one, and in the courts of England that have had frequent occasion to deal with it, is held to be only a penalty, even in the present form, and to leave the ordinary liability upon the undertakings of the contract unchanged. Wall v. Rederiaktiebolaget Luggude [1915] 3 K. B. 66, [1915] W. N. 248, 84 L. J. K. B. N. S. 1663, 31 Times L. R. 487; Watts, W. & Co. v. Mitsui & Co. [1917] A. C. 227, 86 L. J. K. B. N. S. 873, 116 L. T. N. S. 353, 33 Times L. R. 262, 22 Com. Cas. 242, 61 Sol. Jo. 382, [1916] 2 K. B. 826, 844, 85 L. J. K. B. N. S. 1721, 115 L. T. N. S. 248, 32 Times L. R. 622; Watts v. Camors, 115 U. S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91. Presumably this is also the continental point of view. We are of opinion that the decree was clearly right.

Decree affirmed.

---

[317] J. HARTLEY MANNERS, Petitioner,
v.
OLIVER MOROSCO.

(See S. C. Reporter's ed. 317-331.)

Copyright — license — duration.

1. The five years' limitation in a grant by a playwright of the sole and exclusive license and liberty to produce, perform, and represent a copyrighted play within the territorial limits stated, subject to the other terms and conditions of the contract, one of which bound the licensee to produce the play for at least seventy-five performances in each ensuing theatrical season for five years, and another provided for a forfeiture in case the play should not have been produced for the stipulated number of performances in any one theatrical year, limits all the rights and obligations of both parties to the contract,—the license to produce as well as the licensee's obligation to perform.

[Matters as to copyright, see Copyright, in Digest Sup. Ct. 1908.]

Copyright — license — moving-picture rights.

2. The right to represent a copyrighted play in moving pictures cannot be deemed to have been embraced in a grant by a playwright of the sole and exclusive license and liberty to produce, perform, and represent the play within the territorial limits stated, subject to the other terms and conditions of the contract, under which the play is to be continued for seventy-five performances for each ensuing theatrical season for five years, the royalties provided for are adapted only to regular stage presentation, and the play is to be presented in first-class theaters with a competent company, and with a designated actress in the title role, there being stipulations against alterations, eliminations, or additions, and that the rehearsals and production of the play shall be under the direction of the author, and a further provision that the play may be released for stock if it fails in New York city and on the road, or in case the net profits fall below a stipulated amount.

[For matters as to copyright, see Copyright, in Digest Sup. Ct. 1908.]

Copyright — license — implied covenant of licensor — destruction of licensee's estate.

3. There is implied a negative covenant on the part of the lessor of the right to use a copyright not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee's estate.

[Matters as to copyright, see Copyright, in Digest Sup. Ct. 1908.]

Note.—Copyright license as including moving-picture rights.

Whether or not the grant of the right to use a copyrighted play or book gives moving-picture rights depends upon the wording of the contract granting the right.

Thus, a grant of the "exclusive right of producing such dramatic version on the stage" was held in Harper Bros. v. Klaw, 232 Fed. 609, not to give moving-picture rights.

And in Klein v. Beach, 151 C. C. A. 282, 239 Fed. 108, a grant of the "sole and exclusive right to dramatize the said book for presentation on the stage" did not confer motion-picture rights.

These two cases, it will be seen, support MANNERS v. MOROSCO, which had under consideration an analogous contract.

On the other hand, an exclusive license to "produce" a play carries with it the right of production of motion pictures thereof. Lipzin v. Gordin, 166 N. Y. Supp. 792.

And the purchaser from the writer of the exclusive right to "produce or have produced" a certain play was held in Frohman v. Fitch, 164 App. Div. 231,

Injunction — against infringement of copyright — condition.

4. Injunctive relief to the owner of the copyright in a play against the unauthorized representation of such play by his licensee in moving pictures will only be granted upon condition that the former shall also abstain from presenting or authorizing the representation of the play in moving pictures during the life of the license agreement within the territorial limits therein stated.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 370.]

Argued March 2, 1920. Decided March 22, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing the bill in a suit to enjoin the representation of a copyrighted play in moving pictures by the licensee of the right to produce the play. Reversed. Injunction to issue upon condition that plaintiff shall neither represent nor authorize the representation of the play in motion pictures while the license agreement remains in force.

See same case below, 169 C. C. A. 497, 258 Fed. 557.

The facts are stated in the opinion.

Mr. **David Gerber** argued the cause, and, with Mr. William J. Hughes, filed a brief for petitioner:

The contract is not a sale of the play, nor an assignment, but a license only, circumscribed by terms, conditions, and limitations.

Heap v. Hartley, L. R. 42 Ch. Div. 461, 58 L. J. Ch. N. S. 790, 61 L. T. N. S. 538, 38 Week. Rep. 136; London Printing & Pub. Alliance v. Cox, 7 Times L. R. 738, [1891] 3 Ch. 291, 60 L. J. Ch. N. S. 707, 65 L. T. N. S. 60; Neilson v. Horniman, 26 Times L. R. 188; Stevens v. Benning, 1 Kay & J. 168, 69 Eng. Reprint, 414; Tuck v. Canton, 51 L. J. Q. B. N. S. 365.

Whatever was not expressly or by necessary implication granted was reserved by and remained in the petitioner, and respondent's rights were limited to the restrictions of the license.

Lucas v. Cooke, L. R. 13 Ch. Div. 872, 42 L. T. N. S. 180, 28 Week. Rep. 439; Heap v. Hartley, supra.

A company of actors, engaged to travel from city to city for a theatrical season, understand their employment to cover the period of the accepted season.

McIntosh v. Miner, 37 App. Div. 483, 55 N. Y. Supp. 1074.

There is no theatrical season in connection with a photoplay performance.

Law of Motion Picture and the Theater, p. 119.

The contract contains provisions as to royalties and their computation, confessedly incapable of application to any method of producing photoplays.

Harper Bros. v. Klaw, 232 Fed. 609.

How can a provision that there shall be no eliminations be applied to a performance that eliminates every word of the dialogue?

Century Dict. p. 5384; 24 Enc. Britannica, 11th ed. p. 306, "Scene;" Universal Film Mfg. Co. v. Copperman, 134 C. C. A. 305, 218 Fed. 578; Photo Drama Motion Picture Co. v. Social Uplift Film Corp. 213 Fed. 377; New Fiction Pub. Co. v. Star Co. 220 Fed. 995; London v. Biograph Co. 145 C. C. A. 582, 231 Fed. 149 N. Y. Supp. 633, to be entitled to an injunction enjoining and restraining the writer from producing the play by means of motion pictures, and this although neither party to the contract, at the time the contract was entered into, may have contemplated production by means of motion pictures, such pictures not then being common.

In Harper Bros. v. Klaw, 232 Fed. 609, it was held that while the exclusive right of producing on the stage did not give to the grantee any motion-picture rights, yet such a grant did raise by implication a negative covenant against destroying the effect of such a grant by a motion picture. And MANNERS v. MOROSCO, it will be observed, takes the same view.

In Klein v. Beach, 151 C. C. A. 282, 239 Fed. 108, on the other hand, it was held that a contract entered into long after motion pictures had become common did not, by implication, raise a negative covenant against destroying the effect of such a contract by moving pictures. The court pointed out that in Harper Bros. v. Klaw, the contract was entered into in 1899, when motion pictures were not common, and the distinction between them and the stage proper had not become well fixed, and stated that there was no basis for an implied negative covenant in a grant made long after motion pictures had become common, because the situation was not changed since the contract was made, so as to create an unexpected situation.

697; Klein v. Beach, 151 C. C. A. 282, 239 Fed. 110.

The word "represent," used in the contract, cannot be construed as referring to a motion picture, as distinct from the play.

Murray v. Elliston, 5 Barn. & Ald. 657, 106 Eng. Reprint, 1331, 1 Dowl. & R. 299, 24 Revised Rep. 519, 9 Eng. Rul. Cas. 868; Duck v. Bates, L. R. 13 Q. B. Div. 843, 53 L. J. Q. B. N. S. 338, 50 L. T. N. S. 778, 32 Week. Rep. 813, 48 J. P. 501; Chappell v. Boosey, L. R. 21 Ch. Div. 232, 51 L. J. Ch. N. S. 625, 46 L. T. N. S. 854, 30 Week. Rep. 733, 9 Eng. Rul. Cas. 890.

The fact that petitioner retained the motion-picture rights is not inconsistent with a license limited to a representation of the play as a spoken drama.

Société Des Films Menchen v. Vitagraph Co. of America, 163 C. C. A. 414, 251 Fed. 258; Photo-Drama Motion Picture Co. v. Social Uplift Film Corp. 137 C. C. A. 42, 220 Fed. 449.

In England, a contract covering the acting rights is held not to include cinema rights, nor do the words "English performances" embrace them.

Ganthony v. G. R. J. Syndicate, "The Author," vol. 26, No. 1, Oct. 1, 1915, p. 17; Wyndham v. A. E. Huebsch & Co. "The Author," vol. 26, No. 1, of Oct. 1, 1915, p. 16.

The license was not the grant of a right in perpetuity, as was held by the court below.

Grant v. Maddox, 15 Mees. & W. 737, 153 Eng. Reprint, 1048, 16 L. J. Exch. N. S. 227.

Mr. **Charles H. Tuttle** argued the cause, and, with Mr. William Klein, filed a brief for respondent:

The contract, as modified, was not an agreement for personal services or for a naked license, but was a contract of bargain and sale, whereby property was granted and conveyed.

Frohman v. Fitch, 164 App. Div. 233, 149 N. Y. Supp. 633.

Where property is conveyed, the conveyance is presumed to be absolute, and not revocable at will, or for a temporary period, in the absence of clear words of limitation.

Western U. Teleg. Co. v. Pennsylvania Co. 68 L.R.A. 968, 64 C. C. A. 285, 129 Fed. 867.

The limitation of time expressed in paragraph 5 excluded the implication of any other limitation of time.

Norfolk & N. B. Hosiery Co. v. Arnold, 64 N. J. L. 254, 45 Atl. 608; Hart v. Cort, 83 Misc. 46, 144 N. Y. Supp. 627; Cree v. Bristol, 12 Misc. 1, 33 N. Y. Supp. 19.

Quite apart from the special features and circumstances, the absolute character of this grant, as not limited to any fixed period of years, would follow as a matter of law.

6 R. C. L. § 281; Western U. Teleg. Co. v. Pennsylvania Co. 68 L.R.A. 968, 64 C. C. A. 285, 129 Fed. 861; McKell v. Chesapeake & O. R. Co. 99 C. C. A. 109, 175 Fed. 329, 20 Ann. Cas. 1097; White v. Hoyt, 73 N. Y. 511; Duryea v. New York, 62 N. Y. 597.

The granting clause of the contract of January 19, 1912, conveyed all the production rights.

Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633; Kalem Co. v. Harper Bros. 222 U. S. 55, 56 L. ed. 92, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285; Photo Drama Motion Picture Co. v. Social Uplift Film Corp. 213 Fed. 374, 137 C. C. A. 42, 220 Fed. 448; Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552.

The expression of certain reservations in favor of the plaintiff was an exclusion of all others.

13 C. J. 539.

The courts will not easily accept a construction which would permit the plaintiff to produce motion pictures in competition with the defendant's production on the stage.

Harper Bros. v. Klaw, 232 Fed. 609; Frohman v. Fitch, 164 App. Div. 233, 149 N. Y. Supp. 633; Photo Drama Motion Picture Co. v. Social Uplift Film Corp. 213 Fed. 377; Fleischman v. Furguson, 223 N. Y. 241, 119 N. E. 400.

The unbroken tenor of judicial decisions interpreting similar agreements establishes incontestably that the motion-picture rights were included.

Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. Supp. 633; Klein v. Beach, 151 C. C. A. 282, 239 Fed. 109, 232 Fed. 246; Harper Bros. v. Klaw, 232 Fed. 612; Lipzin v. Gordin, 166 N. Y. Supp. 792; Hart v. Fox, 166 N. Y. Supp. 793; Photo-Drama Motion Picture Co. v. Social Uplift Film Corp. 137 C. C. A. 42, 220 Fed. 448; Kalem Co. v. Harper Bros. 222 U. S. 55, 63, 56 L. ed. 92, 96, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285; Klaw v. General Film Co. 154 N. Y. Supp. 988; Universal Film Mfg. Co. v. Copperman, 212 Fed. 301, 134 C. C. A. 305, 218 Fed. 577; Liebler v. Bobbs-Merrill Co. 162 App. Div. 900, 146 N. Y. Supp. 1097; Drone, Copyright, p. 588; Brackett, Theatrical Law, p. 61; Lee v.

Simpson, 3 C. B. 881, 136 Eng. Reprint, 353, 4 Dowl. & L. 666, 16 L. J. C. P. N. S. 105, 11 Jur. 127.

The fact that certain provisions of the contract have to do with production in spoken form in no wise limits the grant.

Dickson v. Wildman, 105 C. C. A. 618, 183 Fed. 398; 17 Am. & Eng. Enc. Law, 2d ed. 8; Stuart v. Easton, 170 U. S. 383, 393, 401, 42 L. ed. 1078, 1081, 1084, 18 Sup. Ct. Rep. 650; Mott v. Richtmyer, 57 N. Y. 63; Re Main St. 216 N. Y. 75, 110 N. E. 176; Holmes v. Hubbard, 60 N. Y. 186.

Nothing in the provision forbidding alterations, eliminations, or additions to be made in the play without the approval of the author, prevents motion-picture productions.

Kalem Co. v. Harper Bros. 222 U. S. 55, 61, 56 L. ed. 92, 95, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285; United States v. Motion Picture Patents Co. 225 Fed. 803, 247 U. S. 524, 62 L. ed. 1248, 38 Sup. Ct. Rep. 578; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit by the author of a play called "Peg O' My Heart," to restrain the defendant, Morosco, from representing the play in motion pictures, in violation of the plaintiff's copyright; and also, although this is a subsidiary question, from producing the play at all. The defendant justifies under an agreement of January 19, 1912, and a supplemental agreement of July 20, 1914, both set forth in the bill. The grounds upon which the right to produce the play in any way was denied was that the agreement gave rights only for five years. This construction was rejected by the district court and the circuit court of appeals. Both courts held also that the agreement conveyed the right to represent the play in moving pictures, and on that ground dismissed the bill. 254 Fed. 737; 169 C. C. A. 497, 258 Fed. 557.

By the first agreement the plaintiff, party of the first, "does grant" to Morosco, the party of the second part, "the sole and exclusive license and liberty to produce, perform, and represent the said play in the United States of America and the Dominion of Canada," subject to the terms and conditions of the contract. Morosco [324] agrees "to produce the play not later than January 1st, 1913, and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years." He agrees further to pay specified percentages on the gross weekly receipts as royalties, and that "if during any one theatrical year . . . said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part." Morosco further agrees to present the play in first-class theaters with competent companies and with Miss Laurette Taylor (the stage name of the author's wife) in the title role; the play to have a production in New York and to be continued on the road for at least one season or longer if considered advisable by both parties. No alterations, eliminations, or additions are to be made without the approval of the author, and the rehearsals and production of the play are to be under his direction. The author to have the right to print and publish the play, but not within six months after the production of the play in New York city without consent. Morosco is not to let or transfer his rights without the author's consent. "Should the play fail in New York city and on the road, it shall be released for stock;" i. e., let to stock companies, with an equal division of royalties between plaintiff and defendant. By an addendum, after Miss Taylor should have finished her season, her successor in the role of "Peg" for any subsequent tours shall be mutually agreeable to both parties. The contract is declared binding upon the parties, "their heirs, executors, assigns, administrators, and successors."

The second agreement, in order to adjust controversies and to modify the first, authorized Morosco "as long as this contract is in force" "to produce, perform, and represent" the play with or in as many companies as he saw fit, [325] without engaging Laurette Taylor, and without consulting the plaintiff as to the cast, rehearsals, or production of the play. Morosco also was authorized to let or sell any of his rights under the contracts, but he was not to be released from his personal liability to pay the royalties as specified in the contracts. The play might be released for stock whenever the net profits realized from all the companies producing the play should be less than $2,000, and then the royalties received from the stock theaters were to be divided equally. For four years from date neither party, without consent of the other, was to produce or give leave to

produce the play by moving pictures, and after that the rights of the parties were to be determined by and under the original agreement as if the supplemental agreement had not been made.

As to the duration of the defendant's rights, we agree with the courts below. We perceive no ground for converting the defendant's undertaking to continue the play for seventy-five performances during the season of 1913–1914, and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the district court, it is a statement of the least that defendant was to do, not of the most that he was to have. The plaintiff was secured sufficiently by the forfeiture in case the play should not have been produced for seventy-five performances. The provisions in both contracts as to the release for stock are somewhat of an additional indication that it was expected that the arrangement was to last as long as the public liked the play well enough to make it pay, provided the defendant kept his half of the bargain performed.

On the question principally argued we are of opinion that the majority below was wrong. The thing granted was "the sole and exclusive license and liberty to produce, perform, and represent" the play within the territorial limits stated, subject to the other terms of the contract. [**326**] It may be assumed that those words might carry the right to represent the play in moving pictures if the other terms pointed that way, but to our mind they are inconsistent with any such intent. We need not discuss the abstract question whether, in view of the fact that such a mode of representation was familiar, it was to be expected that it should be mentioned if it was to be granted, or should be excluded if it was to be denied. Every detail shows that a representation by spoken drama alone is provided for. The play is to be continued for seventy-five performances for the theatrical seasons named. This applies only to the regular stage. The royalties are adapted only to that mode of presentation. Harper Bros. v. Klaw, 232 Fed. 609, 612. The play is to be presented in first-class theaters with a competent company and with Miss Laurette Taylor in the title role, which, of course, does not mean in moving pictures. The stipulations against alterations, eliminations, or additions, and that the rehearsals and production of the play shall be under the direction of the author, denote the same thing, and clearly indicate that no other form of production is contemplated. The residuary clause, so to speak, by which the play is to drop to stock companies, shows the lowest point to which the author was willing to let it go.

The courts below based their reasoning upon the impossibility of supposing that the author reserved the right to destroy the value of the right granted, however that right may be characterized, by retaining power to set up the same play in motion pictures a few doors off with a much smaller admission fee. We agree with the premise, but not with the conclusion. The implied assumption of the contract seems to us to be that the play was to be produced only as a spoken drama, with respect for the author's natural susceptibility concerning a strict adhesion to the text. We need not amplify the argument presented below against the reservation of the right in [**327**] question. As was said by Judge Hough in a similar case: "There is implied a negative covenant on the part of the . . . [grantor] not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensees' estate. Admittedly if Harper Brothers (or Klaw and Erlanger, for the matter of that) permitted photo plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed." Harper Bros. v. Klaw, 232 Fed. 609, 613. The result is that the plaintiff is entitled to an injunction against the representation of the play in moving pictures, but upon the terms that the plaintiff also shall abstain from presenting or authorizing the presentation of the play in that form in Canada or the United States.

Decree reversed. Injunction to issue upon the condition that the plaintiff shall neither represent nor authorize the representation of the play "Peg O' My Heart" in moving pictures while the contract with the defendant remains in force.

Mr. Justice **Clarke**, dissenting:

The decision of this case involves the construction of the written contract of January 19, 1912, as modified by that of July 20, 1914, and, centering its attention upon the claim of the defendant to moving picture rights, the court dismisses in a single paragraph provisions in these contracts which seem to me to so clearly limit the rights of the defendant to a term expiring possibly in May, 1918, but certainly not later than May, 1919, that I cannot concur in the conclusion arrived at by my associates.

The court says:

"As to the duration of the defendant's rights, we agree with the courts below. We perceive no ground for converting the defendant's undertaking to continue the play for seventy-five performances during the season of 1913–1914, [328] and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the district court, it is a statement of the least that defendant was to do, not of the most that he was to have."

This expression that the third paragraph of the contract of January 19, 1912, "is a statement of the least that defendant was to do, not of the most that he was to have," is repeated in the opinion of each of the three courts as the sufficient reason for concluding, as the district court said, that the contract gave to the defendant "all the rights mentioned *for all time.*" It is not the first time that a catchy phrase has diverted attention from less picturesque realities.

My reasons for concluding that the rights of the defendant were limited, as the court says his obligations were limited, to a term expiring not later than the close of the theatrical season of 1918–1919, may be briefly stated.

The grant which it is concluded gave the defendant "the exclusive license and liberty to produce, perform, and represent" the play involved "for all time" is in these words:

"First. The party of the first part hereby grants . . . to the party of the second part, *subject to the terms, conditions, and limitations hereinafter expressed,* the sole and exclusive license and liberty to produce, perform, and represent the said play in the United States" and Canada.

In terms this is a "license," and in terms also it is subject to "conditions and limitations" to follow in the contract,—which are found in the third and fifth paragraphs.

The third paragraph reads:

"The party of the second part—defendant—agrees to produce the play not later than January 1st, 1913, and to continue said play for at least seventy-five performances [329] during the season 1913–1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides that if the defendant shall fail to produce the play seventy-five times in any one theatrical year, "then all rights of the said party of the second part (the defendant) shall cease and determine and shall immediately revert to the said party of the first part."

This third paragraph expresses the agreement of the parties as to what the defendant was to do in consideration of the grant by the plaintiff in the first paragraph, and reading it and the fifth paragraph together, as one, we have the extreme extent and time limit of the defendant's obligation and the penalty, forfeiture, is provided for the failure to perform at any time within that limit. The court says that the third paragraph expresses "the least (all) that the defendant was to do," so that his obligation under the contract ended with the five-year period, which obviously would be not later than the close of the theatrical season of 1918–1919. This being true, when did the reciprocal obligation of the plaintiff expire?

That the obligation of the plaintiff continued "for all time" is apparently derived wholly from the inference, as stated by the district court, that the parties, if they had intended otherwise, "could readily have fixed a time limit in the first paragraph by the addition of words such as 'for . . . years from' or 'until' a stated date."

It is very true that the parties could have written their contract in a different form, and certainly with much more precision of statement, than that in which they did write it, but it is also true that in making it in their own way and terms they granted a general license in the first paragraph, but made it subject to the "terms, conditions, and limitations" thereinafter to be expressed, and that they then went forward and expressed in the third paragraph the five-year limitation as we have seen it. The [330] court holds that this five-year limitation applies to the defendant's obligation to perform, but that it does not apply to the plaintiff's license to produce. I think it applies to both. Plainly the parties were undertaking to set down in their contract the mutual obligations which each intended to assume,—those of the one in consideration of those of the other. The author granted the privilege of producing the play and the defendant agreed to produce it for at least seventy-five performances during each of five years. After that, the court concludes, the defendant was no longer bound by the contract to do anything which could advantage the plaintiff, and therefore, clearly, the plaintiff should not continue thereafter under obligation to the defendant, unless the intention to be so bound is

Since that time operating costs have risen greatly and rates for laundry work prevailing [334] in 1913 have become noncompensatory. Accordingly in January, 1918, the company moved the Commission to set aside its order of 1913 on the ground that the laundry business was not within the purview of § 8235, that the company was not a monopoly within the meaning of that section, and that the section was void. The Commission denied this motion and thereafter the company established rates higher than those prevailing in 1913. On account of this it is now threatened with proceedings for contempt. Since the establishment of these higher rates the company has been summoned before the Commission to give information as to the cost of performing laundry service in Oklahoma City, and information in general to determine what may be reasonable rates for laundry service in that city. Upon these allegations a preliminary injunction was sought below to restrain the Commission from entertaining complaints for violation of its order fixing rates, and to enjoin it from proceeding with the investigation regarding the cost of the service.

The scope of § 8235 and the prescribed course of proceedings thereunder, as construed by the supreme court of the state (Harriss-Irby Cotton Co. v. State, 31 Okla. 603, 122 Pac. 163; Shawnee Gas & E. Co. v. State, 31 Okla. 505, 122 Pac. 222; Oklahoma Gin Co. v. Love, — Okla. —, P.U.R.1916C, 22, 158 Pac. 629), in connection with other legislation (§§ 1192 to 1207 of the Revised Code of 1910), and provisions of the state Constitution (article 9, §§ 18 to 23), are, so far as here material, these: Whenever any business, by reason of its nature, extent, or the exercise of a virtual monopoly therein, is such that the public must use the same or its services, it is deemed a public business, and as such is subject to the duty to render its services upon reasonable terms without discrimination. If any public business violates such duty the Corporation Commission has power to regulate its rates and practices. Disobedience to an order establishing rates may be punished as a contempt, and the Commission has power, [335] sitting as a court, to impose a penalty therefor not exceeding $500 a day. Each day's continuance of failure or refusal to obey the order constitutes a separate offense. The original order may not be made nor any penalty imposed except upon due notice and hearing. No court of the state, except the supreme court, by way of appeal, may review, correct, or annul any action of the Commission within the scope of its authority, or suspend the execution thereof; and the supreme court may not review an order fixing rates by direct appeal from such order. But in the proceedings for contempt the validity of the original order may be assailed; and for that purpose, among others, new evidence may be introduced. When a penalty for failure to obey an order has been imposed, an appeal lies to the supreme court. On this appeal the validity of the original order may be reviewed; the appeal is allowed as of right upon filing a bond with sureties in double the amount of the fine imposed; the filing of the bond suspends the fine; and the period of suspension may not be computed against a concern in fixing the amount of liability for fines.

The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the 14th Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456–458, 33 L. ed. 970, 980, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, 209 U. S. 123, 165, 166, 52 L. ed. 714, 731, 732, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. The Constitution of the state prohibited any of its courts from reviewing any action of the Commission within its authority except by way of appeal to the supreme court (art. 9, § 20); and the supreme court had construed the Constitution and applicable provisions of the statutes as not permitting a direct appeal from [336] orders fixing rates. Harriss-Irby Cotton Co. v. State, 31 Okla. 603, 122 Pac. 163. On behalf of the Commission it was urged at the oral argument that a judicial review of the order fixing rates might have been had also by writ of mandamus or of prohibition issuing out of the supreme court of the state. But, in view of the provision of the state Constitution just referred to, it must be assumed, in the absence of a decision of a state court to the contrary, that neither remedy, even if otherwise available, could be used to review an order alleged to be void because confiscatory. The proviso "that the writs of mandamus and prohibition shall lie from the supreme court to the

Commission in all cases where such writs, respectively, would lie to any inferior court or officer," appears to have no application here. The challenge of a prescribed rate as being confiscatory raises a question not as to the scope of the Commission's authority, but of the correctness of the exercise of its judgment. Compare Hirsch v. Twyford, 40 Okla. 220, 230, 139 Pac. 313.

So it appears that the only judicial review of an order fixing rates possible under the laws of the state was that arising in proceedings to punish for contempt. The Constitution endows the Commission with the powers of a court to enforce its order by such proceedings. Art. 9, §§ 18, 19. By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust, or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the supreme court. But the penalties which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to [337] obey an order may be $500; and each day's continuance of the refusal after service of the order, it is declared, "shall be a separate offense." The penalty may apparently be imposed for each instance of violation of the order. In Oklahoma Gin Co. v. Oklahoma [252 U. S. 339, post, 600, 40 Sup. Ct. Rep. 341], decided this day, it appears that the full penalty of $500, with the provision for the like penalty for each subsequent day's violation of the order, was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L.R.A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 349, 57 L. ed. 1507, 1510, 33 Sup. Ct. Rep. 961; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 662, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

The plaintiff is entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties. Since this suit was commenced, the legislature has provided by chap. 52, § 3, of the Laws of 1919 (Okla. Sess. Laws 1919, p. 87) that in actions arising before the Commission under § 8235 there shall be the same right of direct appeal to the supreme court of the state as had theretofore existed in the case of transportation and transmission companies under art. 9, § 20, of the Constitution. But as plaintiff was obliged to resort to a Federal court of equity for relief, it ought to retain jurisdiction of the cause in order to make that relief as full and complete as the circumstances of the case and the nature of the proofs may require. The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their [338] enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders. Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533, 538, 60 L. ed. 1148, 1154, 36 Sup. Ct. Rep. 715. If, upon final hearing, the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory.

It does not follow that the Commission need be restrained from proceeding with an investigation of plaintiff's rates and practices, so long as its findings and conclusions are subjected to the review of the district court herein. Indeed, such investigation and the results of it might with appropriateness be made a part of the final proofs in the cause.[2]

These conclusions require that the decree of the District Court be reversed and that the case be remanded for further proceedings in conformity with this opinion.

Reversed.

[2] In Ex parte Young, 209 U. S. 123, 133, 52 L. ed. 714, 718, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, the district court appears to have considered whether the rates were reasonable although the penal features of the act were declared void. Missouri P. R. Co. v. Tucker, 230 U.

Since that time operating costs have risen greatly and rates for laundry work prevailing [334] in 1913 have become noncompensatory. Accordingly in January, 1918, the company moved the Commission to set aside its order of 1913 on the ground that the laundry business was not within the purview of § 8235, that the company was not a monopoly within the meaning of that section, and that the section was void. The Commission denied this motion and thereafter the company established rates higher than those prevailing in 1913. On account of this it is now threatened with proceedings for contempt. Since the establishment of these higher rates the company has been summoned before the Commission to give information as to the cost of performing laundry service in Oklahoma City, and information in general to determine what may be reasonable rates for laundry service in that city. Upon these allegations a preliminary injunction was sought below to restrain the Commission from entertaining complaints for violation of its order fixing rates, and to enjoin it from proceeding with the investigation regarding the cost of the service.

The scope of § 8235 and the prescribed course of proceedings thereunder, as construed by the supreme court of the state (Harriss-Irby Cotton Co. v. State, 31 Okla. 603, 122 Pac. 163; Shawnee Gas & E. Co. v. State, 31 Okla. 505, 122 Pac. 222; Oklahoma Gin Co. v. Love, — Okla. —, P.U.R.1916C, 22, 158 Pac. 629), in connection with other legislation (§§ 1192 to 1207 of the Revised Code of 1910), and provisions of the state Constitution (article 9, §§ 18 to 23), are, so far as here material, these: Whenever any business, by reason of its nature, extent, or the exercise of a virtual monopoly therein, is such that the public must use the same or its services, it is deemed a public business, and as such is subject to the duty to render its services upon reasonable terms without discrimination. If any public business violates such duty the Corporation Commission has power to regulate its rates and practices. Disobedience to an order establishing rates may be punished as a contempt, and the Commission has power, [335] sitting as a court, to impose a penalty therefor not exceeding $500 a day. Each day's continuance of failure or refusal to obey the order constitutes a separate offense. The original order may not be made nor any penalty imposed except upon due notice and hearing. No court of the state, except the supreme court, by way of appeal, may review, correct, or annul any action of the Commission within the scope of its authority, or suspend the execution thereof; and the supreme court may not review an order fixing rates by direct appeal from such order. But in the proceedings for contempt the validity of the original order may be assailed; and for that purpose, among others, new evidence may be introduced. When a penalty for failure to obey an order has been imposed, an appeal lies to the supreme court. On this appeal the validity of the original order may be reviewed; the appeal is allowed as of right upon filing a bond with sureties in double the amount of the fine imposed; the filing of the bond suspends the fine; and the period of suspension may not be computed against a concern in fixing the amount of liability for fines.

The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the 14th Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456–458, 33 L. ed. 970, 980, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, 209 U. S. 123, 165, 166, 52 L. ed. 714, 731, 732, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. The Constitution of the state prohibited any of its courts from reviewing any action of the Commission within its authority except by way of appeal to the supreme court (art. 9, § 20); and the supreme court had construed the Constitution and applicable provisions of the statutes as not permitting a direct appeal from [336] orders fixing rates. Harriss-Irby Cotton Co. v. State, 31 Okla. 603, 122 Pac. 163. On behalf of the Commission it was urged at the oral argument that a judicial review of the order fixing rates might have been had also by writ of mandamus or of prohibition issuing out of the supreme court of the state. But, in view of the provision of the state Constitution just referred to, it must be assumed, in the absence of a decision of a state court to the contrary, that neither remedy, even if otherwise available, could be used to review an order alleged to be void because confiscatory. The proviso "that the writs of mandamus and prohibition shall lie from the supreme court to the

Commission in all cases where such writs, respectively, would lie to any inferior court or officer," appears to have no application here. The challenge of a prescribed rate as being confiscatory raises a question not as to the scope of the Commission's authority, but of the correctness of the exercise of its judgment. Compare Hirsch v. Twyford, 40 Okla. 220, 230, 139 Pac. 313.

So it appears that the only judicial review of an order fixing rates possible under the laws of the state was that arising in proceedings to punish for contempt. The Constitution endows the Commission with the powers of a court to enforce its order by such proceedings. Art. 9, §§ 18, 19. By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust, or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the supreme court. But the penalties which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to [337] obey an order may be $500; and each day's continuance of the refusal after service of the order, it is declared, "shall be a separate offense." The penalty may apparently be imposed for each instance of violation of the order. In Oklahoma Gin Co. v. Oklahoma [252 U. S. 339, post, 600, 40 Sup. Ct. Rep. 341], decided this day, it appears that the full penalty of $500, with the provision for the like penalty for each subsequent day's violation of the order, was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L.R.A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 349, 57 L. ed. 1507, 1510, 33 Sup. Ct. Rep. 961; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 662, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

The plaintiff is entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties. Since this suit was commenced, the legislature has provided by chap. 52, § 3, of the Laws of 1919 (Okla. Sess. Laws 1919, p. 87) that in actions arising before the Commission under § 8235 there shall be the same right of direct appeal to the supreme court of the state as had theretofore existed in the case of transportation and transmission companies under art. 9, § 20, of the Constitution. But as plaintiff was obliged to resort to a Federal court of equity for relief, it ought to retain jurisdiction of the cause in order to make that relief as full and complete as the circumstances of the case and the nature of the proofs may require. The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their [338] enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders. Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533, 538, 60 L. ed. 1148, 1154, 36 Sup. Ct. Rep. 715. If, upon final hearing, the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued pendente lite, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory.

It does not follow that the Commission need be restrained from proceeding with an investigation of plaintiff's rates and practices, so long as its findings and conclusions are subjected to the review of the district court herein. Indeed, such investigation and the results of it might with appropriateness be made a part of the final proofs in the cause.[2]

These conclusions require that the decree of the District Court be reversed and that the case be remanded for further proceedings in conformity with this opinion.

Reversed.

[2] In Ex parte Young, 209 U. S. 123, 133, 52 L. ed. 714, 718, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, the district court appears to have considered whether the rates were reasonable although the penal features of the act were declared void. Missouri P. R. Co. v. Tucker, 230 U.

S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961, was an action for the penalty; and the question here raised was not involved. That it is the penalty provision, and not the rate provision, which is void, appears from the cases in which the validity of statutes was sustained because the objectionable penalty provisions were severable and there was no attempt to enforce the penalties. Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 53 L. ed. 382, 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 417, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 443, 54 L. ed. 826, 831, 30 Sup. Ct. Rep. 535; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 286, 56 L. ed. 436, 438, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 662, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

---

[339] OKLAHOMA GIN COMPANY, Plff. in Err.,
v.
STATE OF OKLAHOMA.

(See S. C. Reporter's ed. 339, 340.)

This case is governed by the decision in Oklahoma Operating Company v. Love, ante, 596.

[No. 32.]

Argued January 23 and 24, 1919. Restored to docket for reargument April 21, 1919. Submitted October 9, 1919. Ordered restored to docket for oral argument October 20, 1919. Reargued December 17, 1919. Decided March 22, 1920.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed an order of the state Corporation Commission imposing a fine for violation of a rate-fixing order made by such Commission. Reversed.

See same case below, — Okla. —, P.U.R.1916C, 22, 158 Pac. 629.

The facts are stated in the opinion.

Mr. **C. B. Ames** argued the cause, and filed a brief for plaintiff in error:

The Oklahoma act is invalid because it prohibits a resort to the courts to test the reasonableness of the rate involved except at the risk of penalties and punishment so severe as to amount to a denial of due process of law.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Harriss-Irby Cotton Co. v. State, 31 Okla. 603, 122 Pac. 163; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 207, 54 L. ed. 727, 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 349, 57 L. ed. 1507, 1510, 33 Sup. Ct. Rep. 961; Rail & River Coal Co. v. Yaple, 236 U. S. 338, 350, 59 L. ed. 607, 615, 35 Sup. Ct. Rep. 359; Shawnee Gas & E. Co. v. State, 31 Okla. 508, 122 Pac. 222; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411, P.U.R. 1915A, 106, 35 Sup. Ct. Rep. 214; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53, 53 L. ed. 382, 400, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034.

Mr. **S. P. Freeling**, Attorney General of Oklahoma, argued the cause, and, with Mr. Paul A. Walker filed a brief for defendant in error:

An appeal is not necessary to give due process of law.

Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67.

Note.—As to what constitutes due process of law, generally—see note to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On excessive penalties as denial of constitutional rights—see notes to Rail & River Coal Co. v. Yaple, 59 L. ed. U. S. 608, and State v. Crawford, 46 L.R.A. (N.S.) 1039.

As to injunction to restrain acts of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

Mr. Justice **Brandeis** delivered the opinion of the court:

The Corporation Commission of Oklahoma, having found under § 8235 of the Revised Statutes of 1910 that the Oklahoma Gin Company and four other concerns in the town of Chandler had combined and raised the charges for ginning cotton, on October 17, 1913, fixed a schedule of rates lower than those then in force. The company thereafter charged rates in excess of those so fixed; and three separate complaints against it, alleging violation of the order, were filed with the Commission. Being summoned [340] to show cause why it should not be punished for contempt, the company admitted violation of the order, but alleged that it was void, among other reasons, because § 8235 was in conflict with the 14th Amendment. After a full hearing, at which new evidence was introduced, the Commission affirmed, on October 10, 1914, the rates fixed; made a finding that the violation of the order was wilful; imposed on the company a fine of $500 and costs under each of the three separate complaints; directed refund of all amounts collected in excess of prescribed rates; and declared also: "A fine will be imposed for each day the order has been violated, and the matter as to the number of days and the amounts of fines to be imposed upon defendant, other than those mentioned in the information, will be left open for adjustment upon taking of evidence as to the number of days violated." An appeal was taken by the company to the supreme court of the state, which affirmed the order, and, thereafter, denied two petitions for rehearing. The case comes here on writ of error under § 237 of the Judicial Code [36 Stat. at. L. 1156, chap. 236, Comp. Stat. § 1214, 5 Fed. Stat. Anno. 2d ed. p. 723], as amended.

This case was argued and submitted with Oklahoma Operating Co. v. Love (decided this day 252 U. S. 331, ante, 596, 40 Sup. Ct. Rep. 338). For the reasons set forth in the opinion in that case the provision concerning penalties for disobedience to an order of the Commission was void because it deprived the company of the opportunity of a judicial review. The judgment must, therefore, be reversed. It is unnecessary to consider other contentions of plaintiff in error.

Reversed.

[341] HIAWASSEE RIVER POWER COMPANY, Plff. in Err.,
v.
CAROLINA-TENNESSEE POWER COMPANY.

(See S. C. Reporter's ed. 341-344.)

Error to state court — Federal question — presentation to highest state court.

1. The claim in the state trial court that a ruling was contrary to U. S. Const., 14th Amend:, affords no basis for a writ of error from the Federal Supreme Court, where no such contention was made in the assignment of errors in the highest court of the state, nor was it, so far as appears by the record, otherwise presented to or passed upon by that court.

[For other cases, see Appeal and Error, 1271-1279, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — when raised too late — allowance of writ.

2. The omission to set up a Federal question in the highest court of a state is not cured by the allowance of a writ of error from the Federal Supreme Court by the chief justice of the highest state court, nor by the specific assertion of such question in the petition for such writ of error,

---

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamlin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

On certificate of state court as showing presence of Federal question—see note to Cincinnati, P. B. S. & P. Packet Co. v. Bay, 50 L. ed. U. S. 428.

and in the assignment of errors filed in the Federal Supreme Court.

[For other cases, see Appeal and Error, 1280–1287, 1311–1318, 2317–2339, in Digest Sup. Ct. 1908.]

[No. 208.]

Argued January 30, 1920. Decided March 22, 1920.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which, on a second appeal, affirmed a judgment of the Superior Court of Cherokee County, in that state, in favor of plaintiff in a suit in the nature of a bill to quiet title. Dismissed for want of jurisdiction.

See same case below on first appeal, 171 N. C. 248, 88 S. E. 349; on second appeal, 175 N. C. 668, 96 S. E. 99.

The facts are stated in the opinion.

Mr. **Eugene R. Black** argued the cause, and, with Mr. Sanders McDaniel, filed a brief for plaintiff in error:

That the Federal question relative to defendant in error's charter was made clearly appears from the opinion of the supreme court of North Carolina; and the opinion of the state court is a part of the record and will be considered by this court for the purpose of ascertaining whether either party claimed, in proper form, that a state law, upon which some of the issues depended, was in contravention of the Constitution of the United States.

Loeb v. Columbia Twp. 179 U. S. 472, 483, 45 L. ed. 280, 287, 21 Sup. Ct. Rep. 174; Sayward v. Denny, 158 U. S. 180, 181, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; United States v. Taylor, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479.

This Federal question was raised in the trial court and in the supreme court, and was decided by the supreme court. This being true, it is immaterial how it was raised, and under the decisions of this court, having been raised and decided by the state supreme court, it comes within the jurisdiction of this court and will be reviewed by it.

Miedreich v. Lauenstein, 232 U. S. 236, 243, 58 L. ed. 584, 589, 34 Sup. Ct. Rep. 309; North Carolina R. Co. v. Zachary, 232 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 49, 59 L. ed. 1192, 1195, 35 Sup. Ct. Rep. 671; Cissna v. Tennessee, 246 U. S. 289, 294, 62 L. ed. 720, 725, 38 Sup. Ct. Rep. 306.

Messrs. Eugene R. Black, Sanders McDaniel, J. N. Moody, Felix Alley, and Zebulon Weaver also filed a brief for plaintiff in error.

Mr. **Julius C. Martin** argued the cause, and, with Messrs. Thomas S. Rollins and George H. Wright, filed a brief for defendant in error:

No Federal question was involved.

Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 275, 52 L. ed. 201, 204, 28 Sup. Ct. Rep. 78; Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Sauer v. New York, 206 U. S. 536, 546, 547, 51 L. ed. 1176, 1181, 1182, 27 Sup. Ct. Rep. 686; Presser v. Illinois, 116 U. S. 270, 29 L. ed. 664, 6 Sup. Ct. Rep. 587; Harding v. Illinois, 196 U. S. 78, 83, 49 L. ed. 394, 395, 25 Sup. Ct. Rep. 176.

Jurisdiction is considered first.

Giles v. Teasley, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359; Continental Nat. Bank v. Buford, 191 U. S. 119, 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; Defiance Water Co. v. Defiance, 191 U. S. 184, 194, 48 L. ed. 140, 144, 24 Sup. Ct. Rep. 63; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 382, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.

The record must show that a Federal question was involved.

Harding v. Illinois, 196 U. S. 78, 84, 49 L. ed. 394, 395, 25 Sup. Ct. Rep. 176; Ocean Ins. Co. v. Polleys, 13 Pet. 164, 10 L. ed. 108; Taylor, Jurisdiction, § 242.

A Federal question must be raised by pleading, motion, exception, or other action part, or being made part, of the record, showing that the claim was presented to the court.

Loeb v. Columbia Twp. 179 U. S. 472, 481, 45 L. ed. 280, 286, 21 Sup. Ct. Rep. 174.

The Federal question is not properly made when made for the first time in a petition for rehearing after judgment, or in the petition for writ of error, or in the briefs of counsel not made part of the record.

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Zadig v. Baldwin, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639.

The assertion of the Federal right must be made unmistakably, and not left to mere inferences.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

A Federal question cannot be first raised by argument in a state supreme court.

Loeb v. Columbia Twp. 179 U. S. 472, 483, 45 L. ed. 280, 287, 21 Sup. Ct. Rep. 174; Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Baldwin v. Kansas, 129 U. S. 52, 57, 32 L. ed. 640, 642, 9 Sup. Ct. Rep. 193; Maxwell v. Newbold, 18 How. 511, 515, 15 L. ed. 506, 508.

A Federal question cannot be raised by petition for writ of error.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Butler v. Gage, 138 U. S. 52, 56, 34 L. ed. 869, 871, 11 Sup. Ct. Rep. 235; Sayward v. Denny, 158 U. S. 180, 183, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Johnson v. New York L. Ins. Co. 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194.

A Federal question cannot be raised for the first time in assignments of error to this court.

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 53, 59 L. ed. 127, 128, 35 Sup. Ct. Rep. 21; Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; Mallers v. Commercial Loan & T. Co. 216 U. S. 614, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; Harding v. Illinois, 196 U. S. 78, 84, 49 L. ed. 394, 395, 25 Sup. Ct. Rep. 176; Hulbert v. Chicago, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Appleby v. Buffalo, 221 U. S. 529, 55 L. ed. 840, 31 Sup. Ct. Rep. 699; New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 273, 46 L. ed. 1158, 1160, 22 Sup. Ct. Rep. 916.

The proper time to raise a Federal question is in the trial court, whenever that is required by the state practice.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

The supreme court of North Carolina considers no question not set out in exceptions or assignments of error to rulings of the trial court.

Davis v. Council, 92 N. C. 731; Phipps v. Pierce, 94 N. C. 515; Lytle v. Lytle, 94 N. C. 524; Anthony v. Estes, 99 N. C. 598, 6 S. E. 705; Thornton v. Brady, 100 N. C. 40, 5 S. E. 910; Wallace Bros. v. Robeson, 100 N. C. 210, 6 S. E. 650; Pegram v. Hester, 152 N. C. 765, 68 S. E. 8; Smith v. Globe Home Furniture Mfg. Co. 151 N. C. 261, 65 S. E. 1009; Davis v. Duval, 112 N. C. 834, 17 S. E. 528; McKinnon v. Morrison, 104 N. C. 361, 10 S. E. 513.

The Federal Supreme Court will not review questions of fact.

Chrisman v. Miller, 197 U. S. 313, 319, 49 L. ed. 770, 772, 25 Sup. Ct. Rep. 468; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 222, 48 L. ed. 944, 948, 24 Sup. Ct. Rep. 632; Egan v. Hart, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300; Waters-Pierce Oil Co. v. Texas, 212 U. S. 97, 53 L. ed. 424, 29 Sup. Ct. Rep. 220; Smiley v. Kansas, 196 U. S. 447, 453, 49 L. ed. 546, 550, 25 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 639, 42 L. ed. 878, 887, 18 Sup. Ct. Rep. 488; Dower v. Richards, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

When the decision below is founded upon a state or local question, the writ of error will be dismissed.

White v. Leovy, 174 U. S. 91, 95, 43 L. ed. 907, 909, 19 Sup. Ct. Rep. 604; Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 457, 41 L. ed. 511, 512, 17 Sup. Ct. Rep. 129; Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

Where a case turns on a non-Federal question, the writ of error must be dismissed.

Eustis v. Bolles, 150 U. S. 361, 366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; California Powder Works v. Davis, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; Holden Land & Live Stock Co. v. Inter-State Trading Co. 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661; Leathe v. Thomas, 207 U. S. 93, 98, 99, 52 L. ed. 118, 120, 121, 28 Sup. Ct. Rep. 30; Giles v. Teasley, 193 U. S. 146, 160, 48 L. ed. 655, 658, 24 Sup. Ct. Rep. 359; Rogers v. Jones, 214 U. S. 196, 202, 53 L. ed. 965, 968, 29 Sup. Ct. Rep. 635; Bilby v. Stewart, 246 U. S. 255, 257, 62 L. ed. 701, 702, 38 Sup. Ct. Rep. 264.

The granting of a writ of error by the chief justice of the state supreme court is not sufficient to show that a Federal question was involved.

Hulbert v. Chicago, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Marvin v. Trout, 199 U. S. 212, 223, 50 L. ed. 157, 161, 26 Sup. Ct. Rep. 31; Louisville & N. R. Co. v. Smith, H. & Co. 204 U. S. 551, 561, 51 L. ed. 612, 617, 27 Sup. Ct. Rep. 401; Dibble v. Bellingham Bay Land Co. 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; Henkel v. Cincinnati, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221.

It is solely the province of state courts to determine the power of state corporations concerning all local matters.

Taylor, Due Process of Law, § 428; Berea College v. Kentucky, 211 U. S. 45, 54, 53 L. ed. 81, 85, 29 Sup. Ct. Rep.

33; Home Ins. Co. v. New York, 134 U. S. 599, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593; Horn Silver Min. Co. v. New York, 143 U. S. 305, 313, 36 L. ed. 164, 167, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 579, 580, 28 L. ed. 1084, 1086, 1087, 5 Sup. Ct. Rep. 681; Hancock v. Louisville & N. R. Co. 145 U. S. 409, 415, 36 L. ed. 755, 757, 12 Sup. Ct. Rep. 969; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The case of Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245, is exactly in point.

See also Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

[342] Mr. Justice **Brandeis** delivered the opinion of the court:

The Carolina-Tennessee Power Company, a public utility, was incorporated by a private law of North Carolina with broad powers, including that of taking by eminent domain riparian lands of and water rights in any non-navigable stream of the state. It filed locations for two hydroelectric plants on the Hiawassee river and proceeded to acquire by purchase and by condemnation the lands and water rights necessary for that development. Thereafter the Hiawassee River Power Company was organized under the general laws of the state, and threatened to locate and develop on that river hydroelectric plants which would necessarily interfere with the development undertaken by the Carolina-Tennessee Company. The latter brought in the superior court of Cherokee county a suit in the nature of a bill to quiet title. The case was tried in that court with the aid of a jury. Many issues of fact were raised and many questions of state law presented. A decree entered for the plaintiff below was reversed by the supreme court of the state and a new trial was ordered (171 N. C. 248, 88 S. E. 349). The second trial resulted also in a decree for plaintiff below, which was affirmed by the state supreme court (175 N. C. 670, 96 S. E. 99). The case comes here on writ of error.

The Federal question relied upon as giving jurisdiction to this court is denial of the claim that the private law incorporating the Carolina-Tennessee Company is invalid, because it conferred upon that company broad powers of eminent domain, whereas the general law, under which the Hiawassee Company was later organized, conferred no such right; the contention being that thereby the guaranty of the 14th Amendment of privileges and immunities and equal protection of the laws had been violated. But this claim was not presented to nor passed upon by the [343] supreme court of the state. The only basis for the contention that it was so presented is the fact that, when the Carolina-Tennessee Company offered in evidence at the trial in the superior court the private law as its charter, objection was made to its admission "on the ground that the same was in terms and effect a monopoly and a void exercise of power by the state legislature which undertook to provide it, it being opposed and obnoxious to the Bill of Rights and the Constitution, and in violation of the 14th Amendment;" and that the admission of this evidence is among the many errors assigned in the supreme court of the state. The law, whether valid or invalid, was clearly admissible in evidence, as it was the foundation of the equity asserted in the bill. No right under the Federal Constitution was necessarily involved in that ruling. The reference to the "Bill of Rights and the Constitution," made when objecting to the admissibility of the evidence, was to the state Constitution, and the point was not again called to the attention of that court. Compare Hulbert v. Chicago, 202 U. S. 275, 279, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617. The claim of invalidity under the state Constitution was specifically urged in that court as a reason why the Carolina-Tennessee Company should be denied relief, and the claim was passed upon adversely to the plaintiff in error; but no reference was made in that connection to the 14th Amendment.

If a general statement that the ruling of the state court was against the 14th Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction (see Clarke v. McDade, 165 U. S. 168, 172, 41 L. ed. 673, 674, 17 Sup. Ct. Rep. 284; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120; Marvin v. Trout, 199 U. S. 212, 217, 224, 50 L. ed. 157, 159, 161, 26 Sup. Ct. Rep. 31), still the basis for a review by this court is wholly lacking here. For the 14th Amendment was mentioned only in the trial court. In the supreme court of the state no mention was made of it in the assignment of errors;

nor was it, so far as appears by the record, otherwise presented to or [344] passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 132, 49 L. ed. 413, 417, 25 Sup. Ct. Rep. 200. The omission to set it up properly in the supreme court of the state was not cured by the allowance of the writ of error by its chief justice. Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699; Hulbert v. Chicago, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; Marvin v. Trout, 199 U. S. 212, 223, 50 L. ed. 157, 161, 26 Sup. Ct. Rep. 31.

We have no occasion, therefore, to consider whether the claim of denial of rights under the 14th Amendment was substantial in character which is required to support a writ of error. Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123. Compare Hendersonville Light & P. Co. v. Blue Ridge Interurban R. Co. 243 U. S. 563, 61 L. ed. 900, 37 Sup. Ct. Rep. 440.

Dismissed for want of jurisdiction.

STATE OF ARKANSAS, Complainant,
v.
STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 344-347.)

Boundaries — between Arkansas and Mississippi — navigable waters — avulsion — appointment of commissioners.

The boundary between Arkansas and Mississippi adjudged to be the middle of the main channel of the Mississippi river as it existed just prior to the avulsion of 1848, and commissioners appointed to run such line.

[For other cases, see Boundaries, III. b, in Digest Sup. Ct. 1908.]

[No. 7, Original.]

Motion for entry of interlocutory decree and for the appointment of commissioners submitted March 8, 1920. Adjudication made March 22, 1920.

ORIGINAL SUIT in Equity between the states of Arkansas and Mississippi to determine the location of the boundary line. Boundary decreed to be the middle of the main channel of the Mississippi river as it existed just previous to an avulsion, and commissioners appointed to run such line.

Mr. George F. Snyder for the motion, in behalf of Mr. John D. Arbuckle, Attorney General of Arkansas, and Messrs. John M. Moore and Herbert Pope, counsel for the state of Arkansas, and of Mr. Frank Roberson, Attorney General of Mississippi, and Messrs. Gerald Fitzgerald, George F. Maynard, Marcellus Green, and Garner W. Green, counsel for the state of Mississippi.

Per Mr. Chief Justice White:

This cause came on to be heard by this court on the motions and suggestions of counsel for the respective parties for the appointment of a commission to run, locate, and designate the boundary line between the states of Arkansas and Mississippi, as indicated in the opinion of this court delivered on the 19th day of May, 1919 [250 U. S. 39, 63 L. ed. 832, 39 Sup. Ct. Rep. 422], and [345] thereupon and on consideration thereof, it is ordered, adjudged, and decreed as follows, viz.:

1. The true boundary line between the states of Arkansas and Mississippi, at the places in controversy in this cause, aside from the question of the avulsion of 1848, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi river as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783 [Sept. 3, 1783, 8 Stat. at L. 80], subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion which occurred about 1848, and which resulted in the formation of a new main channel of navigation, the boundary line between said states was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said states should now be located along that portion of said river, or the bed of said river, which ceased to be the main channel of navigation as the result of said avulsion, according to the middle of the

---

Note.—As to judicial settlement of state boundaries—see note to Nebraska v. Iowa, 36 L. ed. U. S. 798.

On rivers and lakes as state boundary—see note to Buck v. Ellenbolt, 15 L.R.A. 187.

As to change of channel as change of state boundary—see note to State v. Bowen, 39 L.R.A.(N.S.) 200.

main navigable channel as it existed immediately prior to the time of said avulsion.

4. A commission consisting of Samuel S. Gannett, Washington, District of Columbia, Charles H. Miller, Little Rock, Arkansas, and Stevenson Archer, Jr., Greenville, Mississippi, competent persons, is here and now appointed by the court, to run, locate, and designate the boundary line between said states along that portion of said river which ceased to be a part of the main navigable channel of said river as the result of said avulsion, in accordance with the above principles: Commencing at a point in said Mississippi river about 1 mile southwest from Friars point, Coahoma county, Mississippi, where the main navigable channel of said river, prior to said avulsion, turned and flowed in a southerly direction, and thence following along the middle of the former main [**346**] channel of navigation by its several courses and windings to the end of said portion of said Mississippi river which ceased to be a part of the main channel of navigation of said river as the result of said avulsion of 1848.

5. In the event the said commission cannot now locate with reasonable certainty the line of the river as it ran immediately before the avulsion of 1848, it shall report the nature and extent of the erosions, accretions, and changes that occurred in the old channel of navigation as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said commission shall give its findings of fact and the evidence on which same are based.

6. Before entering upon the discharge of their duties, each of said commissioners shall be duly sworn to perform faithfully, impartially, and without prejudice or bias the duties hereinafter imposed; said oaths to be taken before the clerk of this court, or before the clerk of any district court of the United States, or before an officer authorized by law to administer an oath in the state of Arkansas or Mississippi, and returned with their report. Said commission is authorized and empowered to make examination of the territory in question, and to adopt all ordinary and legitimate methods in the ascertainment of the true location of the said boundary line; to examine and consider carefully the printed record in this cause and the opinion of this court, delivered on May 19, 1919, and to take such additional evidence under oath as may be necessary and authorized to enable said commission to determine said boundary line, but such evidence shall be taken only upon notice to the parties, with permission to attend by counsel and cross-examine the witnesses; to compel the attendance of witnesses and require them to testify; and all evidence taken and all exceptions thereto and rulings thereon shall be preserved, certified, and returned with the report of said commissioners; and [**347**] said commission shall do all other matters necessary to enable it to discharge its duties and to obtain the end to be accomplished conformably to this decree.

7. It is further ordered that should any vacancy or vacancies occur in said board of commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies, the Chief Justice acting upon such information in the premises as may be satisfactory to him.

8. It is further ordered that said commissioners do proceed with all convenient despatch to discharge their duties conformably to this decree, and they are authorized, if they deem it necessary, to request the co-operation and assistance of the state authorities of Arkansas and Mississippi, or either of those states, in the performance of the duties hereby imposed.

9. It is further ordered that the clerk of this court shall forward at once to the governor of each of said states of Arkansas and Mississippi and to each of the commissioners hereby appointed a copy of this decree and of the opinion of this court, delivered herein May 19, 1919, duly authenticated.

10. Said commissioners shall make a report of their proceedings under this decree as soon as practicable on or before the 1st day of October, 1920, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

11. All other matters are reserved until the coming in of said report, or until such time as matters pertaining to this cause shall be properly presented to this court for its consideration.

[348] STRATHEARN STEAMSHIP COMPANY, Limited, Petitioner,
v.
JOHN DILLON.

(See S. C. Reporter's ed. 348–357.)

Statutes — construction — title.

1. The title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt.

[For other cases, see Statutes, II. 1, in Digest Sup. Ct. 1908.]

Seamen — wages — foreign seamen on foreign vessels in American ports.

2. Foreign seamen on foreign vessels in American ports are entitled to the benefits of the provisions of the Act of March 4, 1915, § 4, authorizing seamen on American vessels to demand and receive one half of the wages earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, notwithstanding contractual obligations to the contrary, and declaring that such section shall apply to seamen on foreign vessels while in American harbors, and that the Federal courts shall be open to such seamen for its enforcement.

[For other cases, see Seamen, IV. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — invalidating wage contracts — foreign seamen on foreign vessels.

3. Congress could, as it did in the Act of March 4, 1915, § 4, make applicable to foreign seamen on foreign vessels when in American ports the provisions of that section authorizing seamen to demand and receive one half the wages earned at any port where the vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, notwithstanding any contractual obligations to the contrary.

[For other cases, see Constitutional Law, 605–607; Seamen, IV. in Digest Sup. Ct. 1908.]

Seamen — wages — demand — prematurity.

4. A foreign vessel need not have been five days in an American port before seamen thereon may make the wage demand provided for by the Act of March 4, 1915, § 4, authorizing seamen to demand and receive one half of the wages earned at any port where the vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, notwithstanding contractual obligations to the contrary, and declaring that such section applies to seamen on foreign vessels while in American harbors, "provided such a demand shall not be made before the expiration of, nor oftener than once in, five days."

[For other cases, see Seamen, IV. in Digest Sup. Ct. 1908.]

[No. 373.]

Argued and submitted December 9, 1919. Decided March 29, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed a decree of the District Court for the Northern District of Florida, dismissing the libel of a seaman for wages. Affirmed.

See same case below, 168 C. C. A. 25, 256 Fed. 631.

The facts are stated in the opinion.

Mr. **Ralph James M. Bullowa** submitted the cause for petitioner:

The libellant's case does not fall within the provisions of the statute in question because it was not intended to apply to a foreign seaman entering into a valid contract in a foreign port for service on a foreign vessel.

2 Moore, International Law Dig. p. 335; Wildenhus's Case (Mali v. Keeper Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383; Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84.

Even if the act applies to foreign seamen upon foreign vessels who ship at a foreign port, the libellant's demand for half wages was premature.

The Italier, 168 C. C. A. 662, 257 Fed. 712.

Messrs. **Frederic R. Coudert** and **Howard Thayer Kingsbury**, by special leave, argued the cause and filed a brief for the British Embassy as amici curiæ:

The decision of the circuit court of appeals is at variance with the principles enunciated by this court in the other cases arising out of the Seamen's Act.

Sanberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84; Neilson v. Rhine Shipping Co. 248 U. S. 205, 63 L. ed. 208, 39 Sup. Ct. Rep. 89.

The statute should not be so construed or applied as to invalidate contracts lawfully made between foreigners in a foreign jurisdiction.

Church of the Holy Trinity v. United States, 143 U. S. 457, 462, 36 L. ed. 227, 229, 12 Sup. Ct. Rep. 511; United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477; The Ixion, 150 C. C. A. 291, 237 Fed. 142; The Italier, 168 C. C. A. 662, 257 Fed. 712; The Magna Charta, 2 Low. Dec. 136, Fed. Cas. No. 8,953; The Egyptian Monarch, 36 Fed. 773; Wilson v. The John Ritson, 35 Fed. 663; The Belvidere, 90 Fed. 106; The Ucayli, 164 Fed. 897; Rainey v. New York & P. S. S. Co. L.R.A.1916A, 1149, 132 C. C. A. 509, 216 Fed. 454; The Elswick Tower, 241 Fed. 706.

The laws of no nation can justly ex-

tend beyond its own territories, except so far as regards its own citizens.

The Apollon, 9 Wheat. 362, 370, 6 L. ed. 111, 113; 2 Moore, International Law Dig. § 197, p. 213.

The British statute is declaratory of the general maritime law of nations.

Abbott, Merchants, Ships & Seamen, 14th ed. p. 209; The Bulmer, 1 Hagg. Adm. 163; Button v. Thompson, L. R. 4 C. P. 330, 38 L. J. C. P. N. S. 225, 20 L. T. N. S. 568, 17 Week. Rep. 1069; The Baltic Merchant, Edw. Adm. 86.

Prior to the statute now under consideration, it was recognized in this country that where a seaman has contracted to serve during a certain voyage, he must, in order to recover wages, allege and prove that he had fully performed his contract, or that he had been prevented from doing so by some circumstance amounting to a legal excuse.

Wilcocks v. Palmer, 3 Wash. C. C. 248, Fed. Cas. No. 17,638; The Leiderhorn, 99 Fed. 1001.

This was in accord with the general rule of the common law that any contract of employment for a definite period is an entire contract, and must be fully performed to entitle the employee to recover.

Spain v. Arnott, 2 Starkie, 256, 19 Revised Rep. 715; Lantry v. Parks, 8 Cow. 63; Faxon v. Mansfield, 2 Mass. 147.

If the act of Congress in question were the act of a state legislature, it would manifestly be unconstitutional, as one impairing the obligation of contracts under U. S. Const. art. 1, § 10. This constitutional prohibition applies specifically to legislation by the states of the Union, and is not in terms applicable to the United States. This court has held, however, in The Sinking Fund Cases, 99 U. S. 700, 718, 25 L. ed. 496, 501, that although the United States are not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, they, equally with the states, are prohibited from depriving persons or corporations of property without due process of law.

Even if Congress has power to impair the obligation of contracts, it has no power to make a new contract between the parties,—especially when both are foreigners. As well might it undertake to impose a fine upon a foreign vessel for an act done wholly within a foreign jurisdiction, and there recognized as lawful.

United States v. Freeman, 239 U. S. 117, 60 L. ed. 172, 36 Sup. Ct. Rep. 32.

A vested right to an existing defense is property, and hence within the constitutional protection.

Pritchard v. Norton, 106 U. S. 124, 132, 27 L. ed. 104, 107, 1 Sup. Ct. Rep. 102.

Legislation which attempts to take away a vested right under a contract not only impairs the obligation of the contract, but is also equivalent to a deprivation of property.

Houston & T. C. R. Co. v. Texas, 170 U. S. 243, 261, 42 L. ed. 1023, 1029, 18 Sup. Ct. Rep. 610; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 19, 38 L. ed. 55, 64, 14 Sup. Ct. Rep. 240.

Where a statute may be so construed as not to contravene the Constitution, such construction should be adopted, thus avoiding the necessity of directly determining the constitutional question.

Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 101, 47 L. ed. 721, 726, 23 Sup. Ct. Rep. 611; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 369, 59 L. ed. 265, 274, 35 Sup. Ct. Rep. 99; Billings v. United States, 232 U. S. 261, 279, 58 L. ed. 596, 604, 34 Sup. Ct. Rep. 421; Towne v. Eisner, 245 U. S. 418, 425, 62 L. ed. 372, 376, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

Messrs. **George Sutherland** and **W. J. Waguespack** argued the cause, and, with Mr. Silas B. Axtell, filed a brief for respondent:

There being no ambiguity in the statute, resort to the title or other extrinsic matters to affect the meaning of the words used is precluded.

Price v. Forrest, 173 U. S. 410, 427, 43 L. ed. 749, 755, 19 Sup. Ct. Rep. 434; United States v. Fisher, 2 Cranch, 358, 366, 2 L. ed. 304, 307; United States v. Oregon & C. R. Co. 164 U. S. 526, 541, 41 L. ed. 541, 545, 17 Sup. Ct. Rep. 165; Cornell v. Coyne, 192 U. S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383; Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155.

Not only is there nothing in the context to indicate that Congress did not intend by the use of the word "seamen" to exclude foreign seamen, a thing which, as we have seen, must exist to justify the court in restricting the otherwise broad application of the term, but the context is quite to the contrary. The language of the proviso is followed by the words "and the courts of the United States shall be open to such seamen for its enforcement." Obviously, if the proviso was intended to apply only to

American seamen, there could be no purpose in this last-quoted provision. The courts of the United States were already indubitably open in such cases.

The Falls of Keltie, 114 Fed. 357; The Epsom, 227 Fed. 161; The Neck, 138 Fed. 147.

The only doubt, therefore, which there was the slightest necessity of removing, was in the case of the foreign seaman. The jurisdiction in that case, while it undoubtedly exists (The Belgenland, 114 U. S. 364, 29 L. ed. 155, 5 Sup. Ct. Rep. 860), is still to be exercised at the discretion of the court, still more or less subject to the interfering power of the consul, and the qualifying force of treaty stipulation (The Topsy, 44 Fed. 635). However effective to that end it may be, it seems very clear that the provision now under discussion was inserted with a view of removing all such restrictions upon, or doubts affecting, the jurisdiction of the courts in cases brought by foreign seamen. It was in this view, and for this purpose, in part, that § 10 of the act provides for the abrogation of conflicting treaty provisions. Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84. There was no reason for Congress to be solicitous respecting the right of American seamen to invoke the jurisdiction of the courts of the United States. Congress, in inserting the provision, could have had in mind only foreign seamen.

The proviso, thus construed, is valid and constitutional.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 482, 55 L. ed. 297, 303, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Patterson v. The Eudora, 190 U. S. 169, 173, 47 L. ed. 1002, 1005, 23 Sup. Ct. Rep. 821; Re Garnett, 141 U. S. 1, 12, 35 L. ed. 631, 633, 11 Sup. Ct. Rep. 840; Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596; Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383; The Exchange v. M'Faddon, 7 Cranch, 116, 3 L. ed. 287, Story, Confl. L. §§ 38, 244; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

The right to demand half wages at every port where the vessel shall load or deliver cargo arises upon the arrival of the vessel in such a port, provided five days have elapsed, to be computed from the last payment or from the commencement of the voyage, and not from the arrival of the vessel in port.

The Talus, 242 Fed. 954, 160 C. C. A. 570, 248 Fed. 670; The Delagoa, 244 Fed. 835; The Strathearn, 168 C. C. A. 25, 256 Fed. 633.

If this proviso needs construction, it is elementary that it must be given that construction which will carry into effect, and not that construction which will defeat, the intention, purpose, and object of the legislator.

United States v. Gooding, 12 Wheat. 460, 6 L. ed. 693; Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331.

It is also elementary that every part of a statute must be construed with reference to every other part, and every word and phrase in connection with its context, and that that construction must be sought which will give effect to its every word, though ambiguous.

Bend v. Holt, 13 Pet. 263, 10 L. ed. 154; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427.

Solicitor General **King** by special leave argued the cause, and, with Mr. A. F. Myers, filed a brief for the United States as amici curiæ:

A foreign merchant vessel has no vested right to enter our ports. The act of entry signifies acceptance of the conditions imposed. The power to impose such conditions is an incident to the sovereignty of the nation.

Vattel, Nations, Chitty's ed. 1863, p. 40.

Congress is empowered to prevent all foreign vessels from entering the ports of the country, as in an embargo, and to admit them only upon conditions within its uncontrolled discretion.

Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671. See also Buttfield v. Stranahan, 192 U. S. 470, 492, 493, 48 L. ed. 525, 534, 535, 24 Sup. Ct. Rep. 349; Weber v. Freed, 239 U. S. 325, 329, 60 L. ed. 308, 310, 36 Sup. Ct. Rep. 131, Ann. Cas. 1916C, 317; United States ex rel. Turner v. Williams, 194 U. S. 279, 289, 48 L. ed. 979, 983, 24 Sup. Ct. Rep. 719; Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 11, 30 L. ed. 565, 566, 7 Sup. Ct. Rep. 383.

It is, of course, unnecessary that Congress label its enactment with the words,

"This is a condition." It is plain enough from the terms used.

Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671; Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821.

The statute declares a rule of policy of the forum, forbidding the enforcement of contracts providing for the payment of wages upon the completion of the voyage, or at the discretion of the master.

Bond v. Hume, 243 U. S. 15, 61 L. ed. 565, 37 Sup. Ct. Rep. 366; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Oscanyon v. Arms Co. 103 U. S. 261, 26 L. ed. 539; Knott v. Botany Worsted Mills, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30.

Mr. Justice **Day** delivered the opinion of the court:

This case presents questions arising under the Seamen's Act of March 4, 1915 (38 Stat. at L. 1164, chap. 153, Comp. Stat. § 8306, 9 Fed. Stat. Anno. 2d ed. p. 145). It appears that Dillon, the respondent, was a British subject, and shipped at Liverpool on the 8th of May, 1916, on a British vessel. The shipping articles provided for a voyage of not exceeding three years, commencing at Liverpool and ending at such port in the United Kingdom as might be required by the master, the voyage including ports of the United States. The wages which were fixed by the articles were made payable at the end of the voyage. At [**352**] the time of the demand for one-half wages, and at the time of the beginning of the action, the period of the voyage had not been reached. The articles provided that no cash should be advanced abroad or liberty granted other than at the pleasure of the master. This, it is admitted, was a valid contract for the payment of wages under the laws of Great Britain. The ship arrived at the port of Pensacola, Florida, on July 31, 1916, and while she was in that port, Dillon, still in the employ of the ship, demanded from her master one-half part of the wages theretofore earned, and payment was refused. Dillon had received nothing for about two months, and after the refusal of the master to comply with his demand for one-half wages, he filed in the district court of the United States a libel against the ship, claiming $125, the amount of wages earned at the time of demand and refusal.

The district court found against Dillon upon the ground that his demand was premature. The circuit court of appeals reversed this decision, and held that Dillon was entitled to recover (168 C. C. A. 25, 256 Fed. 631). A writ of certiorari brings before us for review the decree of the circuit court of appeals.

In Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84, and Neilson v. Rhine Shipping Co. 248 U. S. 205, 63 L. ed. 208, 39 Sup. Ct. Rep. 89, we had occasion to deal with § 11 of the Seamen's Act, and held that it did not invalidate advancement of seamen's wages in foreign countries when legal where made. The instant case requires us to consider now § 4 of the same act. That section amends § 4530, U. S. Revised Statutes (Comp. Stat. § 8322, 9 Fed. Stat. Anno. 2d ed. p. 158), and so far as pertinent provides: "Section 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary [**353**] shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned, . . . And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

This section has to do with the recovery of wages by seamen, and by its terms gives to every seaman on a vessel of the United States the right to demand one-half the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the end of the voyage, and stipulations in the contract to the contrary are declared to be void. A failure of the master to comply with the demand releases the seaman from his contract, and entitles him to recover full payment of the wages, and the section is made applicable to seamen on foreign vessels while in harbors of the United States, and the courts of the United States are open to such seamen for enforcement of the act.

This section is an amendment of § 4530

of the Revised Statutes; it was intended to supplant that section, as amended by the Act of December 21, 1898 [30 Stat. at L. 756, chap. 28, § 5, Comp. Stat. § 8322, 9 Fed. Stat. Anno. 2d ed. p. 159], which provided: "Every seaman on a vessel of the United States shall be entitled to receive from the master of the vessel to which he belongs one-half part of the wages which shall be due him at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, unless the contrary be expressly stipulated in the contract," etc.

The section, of which the statute now under consideration is an amendment, expressly excepted from the right to recover one half of the wages those cases in which the [**354**] contract otherwise provided. In the amended section all such contract provisions are expressly rendered void, and the right to recover is given the seamen notwithstanding contractual obligations to the contrary. The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the Federal courts to foreign seamen. No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the courts of the United States, and if it were the intention of Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.

It is said that it is the purpose to limit the benefit of the act to American seamen, notwithstanding this provision giving access to seamen on foreign vessels to the courts of the United States, because of the title of the act, in which its purpose is expressed "to promote the welfare of American seamen in the merchant marine of the United States." But the title is more than this, and not only declares the purposes to promote the welfare of American seamen, but, further, to abolish arrest and imprisonment as a penalty for desertion, and to secure the abrogation of treaty provisions in relation thereto, and to promote safety at sea. But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt. Cornell v. Coyne, 192 U. S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383, and cases cited. Apart from the text, which we think plain, it is by [**355**] no means clear that if the act were given a construction to limit its application to American seamen only, the purposes of Congress would be subserved, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages under the provisions of the law. But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment, as we have already pointed out, the right to recover one half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute. In the case of Sandberg v. McDonald, supra, we found no purpose manifested by Congress in § 11 to interfere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in § 4. Under § 4 all contracts are avoided which run counter to the purposes of the statute. Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment, and if it had authority to do so, the law is enforceable in the courts.

We come, then, to consider the contention that this construction renders the statute unconstitutional as being destructive of contract rights. But we think this contention must be decided adversely to the petitioner upon the authority of previous cases in this court. The matter was [**356**] fully considered in Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821, in which the previous decisions of this

court were reviewed, and the conclusion reached that the jurisdiction of this government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports, and make them applicable to foreign as well as domestic vessels. Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports, and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States.

But it is insisted that Dillon's action was premature, as he made a demand upon the master within less than five days after the vessel arrived in an American port. This contention was sustained in the district court, but it was ruled otherwise in the court of appeals. Turning to the language of the act, it enacts in substance that the demand shall not be made before the expiration of five days, nor oftener than once in five days. Subject to such limitation, such demand may be made in the port where the vessel stops to load or deliver cargo. It is true that the act is made to apply to seamen on foreign vessels while in United States ports, but this is far from requiring that the wages shall be earned in such ports, or that the vessels shall be in such ports five days before demand for one half the wages earned is made. It is the wages of the voyage for which provision is made, with the limitation of the right to demand one half of the amount earned not oftener than once in five days. The section permits no [357] demand until five days after the voyage has begun, and then provides that it may be made at every port where the vessel stops to load or deliver cargo, subject to the five-day limitation. If the vessel must be five days in port before demand can be made, it would defeat the purpose of the law as to vessels not remaining that long in port, and would run counter to the manifest purpose of Congress to prevent a seaman from being without means while in a port of the United States.

We agree with the circuit court of appeals of the fifth circuit, whose judgment we are now reviewing, that the demand was not premature. It is true that the circuit court of appeals for the second circuit held in the case of The Italier, 168 C. C. A. 662, 257 Fed. 712, that demand made before the vessel had been in port for five days was premature; this was upon the theory that the law was not in force until the vessel had arrived in a port of the United States. But the limitation upon demand has no reference to the length of stay in the domestic port. The right to recover wages is controlled by the provisions of the statute and includes wages earned from the beginning of the voyage. It is the right to demand and recover such wages, with the limitation of the intervals of demand as laid down in the statute, which is given to the seaman while the ship is in a harbor of the United States.

We find no error in the decree of the Circuit Court of Appeals and the same is affirmed.

---

[358] J. M. THOMPSON, Master and Claimant of the Steamship Westmeath, etc., Petitioner,

v.

PETER LUCAS and Gustav Blixt.

(See S. C. Reporter's ed. 358-364.)

This case is governed by the decision in Strathearn Steamship Company v. Dillon, ante, 607.

[No. 391.]

Argued December 8, 1919. Decided March 29, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of New York in favor of the libellants in a suit by seamen for wages. Affirmed.

See same case below, 169 C. C. A. 462, 258 Fed. 446.

The facts are stated in the opinion.

Mr. **L. De Grove Potter** argued the cause, and, with Mr. John M. Woolsey, filed a brief for petitioner:

The title of a statute may be considered as tending to throw light upon the legislature's intention as to its scope and operation.

Church of the Holy Trinity v. United States, 143 U. S. 457, 462, 36 L. ed. 227, 229, 12 Sup. Ct. Rep. 511; United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed.

304, 313; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 563, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689; Knowlton v. Moore, 178 U. S. 41, 65, 44 L. ed. 969, 978, 20 Sup. Ct. Rep. 747; United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477.

Where the statute's meaning, as in this case, is doubtful, or where, as would be the result in this case, adhering to the strict letter would lead to injustice or contradictory provisions, the duty devolves upon the court to ascertain the true meaning. If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction consistent with the general principles of law and comity.

Chinese Laborer's Case, 13 Fed. 291.

It is a well-recognized rule of construction, in so far as practicable, to reconcile different provisions so as to make them consistent and harmonious.

State, Morris & E. R. Co., Prosecutor, v. Railroad Taxation Comr. 37 N. J. L. 229; Manuel v. Manuel, 13 Ohio St. 458; Ogden v. Strong, 2 Paine, 584, Fed. Cas. No. 10,460.

As this statute is in derogation of the common law, it should be construed strictly.

Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84; Northern Securities Co. v. United States, 193 U. S. 361, 48 L. ed. 710, 24 Sup. Ct. Rep. 436; Cope v. Cope, 137 U. S. 682, 685, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 753, 30 L. ed. 825, 827, 7 Sup. Ct. Rep. 757; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 565, 25 L. ed. 892, 894; Meister v. Moore, 96 U. S. 76, 79, 24 L. ed. 826, 827; Ransom v. Williams, 2 Wall. 313, 318, 17 L. ed. 803, 804.

This statute is penal, and for that reason should be construed strictly.

Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84; Hardy v. Shepard & M. Lumber Co. 248 U. S. 205, 63 L. ed. 208, 39 Sup. Ct. Rep. 89; Neilson v. Rhine Shipping Co. 248 U. S. 205, 63 L. ed. 208, 39 Sup. Ct. Rep. 89.

A contract valid where made is valid everywhere, and should be enforced unless against public policy, natural justice, or morality.

Story, Confl. L. 8th ed. § 242; Molin, Comment, ad Consuet. Paris, title 1, § 12, Bouhier, chap. 21 § 190, 2 Boullenios, obs. 46, p. 458; 2 Kent, Com. 457 et seq.; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; The Antelope, 10 Wheat. 66, 6 L. ed. 268; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Smith v. Condry, 1 How. 28, 11 L. ed. 35; The China, 7 Wall. 53, 64, 19 L. ed. 67, 71; Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 29, 26 L. ed. 1001, 1003; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Wilson v. McNamee, 102 U. S. 572, 26 L. ed. 234; Peninsular & Oriental Steam Nav. Co. v. Shand, 3 Moore, P. C. C. N. S. 272, 290, 16 Eng. Reprint, 110, 6 New Reports, 387, 11 Jur. N. S. 771, 12 L. T. N. S. 808, 13 Week. Rep. 1049; Westlake, Priv. International Law, p. 301.

The law of nations is a part of the law of the land, and should be followed by the courts of the United States.

Talbot v. Seeman, 1 Cranch, 1, 2 L. ed. 15; Murray v. The Charming Betsey, 2 Cranch, 64, 118, 2 L. ed. 208, 226; Holmes v. Jennison, 14 Pet. 540, 569, 10 L. ed. 579, 593.

This contract is not contrary to public policy simply because it is in conflict with the provisions of U. S. Rev. Stat. § 4530, Comp. Stat. § 8322, 9 Fed. Stat. Anno. 2d ed. p. 158.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84.

The laws and statutes of any state should not be given extraterritorial force and effect.

American Banana Co. v. United States Fruit Co. 213 U. S. 347, 356, 357, 53 L. ed. 826, 832, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Crapo v. Kelly, 16 Wall. 610, 624, 21 L. ed. 430, 436; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Huntington v. Attrill, 146 U. S. 657, 670, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. ed. 274, 38 L.R.A.(N.S.) 40, 32 Sup. Ct. Rep. 132; The Belgenland, 114 U. S. 355, 370, 29 L. ed. 152, 157, 5 Sup. Ct. Rep. 860; La Bourgogne (Deslions v. La Compagnie Generalé Transatlantique) 210 U. S. 95, 115, 52 L. ed. 973, 983, 28 Sup. Ct. Rep. 664; The Kestor, 110 Fed. 449; The Lamington, 87 Fed. 752; Rundell v. La Compagnie Generalé Transatlantique, 49 L.R.A. 92, 40 C. C. A. 625, 100 Fed. 660; United States v. Palmer, 3 Wheat. 610, 631, 634, 643, 4 L. ed. 471, 477, 480; United States v. Klintock, 5 Wheat. 144,

5 L. ed. 55; The Apollon, 9 Wheat. 362, 6 L. ed. 111; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 405, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133; The Scotia (Sears v. The Scotia) 14 Wall. 170, 184, 20 L. ed. 822, 824; Marshall v. Murgatroyd, L. R. 6 Q. B. 31, 40 L. J. Mag. Cas. N. S. 7, 23 L. T. N. S. 393, 19 Week. Rep. 72; Oceanic Steam Nav. Co. v. Mellor, 233 U. S. 718, 732, 58 L. ed. 1171, 1180, L.R.A.1916B, 637, 34 Sup. Ct. Rep. 754; Lloyd v. Guibert, L. R. 1 Q. B. 127, 5 Eng. Rul. Cas. 870, 6 Best & S. 100, 122 Eng. Reprint, 1134, 35 L. J. Q. B. N. S. 74, 13 L. T. N. S. 602; The Dio Adelphi, Nov. 1879, 91 Jour. du Palais, 1880, pp. 603, 609.

This court, in the cases that have come before it, has construed the act under consideration as not having any extraterritorial force.

Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200, 39 Sup. Ct. Rep. 84; Neilson v. Rhine Shipping Co. 248 U. S. 205, 63 L. ed. 208, 39 Sup. Ct. Rep. 89. To the same effect are: The Italier, 168 C. C. A. 662, 257 Fed. 712: The Nigretia, 166 C. C. A. 384, 255 Fed. 56; The Belgier, 246 Fed. 966; The State of Maine, 22 Fed. 734.

Where a controversy concerns the rights and duties of the crew to the ship or among themselves, and does not involve a breach of the peace on a foreign vessel on the high seas, or in the port of another country, the law of the flag of the vessel governs the rights and liabilities of the parties just as conclusively as though the controversy had arisen on land within the territorial jurisdiction of the country whose flag the vessel flies, for a ship has long been regarded by the courts and by writers on international law as a floating island of the country to which she belongs.

Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; The Belgenland 114 U. S. 355, 369, 370, 29 L. ed. 152, 157, 158, 5 Sup. Ct. Rep. 860; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 24, 29, 26 L. ed. 1001, 1003; Re Ross, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897; Patterson v. The Eudora, 190 U. S. 169, 176, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821; Wilson v. McNamee, 102 U. S. 572, 574, 26 L. ed. 234, 235; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; Dicey, Confl. L. 2d ed. § 663; Whart. Confl. L. § 473; Minor, Confl. L. § 195; Bluntschli, International Law, § 317; 1 Calvo, Droit International, 4th ed. 552; Book 6, § 3; 2 Rutherford, chap. 9; 2 Moore, International Law Dig. §§ 204, 207.

While the history of a statute, from the time it is introduced until it is finally passed, may afford some aid to its construction, the views and votes of individual members, expressed in debate, are not legitimate aids to its construction.

United States v. Union P. R. Co. 91 U. S. 73, 23 L. ed. 224; Church of the Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 318, 41 L. ed. 1007, 1019, 17 Sup. Ct. Rep. 540; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Downes v. Bidwell, 182 U. S. 244, 254, 45 L. ed. 1088, 1093, 21 Sup. Ct. Rep. 770.

However, it has been held by this court in the case of Lincoln v. United States, 202 U. S. 484, 50 L. ed. 1117, 26 Sup. Ct. Rep. 728, that where an act of Congress is passed over opposition of a minority, as in this case, it is to be considered that the words of the act represent all the majority deemed it safe to ask.

If the provisions of this section which do not specifically apply to foreign seamen on foreign vessels are construed by this court to apply to the case at bar, the effect of such a construction would be tantamount to holding that Congress may legislate as to contracts made on foreign soil, and affecting only foreigners.

The Apollon, 9 Wheat. 362, 6 L. ed. 111; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Brown v. Duchesne, 19 How. 183, 15 L. ed. 595.

The interference with the liberty to contract on such terms as may be advisable to the parties to the contract is a deprivation of liberty, without due process of law.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

It is true that, in derogation of the 5th Amendment, Congress may legislate in such a manner as to deprive persons of the liberty of entering into certain contracts, but the justification for such legislation has always been motives of policy based on the exercise of police power.

Patterson v. The Eudora, 190 U. S. 169, 175, 47 L. ed. 1002, 1006, 23 Sup. Ct. Rep. 821.

In order to justify any legislation under the police power it must appear plainly that the legislation has a tendency to rectify the conditions which the legislative body has thought it needful to remedy. The courts will look through the form of any legislative enactment and get at the substance of the matter.

Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425.

Although the Federal legislature is not prohibited from passing laws impairing the obligation of contracts, it cannot deprive a person of property without due process of law.

Hepburn v. Griswold, 8 Wall. 603, 623, 19 L. ed. 513, 526; McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Cooley, Const. Lim. 7th ed. 507.

Mr. W. J. Waguespack argued the cause, and, with Mr. Silas B. Axtell, filed a brief for respondents:

Section 4530 of U. S. Revised Statutes, Comp. Stat. § 8322, 9 Fed. Stat. Anno. 2d ed. p. 158, means what it says. Seamen on foreign vessels, while in ports of the United States, have a right to receive half the wages standing to their credit, and the courts of the United States are open to them for collection.

United States v. Fisher, 2 Cranch, 362, 366, 2 L. ed. 306, 307; United States v. Oregon & C. R. Co. 164 U. S. 526, 541, 41 L. ed. 541, 545, 17 Sup. Ct. Rep. 165; Cornell v. Coyne, 192 U. S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383; Hamilton v. Robertson, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155; Re Ivertsen, 237 Fed. 498; The London, 154 C. C. A. 565, 241 Fed. 863; The Meteor, 241 Fed. 735; The Talus, 242 Fed. 954; The Delagoa, 244 Fed. 835; The Westmeath, 169 C. C. A. 462, 258 Fed. 446; The Strathearn, 168 C. C. A. 25, 256 Fed. 631; The Sutherland, 260 Fed. 247; The Neilson v. Rhine Shipping Co. 248 U. S. 205, 63 L. ed. 208, 39 Sup. Ct. Rep. 89.

Section 4530 is constitutional, and enforceable against foreign vessels to the same extent that it is enforceable against domestic vessels.

Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383; Patterson v. The Eudora, 190 U. S. 177, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821.

The Seamen's Act in all of its parts is remedial in character, and should be liberally interpreted with a view to effecting the purposes intended.

Denn ex dem. Scott v. Reid, 10 Pet. 524, 526, 9 L. ed. 519, 520; Parks v. Turner, 12 How. 39, 13 L. ed. 883; United States v. Nickerson, 17 How. 204, 209, 15 L. ed. 219, 221; United States v. Padelford, 9 Wall. 531, 537, 19 L. ed. 788, 790; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; Home L. Ins. Co. v. Dunn, 19 Wall. 214, 224, 22 L. ed. 68, 69; Western U. Teleg. Co. v. Eyser, 19 Wall. 419, 427, 22 L. ed. 42, 44; Texas v. Chiles, 21 Wall. 488, 491, 22 L. ed. 650, 651; McBurney v. Carson, 99 U. S. 567, 25 L. ed. 378; Jones v. New York Guaranty & Indemnity Co. 101 U. S. 622, 25 L. ed. 1030; Gertgens v. O'Connor, 191 U. S. 237, 48 L. ed. 163, 24 Sup. Ct. Rep. 94; Beley v. Naphtaly, 169 U. S. 353, 359, 42 L. ed. 775, 777, 18 Sup. Ct. Rep. 354; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 35, 23 L. ed. 196, 199.

The fact that the contract was made prior to March 4, 1916, when the act went into effect on foreign vessels, does not change the result.

Louisville & N. R. Co. v. Mottley, 219 U. S. 482, 55 L. ed. 303, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

Mr. Justice Day delivered the opinion of the court:

This case was argued at the same time as Number 373, just decided [252 U. S. 348, ante, 607, 40 Sup. Ct. Rep. 350]. In this case the libellants shipped as part of the crew of the British steamer Westmeath for a voyage not to exceed one year, before the expiration of which time the vessel arrived in the harbor of New York, where she loaded and discharged cargo. A demand was made for one-half wages under § 4 of the Seamen's Act of March 4, 1915 [38 Stat. at L. 1165, chap. 153, Comp. Stat. § 8322, 9 Fed. Stat. Anno. 2d ed. p. 159]. The demand was refused, and an action was begun for full wages. A defense was set up that the libellants were deserters, and therefore not entitled to recover. The district court and the circuit court of appeals held that the libellants' case was made out under the statute. 169 C. C. A. 462, 258 Fed. 446.

[364] The case is controlled by principles which governed the disposition of No. 373. The difference being that it appears in this case that demand was made

more than five days after the vessel had arrived in the United States port. In all other respects as to the constitutionality and construction of the statute our judgment in the former case is controlling. It follows that the decree of the Circuit Court of Appeals must be affirmed.

Affirmed.

CHARLES GLEN COLLINS, Appt.,
v.
FRANK M. MILLER, United States Marshal for the Eastern District of Louisiana. (No. 350.)

TOM F. CARLISLE, British Consul General, Appt.,
v.
CHARLES GLEN COLLINS. (No. 351.)

(See S. C. Reporter's ed. 364-371.)

Appeal — question not raised by parties — finality of decision below.

1. The fundamental question whether the judgment appealed from is a final one must be answered, although not raised by either party.

[For other cases, see Appeal and Error, VIII. a, in Digest Sup. Ct. 1908.]

Appeal — final judgment — complete determination of case.

2. A single judgment upon a petition for a writ of habeas corpus setting forth a detention of the relator in extradition proceedings on three separate affidavits is not reviewable on appeal, where such judgment, though directing that the writ be denied as to the commitment on one of these affidavits, also declared that the writs of habeas corpus are granted as to the commitments on the other two affidavits, and ordered that the case be remanded for further hearing, since only one branch of the case having been finally disposed of below, none of it is reviewable.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

[Nos. 350 and 351.]

Argued December 9, 1919. Decided March 29, 1920.

TWO APPEALS from the District Court of the United States for the Eastern District of Louisiana to review a judgment denying a writ of habeas corpus to review a commitment on one of three affidavits, and granting the writ as to the commitments on the other two. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. **J. Zach. Spearing** argued the cause, and, with Mr. J. Kemp Bartlett, filed a brief for Charles Glen Collins.

Mr. **Guion Miller** also argued the cause for Charles Glen Collins.

Mr. **Charles Fox** argued the cause, and, with Mr. Robert H. Marr, filed a brief for appellee in No. 350 and appellant in No. 351.

Mr. Donaldson Caffery also filed a brief for appellee in No. 350 and appellant in No. 351.

Mr. Justice **Brandeis** delivered the opinion of the court:

These are appeals from a single judgment entered by the district court of the United States for the eastern district of Louisiana on a petition for writs of habeas corpus and certiorari. The relator had been arrested on extradition proceedings. Each party asks to have reviewed the construction given below to provisions of our treaty with Great Britain, proclaimed August 9, 1842 (8 Stat. at L. 572, 576), and of the supplementary treaty proclaimed April 22, 1901 (32 Stat. at L. 1864). The questions presented are, therefore, of a character which may be reviewed upon direct appeal under § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. p. 794]. Charlton v. Kelly, 229 U. S. 447, 57 L. ed. 1274, 46 L.R.A. (N.S.) 397, 33 Sup. Ct. Rep. 945. But this court has jurisdiction on writ of error and appeal under that section, as under others, only from final judgments. McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Heike v. United States, 217 U. S. 423, 54 L. ed. 821, 30 Sup. Ct. Rep. 539. And the rule applies to habeas corpus proceedings. Harkrader v. Wadley, 172 U. S. 148, 162, 43 L. ed. 399, 404, 19 Sup. Ct. Rep. 119. The fundamental question whether the judgment appealed from [366] is a final one within the meaning of the rule has suggested itself to the court; and it must be answered, although it was not raised by either party. Defiance Water Co. v. Defiance, 191 U. S. 184, 194, 48 L. ed. 140, 144, 24 Sup. Ct. Rep. 63. In order to answer the question it is necessary to describe the proceedings before the committing magistrate as well as

Note.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302; Schlosser v. Hemphill, 49 L. ed. U. S. 1001; and Detroit & M. R. Co. v. Michigan R. R. Commission, 60 L. ed. U. S. 802.

those in the district court on the petition for a writ of habeas corpus.

In October and November, 1918, the British Consul General at New Orleans filed with the Honorable Rufus E. Foster, District Judge of the United States for the Eastern District of Louisiana, three separate affidavits, each charging that Charles Glen Collins, who was then within the jurisdiction of that court, had committed at Bombay, India, the crime therein described as obtaining property under false pretenses, and that he stood charged therewith in the chief presidency magistrate's court at Bombay; and asking that he be committed as a fugitive from justice for the purpose of having him returned to India for trial. Warrants of arrest issued and Collins moved, as to each affidavit, to dismiss for want of jurisdiction, contending that the transactions in question were commercial dealings in which he had merely failed to pay debts incurred. Hearings, entitled, "In the Matter of Extradition Proceedings of Charles Glen Collins," were had before Judge Foster, at which the Consul General and Collins appeared by counsel. Evidence in support of each of the three affidavits was introduced by the Consul General. Then Collins, who was sworn at his request, admitted his identity and that he had been present in India at the times each of the alleged crimes was committed. As to one of the charges, that of obtaining a pearl button from Mohamed Alli Zaimel ali Raza, he was allowed to testify further. But he was not permitted to testify as to matters concerning the other two, which had been consolidated. And he was not permitted to introduce other witnesses in defense of any of the three [367] affidavits. After the hearings were concluded Judge Foster made two orders or judgments signed by him as judge of said United States district court and entitled in said court. In these orders he found, as to each of the affidavits, that he deemed the evidence sufficient to sustain the charge under the law and the treaty; and as to each he ordered Collins recommitted to the House of Detention in the custody of the United States marshal for that district, to await the order of the President of the United States. The two proceedings (which included the three affidavits) were then consolidated. Under date of November 27, 1918, a certificate setting forth his findings, together with a copy of the record in all the proceedings, was transmitted to the Secretary of State.

This petition for writs of habeas corpus and certiorari was filed by Collins, in said district court, on January 8, 1919. It set forth the proceedings before Judge Foster on the three affidavits, and alleged that his detention was illegal and in violation of rights secured to him by the treaty; among other reasons because he was refused permission to introduce evidence, as above mentioned. District Judge Grubb ordered that the writs issue; and the marshal made return setting forth in substance the facts above recited. The case was heard before Judge Grubb on February 21, 1919, the record before Judge Foster being introduced. On the same day Judge Grubb, without delivering an opinion, entered an order which declared that "relator's application for habeas corpus is denied" so far as concerned the charge of obtaining the pearl button from Mohamed Alli Zaimel ali Raza, and that "the writs of habeas corpus are granted" so far as the detention was based on the other two charges, but that the relator be remanded to the House of Detention to await further proceedings in said last two named affidavits.

"And it is further ordered that, as to the said two affidavits last mentioned, this cause be and is hereby remanded [368] to the Honorable Rufus E. Foster, Judge, to the end that relator be given the opportunity of introducing such evidence as he might offer at a preliminary examination under the law of Louisiana."

Neither party took any action in respect to such further proceedings before Judge Foster. On March 3, 1919, Collins petitioned for leave to appeal, contending that he should have been discharged on all three affidavits, and his appeal was allowed. This is case No. 350 on the docket of this court. Later, the British Consul General petitioned for leave to appeal on the ground that Collins's application should have been definitely denied also as to the commitment on the other two affidavits. His appeal, being No. 351 on the docket of this court, was allowed March 28, 1919.

First: Was the judgment appealed from a final one? A single petition for a writ of habeas corpus thus sets forth detention of the relator on three separate affidavits. As to the commitment on one of these the judgment entered by Judge Grubb directed that the writ be "denied." Such denial, or more appropriately dismissal, of the writ, would obviously have been a final judgment, if it had stood alone. McNamara v.

man, 179 Cal. 497, 177 Pac. 461; Funk v. State, — Tex. Crim. Rep. —, 208 S. W. 509; United States v. Hirsch, 254 Fed. 109.

Solicitor General King and Mr. H. S. Ridgely filed a brief as amici curiæ in behalf of the United States:

The power of Congress is plenary.

Coleman v. Tennessee, 97 U. S. 514, 24 L. ed. 1121; Tarble's Case, 13 Wall. 397, 408, 20 L. ed. 597, 600; Western U. Teleg. Co. v. Boegli, 251 U. S. 315, ante, 281, 40 Sup. Ct. Rep. 167.

It is to be observed that while Coleman v. Tennessee, 97 U. S. 509, 24 L. ed. 1118, under the then-existing Federal statutes, held that state courts had, in loyal states, concurrent jurisdiction with courts-martial, even during the time of war, the exact question was, Had the courts of Tennessee such power? And this was decided against the power. The cases of Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640, and Franklin v. United States, 216 U. S. 559, 54 L. ed. 615, 30 Sup. Ct. Rep. 434, were what may be termed peace-time cases. The assertion, therefore, in the opinions in those cases, that the civil jurisdiction is concurrent with that of courts-martial, may well be taken to refer to peace times, particularly in view of the permissive civil jurisdiction now recognized in article 74 of the Articles of War, and of United States ex rel. Drury v. Lewis, 200 U. S. 1, 7, 50 L. ed. 343, 345, 26 Sup. Ct. Rep. 229; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 377, 382, 383, 62 L. ed. 349, 352, 355, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 856; Ex parte Foley, 243 Fed. 474; Re Wulzen, 235 Fed. 367, Ann. Cas. 1917A, 274; Trask v. Payne, 43 Barb. 575; Ex parte Bright, 1 Utah, 154.

By enlistment the citizen becomes a soldier. His relations to the state and to the public are changed.

Re Grimley, 137 U. S. 147, 152, 34 L. ed. 636, 638, 11 Sup. Ct. Rep. 54.

Mr. Chief Justice **White** delivered the opinion of the court:

Pending the existence of a state of war with Germany the appellant, a soldier in the Army of the United States, serving in a camp in Alabama, was tried and convicted for the murder of a civilian at a place within the jurisdiction of the state, and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. The conviction was reviewed and affirmed by the supreme court of Alabama, and was reexamined and reaffirmed on rehearing.

The case is here to reverse the action of the court below in refusing, on writ of habeas corpus, a discharge which was prayed on the ground that, under the circumstances stated, the sentence was void because the state court had no jurisdiction whatever over the subject of the commission of the crime, since, under the Constitution and laws of the United States, that power was exclusively vested in a court-martial.

As there was no demand by the military authorities for the surrender of the accused, what would have been the effect of such a demand, if made, is not before us. The contention of a total absence of jurisdiction in the state court is supported in argument, not only by the appellant, but also by the United States in a brief which it has filed as amicus curiæ. These arguments, while differing in forms of expression, rest upon the broad assumption that Congress, in re-enacting the Articles of War in 1916, by an exercise of constitutional authority, vested in the military courts during a state of war exclusive jurisdiction to try and punish persons in the military service for offenses [**381**] committed by them which were violative of the law of the several states. In other words, the proposition is that under the Act of August 29, 1916 [39 Stat. at L. 650, chap. 418, Comp. Stat. § 2308a, 9 Fed. Stat. Anno. 2d ed. p. 1243], by mere operation of a declaration of war, the states were completely stripped of authority to try and punish for virtually all offenses against their laws committed by persons in the military service. As in both arguments differences between the provisions of the Act of 1916 and the previous Articles are relied upon to sustain the accomplishment of the result contended for, we must briefly consider the prior Articles before we come to test the correctness of the conclusion sought to be drawn from the Articles of 1916.

The first Articles of War were adopted in 1775. By them the generic power of courts-martial was established as follows:

"L. All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the Articles of War, are to be taken cognizance of by general or regimental court-martial, according to the nature and de-

gree of the offense, and be punished at their discretion."

It cannot be disputed that the effect of this grant was to confer upon courts-martial as to offenses inherently military an exclusive authority to try and punish. In so far, however, as acts which were criminal under the state law, but which became subject to military authority because they could also appropriately be treated as prejudicial to good order and military discipline, a concurrent power necessarily arose, although no provision was made in the Articles regulating its exercise. But this omission was provided for in Article 1 of § 10 of the revised Articles adopted in 1776, as follows:

"Whenever an officer or soldier shall be accused of a capital crime, or of having used violence, or of having committed any offense against the persons or property of the good people [382] of any of the United American states, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made, or in behalf of the party or parties, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding or assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

In view of the terms of this Article, and the fact that it was drawn from the British Articles, where the supremacy of the civil law had long prevailed, it results that its provisions gave the civil courts, if not a supremacy of jurisdiction, at least a primary power to proceed against military offenders violating the civil law, although the same acts were concurrently within the jurisdiction of the military courts because of their tendency to be prejudicial to good order and military discipline.

And in harmony with this view, the Articles in question were applied up to 1806, in which year they were re-enacted without change as Articles 99 and 33 of that Revision, and were in force in 1863, in the Enrolment Act of which year it was provided (Act of March 3, 1863, § 30, 12 Stat. at L. 736, chap. 75):

"That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit [383] rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the Articles of War; and the punishment for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed."

It is to be observed that by this section there was given to courts-martial, under the conditions mentioned, power to punish for capital crimes, from which their authority had been from 1775 expressly excluded; and power was also given to deal, under the conditions stated and in the manner specified, with other enumerated offenses over which they had not, prior to the passage of the act, had jurisdiction, presumably because such acts had not in practice been treated as within the grant of authority to deal with them as prejudicial to good order and military discipline.

In 1874, when the Articles of War were revised and re-enacted (Rev. Stat. § 1342, Comp. Stat. § 2308a), the generic grant of power to punish acts prejudicial to good order and military discipline was re-expressed in Article 62, substantially as it existed from 1775. The provisions of § 30 of the Act of 1863, supra, were in so many words made to constitute Article 58; and the duty put upon military officials, to surrender to state officers, on demand, persons in the military service charged with offenses against the state, was re-enacted in Article 59, qualified, however, with the words, "except in time of war." Thus the Articles stood until they were re-enacted in the Revision of 1916, as follows:

The general grant of authority as to acts prejudicial to good order and military discipline was re-enacted in Article 96, substantially as it had obtained from the beginning. The capital offenses of murder and rape, as enumerated in § 30 of the Act of 1863, were placed in a distinct Article, [384] and power was

given to military courts to prosecute and punish them, as follows:

"Article 92. Murder — Rape. — Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may [be] direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace." 39 Stat. at L. 664, chap. 418, Comp. Stat. § 2308a (92), 9 Fed. Stat. Anno. 2d ed. p. 1286.

The remaining offenses enumerated in the Act of 1863 were placed in a separate Article, as follows:

"Art. 93. Various crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct." 39 Stat. at L. 664.

And finally, the duty to respond to the demand of the state authorities for the surrender of military offenders against the state criminal laws was re-enacted as it had prevailed from the beginning, subject, however, to express regulations to govern in case of conflict between state and Federal authority, and again subject to the qualification, "except in time of war," as first expressed in the Revision of 1874, the Article being as follows:

"Art. 74. Delivery of offenders to civil authorities.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the states of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil [385] authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct." 39 Stat. at L. 662.

Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding, for the sake of the argument, that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of state authority and the extraordinary extension of military power upon which the argument rests. This alone might be sufficient to dispose of the subject, for, as said in Coleman v. Tennessee, 97 U. S. 509, 514, 24 L. ed. 1118, 1121: "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect." Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted, since the Articles of War, originally adopted in 1775, were, as we have seen, in the very midst of the War for Independence, modified in 1776 to make certain the preservation of the civil power.

But the contention relied upon is directly based upon the words, "except in time of war," as qualifying the duty of the military officers to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, imposed by Article 74, and the grant in Article 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital [386] crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war. Both these provisions took their origin in the Act of 1863, and were drawn from the terms of that act as re-expressed in the Revision of 1874. By its very terms, however, the Act of 1863 was wholly foreign to the destruction of state and the enlargement of military power here relied upon. It is true, indeed, that by that act authority was for the first time given, as pointed out in the Coleman Case, supra, to courts-martial or military commissions to deal with capital and other serious crimes punishable under the state law. But the act did not purport to increase the general power of courts-martial by defining new crimes, or by bringing enumerated offenses within the category of military crimes as defined from the beginning, as we have already pointed out, but simply contemplated endow-

ing the military authorities with power, not to supplant, but to enforce, the state law. As observed by Winthrop, in his work on Military Law, 2d ed. page 1033, it was intended to provide, through the military authorities, means of enforcing and punishing crimes against the state law, committed by persons in the military service, where, as the result of the existence of martial law or of military operations, the courts of the state were not open, and military power was therefore needed to enforce the state law. And it was doubtless this purpose indicated by the text, to which we have already called attention, which caused the court in the Coleman Case to say that that statute had no application to territory where "the civil courts were open and in the undisturbed exercise of their jurisdiction." Page 515.

As in 1867 it was settled in Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281, that a state of war, in the absence of some occasion for the declaration of martial law or conditions consequent on military operations, gave no power to the military authorities where the civil courts were open and capable of performing [387] their duties, to disregard their authority or frustrate the exercise by them of their normal and legitimate jurisdiction, it is indeed open to grave doubt whether it was the purpose of Congress, by the words "except in time of war," or the cognate words which were used with reference to the jurisdiction conferred in capital cases, to do more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations, or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified,—a doubt which, if solved against the assumption of general military power, would demonstrate not only the jurisdiction of the state courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the Revision of 1874 is considered, since in that revision the Act of 1863 was in terms re-enacted and the words "except in time of war," appearing for the first time in Article 59 of that revision, could have been alone intended to qualify the time of war with which the act dealt; that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts.

Into the investigation of the subject of whether it was intended by the provision "except in time of war," contained in the Articles of 1916, to do more than meet the conditions exacted by the actual exigencies of war like those contemplated by the Act of 1863, and which were within the purview of military authority, as pointed out in Ex parte Milligan, we do not feel called upon to enter. We say this because, even though it be conceded that the purpose of Congress by the Article of 1916, departing from everything which had gone before, was to give to military courts, as the mere result of a state of war, the power to punish as military offenses the crimes specified when committed by those in the military service, such admission is [388] here negligible because, in that view, the regulations relied upon would do no more than extend the military authority, because of a state of war, to the punishment, as military crimes, of acts criminal under the state law, without the slightest indication of purpose to exclude the jurisdiction of state courts to deal with such acts as offenses against the state law.

And this conclusion harmonizes with the principles of interpretation applied to the Articles of War previous to 1916 (United States ex rel. Drury v. Lewis, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. Rep. 229; Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640; Franklin v. United States, 216 U. S. 559, 54 L. ed. 615, 30 Sup. Ct. Rep. 434, 6 Ops. Atty. Gen. 413); and is, moreover, in accord with the decided cases which have considered the contention of exclusive power in the military courts as resulting from the Articles of 1916, which we have here considered (People v. Denman, 179 Cal. 497, 177 Pac. 461; Funk v. State, — Tex. Crim. Rep. —, 208 S. W. 509; United States v. Hirsch, 254 Fed. 109).

It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit, and that the court was right in so deciding and hence its judgment must be and it is affirmed.

CUYAHOGA RIVER POWER COMPANY, Appt.,
v.
NORTHERN OHIO TRACTION & LIGHT COMPANY and the Northern Ohio Power Company.

(See S. C. Reporter's ed. 388-399.)

Federal courts — jurisdiction — frivolous Federal question — impairing contract obligations — due process of law.

The contention that a hydroelectric company, incorporated under the general laws of a state, which has adopted a resolution designating certain parcels of land as appropriated and necessary to carry out the corporate purpose, had acquired rights before appropriation was completed, as provided by the state condemnation laws, of which it was unconstitutionally deprived by the use of the designated parcels by other public utility companies,—is too unsubstantial to serve as the basis of Federal jurisdiction where, independently of the incorporation and resolution, the company had no rights or property to be taken, and there was no state legislative or other action against any charter rights which such corporation possessed. Whatever controversies or causes of action the corporation had were against other companies as rivals in eminent domain, or as owners of the land, over which a Federal court has no jurisdiction, diversity of citizenship not existing.

[For other cases, see Courts, 480-541, in Digest Sup. Ct. 1908.]

[No. 102.]

Argued March 17, 1920. Decided April 19, 1920.

APPEAL from the District Court of the United States for the Northern District of Ohio to review a decree dismissing a bill filed by a hydroelectric company against other public utility companies exercising rights in certain parcels of land over which the complainant corporation asserts exclusive rights. Affirmed.

Statement by Mr. Justice **McKenna**:

The appeal is direct to this court, the laws and Constitution of the United States being asserted to be involved. Upon motion of defendants (appellees) the bill was dismissed for want of jurisdiction and equity. Its allegations, therefore, become necessary to consider.

Plaintiff (appellant) was incorporated as a hydroelectric power company on May 29, 1908, for the purposes specified in the act of the legislature of Ohio, passed in 1904, and contained in §§ 10,128 and 10,134 of the Ohio General Code of 1910.

The articles of incorporation filed May 29, 1908, with the secretary of state, specified the streams across which the dams were to be built and maintained; that is, the streams in controversy, the Big Cuyahoga river and certain of its tributaries.

By said incorporation a contract was duly made and entered into between the state and plaintiff whereby the state granted to plaintiff a right of way over and along the [**390**] Cuyahoga river between the designated termini, and a vested right and franchise to construct, maintain, and operate, within the limits of the right of way, a hydroelectric plant for the development of electric current and energy from the waters of the river, together with a right or franchise to exercise the state's power of eminent domain in order to appropriate and acquire property necessary to carry out and perform the grant and make it effective. The grant has not been repealed.

The grants were accepted and are of great value, and upon the faith of that, the capital stock of plaintiff was subscribed for, and large expenditures and investments made and obligations incurred, including bonds of the par value of $150,000, and stock to the value of $210,000, all in a large part prior to December, 1910.

On June 4, 1908, plaintiff, by its board of directors, adopted a specific and detailed plan for the development of the power and sale of the same to the public, and definitely located its proposed improvements for that purpose upon specifically described lands, which had previously been entered upon and surveyed by its engineers, and then and there declared and resolved that the parcels of land were necessary to carry out the purpose of the plaintiff's organization, and that it thereby appropriated and de-

Note.—Generally as to what laws are void as impairing the obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

manded them for its corporate purposes. The parcels of land described in the resolution include all that were necessary for the purpose of the corporation, and the location of the improvement so fixed by the resolution was permanent and irrevocable, and conclusive upon plaintiff and all other persons except as the same might be altered by further act of the state.

June 5, 1908, the plaintiff instituted a suit in the court of proper jurisdiction, to condemn or appropriate, in accordance with the statutes of Ohio, the parcels of land mentioned in the resolution, and the persons owning the same were made parties. The suit was continuously pending [391] until a date subsequent to July 18, 1911, but at the instance and request of one of the owners of the parcels, and of the Northern Ohio Traction & Light Company, called the Traction Company, the suit was not pressed for trial against them until January, 1911, up to which date certain negotiations in regard to the improvement of the company were proposed, but finally terminated in the refusal of the owner of the land and the Traction Company to sell the land to plaintiff.

December 20, 1910, pending the suit and negotiations, the landowner executed a deed of the lands to the Northern Realty Company, conveying to it a fee-simple title.

January 20, 1911, after unsuccessful negotiations with the Realty Company, plaintiff instituted another suit for the condemnation of the land, which suit was prosecuted in the probate court (the court of jurisdiction), and is now pending in the Supreme Court of the United States, undetermined, to which court it was carried by a writ of error from the court of appeals of Ohio.

January 31, 1911, and while the suit above mentioned was pending, the Realty Company conveyed the land that had been conveyed to it, to the Northern Ohio Power Company, and the latter company conveyed that and other land which it had acquired, and all of its properties, rights, and franchises to the Traction Company, and the latter company entered upon the lands and now holds possession of them and of the improvements erected thereon.

Prior to January 20, 1911, no location or improvement upon the lands above designated was made for the purpose of utilizing them in the development of power, and they were actually employed for no use whatsoever, except a small wooden structure intended and occasionally used for dances and roller skating, a small portion of which structure was within all of the parcels.

Between January 31, 1911, and February 24, 1914, there [392] was erected upon the lands designated, a power house and other appliances for the generation of electric current and energy by means of steam power, also a dam, a power house, and other appliances for the generation of electric current and energy by the flow and fall of the waters of the river.

(There is an allegation of the capacity of the plants which may be omitted. Other allegations in regard to the various companies and the powers they possess and do not possess also may be omitted. It is only necessary to say that it is alleged that the Power Company had not, and the Traction Company has not, power to use the designated lands or the waters of the river to operate the steam power plant and the hydroelectric plant, or for the development of such powers. and, therefore, neither company had power to exercise eminent domain for such purposes, though asserting its right and intention to do so, and if it should do so, it would invade and injure rights of plaintiff, "inflicting upon the plaintiff and the persons interested therein a continuing and irreparable injury, for which there is no adequate remedy at law.")

From and after the time of the adoption of the resolution of June 4, 1908, the designated parcels of land were subjected to plaintiff's public use and its rights and franchises, exclusive of all other persons and corporations; that such rights and franchises were granted to plaintiff by the state of Ohio under and by authority of plaintiff's contract with the state, and for the protection of which plaintiff is entitled to, and claims, the protection of the Constitution of the United States and of the amendments thereof, as well as § 5 of article 13 of the Constitution of the state of Ohio.

The effect and result of the Traction Company's use of the designated parcels of land and of the waters of the river is an appropriation by it of the rights and franchises of plaintiff, and the deprivation of its property for private [393] use without compensation and without due process of law, contrary to the 14th Amendment of the Constitution of the United States, and an impairment of the contract of plaintiff with the state of Ohio, within the meaning of article 1 of the Constitution of the United States.

Plaintiff has at all times, and since its incorporation, actively and diligently and in good faith proceeded to carry out and accomplish its corporate purpose.

In April, 1909, the plaintiff amended its resolution of June 4, 1908, and enlarged its proposed plant and the output and product thereof, and obtained a grant from the state over the additional portion or section of the Cuyahoga river so as to carry out the amended plan, and it provides for the utilization of the designated parcels of land necessary to the plaintiff's rights and franchises. (The additional capacity is alleged.)

The prayer is that plaintiff's rights and franchises be established and adjudged; that the proceedings complained of be decreed a violation of the plaintiff's rights, and of the Constitution of Ohio and the Constitution of the United States, and a taking of its property without due process of law. And that an injunction be granted against their further exercise; that defendants be required to remove the structures and devices already erected upon the lands, or to convey them to the plaintiff, and that a receiver be appointed to take possession of the lands and structures. An accounting is also prayed, and general relief.

Mr. Carroll G. Walter argued the cause, and, with Messrs. William Z. Davis and John L. Wells, filed a brief for appellant:

The plaintiff has an indefeasible property right to proceed with its development according to the plan adopted by its board of directors, and a correlative right to exclude rival companies from the lands of its choice.

Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574, 582–584, 62 L. ed. 481, 486–488, L.R.A.1918E, 865, 38 Sup. Ct. Rep. 196; 10 Cyc. 226; 33 Cyc. 111, 127, 138, 139; Lewis, Em. Dom. §§ 503, 504; Elliott, Railroads, §§ 921, 927; Denver & R. G. R. Co. v. Arizona & C. R. Co. 233 U. S. 601, 58 L. ed. 1111, 34 Sup. Ct. Rep. 691; Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co. 27 Fed. 770; Chesapeake & O. R. Co. v. Deepwater R. Co. 57 W. Va. 641, 50 S. E. 890; Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co. 141 Pa. 407, 12 L.R.A. 220, 21 Atl. 645; Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co. 44 Hun, 206, 110 N. Y. 128, 17 N. E. 680; Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 28 N. E. 525; Nicomen Boom Co. v. North Shore Boom & Driving Co. 40 Wash. 315, 82 Pac. 412; Barre R. Co. v. Montpelier & W. River R. Co. 61 Vt. 1, 4 L.R.A. 785, 15 Am. St. Rep. 877, 17 Atl. 923; Fayetteville Street R. Co. v. Aberdeen & R. R. Co. 142 N. C. 423, 55 S. E. 345, 9 Ann. Cas. 683.

Mr. John E. Morley argued the cause, and, with Messrs. S. H. Tolles and T. H. Hogsett, filed a brief for appellees:

Incorporation under the general statutes of Ohio covering the incorporation of hydroelectric companies did not constitute a contract with the state, or confer any exclusive franchise rights.

State ex rel. Hamilton Gas & Coke Co. v. Hamilton, 47 Ohio St. 74, 23 N. E. 935; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 270, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90; Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122; Ramapo Water Co. v. New York, 236 U. S. 579, 59 L. ed. 731, 35 Sup. Ct. Rep. 442; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Pearsall v. Great Northern R. Co. 161 U. S. 646, 664, 40 L. ed. 838, 844, 16 Sup. Ct. Rep. 705; Bank of Commerce v. Tennessee, 163 U. S. 416, 424, 41 L. ed. 211, 214, 16 Sup. Ct. Rep. 1113; Sears v. Akron, 246 U. S. 242, 62 L. ed. 688, 38 Sup. Ct. Rep. 245.

Mr. Joseph S. Clark also argued the cause and filed a brief for appellees:

The Federal courts have no jurisdiction to entertain plaintiff's case.

Underground R. Co. v. New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494; Rampo Water Co. v. New York, 236 U. S. 579, 59 L. ed. 731, 35 Sup. Ct. Rep. 442.

[394] Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

As we have said, a motion was made to dismiss the bill. The grounds of the motion were that there was no jurisdiction in the court, the controversy not arising under the Constitution and laws of the United States, and that the bill did not state facts sufficient to constitute a cause of action against defendants or either of them.

There is an assertion in words, of rights under the Constitution of the United States, and the only question now presented is whether the assertion is justified by the allegations of the bill Putting the question concretely, or rather, the contention which constitutes

its foundation, the district court said: "The contention of the plaintiff is that, by virtue of its charter, it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the general laws of the state, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future while it proceeds, however dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the state of Ohio, giving the exclusive right to the employment of the benefits which nature has conferred upon the public through the forces of these streams, to the end that, until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it, through the employment of the resources thereof by another public utility company."

The court rejected the contention, holding that it was not tenable under the law and Constitution of Ohio. To [395] sustain this view the court cited prior Ohio cases, and certain cases on the docket of the court, and, as an inference from them, declared that it was "not true in Ohio that the character of complainant gave to it 'a vested right seemingly unlimited in time to exclude the rest of the world from the watersheds it chose' simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes;" and further, "The terms of § 19, article 1, of the Ohio Constitution, militates against the plaintiff's claim. Until appropriation is completed as provided by the condemnation laws of the state, the Traction Company's right to dominion over its holdings is inviolate. Wagner v. Railway Co. 38 Ohio St. 32." The court also cited Sears v. Akron, 246 U. S. 242, 62 L. ed, 688, 38 Sup. Ct. Rep. 245 (then just delivered), expressing the view that if the case had been brought to the court's attention sooner, a less extended discussion of the motion to dismiss could have been made.

We concur with the district court both in its reasoning and its deductions from the cited cases. The contention of plaintiff is certainly a bold one, and seemingly erects into a legal principle that unexecuted intention, or partly executed intention, has the same effect as executed intention, and that the declaration of an enterprise gives the same right as its consummation. Of course, there must be a first step in every project as well as a last step, and in enterprises like those we are considering there may be attainment under the local law of a right invulnerable to opposing assertion. And this plaintiff contends. To be explicit, it contends that, as against the Power Company and the Traction Company, they being its competitors in the same field of enterprise, its resolution of June 4, 1908, constituted an appropriation of the waters of the river, and a definite location of "its proposed improvement for that purpose upon specifically described parcels of land previously entered upon and surveyed by its engineers." Whether the [396] resolution had that effect under the Ohio laws we are not called upon to say. Indeed, we are not so much concerned with the contention as the ground of it. Plaintiff alleges as a ground of it, a contract with the state of Ohio, by its incorporation, "wherein and whereby said state duly granted to the plaintiff a right of way over and along said Cuyahoga river" between the designated termini, with the rights and franchises which we have mentioned, together "with the right or franchise to exercise the state's power of eminent domain in order to appropriate and acquire all property necssary to carry out and perform said grant and make the same effective," and that the acts of defendants, having legislative sanction of the state, impair plaintiff's contract.

It is manifest, therefore, that the determining and effective element of the contention is the charter of the state, and plaintiff has proceeded in confidence in it, against adverse adjudications. One of the adjudications is Sears v. Akron, supra. The elemental principle urged here was urged there; that is, there was urged there as here, that the charter of the company constituted a contract with the state, and that the contract was to a conclusive effect executed by the resolution of the board of directors of plaintiff on June 4, 1908, such resolution constituting an appropriation of the lands described therein, they being necessary to be acquired in order to construct and maintain the improvement specified in the plaintiff's charter and resolution. The principle was rejected, and it was decided that the incorporation of plaintiff was not a contract by the state with reference to the riparian rights, and that if plaintiff acquired riparian ri

specific rights in the use and flow of the water, that "would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter."

The case is determinative of the plaintiff's contention here, and it is manifest if plaintiff has any rights, they [397] are against defendants as rival companies, or against them as landowners, —rights under the charter, not by the charter, considered as a contract express or implied. The district court recognized the distinction and confined its decree accordingly, The court refused to speculate as to what plaintiff might be able to do hereafter in the assertion of rights against the Traction Company, but declared that it was against public policy to accede to the contention of plaintiff that, in the absence of specific acquirement, it, plaintiff, could prevent an owner of property within its territory from occupying or using the same without condemnation proceedings being had, and compensation paid or secured for such property.

The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal court unless there be involved a Federal question. And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect. The Federal questions urged in this case do not satisfy the requirement. The charter as a contract is the plaintiff's reliance primarily and ultimately. Independent of that it has no rights or property to be taken; that is, independently of the resolution of June 4, 1908, there was no appropriation or condemnation of the land. Wagner v. Railway Co. supra.

Having nothing independently of its charter and the resolution of June 4, 1908, it could be devested of nothing, and it must rely upon the assertion of a contract and the impairment of it by the state or some agency of the state, exercising the state's legislative power. That there is such agency is the contention, but what it is exactly it is not easy to say. We, however, pick out of the confusion of the bill, with the assistance of plaintiff's brief, that the rights [398] it acquired, and by what they are impaired, are as follows: By the resolution of June 4, 1908, the lands described in the bill (exhibit A) became, and ever since have been, subjected to plaintiff's public use and subject to its rights of way and franchises exclusive of all other persons or corporations; that the Traction Company asserts and claims that, by reason of purchases of the rights and franchises of the Northern Ohio Power Company, sanctioned by the orders of the Public Utilities Commission, as set forth in the bill, and the construction by it, the Traction Company, of power plants upon the designated tracts of land, they, the tracts of land, have become subject to a public use and cannot be appropriated by plaintiff. And it is said (in the brief) that the Traction Company bases its claim upon the state laws; that is, the incorporation of the defendant Power Company and the Public Utilities Commission's orders.

It is manifest that there was no state legislative or other action against any charter rights which plaintiff possessed. What the Traction Company may or does claim cannot be attributed to the state (its incorporation antedated that of plaintiff), and it would be a waste of words to do more than say that the incorporation of plaintiff under the general laws of the state did not preclude the incorporation of the Power Company under the same general laws. What rights, if any, the Power Company thereby acquired against plaintiff, is another question. There remains, then, only the order of the Public Utilities Commission, authorizing the conveyance by the Power Company of the latter's rights and franchises to the Traction Company, to complain of as an impairment of plaintiff's asserted contract. But here again we are not disposed to engage in much discussion. The Commission's order may or may not have been the necessary condition to a conveyance by the Power Company of whatever rights it had to the Traction Company. Page & A. Gen. [399] Code (Ohio) § 614-60. The order conferred no new rights upon the Power Company which that company could or did convey to the Traction Company, nor give them a sanction that they did not have, nor did it affect any rights of the plaintiff.

From every Federal constitutional standpoint, therefore, the contentions of plaintiff are so obviously without merit as to be colorless; and whatever controversies or causes of action it had were against the defendant companies as rivals in eminent domain, or as owners of the lands; and, diversity of citizenship not

existing, the District Court of the United States had no jurisdiction.

Decree affirmed.

Mr. Justice **Day** and Mr. Justice **Clarke** took no part in the consideration or decision of this case.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plff. in Err.,

v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 399–408.)

Commerce — state regulation — street railways — separate coach law.

A Kentucky street railway may be required by a statute of that state to furnish either separate cars or separate compartments in the same car for white and negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

[No. 252.]

Argued March 18 and 19, 1920. Decided April 19, 1920.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Kenton County, in that state, convicting a street railway company of violating the Separate Coach Law. Affirmed.

See same case below, 181 Ky. 449, 205 S. W. 603.

The facts are stated in the opinion.

Mr. **Alfred C. Cassatt** argued the cause, and, with Messrs. J. C. W. Beckham, Richard P. Ernst, and Frank W. Cottle, filed a brief for plaintiff in error:

This court will consider the facts independently, especially where, as in this case, there is no conflict of testimony.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 344, 345, 51 L. ed. 209, 214, 215, 27 Sup. Ct. Rep. 90; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; Seaboard Air Line R. Co. v. Blackwell, 244 U. S. 310, 61 L. ed. 1160, L.R.A. 1917F, 1184, 37 Sup. Ct. Rep. 640; Missouri, K. & T. R. Co. v. Texas, 245 U. S. 484, 62 L. ed. 419, L.R.A.1918C, 535, P.U.R.1918B, 602, 38 Sup. Ct. Rep. 178.

The Separate Coach Law is a direct and unreasonable regulation of interstate commerce.

South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Cleveland,

---

Note.—Separating white and negro passengers as interference with interstate commerce.

Unless considered as limited to street railways only, the decisions in SOUTH COVINGTON & C. STREET R. CO. v. KENTUCKY and Cincinnati, C. & E. R. Co. v. Kentucky, 252 U. S. 408, post, 637, 40 Sup. Ct. Rep. 381, seem to mark a departure from the generally accepted view that a state law which requires separate but equal accommodations to be furnished for colored and white passengers is void so far as it applies to interstate commerce. This is the doctrine of such cases as State ex rel. Abbott v. Hicks, 44 La. Ann. 770, 11 So. 74; Anderson v. Louisville & N. R. Co. 4 Inters. Com. Rep. 764, 62 Fed. 46; Hart v. State, 100 Md. 595, 60 Atl. 457; State v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 184 S. W. 227.

So, a statute requiring all railroads in the state to furnish equal but separate accommodations for the white and colored races, and requiring conductors to assign passengers to their respective places, when applied to a passenger from another state on an interstate railroad line, invades the powers conferred on Congress by the commerce clause of the Constitution. Carrey v. Spencer, 72 N. Y. S. R. 108, 36 N. Y. Supp. 886, 5 Inters. Com. Rep. 636.

And support for this view is found in the decision in Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547, that state laws prohibiting any discrimination as to color between passengers are unconstitutional in so far as they apply to interstate commerce, such as to the carriage of passengers by vessel making voyages between different states.

However, in Smith v. State, 100 Tenn. 494, 41 L.R.A. 432, 46 S. W. 566; Alabama & V. R. Co. v. Morris, 103 Miss. 511, 60 So. 11, Ann. Cas. 1915B, 613; and Southern R. Co. v. Norton, 112 Miss. 302, 73 So. 1, it was held that a state statute providing for separate but equal accommodations for white and colored

CUYAHOGA RIVER POWER COMPANY, Appt.,
v.
NORTHERN OHIO TRACTION & LIGHT COMPANY and the Northern Ohio Power Company.

(See S. C. Reporter's ed. 388-399.)

Federal courts — jurisdiction — frivolous Federal question — impairing contract obligations — due process of law.

The contention that a hydroelectric company, incorporated under the general laws of a state, which has adopted a resolution designating certain parcels of land as appropriated and necessary to carry out the corporate purpose, had acquired rights before appropriation was completed, as provided by the state condemnation laws, of which it was unconstitutionally deprived by the use of the designated parcels by other public utility companies,—is too unsubstantial to serve as the basis of Federal jurisdiction where, independently of the incorporation and resolution, the company had no rights or property to be taken, and there was no state legislative or other action against any charter rights which such corporation possessed. Whatever controversies or causes of action the corporation had were against other companies as rivals in eminent domain, or as owners of the land, over which a Federal court has no jurisdiction, diversity of citizenship not existing.

[For other cases, see Courts, 489–541, in Digest Sup. Ct. 1908.]

[No. 102.]

Argued March 17, 1920. Decided April 19, 1920.

APPEAL from the District Court of the United States for the Northern District of Ohio to review a decree dismissing a bill filed by a hydroelectric company against other public utility companies exercising rights in certain parcels of land over which the complainant corporation asserts exclusive rights. Affirmed.

Statement by Mr. Justice **McKenna**:

The appeal is direct to this court, the laws and Constitution of the United States being asserted to be involved. Upon motion of defendants (appellees) the bill was dismissed for want of jurisdiction and equity. Its allegations, therefore, become necessary to consider.

Plaintiff (appellant) was incorporated as a hydroelectric power company on May 29, 1908, for the purposes specified in the act of the legislature of Ohio, passed in 1904, and contained in §§ 10,-128 and 10,134 of the Ohio General Code of 1910.

The articles of incorporation filed May 29, 1908, with the secretary of state, specified the streams across which the dams were to be built and maintained; that is, the streams in controversy, the Big Cuyahoga river and certain of its tributaries.

By said incorporation a contract was duly made and entered into between the state and plaintiff whereby the state granted to plaintiff a right of way over and along the [**390**] Cuyahoga river between the designated termini, and a vested right and franchise to construct, maintain, and operate, within the limits of the right of way, a hydroelectric plant for the development of electric current and energy from the waters of the river, together with a right or franchise to exercise the state's power of eminent domain in order to appropriate and acquire property necessary to carry out and perform the grant and make it effective. The grant has not been repealed.

The grants were accepted and are of great value, and upon the faith of that, the capital stock of plaintiff was subscribed for, and large expenditures and investments made and obligations incurred, including bonds of the par value of $150,000, and stock to the value of $210,-000, all in a large part prior to December, 1910.

On June 4, 1908, plaintiff, by its board of directors, adopted a specific and detailed plan for the development of the power and sale of the same to the public, and definitely located its proposed improvements for that purpose upon specifically described lands, which had previously been entered upon and surveyed by its engineers, and then and there declared and resolved that the parcels of land were necessary to carry out the purpose of the plaintiff's organization, and that it thereby appropriated and de-

Note.—Generally as to what laws are void as impairing the obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

manded them for its corporate purposes. The parcels of land described in the resolution include all that were necessary for the purpose of the corporation, and the location of the improvement so fixed by the resolution was permanent and irrevocable, and conclusive upon plaintiff and all other persons except as the same might be altered by further act of the state.

June 5, 1908, the plaintiff instituted a suit in the court of proper jurisdiction, to condemn or appropriate, in accordance with the statutes of Ohio, the parcels of land mentioned in the resolution, and the persons owning the same were made parties. The suit was continuously pending [**391**] until a date subsequent to July 18, 1911, but at the instance and request of one of the owners of the parcels, and of the Northern Ohio Traction & Light Company, called the Traction Company, the suit was not pressed for trial against them until January, 1911, up to which date certain negotiations in regard to the improvement of the company were proposed, but finally terminated in the refusal of the owner of the land and the Traction Company to sell the land to plaintiff.

December 20, 1910, pending the suit and negotiations, the landowner executed a deed of the lands to the Northern Realty Company, conveying to it a fee-simple title.

January 20, 1911, after unsuccessful negotiations with the Realty Company, plaintiff instituted another suit for the condemnation of the land, which suit was prosecuted in the probate court (the court of jurisdiction), and is now pending in the Supreme Court of the United States, undetermined, to which court it was carried by a writ of error from the court of appeals of Ohio.

January 31, 1911, and while the suit above mentioned was pending, the Realty Company conveyed the land that had been conveyed to it, to the Northern Ohio Power Company, and the latter company conveyed that and other land which it had acquired, and all of its properties, rights, and franchises to the Traction Company, and the latter company entered upon the lands and now holds possession of them and of the improvements erected thereon.

Prior to January 20, 1911, no location or improvement upon the lands above designated was made for the purpose of utilizing them in the development of power, and they were actually employed for no use whatsoever, except a small wooden structure intended and occasionally used for dances and roller skating, a small portion of which structure was within all of the parcels.

Between January 31, 1911, and February 24, 1914, there [**392**] was erected upon the lands designated, a power house and other appliances for the generation of electric current and energy by means of steam power, also a dam, a power house, and other appliances for the generation of electric current and energy by the flow and fall of the waters of the river.

(There is an allegation of the capacity of the plants which may be omitted. Other allegations in regard to the various companies and the powers they possess and do not possess also may be omitted. It is only necessary to say that it is alleged that the Power Company had not, and the Traction Company has not, power to use the designated lands or the waters of the river to operate the steam power plant and the hydroelectric plant, or for the development of such powers, and, therefore, neither company had power to exercise eminent domain for such purposes, though asserting its right and intention to do so, and if it should do so, it would invade and injure rights of plaintiff, "inflicting upon the plaintiff and the persons interested therein a continuing and irreparable injury, for which there is no adequate remedy at law.")

From and after the time of the adoption of the resolution of June 4, 1908, the designated parcels of land were subjected to plaintiff's public use and its rights and franchises, exclusive of all other persons and corporations; that such rights and franchises were granted to plaintiff by the state of Ohio under and by authority of plaintiff's contract with the state, and for the protection of which plaintiff is entitled to, and claims, the protection of the Constitution of the United States and of the amendments thereof, as well as § 5 of article 13 of the Constitution of the state of Ohio.

The effect and result of the Traction Company's use of the designated parcels of land and of the waters of the river is an appropriation by it of the rights and franchises of plaintiff, and the deprivation of its property for private [**393**] use without compensation and without due process of law, contrary to the 14th Amendment of the Constitution of the United States, and an impairment of the contract of plaintiff with the state of Ohio, within the meaning of article 1 of the Constitution of the United States.

Plaintiff has at all times, and since its incorporation, actively and diligently and in good faith proceeded to carry out and accomplish its corporate purpose.

In April, 1909, the plaintiff amended its resolution of June 4, 1908, and enlarged its proposed plant and the output and product thereof, and obtained a grant from the state over the additional portion or section of the Cuyahoga river so as to carry out the amended plan, and it provides for the utilization of the designated parcels of land necessary to the plaintiff's rights and franchises. (The additional capacity is alleged.)

The prayer is that plaintiff's rights and franchises be established and adjudged; that the proceedings complained of be decreed a violation of the plaintiff's rights, and of the Constitution of Ohio and the Constitution of the United States, and a taking of its property without due process of law. And that an injunction be granted against their further exercise; that defendants be required to remove the structures and devices already erected upon the lands, or to convey them to the plaintiff, and that a receiver be appointed to take possession of the lands and structures. An accounting is also prayed, and general relief.

Mr. Carroll G. Walter argued the cause, and, with Messrs. William Z. Davis and John L. Wells, filed a brief for appellant:

The plaintiff has an indefeasible property right to proceed with its development according to the plan adopted by its board of directors, and a correlative right to exclude rival companies from the lands of its choice.

Northern Ohio Traction & Light Co. v. Ohio, 245 U. S. 574, 582–584, 62 L. ed. 481, 486–488, L.R.A.1918E, 865, 38 Sup. Ct. Rep. 196; 10 Cyc. 226; 33 Cyc. 111, 127, 138, 139; Lewis, Em. Dom. §§ 503, 504; Elliott, Railroads, §§ 921, 927; Denver & R. G. R. Co. v. Arizona & C. R. Co. 233 U. S. 601, 58 L. ed. 1111, 34 Sup. Ct. Rep. 691; Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co. 27 Fed. 770; Chesapeake & O. R. Co. v. Deepwater R. Co. 57 W. Va. 641, 50 S. E. 890; Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co. 141 Pa. 407, 12 L.R.A. 220, 21 Atl. 645; Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co. 44 Hun, 206, 110 N. Y. 128, 17 N. E. 680; Suburban Rapid Transit Co. v. New York, 128 N. Y. 510, 28 N. E. 525; Nicomen Boom Co. v. North Shore Boom & Driving Co. 40 Wash. 315, 82 Pac. 412; Barre R. Co. v. Montpelier & W. River R. Co. 61 Vt. 1, 4 L.R.A. 785, 15 Am. St. Rep. 877, 17 Atl. 923; Fayetteville Street R. Co. v. Aberdeen & R. R. Co. 142 N. C. 423, 55 S. E. 345, 9 Ann. Cas. 683.

Mr. John E. Morley argued the cause, and, with Messrs. S. H. Tolles and T. H. Hogsett, filed a brief for appellees:

Incorporation under the general statutes of Ohio covering the incorporation of hydroelectric companies did not constitute a contract with the state, or confer any exclusive franchise rights.

State ex rel. Hamilton Gas & Coke Co. v. Hamilton, 47 Ohio St. 74, 23 N. E. 935; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 270, 36 L. ed. 963, 968, 13 Sup. Ct. Rep. 90; Calder v. Michigan, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122; Ramapo Water Co. v. New York, 236 U. S. 579, 59 L. ed. 731, 35 Sup. Ct. Rep. 442; Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; Pearsall v. Great Northern R. Co. 161 U. S. 646, 664, 40 L. ed. 838, 844, 16 Sup. Ct. Rep. 705; Bank of Commerce v. Tennessee, 163 U. S. 416, 424, 41 L. ed. 211, 214, 16 Sup. Ct. Rep. 1113; Sears v. Akron, 246 U. S. 242, 62 L. ed. 688, 38 Sup. Ct. Rep. 245.

Mr. Joseph S. Clark also argued the cause and filed a brief for appellees:

The Federal courts have no jurisdiction to entertain plaintiff's case.

Underground R. Co. v. New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494; Rampo Water Co. v. New York, 236 U. S. 579, 59 L. ed. 731, 35 Sup. Ct. Rep. 442.

[394] Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

As we have said, a motion was made to dismiss the bill. The grounds of the motion were that there was no jurisdiction in the court, the controversy not arising under the Constitution and laws of the United States, and that the bill did not state facts sufficient to constitute a cause of action against defendants or either of them.

There is an assertion in words, of rights under the Constitution of the United States, and the only question now presented is whether the assertion is justified by the allegations of the bill Putting the question concretely, or rather, the contention which constitutes

its foundation, the district court said: "The contention of the plaintiff is that, by virtue of its charter, it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the general laws of the state, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future while it proceeds, however dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the state of Ohio, giving the exclusive right to the employment of the benefits which nature has conferred upon the public through the forces of these streams, to the end that, until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it, through the employment of the resources thereof by another public utility company."

The court rejected the contention, holding that it was not tenable under the law and Constitution of Ohio. To [395] sustain this view the court cited prior Ohio cases, and certain cases on the docket of the court, and, as an inference from them, declared that it was "not true in Ohio that the character of complainant gave to it 'a vested right seemingly unlimited in time to exclude the rest of the world from the watersheds it chose' simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes;" and further, "The terms of § 19, article 1, of the Ohio Constitution, militates against the plaintiff's claim. Until appropriation is completed as provided by the condemnation laws of the state, the Traction Company's right to dominion over its holdings is inviolate. Wagner v. Railway Co. 38 Ohio St. 32." The court also cited Sears v. Akron, 246 U. S. 242, 62 L. ed, 688, 38 Sup. Ct. Rep. 245 (then just delivered), expressing the view that if the case had been brought to the court's attention sooner, a less extended discussion of the motion to dismiss could have been made.

We concur with the district court both in its reasoning and its deductions from the cited cases. The contention of plaintiff is certainly a bold one, and seemingly erects into a legal principle that unexecuted intention, or partly executed intention, has the same effect as executed intention, and that the declaration of an enterprise gives the same right as its consummation. Of course, there must be a first step in every project as well as a last step, and in enterprises like those we are considering there may be attainment under the local law of a right invulnerable to opposing assertion. And this plaintiff contends. To be explicit, it contends that, as against the Power Company and the Traction Company, they being its competitors in the same field of enterprise, its resolution of June 4, 1908, constituted an appropriation of the waters of the river, and a definite location of "its proposed improvement for that purpose upon specifically described parcels of land previously entered upon and surveyed by its engineers." Whether the [396] resolution had that effect under the Ohio laws we are not called upon to say. Indeed, we are not so much concerned with the contention as the ground of it. Plaintiff alleges as a ground of it, a contract with the state of Ohio, by its incorporation, "wherein and whereby said state duly granted to the plaintiff a right of way over and along said Cuyahoga river" between the designated termini, with the rights and franchises which we have mentioned, together "with the right or franchise to exercise the state's power of eminent domain in order to appropriate and acquire all property necessary to carry out and perform said grant and make the same effective," and that the acts of defendants, having legislative sanction of the state, impair plaintiff's contract.

It is manifest, therefore, that the determining and effective element of the contention is the charter of the state, and plaintiff has proceeded in confidence in it, against adverse adjudications. One of the adjudications is Sears v. Akron, supra. The elemental principle urged here was urged there; that is, there was urged there as here, that the charter of the company constituted a contract with the state, and that the contract was to a conclusive effect executed by the resolution of the board of directors of plaintiff on June 4, 1908, such resolution constituting an appropriation of the lands described therein, they being necessary to be acquired in order to construct and maintain the improvement specified in the plaintiff's charter and resolution. The principle was rejected, and it was decided that the incorporation of plaintiff was not a contract by the state with reference to the riparian rights, and that if plaintiff acquired riparian rights or

specific rights in the use and flow of the water, that "would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter."

The case is determinative of the plaintiff's contention here, and it is manifest if plaintiff has any rights, they [397] are against defendants as rival companies, or against them as landowners, —rights under the charter, not by the charter, considered as a contract express or implied. The district court recognized the distinction and confined its decree accordingly, The court refused to speculate as to what plaintiff might be able to do hereafter in the assertion of rights against the Traction Company, but declared that it was against public policy to accede to the contention of plaintiff that, in the absence of specific acquirement, it, plaintiff, could prevent an owner of property within its territory from occupying or using the same without condemnation proceedings being had, and compensation paid or secured for such property.

The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal court unless there be involved a Federal question. And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect. The Federal questions urged in this case do not satisfy the requirement. The charter as a contract is the plaintiff's reliance primarily and ultimately. Independent of that it has no rights or property to be taken; that is, independently of the resolution of June 4, 1908, there was no appropriation or condemnation of the land. Wagner v. Railway Co. supra.

Having nothing independently of its charter and the resolution of June 4, 1908, it could be devested of nothing, and it must rely upon the assertion of a contract and the impairment of it by the state or some agency of the state, exercising the state's legislative power. That there is such agency is the contention, but what it is exactly it is not easy to say. We, however, pick out of the confusion of the bill, with the assistance of plaintiff's brief, that the rights [398] it acquired, and by what they are impaired, are as follows: By the resolution of June 4, 1908, the lands described in the bill (exhibit A) became, and ever since have been, subjected to plaintiff's public use and subject to its rights of way and franchises exclusive of all other persons or corporations; that the Traction Company asserts and claims that, by reason of purchases of the rights and franchises of the Northern Ohio Power Company, sanctioned by the orders of the Public Utilities Commission, as set forth in the bill, and the construction by it, the Traction Company, of power plants upon the designated tracts of land, they, the tracts of land, have become subject to a public use and cannot be appropriated by plaintiff. And it is said (in the brief) that the Traction Company bases its claim upon the state laws; that is, the incorporation of the defendant Power Company and the Public Utilities Commission's orders.

It is manifest that there was no state legislative or other action against any charter rights which plaintiff possessed. What the Traction Company may or does claim cannot be attributed to the state (its incorporation antedated that of plaintiff), and it would be a waste of words to do more than say that the incorporation of plaintiff under the general laws of the state did not preclude the incorporation of the Power Company under the same general laws. What rights, if any, the Power Company thereby acquired against plaintiff, is another question. There remains, then, only the order of the Public Utilities Commission, authorizing the conveyance by the Power Company of the latter's rights and franchises to the Traction Company, to complain of as an impairment of plaintiff's asserted contract. But here again we are not disposed to engage in much discussion. The Commission's order may or may not have been the necessary condition to a conveyance by the Power Company of whatever rights it had to the Traction Company. Page & A. Gen. [399] Code (Ohio) § 614-60. The order conferred no new rights upon the Power Company which that company could or did convey to the Traction Company, nor give them a sanction that they did not have, nor did it affect any rights of the plaintiff.

From every Federal constitutional standpoint, therefore, the contentions of plaintiff are so obviously without merit as to be colorless; and whatever controversies or causes of action it had were against the defendant companies as rivals in eminent domain, or as owners of the lands; and, diversity of citizenship not

existing, the District Court of the United States had no jurisdiction.

Decree affirmed.

Mr. Justice **Day** and Mr. Justice **Clarke** took no part in the consideration or decision of this case.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plff. in Err.,

v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 399–408.)

Commerce — state regulation — street railways — separate coach law.

A Kentucky street railway may be required by a statute of that state to furnish either separate cars or separate compartments in the same car for white and negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

[No. 252.]

Argued March 18 and 19, 1920. Decided April 19, 1920.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Kenton County, in that state, convicting a street railway company of violating the Separate Coach Law. Affirmed.

See same case below, 181 Ky. 449, 205 S. W. 603.

The facts are stated in the opinion.

Mr. **Alfred C. Cassatt** argued the cause, and, with Messrs. J. C. W. Beckham, Richard P. Ernst, and Frank W. Cottle, filed a brief for plaintiff in error:

This court will consider the facts independently, especially where, as in this case, there is no conflict of testimony.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 344, 345, 51 L. ed. 209, 214, 215, 27 Sup. Ct. Rep. 90; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; Seaboard Air Line R. Co. v. Blackwell, 244 U. S. 310, 61 L. ed. 1160, L.R.A. 1917F, 1184, 37 Sup. Ct. Rep. 640; Missouri, K. & T. R. Co. v. Texas, 245 U. S. 484, 62 L. ed. 419, L.R.A.1918C, 535, P.U.R.1918B, 602, 38 Sup. Ct. Rep. 178.

The Separate Coach Law is a direct and unreasonable regulation of interstate commerce.

South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Cleveland,

---

Note.—Separating white and negro passengers as interference with interstate commerce.

Unless considered as limited to street railways only, the decisions in South Covington & C. Street R. Co. v. Kentucky and Cincinnati, C. & E. R. Co. v. Kentucky, 252 U. S. 408, post, 637, 40 Sup. Ct. Rep. 381, seem to mark a departure from the generally accepted view that a state law which requires separate but equal accommodations to be furnished for colored and white passengers is void so far as it applies to interstate commerce. This is the doctrine of such cases as State ex rel. Abbott v. Hicks, 44 La. Ann. 770, 11 So. 74; Anderson v. Louisville & N. R. Co. 4 Inters. Com. Rep. 764, 62 Fed. 46; Hart v. State, 100 Md. 595, 60 Atl. 457; State v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 184 S. W. 227.

So, a statute requiring all railroads in the state to furnish equal but separate accommodations for the white and colored races, and requiring conductors to assign passengers to their respective places, when applied to a passenger from another state on an interstate railroad line, invades the powers conferred on Congress by the commerce clause of the Constitution. Carrey v. Spencer, 72 N. Y. S. R. 108, 36 N. Y. Supp. 886, 5 Inters. Com. Rep. 636.

And support for this view is found in the decision in Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547, that state laws prohibiting any discrimination as to color between passengers are unconstitutional in so far as they apply to interstate commerce, such as to the carriage of passengers by vessel making voyages between different states.

However, in Smith v. State, 100 Tenn. 494, 41 L.R.A. 432, 46 S. W. 566; Alabama & V. R. Co. v. Morris, 103 Miss. 511, 60 So. 11, Ann. Cas. 1915B, 613; and Southern R. Co. v. Norton, 112 Miss. 302, 73 So. 1, it was held that a state statute providing for separate but equal accommodations for white and colored

specific rights in the use and flow of the water, that "would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter."

The case is determinative of the plaintiff's contention here, and it is manifest if plaintiff has any rights, they [397] are against defendants as rival companies, or against them as landowners, —rights under the charter, not by the charter, considered as a contract express or implied. The district court recognized the distinction and confined its decree accordingly, The court refused to speculate as to what plaintiff might be able to do hereafter in the assertion of rights against the Traction Company, but declared that it was against public policy to accede to the contention of plaintiff that, in the absence of specific acquirement, it, plaintiff, could prevent an owner of property within its territory from occupying or using the same without condemnation proceedings being had, and compensation paid or secured for such property.

The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal court unless there be involved a Federal question. And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect. The Federal questions urged in this case do not satisfy the requirement. The charter as a contract is the plaintiff's reliance primarily and ultimately. Independent of that it has no rights or property to be taken; that is, independently of the resolution of June 4, 1908, there was no appropriation or condemnation of the land. Wagner v. Railway Co. supra.

Having nothing independently of its charter and the resolution of June 4, 1908, it could be devested of nothing, and it must rely upon the assertion of a contract and the impairment of it by the state or some agency of the state, exercising the state's legislative power. That there is such agency is the contention, but what it is exactly it is not easy to say. We, however, pick out of the confusion of the bill, with the assistance of plaintiff's brief, that the rights [398] it acquired, and by what they are impaired, are as follows: By the resolution of June 4, 1908, the lands described in the bill (exhibit A) became, and ever since have been, subjected to plaintiff's public use and subject to its rights of way and franchises exclusive of all other persons or corporations; that the Traction Company asserts and claims that, by reason of purchases of the rights and franchises of the Northern Ohio Power Company, sanctioned by the orders of the Public Utilities Commission, as set forth in the bill, and the construction by it, the Traction Company, of power plants upon the designated tracts of land, they, the tracts of land, have become subject to a public use and cannot be appropriated by plaintiff. And it is said (in the brief) that the Traction Company bases its claim upon the state laws; that is, the incorporation of the defendant Power Company and the Public Utilities Commission's orders.

It is manifest that there was no state legislative or other action against any charter rights which plaintiff possessed. What the Traction Company may or does claim cannot be attributed to the state (its incorporation antedated that of plaintiff), and it would be a waste of words to do more than say that the incorporation of plaintiff under the general laws of the state did not preclude the incorporation of the Power Company under the same general laws. What rights, if any, the Power Company thereby acquired against plaintiff, is another question. There remains, then, only the order of the Public Utilities Commission, authorizing the conveyance by the Power Company of the latter's rights and franchises to the Traction Company, to complain of as an impairment of plaintiff's asserted contract. But here again we are not disposed to engage in much discussion. The Commission's order may or may not have been the necessary condition to a conveyance by the Power Company of whatever rights it had to the Traction Company. Page & A. Gen. [399] Code (Ohio) § 614-60. The order conferred no new rights upon the Power Company which that company could or did convey to the Traction Company, nor give them a sanction that they did not have, nor did it affect any rights of the plaintiff.

From every Federal constitutional standpoint, therefore, the contentions of plaintiff are so obviously without merit as to be colorless; and whatever controversies or causes of action it had were against the defendant companies as rivals in eminent domain, or as owners of the lands; and, diversity of citizenship not

existing, the District Court of the United States had no jurisdiction.

Decree affirmed.

Mr. Justice **Day** and Mr. Justice **Clarke** took no part in the consideration or decision of this case.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plff. in Err.,

v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 399–408.)

Commerce — state regulation — street railways — separate coach law.

A Kentucky street railway may be required by a statute of that state to furnish either separate cars or separate compartments in the same car for white and negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

[No. 252.]

Argued March 18 and 19, 1920. Decided April 19, 1920.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Kenton County, in that state, convicting a street railway company of violating the Separate Coach Law. Affirmed.

See same case below, 181 Ky. 449, 205 S. W. 603.

The facts are stated in the opinion.

Mr. **Alfred C. Cassatt** argued the cause, and, with Messrs. J. C. W. Beckham, Richard P. Ernst, and Frank W. Cottle, filed a brief for plaintiff in error:

This court will consider the facts independently, especially where, as in this case, there is no conflict of testimony.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 344, 345, 51 L. ed. 209, 214, 215, 27 Sup. Ct. Rep. 90; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; Seaboard Air Line R. Co. v. Blackwell, 244 U. S. 310, 61 L. ed. 1160, L.R.A. 1917F, 1184, 37 Sup. Ct. Rep. 640; Missouri, K. & T. R. Co. v. Texas, 245 U. S. 484, 62 L. ed. 419, L.R.A.1918C, 535, P.U.R.1918B, 602, 38 Sup. Ct. Rep. 178.

The Separate Coach Law is a direct and unreasonable regulation of interstate commerce.

South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Cleveland,

---

Note.—Separating white and negro passengers as interference with interstate commerce.

Unless considered as limited to street railways only, the decisions in SOUTH COVINGTON & C. STREET R. CO. v. KENTUCKY and Cincinnati, C. & E. R. Co. v. Kentucky, 252 U. S. 408, post, 637, 40 Sup. Ct. Rep. 381, seem to mark a departure from the generally accepted view that a state law which requires separate but equal accommodations to be furnished for colored and white passengers is void so far as it applies to interstate commerce. This is the doctrine of such cases as State ex rel. Abbott v. Hicks, 44 La. Ann. 770, 11 So. 74; Anderson v. Louisville & N. R. Co. 4 Inters. Com. Rep. 764, 62 Fed. 46; Hart v. State, 100 Md. 595, 60 Atl. 457; State v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 184 S. W. 227.

So, a statute requiring all railroads in the state to furnish equal but separate accommodations for the white and colored races, and requiring conductors to assign passengers to their respective places, when applied to a passenger from another state on an interstate railroad line, invades the powers conferred on Congress by the commerce clause of the Constitution. Carrey v. Spencer, 72 N. Y. S. R. 108, 36 N. Y. Supp. 886, 5 Inters. Com. Rep. 636.

And support for this view is found in the decision in Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547, that state laws prohibiting any discrimination as to color between passengers are unconstitutional in so far as they apply to interstate commerce, such as to the carriage of passengers by vessel making voyages between different states.

However, in Smith v. State, 100 Tenn. 494, 41 L.R.A. 432, 46 S. W. 566; Alabama & V. R. Co. v. Morris, 103 Miss. 511, 60 So. 11, Ann. Cas. 1915B, 613; and Southern R. Co. v. Norton, 112 Miss. 302, 73 So. 1, it was held that a state statute providing for separate but equal accommodations for white and colored

specific rights in the use and flow of the water, that "would be property acquired under the charter, not contract rights expressed or implied in the grant of the charter."

The case is determinative of the plaintiff's contention here, and it is manifest if plaintiff has any rights, they [397] are against defendants as rival companies, or against them as landowners, —rights under the charter, not by the charter, considered as a contract express or implied. The district court recognized the distinction and confined its decree accordingly, The court refused to speculate as to what plaintiff might be able to do hereafter in the assertion of rights against the Traction Company, but declared that it was against public policy to accede to the contention of plaintiff that, in the absence of specific acquirement, it, plaintiff, could prevent an owner of property within its territory from occupying or using the same without condemnation proceedings being had, and compensation paid or secured for such property.

The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal court unless there be involved a Federal question. And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect. The Federal questions urged in this case do not satisfy the requirement. The charter as a contract is the plaintiff's reliance primarily and ultimately. Independent of that it has no rights or property to be taken; that is, independently of the resolution of June 4, 1908, there was no appropriation or condemnation of the land. Wagner v. Railway Co. supra.

Having nothing independently of its charter and the resolution of June 4, 1908, it could be devested of nothing, and it must rely upon the assertion of a contract and the impairment of it by the state or some agency of the state, exercising the state's legislative power. That there is such agency is the contention, but what it is exactly it is not easy to say. We, however, pick out of the confusion of the bill, with the assistance of plaintiff's brief, that the rights [398] it acquired, and by what they are impaired, are as follows: By the resolution of June 4, 1908, the lands described in the bill (exhibit A) became, and ever since have been, subjected to plaintiff's public use and subject to its rights of way and franchises exclusive of all other persons or corporations; that the Traction Company asserts and claims that, by reason of purchases of the rights and franchises of the Northern Ohio Power Company, sanctioned by the orders of the Public Utilities Commission, as set forth in the bill, and the construction by it, the Traction Company, of power plants upon the designated tracts of land, they, the tracts of land, have become subject to a public use and cannot be appropriated by plaintiff. And it is said (in the brief) that the Traction Company bases its claim upon the state laws; that is, the incorporation of the defendant Power Company and the Public Utilities Commission's orders.

It is manifest that there was no state legislative or other action against any charter rights which plaintiff possessed. What the Traction Company may or does claim cannot be attributed to the state (its incorporation antedated that of plaintiff), and it would be a waste of words to do more than say that the incorporation of plaintiff under the general laws of the state did not preclude the incorporation of the Power Company under the same general laws. What rights, if any, the Power Company thereby acquired against plaintiff, is another question. There remains, then, only the order of the Public Utilities Commission, authorizing the conveyance by the Power Company of the latter's rights and franchises to the Traction Company, to complain of as an impairment of plaintiff's asserted contract. But here again we are not disposed to engage in much discussion. The Commission's order may or may not have been the necessary condition to a conveyance by the Power Company of whatever rights it had to the Traction Company. Page & A. Gen. [399] Code (Ohio) § 614-60. The order conferred no new rights upon the Power Company which that company could or did convey to the Traction Company, nor give them a sanction that they did not have, nor did it affect any rights of the plaintiff.

From every Federal constitutional standpoint, therefore, the contentions of plaintiff are so obviously without merit as to be colorless; and whatever controversies or causes of action it had were against the defendant companies as rivals in eminent domain, or as owners of the lands; and, diversity of citizenship not

existing, the District Court of the United States had no jurisdiction.

Decree affirmed.

Mr. Justice **Day** and Mr. Justice **Clarke** took no part in the consideration or decision of this case.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, Plff. in Err.,

v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 399–408.)

Commerce — state regulation — street railways — separate coach law.

A Kentucky street railway may be required by a statute of that state to furnish either separate cars or separate compartments in the same car for white and negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

[No. 252.]

Argued March 18 and 19, 1920. Decided April 19, 1920.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Kenton County, in that state, convicting a street railway company of violating the Separate Coach Law. Affirmed.

See same case below, 181 Ky. 449, 205 S. W. 603.

The facts are stated in the opinion.

Mr. **Alfred C. Cassatt** argued the cause, and, with Messrs. J. C. W. Beckham, Richard P. Ernst, and Frank W. Cottle, filed a brief for plaintiff in error:

This court will consider the facts independently, especially where, as in this case, there is no conflict of testimony.

Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 344, 345, 51 L. ed. 209, 214, 215, 27 Sup. Ct. Rep. 90; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; Seaboard Air Line R. Co. v. Blackwell, 244 U. S. 310, 61 L. ed. 1160, L.R.A. 1917F, 1184, 37 Sup. Ct. Rep. 640; Missouri, K. & T. R. Co. v. Texas, 245 U. S. 484, 62 L. ed. 419, L.R.A.1918C, 535, P.U.R.1918B, 602, 38 Sup. Ct. Rep. 178.

The Separate Coach Law is a direct and unreasonable regulation of interstate commerce.

South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Cleveland,

---

Note.—Separating white and negro passengers as interference with interstate commerce.

Unless considered as limited to street railways only, the decisions in SOUTH COVINGTON & C. STREET R. CO. v. KENTUCKY and Cincinnati, C. & E. R. Co. v. Kentucky, 252 U. S. 408, post, 637, 40 Sup. Ct. Rep. 381, seem to mark a departure from the generally accepted view that a state law which requires separate but equal accommodations to be furnished for colored and white passengers is void so far as it applies to interstate commerce. This is the doctrine of such cases as State ex rel. Abbott v. Hicks, 44 La. Ann. 770, 11 So. 74; Anderson v. Louisville & N. R. Co. 4 Inters. Com. Rep. 764, 62 Fed. 46; Hart v. State, 100 Md. 595, 60 Atl. 457; State v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 184 S. W. 227.

So, a statute requiring all railroads in the state to furnish equal but separate accommodations for the white and colored races, and requiring conductors to assign passengers to their respective places, when applied to a passenger from another state on an interstate railroad line, invades the powers conferred on Congress by the commerce clause of the Constitution. Carrey v. Spencer, 72 N. Y. S. R. 108, 36 N. Y. Supp. 886, 5 Inters. Com. Rep. 636.

And support for this view is found in the decision in Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547, that state laws prohibiting any discrimination as to color between passengers are unconstitutional in so far as they apply to interstate commerce, such as to the carriage of passengers by vessel making voyages between different states.

However, in Smith v. State, 100 Tenn. 494, 41 L.R.A. 432, 46 S. W. 566; Alabama & V. R. Co. v. Morris, 103 Miss. 511, 60 So. 11, Ann. Cas. 1915B, 613; and Southern R. Co. v. Norton, 112 Miss. 302, 73 So. 1, it was held that a state statute providing for separate but equal accommodations for white and colored

C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

A state statute or regulation which operates upon interstate commerce, or which is interpreted by the state in such a way as to make it operate on interstate commerce, is on the defensive, and to be upheld it must be entirely and affirmatively reasonable. The regulation of interstate commerce is the domain of the Federal government. A state statute which, as interpreted in a given case, regulates or burdens interstate commerce, does not have the presumption in its favor which attends public regulations in general.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Central of Georgia R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; Welton v. Missouri, 91 U. S. 282, 23 L. ed. 350; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 154, 41 L. ed. 107, 111, 16 Sup. Ct. Rep. 1096; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 58 L. ed. 857, 34 Sup. Ct. Rep. 564.

Mr. **Stephens L. Blakely** argued the cause, and, with Mr. Charles I. Dawson, Attorney General of Kentucky, filed a brief for defendant in error:

The statute of Kentucky, as applied to the facts in this case, was not an unlawful and unreasonable interference with interstate commerce, in violation of the Federal Constitution.

Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.

Mr. Justice **McKenna** delivered the opinion of the court:

The railway company was indicted for a violation of a statute of Kentucky which required companies or persons running or operating railroads in the state to furnish separate coaches or cars for white and colored passengers.

The statute, as far as we are concerned with it, is as follows: All corporations, companies, or persons "engaged in running or operating any of the railroads of this state, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart." [Ky. Stat. 1915, § 795.]

---

races on railroads is a valid police regulation, and applies both to intrastate and interstate travel. These cases take the position that the question of the validity of such statute, as applied to interstate commerce, is an open one under the decisions of the Supreme Court of the United States, pointing out that in cases where a similar state statute was before the United States Supreme Court, the only question under consideration was that of its validity as to intrastate commerce, the court limiting itself to an affirmance of the validity of the statute as interpreted by the state courts as being applicable to intrastate commerce only.

The court in the Morris Case said that "the ultimate settlement of the question rests with the Supreme Court of the United States; and until that great court decides against the validity of the statute as construed by us, we feel impelled to adhere to our belief that the law is not only beyond criticism from a constitutional standpoint, but is also a reasonable and wise exercise of the police power of the state."

And such statutes refer to sleeping cars as well as to other cars. Alabama & V. R. Co. v. Morris, and Southern R. Co. v. Norton, supra.

Inaction by Congress is equivalent to the declaration that a carrier may by regulation separate its colored and white interstate passengers. Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980.

State statutes which have been or may be construed as applying to intrastate commerce only have been upheld.

Thus, the requirement of separate coaches for white and colored passengers, which is made by a Kentucky Statute, §§ 795–801, does not, at least as applied to carriage wholly within the state, violate the interstate commerce or any other clause of the Federal Constitution, although the line extends beyond the

[401] It is also provided that there shall be no difference or discrimination in the quality of the coaches or cars. A violation of the act is made a misdemeanor.

Interurban electric railroads are subject to the above provisions. We may say in passing that the railway company denies that it is interurban, but admits that the fact has been decided against it and accepts the ruling. It will be considered, therefore, as interurban, and, being so, it was within the law and the charge of the indictment. The charge is that it, the company, at the time designated, "then and there had authority and was authorized to operate a line of railroad 10 miles in length between Covington and Erlanger, and beyond, through and by means of its control, ownership, and lease of and from the Cincinnati, Covington, & Erlanger Railway Company, a corporation organized under the laws of the commonwealth of Kentucky, an interurban railroad company authorized to construct and operate an electric railroad 10 miles in length in this county between Covington and Erlanger and beyond, and incorporated under the general railroad laws of this commonwealth, said defendant then and there operating said line of railroad, the construction of which by the Cincinnati, Covington, & Erlanger Railway Company had theretofore been authorized." And having such authority and control of the line of railroad, the company violated the law of the state by not observing its requirement as to separate coaches.

The defense to the action was, and the contention here is, not that the facts charged are not true, but that the statute, so far as it is attempted to be made applicable to the company, is an interference with interstate commerce, and that the defense was made in the trial court in a motion to dismiss and for a new trial, and also in the court of appeals.

In support of the contention it is stated that the company's principal business was interstate commerce,—the [402] carriage of passengers between Cincinnati and the Kentucky cities across the Ohio river; that the car in question was an ordinary single truck street car solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and a suburb about 5 miles distant, and that 80 per cent of the passengers carried were interstate.

The reply made by the state, and expressed by the court of appeals, to the contention, is that the railway company is a Kentucky corporation and by its charter was given authority "to construct, operate, and manage street railways in the city of Covington and vicinity;" "and along such streets and public highways in the city as the council shall grant the right of way to;" "and along such roads or streets out of the city as the companies or corporations owning the same may

---

state. Ohio Valley R. Co. v. Lander, 104 Ky. 431, 47 S. W. 344, 882.

And Kentucky Statute 1892, § 1, requiring separate coaches for white and colored passengers, was held in Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101, not to contravene the commerce clause of the Federal Constitution, since its constitutionality was sustained by the highest court of the state on the ground that the statute applied only to transportation between points in that state; or, if not, that the regulation of such transportation is severable from that as to interstate business, which decision constitutes a determination of the local law which is binding on the Supreme Court of the United States.

And the separate coach provision of the Oklahoma Act of December 18, 1907, must be construed as applying to transportation wholly intrastate, in the absence of a different construction by the state court, and hence, as not contravening the commerce clause of the Federal Constitution. McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69.

So, too, the Maryland Act of 1904, chap. 109, requiring carriers to provide separate coaches for white and colored passengers, is valid in so far as it affects commerce wholly within the state, but invalid as to interstate passengers, and must be construed as not applying to them. Hart v. State, 100 Md. 595, 60 Atl. 457.

And in State v. Jenkins, 124 Md. 376, 92 Atl. 773, it was held that the Maryland Act of 1908, known as the Jim Crow Law, must be construed to apply only to intrastate passengers, and not to interstate passengers, and hence not to be in conflict with the commerce clause of the Federal Constitution.

And the Mississippi Statute of March 2, 1888, having been settled by the supreme court of that state to apply solely to commerce within that state, the first section of such statute, which requires railroads to provide separate ac-

C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101.

A state statute or regulation which operates upon interstate commerce, or which is interpreted by the state in such a way as to make it operate on interstate commerce, is on the defensive, and to be upheld it must be entirely and affirmatively reasonable. The regulation of interstate commerce is the domain of the Federal government. A state statute which, as interpreted in a given case, regulates or burdens interstate commerce, does not have the presumption in its favor which attends public regulations in general.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Central of Georgia R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 Ann. Cas. 514; Welton v. Missouri, 91 U. S. 282, 23 L. ed. 350; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 154, 41 L. ed. 107, 111, 16 Sup. Ct. Rep. 1096; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 58 L. ed. 857, 34 Sup. Ct. Rep. 564.

Mr. **Stephens L. Blakely** argued the cause, and, with Mr. Charles I. Dawson, Attorney General of Kentucky, filed a brief for defendant in error:

The statute of Kentucky, as applied to the facts in this case, was not an unlawful and unreasonable interference with interstate commerce, in violation of the Federal Constitution.

Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.

Mr. Justice **McKenna** delivered the opinion of the court:

The railway company was indicted for a violation of a statute of Kentucky which required companies or persons running or operating railroads in the state to furnish separate coaches or cars for white and colored passengers.

The statute, as far as we are concerned with it, is as follows: All corporations, companies, or persons "engaged in running or operating any of the railroads of this state, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart." [Ky. Stat. 1915, § 795.]

---

races on railroads is a valid police regulation, and applies both to intrastate and interstate travel. These cases take the position that the question of the validity of such statute, as applied to interstate commerce, is an open one under the decisions of the Supreme Court of the United States, pointing out that in cases where a similar state statute was before the United States Supreme Court, the only question under consideration was that of its validity as to intrastate commerce, the court limiting itself to an affirmance of the validity of the statute as interpreted by the state courts as being applicable to intrastate commerce only.

The court in the Morris Case said that "the ultimate settlement of the question rests with the Supreme Court of the United States; and until that great court decides against the validity of the statute as construed by us, we feel impelled to adhere to our belief that the law is not only beyond criticism from a constitutional standpoint, but is also a reasonable and wise exercise of the police power of the state."

And such statutes refer to sleeping cars as well as to other cars. Alabama & V. R. Co. v. Morris, and Southern R. Co. v. Norton, supra.

Inaction by Congress is equivalent to the declaration that a carrier may by regulation separate its colored and white interstate passengers. Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Chiles v. Chesapeake & O. R. Co. 218 U. S. 71, 54 L. ed. 936, 30 Sup. Ct. Rep. 667, 20 Ann. Cas. 980.

State statutes which have been or may be construed as applying to intrastate commerce only have been upheld.

Thus, the requirement of separate coaches for white and colored passengers, which is made by a Kentucky Statute, §§ 795–801, does not, at least as applied to carriage wholly within the state, violate the interstate commerce or any other clause of the Federal Constitution, although the line extends beyond the

[401] It is also provided that there shall be no difference or discrimination in the quality of the coaches or cars. A violation of the act is made a misdemeanor.

Interurban electric railroads are subject to the above provisions. We may say in passing that the railway company denies that it is interurban, but admits that the fact has been decided against it and accepts the ruling. It will be considered, therefore, as interurban, and, being so, it was within the law and the charge of the indictment. The charge is that it, the company, at the time designated, "then and there had authority and was authorized to operate a line of railroad 10 miles in length between Covington and Erlanger, and beyond, through and by means of its control, ownership, and lease of and from the Cincinnati, Covington, & Erlanger Railway Company, a corporation organized under the laws of the commonwealth of Kentucky, an interurban railroad company authorized to construct and operate an electric railroad 10 miles in length in this county between Covington and Erlanger and beyond, and incorporated under the general railroad laws of this commonwealth, said defendant then and there operating said line of railroad, the construction of which by the Cincinnati, Covington, & Erlanger Railway Company had theretofore been authorized." And having such authority and control of the line of railroad, the company violated the law of the state by not observing its requirement as to separate coaches.

The defense to the action was, and the contention here is, not that the facts charged are not true, but that the statute, so far as it is attempted to be made applicable to the company, is an interference with interstate commerce, and that the defense was made in the trial court in a motion to dismiss and for a new trial, and also in the court of appeals.

In support of the contention it is stated that the company's principal business was interstate commerce,—the [402] carriage of passengers between Cincinnati and the Kentucky cities across the Ohio river; that the car in question was an ordinary single truck street car solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and a suburb about 5 miles distant, and that 80 per cent of the passengers carried were interstate.

The reply made by the state, and expressed by the court of appeals, to the contention, is that the railway company is a Kentucky corporation and by its charter was given authority "to construct, operate, and manage street railways in the city of Covington and vicinity;" "and along such streets and public highways in the city as the council shall grant the right of way to;" "and along such roads or streets out of the city as the companies or corporations owning the same may

---

state. Ohio Valley R. Co. v. Lander, 104 Ky. 431, 47 S. W. 344, 882.

And Kentucky Statute 1892, § 1, requiring separate coaches for white and colored passengers, was held in Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101, not to contravene the commerce clause of the Federal Constitution, since its constitutionality was sustained by the highest court of the state on the ground that the statute applied only to transportation between points in that state; or, if not, that the regulation of such transportation is severable from that as to interstate business, which decision constitutes a determination of the local law which is binding on the Supreme Court of the United States.

And the separate coach provision of the Oklahoma Act of December 18, 1907, must be construed as applying to transportation wholly intrastate, in the absence of a different construction by the state court, and hence, as not contravening the commerce clause of the Federal Constitution. McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69.

So, too, the Maryland Act of 1904, chap. 109, requiring carriers to provide separate coaches for white and colored passengers, is valid in so far as it affects commerce wholly within the state, but invalid as to interstate passengers, and must be construed as not applying to them. Hart v. State, 100 Md. 595, 60 Atl. 457.

And in State v. Jenkins, 124 Md. 376, 92 Atl. 773, it was held that the Maryland Act of 1908, known as the Jim Crow Law, must be construed to apply only to intrastate passengers, and not to interstate passengers, and hence not to be in conflict with the commerce clause of the Federal Constitution.

And the Mississippi Statute of March 2, 1888, having been settled by the supreme court of that state to apply solely to commerce within that state, the first section of such statute, which requires railroads to provide separate ac-

cede the right to the use of." And further, "It may at any time, by agreement, purchase, lease, consolidate with, acquire, hold, or operate any other street railway, or intersect therein, in Covington, Cincinnati, Newport, or vicinity," etc.

The court of appeals further declared that the railway company became in some way the owner of all of the stocks of the Cincinnati, Covington, & Erlanger Railway Company, and that the corporations are operated under the same general management, and "that the elder corporation, operating in the name of the junior, actually constructed its road, and has been operating it from the beginning, being the owner of the cars which are operated upon the road. The motive power is electricity, and is the property of the elder corporation; the cars operated upon the road are such as are ordinarily used upon street railroads, and such as the elder corporation uses upon the street railroads of its system. A fare of 5 cents is charged for passage from any point upon the road of the Cincinnati, Covington, & Erlanger Company, to any point on the system of the South Covington & Cincinnati [**403**] Street Railway Company, and from one point to another upon the entire system of the latter company, and transfers are given for all connecting lines. Many persons who take passage upon the line of the Cincinnati, Covington, & Erlanger Railway Company, at its terminus near Erlanger and at other places along its lines, are transported without change of cars, into Cincinnati, in the state of Ohio, as it connects with the lines of the South Covington & Cincinnati Street Railway Company, at its terminus, in the city of Covington." [181 Ky. 452, 205 S. W. 603.] Separate coaches were not provided as required by the law.

These being the facts, the court of appeals decided that there was no interference with or regulation of interstate commerce. "Each of the termini," the court said, "as well as all the stations of the Cincinnati, Covington, & Erlanger Railway Company's road, is within the state of Kentucky." And it was concluded that "the offense charged and for which the" railway was "convicted was the operation of the railroad, in an unlawful manner, within the state, and in violation of one of the measures enacted under the police powers of the state."

In answer to, and in resistance to, the conclusion of the court, the railway company contends that it operates a railway between designated termini, one being in Kentucky and the other in Ohio, that the price of a fare may be the single one of 5 cents for the complete trip in the same coach taken at or terminating at the respective termini, and that therefore the car and passenger are necessarily interstate. Thus viewed they undoubtedly are, but there are other considerations. There was a distinct operation in Kentucky. An operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A.

---

commodations for white and colored races, is within the power of the state, and is not a regulation of interstate commerce, and so does not violate the commerce clause of the Constitution. Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348. The court distinguished Hall v. DeCuir, supra, stating that the supreme court of the state of Louisiana held that the act under consideration in that case applied to interstate carriers, and required them, when they came within the limits of the state, to receive colored passengers into the cabin set apart for white persons, and so this court (United States Supreme Court), accepting that construction as conclusive, held that the act was a regulation of interstate commerce, and therefore beyond the power of the state. While in the instant case the supreme court of Mississippi held that the statute applied solely to commerce within the state, and that construction, being the construction of the statute of the state by the highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a state, and not interfering with commerce between the states, then obviously there is no violation of the commerce clause of the Federal Constitution. The court added: "So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the state is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the state. No question

1915F, 792, P.U.R.1915A, 231, 35 Sup. Ct. Rep. 158. The [404] regulation of the act affects interstate business incidentally, and does not subject it to unreasonable demands.

The cited case points out the equal necessity, under our system of government, to preserve the power of the states within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty, and an interurban railroad company deriving its powers from the state, and subject to obligations under the laws of the state, should not be permitted to exercise the powers given by the state, and escape its obligations to the state, under the circumstances presented by this record, by running its coaches beyond the state lines. But we need not extend the discussion. The cited case expresses the principle of decision, and marks the limitation upon the power of a state, and when its legislation is or is not an interference with interstate commerce. And regarding its principle, we think, as we have said, the act in controversy does not transcend that limitation.

Judgment affirmed.

Mr. Justice **Day**, dissenting:

If the statute of the state of Kentucky, here involved, as enforced by the decision under review, imposes an unreasonable burden upon interstate commerce, the conviction should be reversed. To determine this question it is necessary to have in mind precisely what the charge was, and the nature of the traffic to which it was applied. The South Covington & Cincinnati Street Railway Company was charged with the offense of unlawfully running and operating a coach or car by electricity on a railroad track within the state of Kentucky, without causing or having a separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters, indicating the race for which it was set apart, and without having its coach or car divided by a good and substantial [405] wooden partition, or other partition, dividing the same into compartments with a door therein, and each separate compartment bearing in some conspicuous place appropriate words in plain letters, indicating the race for which it was set apart.

There is no conflict of testimony, and the record shows that the company was engaged in the operation of a street railway system whose principal business was interstate commerce, carrying passengers between Cincinnati and Kentucky cities across the Ohio river; that the car in question, described in the indictment, was an ordinary single truck street car, seating thirty-two passengers, about 21 feet in length, inside measurement, solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and well-populated territory adjacent thereto, to a point near Fort Mitchell, a suburb, about 5 miles distant. Eighty per cent of the passengers carried were interstate. Not to exceed 6 per cent of the passengers carried at any time were colored, and on a large proportion of the trips no colored passengers were carried.

---

arises under this section as to the power of the state to separate in different compartments interstate passengers, or to affect in any manner the privileges and rights of such passengers. All that we can consider is whether the state has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the state is no invasion of a power given to Congress by the commerce clause."

Justice Harlan, dissenting, in referring to Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547, said: "In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races where such vessels were within the limits of that state. The Mississippi statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races while those trains are within that state. I am unable to perceive how the former is a regulation of interstate commerce and the other is not. It is difficult to understand how a state enactment requiring the separation of the white and black races on interstate carriers of passengers is a regulation of commerce among the states, while a similar enactment forbidding such separation is not a regulation of that character."

The Texas Separate Coach Law of 1891 by its terms applies only to railroad companies, lessees, managers, or receivers "doing business in the state," and is therefore in no manner repugnant to the Federal organic law. Southern Kansas R. Co. v. State, 44 Tex. Civ. App. 218, 99 S. W. 166. See also note to Chesapeake & O. R. Co. v. Kentucky, 45 L. ed. U. S. 244.

The question for determination is: Whether, under such circumstances, the requirement of the statute of the state of Kentucky that railroad companies doing business in that state shall be required to furnish separate coaches and cars for the travel or transportation of white and colored persons or cars, with compartments, as described in the indictment, is constitutional? The nature of the traffic of the South Covington & Cincinnati Street Railway Company was considered by this court in South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R. 1915A, 231, 35 Sup. Ct. Rep. 158, and we held that the traffic between Kentucky and Ohio on the same cars, under the same management, and having a single fare, constituted interstate commerce. See 235 U. S., page 545, and cases cited. In that case we held that an ordinance of the city of Covington, which undertook [406] to determine the number of cars and passengers to be carried in interstate transportation, was invalid as a burden upon interstate commerce; and that, as to certain regulations affecting the safety and welfare of passengers, the ordinance was valid until Congress saw fit to regulate the interstate transportation involved.

It is true that a portion of the transportation involved in the present case is over the track of a railroad company organized under the laws of Kentucky. But that road had no cars, conducted no railroad operations, and its stock was owned and it was operated by the South Covington & Cincinnati Street Railway Company. The car for which the indictment was returned and the conviction had, was operated only in interstate traffic, and whether over one road or the other, such operation was interstate commerce, and plainly within the authority of Congress. In the absence of congressional regulation the state had power to make reasonable rules, not burdening interstate commerce, which should be enforced until Congress otherwise enacted.

The question in this case, then, is: Was the application of this statute a reasonable regulation? The traffic consists in running a single car, of the character already described, from Fountain square, Cincinnati, a distance of about 6 miles, to Fort Mitchell, a suburb of South Covington, Kentucky. How could this separate car or compartment statute be complied with? It is first suggested a separate car could be put on for the accommodation of colored passengers for the distance of the intrastate run on the Kentucky side of the river. In view of the nature of the transportation and the meager patronage, compared with the expense of such an undertaking, this method would be impracticable without interrupting travel and entailing a great loss upon the company. Secondly, it is suggested, and this seems to be the weight of the argument, that cars could be constructed with a separate compartment for the few colored [407] persons who ride in the car after it reaches or before it leaves Kentucky. It is admitted that this regulation would not apply to interstate passengers, and colored passengers going from Kentucky to Cincinnati, or going from Cincinnati to Kentucky on a through trip, would not be subject to the regulation. The few colored passengers traveling exclusively in the state of Kentucky in this car would thus be discriminated against by reason of the different privilege accorded to other colored passengers on the same car,—a condition not likely to promote the peace or public welfare.

As this transportation is also subject to regulation in the state of Ohio (see Ohio Gen. Code, § 12,940), and as, by the laws of that state, no such separation of passengers is permitted, it follows that upon the same trip the traffic would be the subject of conflicting regulations, calculated to be destructive of the public policy which it is supposed to be the design of this statute to promote,—a condition which we said in South Covington & C. Street R. Co.'s Case, supra, would breed confusion greatly to the detriment of interstate traffic.

This case is quite different from Chesapeake & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. Rep. 101, in which the statute now under consideration was before the court, and wherein it was held that the law was valid when applied to a carrier operating an interstate road. The act was held to be separable, and capable of being complied with within the state by attaching a car for passengers traveling only within the state. That case presented quite a different situation from the operation of the single street car here involved.

The present indictment is for running an ordinary street car upon an interstate journey of only about 6 miles, with 80 per cent of its travel interstate, and not over 6 per cent of the passengers colored, and on many trips no colored passengers at all. As we have indicated, the attachment of the additional car upon the Kentucky side on so short a [408] journey

would burden interstate commerce as to cost and in the practical operation of the traffic. The provision for a separate compartment for the use of only intrastate colored passengers would lead to confusion and discrimination. The same interstate transportation would be subject to conflicting regulation in the two states in which it is conducted.

It seems to me that the statute in question, as applied to the traffic here involved, is an unreasonable regulation and burdensome to interstate commerce, and, therefore, beyond the power of the state. I think the judgment should be reversed.

Mr. Justice **Van Devanter** and Mr. Justice **Pitney** concur in this dissent.

CINCINNATI, COVINGTON, & ERLANGER RAILWAY COMPANY, Plff. in Err.,

v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 408-411.)

Commerce — state regulation — interurban electric railways — separate coach law.

Interstate traffic over a Kentucky interurban electric railway may be subjected to the operation of a statute of that state requiring separate coaches, or separate compartments in the same coach, for white and negro passengers, without unlawfully interfering with interstate commerce.

[For other cases, see Commerce, III. a, in Digest Sup. Ct. 1908.]

[No. 253.]

Argued March 18 and 19, 1920. Decided April 19, 1920.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Kenton County, in that state, convicting an interurban railway company of violating the Separate Coach Law. Affirmed.

See case below, 181 Ky. 449, 205 S. W. 603.

The facts are stated in the opinion.

Mr. **Alfred C. Cassatt** argued the cause, and, with Messrs. J. C. W. Beckham, Richard P. Ernst, and Frank W. Cottle, filed a brief for plaintiff in error.

Mr. **Stephens L. Blakely** argued the cause, and, with Mr. Charles I. Dawson, Attorney General of Kentucky, filed a brief for defendant in error.

For contentions of counsel, see their briefs as reported in South Covington & C. Street R. Co. v. Kentucky, ante, 631.

Mr. Justice **McKenna** delivered the opinion of the court:

This case was argued with No. 252, South Covington & C. Street R. Co. v. Kentucky [252 U. S. 399, ante, 631, 40 Sup. Ct. Rep. 378]. It was disposed of by the court of appeals with that case in one opinion. The company was indicted, as the other company was, for a violation of the Separate Coach Law of the state, and found guilty. The facts are in essence the same as in the other case, though the indictment is more elaborate. The defenses and contentions are the same. We have stated them, and upon what they are based, and the character and relation of the companies, in our opinion in the other case.

The company is an interurban road and the Separate Coach Law is applicable to it. It was incorporated under the general laws of the state, and authority conferred upon it to construct and operate an electric railway from the city of Covington to the town of Erlanger, and to such further point beyond Erlanger as might be determined. It was constructed from Covington to a point just beyond the suburban town called Fort Mitchell,—a town of a few hundred inhabitants.

The South Covington & Cincinnati Street Railway Company furnished the means to build the road, and at the time covered by the indictment was operating the road as part of its railway system, as described in the other case.

The intimate relations of the roads, as stated by the court of appeals, we have set forth in the other case, and it is only necessary to add that the indictment in the present case charges that the company in this case was [**410**] the lessor of the other company, and "thereby permitted and brought about the acquisition of its rights and privileges knowing that" the other company "would not operate and run separate coaches for its white and colored passengers." And it is charged that the other company operating the lease violated the law, and that the defendant company, knowing of the intended method of operation, also violated the law. These facts and other

NOTE.—As to separating white and negro passengers as interference with interstate commerce—see note to South Covington & C. Street R. Co. v. Kentucky, ante, 631.

facts the court of appeals decided made the company an offender against the statute, and decided further that the statute was not an interference with interstate commerce. The conviction of the company was sustained.

Our reviewing power, we think, is limited to the last point; that is, the effect of the law as an interference with interstate commerce, and that we disposed of in the other case. The distinction counsel make between street railways and other railways, and between urban and interurban roads, we are not concerned with.

Judgment affirmed.

Mr. Justice **Day**, dissenting:

This case is controlled by the disposition made of No. 252 [252 U. S. 399, ante, 631, 40 Sup. Ct. Rep. 378.] While it is true that the Erlanger Company was incorporated under the laws of the state of Kentucky, the proof shows that its road was built and operated by the South Covington & Cincinnati Street Railway Company as part of the latter's system. This is not a proceeding to test the right to operate the road. The conviction is justified because the local company permitted the principal company to operate without separate coaches or compartments for its colored passengers. The traffic conducted is of an interstate nature, and the same reasons which impel a dissent in No. 252 require a like dissent in the presnt case.

In my opinion the single traffic over both railroads being [411] interstate, the regulation embodied in the statute, and for which the conviction was had, as to both roads, is an unreasonable and burdensome interference with interstate commerce.

Mr. Justice **Van Devanter** and Mr. Justice **Pitney** concur in this dissent.

THOMAS P. KENNEY, Administrator of the Estate of Donald A. Kenney, Petitioner and Plff. in Err.,

v.

SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE.

(See S. C. Reporter's ed. 411-416.)

Judgment — full faith and credit — case not within jurisdiction.

1. The fact that the original cause of action could not have been maintained in the courts of a state is not an answer to a suit upon a judgment rendered by a court of another state.

[For other cases, see Judgment, VI. b, 4, in Digest Sup. Ct. 1908.]

Judgment — full faith and credit — duty to enforce foreign judgment.

2. The constitutional obligation of a state to give full faith and credit to the judgments of courts of other states cannot be escaped by the simple device of denying jurisdiction in such cases to courts otherwise competent.

[For other cases, see Judgment, VI. b, 4, in Digest Sup. Ct. 1908.]

Judgment — full faith and credit — duty to enforce foreign judgment.

3. A state statute providing that no action shall be brought or prosecuted in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct contravenes the full faith and credit clause of the Federal Constitution when construed by the state courts as forbidding the maintenance of an action upon a judgment recovered in a court of another state, in conformity with the laws of that state, for negligently causing the death of plaintiff's intestate in that state.

[For other cases, see Judgment, VI. b, 4, in Digest Sup. Ct. 1908.]

Error to state court — error or certiorari.

4. Writ of error, not certiorari, is the proper mode of reviewing, in the Federal Supreme Court, a judgment of the highest court of a state upholding a state statute

---

Note.—As to full faith and credit to be given to state records and judicial proceedings—see notes to Lindley v. O'Reilly, 1 L.R.A. 79; Cummington v. Belchertown, 4 L.R.A. 131; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 578; Rand v. Hanson, 12 L.R.A. 574; Mills v. Duryee, 3 L. ed. U. S. 411; Darby v. Mayer, 6 L. ed. U. S. 367; D'Arcy v. Ketchum, 13 L. ed. U. S. 648; and Huntington v. Attrill, 36 L. ed U. S. 1123.

On review of decisions of state courts presenting questions of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

As to questions of local practice and procedure on writ of error from Federal Supreme Court to a state court—see note to Texas & N. O. R. Co. v. Miller, 55 L. ed. U. S. 790.

On extraterritorial effect of statute limiting jurisdiction in which action may be brought—see note to Tennessee Coal, Iron & R. Co. v. George, L.R.A.1916D, 688.

And see note to this case in Illinois supreme court, as reported in 4 A.L.R. 968.

challenged as repugnant to the Federal Constitution.

[For other cases, see Appeal and Error, 1645–1672, in Digest Sup. Ct. 1908.]

[Nos. 269 and 303.]

Argued March 23, 1920. Decided April 19, 1920.

ON WRIT of Certiorari and IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court for Kane County in that state in favor of defendant in an action brought to enforce a judgment recovered in Alabama for negligently causing the death of plaintiff's intestate in that state. Writ of certiorari dismissed. Judgment reversed on writ of error.

See same case below, 285 Ill. 188, 4 A.L.R. 964, 120 N. E. 631.

The facts are stated in the opinion.

Mr. Griffeth R. Harsh argued the cause and filed a brief for petitioner and plaintiff in error:

A judgment of a sister state must be given the same effect it has in the state where rendered.

Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Stewart v. Stewart, 27 W. Va. 167.

Whenever a cause of action, in the language of the law, transit in rem judicatam, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever.

Hamer v. New York R. Co. 244 U. S. 272, note 1, 61 L. ed. 1129, note 1, 37 Sup. Ct. Rep. 514, note, 1; 15 R. C. L. 782; Fletcher v. Brown, 220 U. S. 611, 55 L. ed. 609, 31 Sup. Ct. Rep. 715, 105 C. C. A. 425, 182 Fed. 963.

This attempt of the Illinois legislature violated the full faith and credit clause of the United States Constitution, and was therefore void.

Dodge v. Coffin, 15 Kan. 277; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Fauntleroy v. Lum, 210 U. S. 230, 236, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641; Beal v. Carpenter, 148 C. C. A. 633, 235 Fed. 273.

The interpretation of Illinois statutes is for the courts of Illinois; but if, when so interpreted (which is then their true meaning), they deny a right guaranteed by the Constitution of the United States, as interpreted by the courts of the United States, then they must be held invalid.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126; Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; General Oil Co. v. Crain, 209 U. S. 224, 52 L. ed. 763, 28 Sup. Ct. Rep. 475; Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

Mr. E. J. Henning argued the cause, and, with Mr. Ralph C. Putnam, filed a brief for respondent and defendant in error:

The matter sought to be reviewed by this court can only be considered upon writ of certiorari, and not by writ of error.

Philadelphia & R. Coal & I. Co. v. Gilbert, 245 U. S. 162, 62 L. ed. 221, 38 Sup. Ct. Rep. 58; Bruce v. Tobin, 245 U. S. 18, 62 L. ed. 123, 38 Sup. Ct. Rep. 7; Ireland v. Woods, 246 U. S. 327, 62 L. ed. 749, 38 Sup. Ct. Rep. 319; Northern P. R. Co. v. Solum, 247 U. S. 477, 62 L. ed. 1221, 38 Sup. Ct. Rep. 550.

The assignments of error are too general, and no alleged error is specifically designated.

Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

A state court is free to determine its own jurisdiction absolutely, without reference to the full faith and credit clause of the Federal Constitution.

Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; Walton v. Pryor, 276 Ill. 563, L.R.A.1918E, 914, 115 N. E. 2, 16 N. C. C. A. 191; Dougherty v. American-McKenna Process Co. 255 Ill. 369, L.R.A.1915F, 955, 99 N. E. 619, Ann. Cas. 1913D, 568; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641.

Where an action is brought upon a judgment of a sister state the court may always examine the nature of the cause of action upon which the judgment is founded, for the purpose of determining if it would have jurisdiction of the real subject-matter of the action, and if it appears that the court would not have jurisdiction of the original action, it will not have jurisdiction of an action on the judgment.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641; Carpenter v. Beal-McDonell & Co. 222

Fed. 453; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; Oklahoma ex rel. West v. Gulf, C. & S. F. R. Co. 220 U. S. 290, 55 L. ed. 469, 31 Sup. Ct. Rep. 437, Ann. Cas. 1912C, 524.

The provision of Ill. Rev. Stat. chap. 70, § 2, that no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state, is a jurisdictional provision.

Walton v. Pryor, 276 Ill. 563, L.R.A. 1918E, 914, 115 N. E. 2, 16 N. C. C. A. 191; Dougherty v. American McKenna Process Co. 225 Ill. 369, L.R.A.1915F, 955, 99 N. E. 619, Ann. Cas. 1913D, 568.

This provision is constitutional, and does not violate the full faith and credit clause of the Federal Constitution, or the clause entitling the citizens of each state to all the privileges and immunities of the citizens of the several states.

Ibid.: Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34.

The provision of the Alabama statute that an action for death by wrongful act shall be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere, is jurisdictional, and no court outside of the state of Alabama has jurisdiction of the subject-matter of such an action.

40 Cyc. 28, 46, 81, 87; 22 Enc. Pl. & Pr. 786; Eachus v. Illinois & M. Canal, 17 Ill. 534; Ellenwood v. Marietta Chair Co. 158 U. S. 105, 39 L. ed. 913, 15 Sup. Ct. Rep. 771; Reynolds v. Day, 79 Wash. 499, L.R.A.1916A, 432, 140 Pac. 681, 5 N. C. C. A. 814; Coyne v. Southern P. Co. 155 Fed. 683; 12 C. J. 441; Southern P. Co. v. Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766; Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376.

Mr. Justice Holmes delivered the opinion of the court:

This is an action of debt, brought in Illinois upon a judgment recovered in Alabama. The defendant pleaded [414] to the jurisdiction that the judgment was for negligently causing the death of the plaintiff's intestate in Alabama. The plaintiff demurred to the plea, setting up article 4, §§ 1 and 2 of the Constitution of the United States. A statute of Illinois provided that no action should be brought or prosecuted in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct. The supreme court of Illinois held that as, by the terms of the statute, the original action could not have been brought there, the Illinois courts had no jurisdiction of a suit upon the judgment. The circuit court of Kane county having ordered that the demurrer be quashed, its judgment was affirmed. 285 Ill. 188, 4 A.L.R. 964, 120 N. E. 631.

In the court below and in the argument before us reliance was placed upon Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92, and language in Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, the former as showing that the clause requiring full faith and credit to be given to judgments of other state does not require a state to furnish a court, and the latter as sanctioning an inquiry into the nature of the original cause of action in order to determine the jurisdiction of a court to enforce a foreign judgment founded upon it. But we are of opinion that the conclusion sought to be built upon these premises in the present case cannot be sustained.

Anglo-American Provision Co. v. Davis Provision Co. was a suit by a foreign corporation on a foreign judgment against a foreign corporation. The decision is sufficiently explained without more by the views about foreign corporations that had prevailed unquestioned since Bank of Augusta v. Earle, 13 Pet. 579, 589–591, 10 L. ed. 303, 308, 309, cited 191 U. S. 375, 48 L. ed. 227, 24 Sup. Ct. Rep. 92. Moreover, no doubt there is truth in the proposition that the Constitution does not require the state to furnish a court. But it also is true that there are limits to the power of exclusion and to the power to consider the nature of [415] the cause of action before the foreign judgment based upon it is given effect.

In Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1030, 28 Sup. Ct. Rep. 641, it was held that the courts of Mississippi were bound to enforce a judgment rendered in Missouri upon a cause of action arising in Mississippi, and illegal and void there. The policy of Mississippi was more actively contravened in that case than the policy of Illinois is in this. Therefore the fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment. See Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292. But this being true, it is plain that a state cannot escape its constitutional obligations by the sim-

ple device of denying jurisdiction in such cases to courts otherwise competent. The assumption that it could not do so was the basis of the decision in International Textbook Co. v. Pigg, 217 U. S. 91, 111, 112, 54 L. ed. 678, 687, 688, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, and the same principle was foreshadowed in General Oil Co. v. Crain, 209 U. S. 211, 216, 220, 228, 52 L. ed. 754, 758, 761, 764, 28 Sup. Ct. Rep. 475, and in Fauntleroy v. Lum, 210 U. S. 230, 235, 236, 52 L. ed. 1039, 1041, 1042, 28 Sup. Ct. Rep. 641. See Keyser v. Lowell, 54 C. C. A. 574, 117 Fed. 400; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34, and cases cited. Whether the Illinois statute should be construed as the Mississippi act was construed in Fauntleroy v. Lum was for the supreme court of the state to decide; but read as that court read it, it attempted to achieve a result that the Constitution of the United States forbade.

Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of competent jurisdiction within the state, "and not elsewhere." But when the cause of action is created, the invalidity of attempts to limit the jurisdiction of other states to enforce it has been established by the decisions of this court. Tennessee Coal, I. & R. Co. v. Georgia, 233 U. S. 354, 58 L. ed. 997, L.R.A.1916D, 685, 34 Sup. Ct. Rep. 587; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; and had these decisions been otherwise, [416] they would not have imported that a judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister state.

As the judgment below upheld a statute that was invalid as construed, the writ of error was the proper proceeding, and the writ of certiorari must be dismissed.

Judgment reversed.

STATE OF MISSOURI, Appt.,
v.
RAY P. HOLLAND, United States Game Warden.

(See S. C. Reporter's ed. 416–435.)

States — suit by — necessary interest.

1. A suit by a state to enjoin a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act and the regulation made by the Secretary of Agriculture in pursuance thereof on the ground that the statute is an unconstitutional interference with the reserved rights of the states, and that acts of the defendant, done and threatened under that authority, invade the sovereign rights of the state and contravene its will manifested in statutes, is a reasonable and proper means to assert the alleged quasi sovereign rights of the state.

[For other cases, see States, IX. a, in Digest Sup. Ct. 1908.]

Treaties — validity — infringement of state rights — migratory birds.

2. The rights of the several states are not unconstitutionally infringed by the Migratory Bird Treaty of December 8, 1916, and the Act of July 3, 1918, enacted to give effect to such treaty, under which the killing, capturing, or selling any of the migratory birds included in the terms of the treaty are prohibited except as permitted by regulations compatible with those terms to be made by the Secretary of Agriculture.

[For other cases, see Treaties, I. in Digest Sup. Ct. 1908.]

[No. 609.]

Argued March 2, 1920. Decided April 19, 1920.

APPEAL from the District Court of the United States for the Western District of Missouri to review a decree dismissing a suit brought by the state of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act, and regulations made by the Secretary of Agriculture in pursuance of that act. Affirmed.

See same case below, 258 Fed. 479.

The facts are stated in the opinion.

Messrs. **J. G. L. Harvey** and **John T. Gose** argued the cause, and, with Mr. Frank W. McAllister, Attorney General of Missouri, filed a brief for appellant:

If an executive officer, Federal or state, is committing, or is about to commit, acts unauthorized by or in violation of law, to the irreparable injury of the

---

Note.—On suit against Federal officer or agent as suit against United States—see notes to Louisiana v. Garfield, 53 L. ed. U. S. 92, and Wells v. Roper, 62 L. ed. U. S. 756.

As to injunction to restrain acts of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

On construction and operation of treaties—see note to United States v. The Amistad, 10 L. ed. U. S. 826.

On relation of treaty to state and Federal law—see note to Trott v. State, 4 A.L.R. 1377.

property rights of another, such action or threatened action is good ground for injunctive relief against such officer.

Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 56 L. ed. 570, 576, 32 Sup. Ct. Rep. 340; Magruder v. Belle Fourche Valley Water Users' Asso. 133 C. C. A. 524, 219 Fed. 79; Noble v. Union River Logging R. Co. 147 U. S. 165, 172, 37 L. ed. 123, 126, 13 Sup. Ct. Rep. 271; School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Dobbins v. Los Angeles, 195 U. S. 241, 49 L. ed. 177, 25 Sup. Ct. Rep. 18; Truax v. Raich, 239 U. S. 37, 60 L. ed. 133, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Lane v. Watts, 234 U. S. 525, 540, 58 L. ed. 1440, 1456, 34 Sup. Ct. Rep. 965; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 217, 47 L. ed. 780, 23 Sup. Ct. Rep. 498; Ex parte Young, 209 U. S. 162, 52 L. ed. 730, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

In a suit of the character of the one at bar, mere property rights and loss of revenue, however, are not the chief consideration. Rights are involved which may not be valued in money, but the infraction of which the state may insist shall be stopped. An adequate remedy can only be had in a suit by the state to enjoin such infraction.

Georgia v. Tennessee Copper Co. 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488; Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; Glenwood Light & Water Co. v. Mutual Light, Heat & P. Co. 239 U. S. 121, 60 L. ed. 174, 36 Sup. Ct. Rep. 30.

Our government had no prototype in history. The Federal government and the states are separate and distinct sovereignties. The one, within the sphere of its delegated powers, is supreme; the other, within the sphere of its undelegated and reserved powers, is no less supreme. It was never intended that the states should be shorn of their sovereignty in internal affairs.

Collector v. Day (Buffington v. Day) 11 Wall. 113, 124, 20 L. ed. 122, 125; Lane County v. Oregon, 7 Wall. 71, 76, 19 L. ed. 101, 104; Gordon v. United States, 117 U. S. 697, 705; Martin v. Hunter, 1 Wheat. 325, 4 L. ed. 102; United States ex rel. Turner v. Williams, 194 U. S. 279, 295, 48 L. ed. 979, 986, 24 Sup. Ct. Rep. 719; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; 1 Willoughby, Const. p. 66; South Carolina v. United States, 199 U. S. 447, 50 L. ed. 264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

Under the ancient law, feudal law, and the common law in England, the absolute control of wild game was an attribute of government and a necessary incident of sovereignty. When, therefore, the United Colonies became free and independent states, with full power to do all acts and things which independent states may of right do, the power to control the taking of wild game passed to the states.

Geer v. Connecticut, 161 U. S. 519, 523, 530, 40 L. ed. 794, 797, 16 Sup. Ct. Rep. 600; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076.

Missouri, upon her admission to the Union, became entitled to and possessed of all the rights and dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. Equality of constitutional right and power is the condition of all the states of the Union, old and new.

Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185; Ward v. Race Horse, 163 U. S. 504, 513, 41 L. ed. 244, 247, 16 Sup. Ct. Rep. 1076; Cardwell v. American River Bridge Co. 113 U. S. 205, 212, 28 L. ed. 959, 961, 5 Sup. Ct. Rep. 423; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Pollard v. Hagan, 3 How. 212, 11 L. ed. 565; Withers v. Buckley, 20 How. 84, 92, 15 L. ed. 816, 819; Permoli v. New Orleans, 3 How. 589, 11 L. ed. 739.

This power of the state over wild game within its borders, which cannot be questioned and will not be gainsaid, is derived from the peculiar nature of such property and its common ownership by all the citizens of the state in their collective sovereign capacity. The state, in its sovereign capacity, is the representative of the people in their common ownership of the wild game within the borders of the state, and holds the same in trust for the benefit of all its people.

Geer v. Connecticut, 161 U. S. 519, 529, 530, 40 L. ed. 793, 797, 16 Sup. Ct. Rep. 600; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Martin v. Waddell, 16 Pet. 410, 10 L. ed. 1012; United States v. Shauver, 214 Fed. 154; United States v. McCullagh, 221 Fed. 294; Rupert v. United States, 104 C. C. A. 256, 181 Fed. 90; Magner v. People, 97 Ill. 333; Gentile v. State, 29 Ind. 417; Ex

parte Maier, 103 Cal. 483, 42 Am. St. Rep. 129, 37 Pac. 402; Chambers Bros. v. Church, 14 R. I. 400, 51 Am. Rep. 410; Manchester v Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; The Abby Dodge, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310; Smith v. Maryland, 18 How. 72, 15 L. ed. 270; Carey v. South Dakota, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Re Deininger, 108 Fed. 623; Heim v. McCall, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, Ann. Cas. 1917B, 287.

The power of the state over wild game within its borders is not dependent solely upon the authority which the state derives from common ownership and the trust for the benefit of the people; the power of the state to control wild game is a necessary incident of the power of police. The power of police is an attribute of state sovereignty.

Geer v. Connecticut, 161 U. S. 519, 534, 40 L. ed. 793, 798, 16 Sup. Ct. Rep. 600; New York v. Miln, 11 Pet. 102, 132, 133, 9 L. ed. 648, 659, 660; Pierce v. State, 13 N. H. 576; New York ex rel. Cutler v. Dibble, 21 How. 366, 16 L. ed. 149; Federalist, No. XLV. (Hallowell, 1852) pp. 215, 216; Compagnie Francaise De Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; Groves v. Slaughter, 15 Pet. 449, 511, 10 L. ed. 800, 823; Prigg v. Com. 16 Pet. 539, 625, 10 L. ed. 1060, 1092; Com. v. Alger, 7 Cush. 84; Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 33, 24 L. ed. 989, 992; Rupert v. United States, 104 C. C. A. 255, 181 Fed. 90; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Re Raher, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; House v. Mayes, 219 U. S. 270, 281, 282, 55 L. ed. 213, 217, 218, 31 Sup. Ct. Rep. 234; Brodnax v. Missouri, 219 U. S. 292, 293, 55 L. ed. 223, 224, 31 Sup. Ct. Rep. 238; New York ex rel. Kennedy v. Becker, 241 U. S. 556, 60 L. ed. 1166, 36 Sup. Ct. Rep. 705; Cantini v. Tillman, 54 Fed. 969; Plumley v. Massachusetts, 155 U. S. 461, 473, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

Upon the authority and principles of the cases hereinbefore cited, it has been held that a prior act of Congress, approved March 4, 1913,—which act is similar to the one now in question, save that it was not made in aid of any treaty,—was unconstitutional and void.

United States v. Shauver, 214 Fed. 154; United States v. McCullagh, 221 Fed. 288.

The fact that the present act of Congress purports to give effect to a treaty between the United States and Great Britain cannot validate such act of Congress when its effect is not only to accomplish that which, under the Constitution, Congress has no power to do, but also to do that which is forbidden to the entire Federal government in all or any of its departments, under the terms of the Constitution. Any and every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all departments of the government, can bind the government to do that which the Constitution forbids.

The Federalist, pp. 144, 145, 215, 216; Works of Calhoun, vol. 1, 203, 204, pp. 249, 250, 252, 253; Geofroy v. Riggs, 133 U. S. 258, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295; People ex rel. Atty. Gen. v. Gerke, 5 Cal. 383; 2 Tucker, Const. pp. 725, 726; George v. Pierce, 85 Misc. 105, 148 N. Y. Supp. 237; Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 51 La. Ann. 662, 56 L.R.A. 795, 72 Am. St. Rep. 458, 25 So. 591, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; Cantini v. Tillman, 54 Fed. 969; 1 Butler, Treaty-Making Power, p. 64; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 663, 22 L. ed. 455, 461; Story, Const. § 1508; Duer, Lectures on Const. Jur. of U. S. 2d ed. p. 228; Cooley, Const. Law, p. 117; Von Holst, Const. Law of U. S. p. 202; 1 Thayer, Cases on Const. Law, p. 373; Coeke, Const. History of U. S. p. 235; Jefferson, Manual of Parliamentary Practice, p. 110, note 3; 3 Elliot, Debates, pp. 504, 507; Cherokee Tobacco, 11 Wall. 616, 20 L. ed. 227; Siemssen v. Bofer, 6 Cal. 250; People ex rel. Atty. Gen. v. Naglee, 1 Cal. 246, 52 Am. Dec. 312; 8 Ops. Atty. Gen. 411, 415; Kansas v. Colorado, 206 U. S. 46, 80, 51 L. ed. 956, 962, 27 Sup. Ct. Rep. 655; Murphy v. Ramsey, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Jones v. Meehan, 175 U. S. 1, 32, 44 L. ed. 49, 61, 20 Sup. Ct. Rep. 1; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; 2 Butler, Treaty Making Power, pp. 350,

352; Seneca Nation v. Christie, 126 N. Y. 122, 27 N. E. 275; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Pierce v. State, 13 N. H. 576; Cooley, Const. Lim. 7th ed. p. 11; Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102; Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792.

The Federal government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied; they are to be obtained, if obtained at all, from, and in the manner provided by, those who originally granted the enumerated powers, but who, at the same time, denied other powers,—the people.

Barron v. Baltimore, 7 Pet. 243, 247, 8 L. ed. 672, 674; Kansas v. Colorado, 206 U. S. 46, 89, 90, 51 L. ed. 956, 971, 972, 27 Sup. Ct. Rep. 655; United States v. Shauver, 214 Fed. 156; Holden v. Joy, 17 Wall. 243, 21 L. ed. 534; United States v. Rhodes, 1 Abb. (U. S.) 43, Fed. Cas. No. 16,151; Fairbank v. United States, 181 U. S. 283, 288, 45 L. ed. 862, 865, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

Among those powers denied to the Federal government until secured by amendment are those which are reserved to the states respectively or to the people. These reserved powers include those over purely internal affairs which concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state. Without exception wild game has been held to be a part of this mass which is within the exclusive and absolute power of the state. When the power of the states over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

Downes v. Bidwell, 182 U. S. 244, 312, 313, 369, 370, 45 L. ed. 1088, 1116, 1117, 21 Sup. Ct. Rep. 770; Pierce v. State, 13 N. H. 576; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; South Carolina v. United States, 199 U. S. 447, 451, 50 L. ed. 264, 265, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Collector v. Day (Buffington v. Day) 11 Wall. 125, 127, 20 L. ed. 122, 126; Tucker, Limitations on Treaty-making Power, 92, 93, 129, 130; Geofroy v. Riggs, 133 U. S. 258, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295; George v. Pierce, 85 Misc. 105, 148 N. Y. Supp. 237; 2 Tucker, Const. pp. 726, 727; Federalist, p. 145; People ex rel. Atty. Gen. v. Gerke, 5 Cal. 383.

Those who maintain that the reserved powers of the states are subject to treaties, and may be taken from the states respectively, or the people, by means of a convention with some foreign power, rest their position upon the assertion that a treaty is the supreme law of the land. If a treaty be the supreme law of the land, it has become so by construction, for the Constitution, as ratified by the people, made the supreme law of the land to consist of three things: 1st, the Constitution; 2d, the laws of the United States which shall be made in pursuance thereof; 3d, all treaties made or which shall be made under the authority of the United States. The Constitution is the godhead of this trinity. It yields to neither law nor treaty, nor anything else save and alone the sovereign will of its creator,—the people. The powers reserved to the states respectively or to the people are, under this Constitution, as sacred as the power to make treaties. Are they not even more so, since they are the object of specific reservation, and necessarily limit or restrict the general grant of power made to the treaty-making department of the government?

Hamilton's Works, vol. 4, p. 342; Cooley, The Forum, June, 1893, p. 397; Von Holst, Const. Law of U. S. p. 202; Duer, Lectures on Const. Jur. of U. S. 2d ed. p. 228; Tucker, Limitations on Treaty-making Power, pp. 21, 22, 86, 87, 93, 94, 128, 129, 135, 136, 139; People ex rel. Atty. Gen. v. Naglee, 1 Cal. 247, 52 Am. Dec. 312; Cocke, Const. History of U. S. p. 235; 5 Moore, Int. Law Dig. p. 168; Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 51 La. Ann. 645, 56 L.R.A. 795, 72 Am. St. Rep. 458, 25 So. 591, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811, 1 Butler, Treaty Making Power, p. 63, § 37, and note; Benjamin Harrison, North American Review, Jan. 1901, p. 110; Story, Const. 5th ed. pp. 217, 220; 2 Thorpe, Const. History, chap. 6, p. 199; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 663, 22 L. ed. 455, 461; Jefferson, Manual of Parliamentary Practice, p. 110, note 3; 4 Elliot, Debates, p. 464; Geofroy v. Riggs, 133 U. S. 266, 267, 33 L. ed. 644, 645, 10 Sup. Ct. Rep. 295.

Mr. Richard J. Hopkins, Attorney General of Kansas, and Mr. Samuel W. Moore, filed a brief as amici curiæ in behalf of the state of Kansas:

Every state possesses the absolut-

right to deal as it may see fit with property held by it, either as proprietor, or in its sovereign capacity as a representative of the people; and this right is paramount to the exercise by the national government of its legislative or treaty-making power.

State v. Heger, 194 Mo. 707, 93 S. W. 252; State v. McCullagh, 96 Kan. 786, — A.L.R. —, 153 Pac. 557; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; The Abby Dodge, 223 U. S. 166, 174, 56 L. ed. 390, 392, 32 Sup. Ct. Rep. 310; Geer v. Connecticut, 161 U. S. 519, 522, 528, 40 L. ed. 793, 794, 796, 16 Sup. Ct. Rep. 600; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; United States v. McCullagh, 221 Fed. 288; United States v. Shauver, 214 Fed. 154; New York ex rel. Kennedy v. Becker, 241 U. S. 556, 60 L. ed. 1166, 36 Sup. Ct. Rep. 705; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Smith v. Maryland, 18 How. 71, 75, 15 L. ed. 269, 271; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Carey v. South Dakota, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403.

The constitutional limitation prohibiting a state, without the consent of Congress, from entering into any agreement or compact with any state or with a foreign power, prohibits the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States. It has no application to agreements or compacts which a state may make in the control and regulation of its own property or property rights.

Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669, 14 Sup. Ct. Rep. 783; Virginia v. Tennessee, 148 U. S. 504, 37 L. ed. 538, 13 Sup. Ct. Rep. 728.

The treaty-making power conferred upon the President and Senate does not include the right to regulate and control the property and property rights of an individual state, held by it in its quasi-sovereign capacity.

Story, Const. § 1403; Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669, 14 Sup. Ct. Rep. 783; Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728; Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; 38 Cyc. 966.

The lack of legislative power in Congress to devest a state of its property right and control over the wild game within its borders cannot be supplied by making a treaty with Great Britain.

Rawle, Const. p. 66; Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; United States v. Lee Yen Tai, 185 U. S. 213, 220, 46 L. ed. 878, 882, 22 Sup. Ct. Rep. 629.

The treaty-making power of the national government is limited by other provisions of the Constitution, including the 10th Amendment. It cannot, therefore, devest a state of its police power, or take away its ownership or control of its wild game.

2 Whart. Int. Law Dig. ¶ 131a; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Pierce v. State, 13 N. H. 576; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Heim v. McCall, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, Ann. Cas. 1917B, 287; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Cantini v. Tillman, 54 Fed. 969; Leong Mow v. Commissioners for Protection of Birds, Game & Fish, 185 Fed. 223; Re Wong Yung Quy, 6 Sawy. 442, 2 Fed. 624; Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 51 La. Ann. 645, 56 L.R.A. 795, 72 Am. St. Rep. 458, 25 So. 591, affirmed in 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; New York ex rel. Kennedy v.

Becker, 241 U. S. 556, 60 L. ed. 1166, 36 Sup. Ct. Rep. 705; George v. Pierce, 85 Misc. 105, 148 N. Y. Supp. 230; Bondi v. MacKay, 87 Vt. 271, 89 Atl. 228, Ann. Cas. 1916C, 130; Downes v. Bidwell, 182 U. S. 318, 45 L. ed. 1118, 21 Sup. Ct. Rep. 796; Passenger Cases, 7 How. 283, 12 L. ed. 702; Holmes v. Jennison, 14 Pet. 616, 10 L. ed. 619; Tucker, Limitations on Treaty-making, p. 339; House v. Mayes, 219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234.

The treaty in this case does not, by its terms, purport to create a closed season between December 31st and March 10th. Its executory agreement to pass future legislation covering this period is not the supreme law of the land, and cannot have the effect of giving validity to an unconstitutional act.

Whitney v. Robertson, 124 U. S. 190, 194, 31 L. ed. 386, 388, 8 Sup. Ct. Rep. 456; Turner v. American Baptist Missionary Union, 5 McLean, 347, Fed. Cas. No. 14,251.

Solicitor General **King** and Assistant Attorney General **Frierson** argued the cause and filed a brief for appellee:

The Constitution expressly grants to Congress the power to enact such laws as may be necessary to give effect to treaties.

United States v. Thompson, 258 Fed. 257; United States v. Rockefeller, 260 Fed. 346; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; United States v. Jin Fuey Moy, 241 U. S. 394, 60 L. ed. 1061, 36 Sup. Ct. Rep. 658, Ann. Cas. 1917D, 854; Chinese Exclusion Case, 130 U. S. 581, 600, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623; Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 196, 23 L. ed. 846, 847.

The power of the state over game is limited by such powers as have been conferred upon the Federal government.

Geer v. Connecticut, 161 U. S. 519, 528, 40 L. ed. 793, 796, 16 Sup. Ct. Rep. 600.

The power of Congress to legislate to make treaties effective is not limited to the subjects with respect to which it is empowered to legislate in purely domestic affairs.

Cohen v. Virginia, 6 Wheat. 264, 413, 5 L. ed. 257, 293; Legal Tender Cases, 12 Wall. 457, 555, 20 L. ed. 287, 313; Chinese Exclusion Case, 130 U. S. 581, 604, 32 L. ed. 1068, 1075, 9 Sup. Ct. Rep. 623; Hauenstein v. Lynham, 100 U. S. 483, 490, 25 L. ed. 628, 630; Re Ross (Ross v. McIntyre) 140 U. S. 453, 463, 35 L. ed. 581, 585, 11 Sup. Ct. Rep. 897.

The power of the Federal government to make and enforce treaties is not a limitation on the reserved powers of the states, but is the exercise of a power not reserved to the states under the 10th Amendment, being both expressly granted to the United States and prohibited to the states.

United States v. Thompson, 258 Fed. 264; Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 17, 30 L. ed. 565, 568, 7 Sup. Ct. Rep. 383; Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Chirac v. Chirac, 2 Wheat. 259, 276, 4 L. ed. 234, 238; Geofroy v. Riggs, 133 U. S. 258, 266, 33 L. ed. 642, 644, 10 Sup. Ct. Rep. 295; Hopkirk v. Bell, 3 Cranch, 454, 2 L. ed. 497; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662.

The treaty-making power of the United States embraces all such power as would have belonged to the several states if the Constitution had not been adopted; in the exercise of that power the Federal government is the accredited agent of both the people of the United States and of the states themselves.

Baldwin v. Franks, 120 U. S. 678, 682, 683, 30 L. ed. 766–768, 7 Sup. Ct. Rep. 656, 763.

The treaty-making power applies to all matters which may properly be the subject of negotiations between the two governments.

4 Elliot, Debates, p. 464; Story, Const. 5th ed. § 1508; Ware v. Hylton, 3 Dall. 199, 235, 1 L. ed. 568, 583; Geofroy v. Riggs, 133 U. S. 258, 266, 33 L. ed. 642, 644, 10 Sup. Ct. Rep. 295; Re Ross (Ross v. McIntyre) 140 U. S. 453, 463, 35 L. ed. 581, 585, 11 Sup. Ct. Rep. 897.

The protection of migratory game is a proper subject of negotiations and treaties between the governments of the countries interested in such game.

United States v. Rockefeller, 260 Fed. 347.

Mr. Louis Marshall filed a brief for the Association for the Protection of the Adirondacks, as amicus curiæ.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity, brought by the state of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of [431] July 3, 1918, chap.

128, 40 Stat. at L. 755, Comp. Stat. § 8837a, Fed. Stat. Anno. Supp. 1918, p. 196, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the states by the 10th Amendment, and that the acts of the defendant, done and threatened under that authority, invade the sovereign right of the state and contravene its will manifested in statutes. The state also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi-sovereign rights of a state. Kansas v. Colorado, 185 U. S. 125, 142, 46 L. ed. 838, 844, 22 Sup. Ct. Rep. 552; Georgia v. Tennessee Copper Co. 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488; Marshall Dental Mfg. Co. v. Iowa, 226 U. S. 460, 462, 57 L. ed. 300, 302, 33 Sup. Ct. Rep. 168. A motion to dismiss was sustained by the district court on the ground that the act of Congress is constitutional. 258 Fed. 479. United States v. Thompson, 258 Fed. 257; United States v. Rockefeller, 260 Fed. 346. The state appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out. 39 Stat. at L. 1702. The above-mentioned Act of July 3, 1918, entitled, "An Act to Give Effect to the Convention," prohibited the killing, capturing, or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by [**432**] the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. at L. 1812, 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states.

To answer this question it is not enough to refer to the 10th Amendment, reserving the powers not delegated to the United States, because by article 2, § 2, the power to make treaties is delegated expressly, and by article 6, treaties made under the authority of the United States, along with the Constitution and laws of the United States, made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid, there can be no dispute about the validity of the statute under article 1, § 8, as a necessary and proper means to execute the powers of the government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution; that there are limits, therefore, to the treaty-making power; and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself, and not in pursuance of a treaty, to regulate the killing of migratory birds within the states, had been held bad in the district court. United States v. Shauver, 214 Fed. 154; United States v. McCullagh, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the states in their sovereign capacity, for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

[**433**] Whether the two cases cited were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-

being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. Andrews v. Andrews, 188 U. S. 14, 33, 47 L. ed. 366, 370, 23 Sup. Ct. Rep. 237. What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where the states individually are incompetent to act. We are not yet discussing the particular case before us, but only are considering the validity of the test proposed. With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether [434] it is forbidden by some invisible radiation from the general terms of the 10th Amendment. We must consider what this country has become in deciding what that amendment has reserved.

The state, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds,—an assertion that is embodied in statute. No doubt it is true that, as between a state and its inhabitants, the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, to-morrow may be in another state, and in a week a thousand miles away. If we are to be accurate, we cannot put the case of the state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that, but for the treaty, the state would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the states, and as many of them deal with matters which, in the silence of such laws, the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties, of course, "are as binding within the territorial limits of the states as they are effective throughout the dominion of the United States." Baldwin v. Franks, 120 U. S. 678, 683, 30 L. ed. 766, 767, 7 Sup. Ct. Rep. 656, 763. No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as Hopkirk v. Bell, 3 Cranch, 454, 2 L. ed. 497, with regard to statutes [435] of limitation, and even earlier, as to confiscation, in Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568. It was assumed by Chief Justice Marshall with regard to the escheat of land to the state in Chirac v. Chirac, 2 Wheat. 259, 275, 4 L. ed. 234, 238; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Blythe v. Hinckley, 180 U. S. 333, 340, 45 L. ed. 557, 561, 21 Sup. Ct. Rep. 390. So, as to a limited jurisdiction of foreign consuls within a state. Wildenhus's Case (Mali v. Keeper of Common Jail) 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383. See Re Ross, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden

to act. We are of opinion that the treaty and statute must be upheld. Cary v. South Dakota, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403.

Decree affirmed.

Mr. Justice **Van Devanter** and Mr. Justice **Pitney** dissent.

---

[436] BLUMENSTOCK BROTHERS ADVERTISING AGENCY, Plff. in Err.,
v.
CURTIS PUBLISHING COMPANY.

(See S. C. Reporter's ed. 436–444.)

Pleading — jurisdictional averments.

1. In any case alleged to come within the Federal jurisdiction, it is not enough to allege that questions of a Federal character arise in the case, but it must plainly appear that the averments attempting to bring the case within such jurisdiction are real and substantial.

[For other cases, see Pleading, II. a, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — substantial Federal question.

2. Jurisdiction over a subject-matter limited by Federal law, for which recovery can be had only in the Federal courts, attaches only when the suit presents a substantial claim under an act of Congress.

[For other cases, see Courts, V. c, 2, a, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — substantial Federal question — monopoly of interstate commerce — treble-damage suit.

3. The merely incidental relation to interstate commerce of transactions concerning advertising in periodicals which are to be circulated and distributed throughout the United States will not support the Federal jurisdiction of a suit brought under the provisions of the Sherman Anti-trust Act of July 2, 1890, § 7, creating a cause of action in favor of any person to recover by suit in any Federal district court in the district in which the defendant resides or is found threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act, on the theory that defendant's conduct in respect to such matters is forbidden by that act as a monopoly or attempted monopoly of interstate commerce.

[For other cases, see Courts, V. c, 2, a; Monopoly, II. a, in Digest Sup. Ct. 1908.]

[No. 197.]

Submitted January 26, 1920. Decided April 19, 1920.

IN ERROR to the District Court of the United States for the Northern District of Illinois to review a judgment dismissing, for want of jurisdiction, a treble-damage suit brought under the Sherman Anti-trust Act. Affirmed.

The facts are stated in the opinion.

Mr. **Colin C. H. Fyffe** submitted the cause for plaintiff in error. Messrs. Paul N. Dale and David R. Clarke were on the brief:

The question before this court is whether the allegations of the declaration, and the contention that they raise real questions of the interpretation and application of the Sherman Act, are frivolous.

Louisville & N. R. Co. v. Rice, 247 U. S. 201, 203, 62 L. ed. 1071, 1072, 38 Sup. Ct. Rep. 429; The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 Sup. Ct. Rep. 410; Public Service Co. v. Corboy, 250 U. S. 153, 63 L. ed. 905, 39 Sup. Ct. Rep. 440; Boston Store v. American Graphophone Co. 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C, 447; Odell v. F. C. Farnsworth Co. 250 U. S. 501, 63 L. ed. 1111, 39 Sup. Ct. Rep. 516; Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 259, 42 L. ed. 458, 460, 18 Sup. Ct. Rep. 62; Sutton v. English, 246 U. S. 199, 62 L. ed. 664, 38 Sup. Ct. Rep. 254; Berkman v. United States, 250 U. S. 114, 63 L. ed. 877, 39 Sup. Ct. Rep. 411.

The allegations of the declaration herein raise a substantial question as to whether the defendant was engaged in interstate commerce.

Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Passenger Cases, 7 How. 283, 12 L. ed. 702; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31,

---

Note.—On monopolies, generally—see notes to Fowle v. Park, 33 L. ed. U. S. 67, and United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008.

As to illegal trusts under modern Anti-trust Laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to actions for threefold damages under the Federal Anti-trust Acts—see note to American Banana Co. v. United Fruit Co. 53 L. ed. U. S. 826.

As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal Anti-trust Act—see notes to Loewe v. Lawler, 52 L. ed. U. S. 488, and Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 10 L.R.A.(N.S.) 268.

7 Sup. Ct. Rep. 4; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Preston v. Finley, 72 Fed. 859; State v. J. P. Bass Pub. Co. 104 Me. 288, 20 L.R.A.(N.S.) 495, 71 Atl. 896; United States v. Associated Bill Posters, 235 Fed. 540; Pueblo v. Lukins, — Colo. —, L.R.A.1917E, 699, 164 Pac. 1165; Circular Adv. Co. v. American Mercantile Co. 66 Fla. 96, 63 So. 3; Marienelli v. United Booking Offices, 227 Fed. 168.

The allegations in the declaration herein raise a substantial question as to whether the defendant in error attempted a monopoly of the branch of interstate commerce in which it was engaged.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Quaker Oats Co. 232 Fed. 500; Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co. 139 C. C. A. 319, 223 Fed. 881, affirmed in 248 U. S. 55, 63 L. ed. 123, 39 Sup. Ct. Rep. 38; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; United States v. United States Steel Corp. 223 Fed. 162.

Mr. **Amos C. Miller** submitted the cause for defendant in error. Messrs. Sidney S. Gorham, Henry W. Wales, and Gilbert Noxon were on the brief:

The district court had no jurisdiction to entertain this suit unless the declaration of plaintiff in error states a cause of action under the Sherman Act.

Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 641; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Newburyport Water Co. v. Newburyport, 193 U. S. 562, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553; Defiance Water Co. v. Defiance, 191 U. S. 184, 191, 48 L. ed. 140, 143, 24 Sup. Ct. Rep. 63; Underground R. Co. v. New York, 193 U. S. 417, 48 L. ed. 733, 24 Sup. Ct. Rep. 494; Arbuckle v. Blackburn, 191 U. S. 406, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; Norton v. Whiteside, 239 U. S. 144, 60 L. ed. 186, 36 Sup. Ct. Rep. 97; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; The Ira M. Hedges (Lehigh Valley R. Co. v. Cornell S. B. Co.) 218 U. S. 269, 54 L. ed. 1030, 31 Sup. Ct. Rep. 17, 20 Ann. Cas. 1235; Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332; Healy v. Sea Gull Specialty Co. 237 U. S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658; Briggs v. United Shoe Machinery Co. 239 U. S. 49, 60 L. ed. 138, 36 Sup. Ct. Rep. 6; Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726.

In no count of plaintiff's declaration is a cause of action stated within the provisions of that act.

(A) The transactions complained of in the declaration do not constitute interstate commerce.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; United States Fidelity & G. Co. v. Kentucky, 231 U. S. 394, 58 L. ed. 283, 34 Sup. Ct. Rep. 122; Hopkins v. United States, 171 U. S. 579, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; State v. Morgan, 2 S. D. 32, 48 N. W. 314.

(B) Apart from the question of interstate commerce, no cause of action under the Sherman Act is stated in the declaration.

Rice v. Standard Oil Co. 134 Fed. 464; Cilley v. United Shoe Mach. Co. 152 Fed. 726; Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co. 196 Fed. 514; Otis Elevator Co. v. Geiger, 107 Fed. 131; McLatchy v. King, 250 Fed. 920; Corey v. Boston Ice Co. 207 Fed. 465; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737; Patterson v. United States, 138 C. C. A. 123, 222 Fed. 599; United States v. Whiting, 212 Fed. 466; United States v. Trans-Missouri Freight Asso. 166 U. S. 320, 41 L. ed. 1020, 17 Sup. Ct. Rep. 540; Northern Securities Co. v. United States, 193 U. S. 361, 48 L. ed. 710, 24 Sup. Ct. Rep. 436; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 614, 58 L. ed. 1500, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; United States v. Colgate & Co.

250 U. S. 300, 63 L. ed. 992, 7 A.L.R. 443, 39 Sup. Ct. Rep. 465; Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. 141 C. C. A. 594, 227 Fed. 49.

[437] Mr. Justice Day delivered the opinion of the court:

This suit was brought by the Blumenstock Brothers Advertising Agency against the Curtis Publishing Company, in the district court of the United States for the northern district of Illinois, to recover treble damages under § 7 of the Sherman Anti-trust Act, July 2, 1890, 26 Stat. at L. 209, chap. 647, Comp. Stat. §§ 8820, 8829, 9 Fed. Stat. Anno. 2d ed. pp. 644, 713. The case here concerns the question of the jurisdiction of the district court. Judicial Code, § 238 [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. p. 794]. The plaintiff is a corporation of the state of Missouri, the defendant a corporation of the state of Pennsylvania. The defendant appeared specially in the district court and moved to dismiss the complaint for want of jurisdiction, the grounds stated being:

1. "That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the state of Missouri, and that this defendant is a citizen and resident of the state of Pennsylvania."

2. "That in none of said counts is a cause of action stated by plaintiff within the provisions of the act of Congress approved July 2, 1890, entitled, 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies.'"

The court entered judgment dismissing the suit for want of jurisdiction over the defendant or the action.

The record contains a certificate stating that the court found that it had no jurisdiction of the defendant and no jurisdiction to entertain the action. The certificate further states that the question involved is whether the transaction set forth in the several counts of the declaration involves a question of interstate commerce, and whether the averments in said several counts of the declaration state a cause of action within the provisions of the Act of July 2, 1890.

The declaration is voluminous, containing five counts [438] and an additional count. So far as it is necessary for our purpose, the cause of action of the plaintiff may be said to rest upon the allegations: That the plaintiff is engaged at Chicago in conducting an advertising agency. That when customers or principals desire to place advertisements in the magazines and periodicals of the trade they make plaintiff their agent, and plaintiff contracts with the defendant and other publishers and distributers of magazines; that plaintiff had many customers with whom it placed advertisements in the periodicals published and distributed by the defendant and in other periodicals of other publishers, all of which were distributed throughout the United States and the several states thereof; and that the defendant was the owner and publisher of three periodicals sold and distributed throughout the United States, known as "The Saturday Evening Post," "The Ladies Home Journal," and "The Country Gentleman;" that the business of the defendant in publishing, selling, and distributing said periodicals was interstate commerce. The character of each of the several publications is described, and a large circulation is attributed to each of them; and it is stated that in publishing and distributing said periodicals defendant held itself out as desirous of taking, receiving, printing, publishing, and distributing throughout the United States its publications and advertisements to persons, firms, and corporations concerning their business and occupation; that in the course of the business the defendant dealt with the plaintiff and other advertising agencies; that the defendant, in the regular course of its business, dealt with not only advertisers, but with advertising agencies such as the plaintiff, and it is alleged that such dealings were transactions of interstate commerce, and that the business of editing, publishing, and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising [439] agencies, was interstate commerce; that such commerce is dependent for its operation and growth upon advertising facilities offered by magazines and periodicals such as those of the defendant, and that such publications constitute the chief method of presenting to the buying public the articles held out for sale; that the advertising facilities were necessary to dealers, merchants, and manufacturers in order to bring their products to the notice and attention of purchasers; that the defendant's periodicals, particularly "The Saturday Evening Post," have an important position among such publications, and are largely read throughout the United States; that "The Saturday Evening Post" is the most

necessary of such advertising mediums to the customers of the plaintiff; that the defendant's periodicals, together with certain other magazines, periodicals, and publications owned by persons other than the defendant, had, to a certain extent, exclusive control of a certain field of advertising; that the magazines and other publications which control and do all the advertising business of the field in question are few in number; that for the advertising of goods and merchandise offered for sale in commerce there were no adequate facilities except those offered by the defendant and other publishers of similar magazines; that the defendant was desirous of using its preponderant position in this special field of advertising as a means of acquiring for itself and its publications, especially for "The Saturday Evening Post," a monopoly of the publication and distribution of advertising matter in this restricted field of advertising throughout the United States, in violation of the Anti-trust Act; that the defendant refused, without any reasonable cause, to accept proper and ordinary advertising matter or copy, offered in the usual way to the defendant by the plaintiff and other advertising agencies, unless the plaintiff and other advertising agencies would agree to allow the defendant to increase its preponderance [**440**] in said advertising field by permitting it to control and limit and reduce, at the will of the defendant, the amount of advertising given by the plaintiff and other advertising agencies to the owners and publishers of other magazines, journals, periodicals, and other publications aforesaid, which were competing with the defendant in the field of advertising mentioned and described; that by reason of the illegal and wrongful acts done by the defendant in pursuance of its attempt and scheme to create a monopoly for its own benefit in and to monopolize the advertising business, plaintiff lost the business of its customers for whom it had been acting as agent in placing of advertisements with defendant's and other publications, and was prevented from making further contracts for the placing of advertising matter in publications of the defendant, and in consequence thereof, in any other publications of a like or similar character, to the damage of the plaintiff in the sum of $25,000.

The declaration contains an alleged cause of action at common law; but, as either the plaintiff nor the defendant reside in the district in which the suit was brought, it is conceded that such cause of action could not be maintained in that court against the defendant's objection. Section 51, Judicial Code [36 Stat. at L. 1101, chap. 231, Comp. Stat. § 1033, 5 Fed. Stat. Anno. 2d ed. p. 486].

The Sherman Anti-trust Act (§ 7) created a cause of action in favor of any person to recover by suit in any district court of the United States, in the district in which the defendant resides or is found, threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act. In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a district court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

[**441**] In some cases it is difficult to determine whether a ruling dismissing the complaint involves the merits of the cause of action attempted to be pleaded, or only a question of the jurisdiction of the court. In any case alleged to come within the Federal jurisdiction it is not enough to allege that questions of a Federal character arise in the case, it must plainly appear that the averments attempting to bring the case within Federal jurisdiction are real and substantial. Newburyport Water Co. v. Newburyport, 193 U. S. 562, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553.

In cases where, as here, the controversy concerns a subject-matter limited by a Federal law, for which recovery can be had only in the Federal courts, the jurisdiction attaches only when the suit presents a substantial claim under an act of Congress. This rule has been applied in bankruptcy cases (Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332), in copyright cases (Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726), in patent cases (Healy v. Sea Gull Specialty Co. 237 U. S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658), in admiralty cases (The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907).

We come, then, to inquire whether the cause of action stated was a substantial one within § 7 of the Sherman Anti-trust Act. It is not contended that any combination, conspiracy, or contract in

restraint of trade is alleged, such as would bring the case within the first section of the act. The second section is relied upon, which in terms punishes persons who monopolize or attempt to monopolize, or combine with others to monopolize, any part of trade or commerce among the several states or with foreign nations.

The Anti-trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the states. It declares unlawful combinations, conspiracies, and contracts, and attempts to monopolize which concern such trade or commerce. It follows that if the dealings with the defendant, which [442] form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act.

Commerce, as defined in the often quoted definition of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68, is not traffic alone, it is intercourse,—"It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.

This case is wholly unlike International Text-book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of Federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and nonresident merchants of goods situated in another state was not engaged in interstate commerce; and within that line of [443] cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. Rep. 167. We held in Hopkins v. United States, 171 U. S. 579, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, that the buying and selling of live stock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the live stock was sent from other states. In Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128, we held that labor agents engaged within the state of Georgia in hiring persons to be employed outside the state were not engaged in interstate commerce. In Ware v. Mobile Co. 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, we held that brokers taking orders and transmitting them to other states for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce. In the recent case of United States Fidelity & G. Co. v. Kentucky, 231 U. S. 394, 58 L. ed. 283, 34 Sup. Ct. Rep. 122, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the state was not unconstitutional as a burden upon interstate commerce as applied to a nonresident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the state. The contention in that case, which this court denied, was that the service rendered through the representatives in Kentucky, and other representatives of the same kind, acting as agents of merchants engaged in interstate commerce, to furnish them with information through the mails, or by telegraph, or telephone, as a result

of which merchandise might be transported in interstate commerce, [444] or withheld from such transportation, according to the character of the information reported, was so connected with interstate commerce as to preclude the state of Kentucky from imposing a privilege tax upon such business.

Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under § 7 of the Sherman Anti-trust Act. The court was right in dismissing the suit.

Affirmed.

O. O. ASKREN, Attorney General of the State of New Mexico, et al., Appts.,
v.
CONTINENTAL OIL COMPANY. (No. 521.)

O. O. ASKREN, Attorney General of the State of New Mexico, et al., Appts.,
v.
SINCLAIR REFINING COMPANY. (No. 522.)

O. O. ASKREN, Attorney General of the State of New Mexico, et al., Appts.,
v.
TEXAS COMPANY. (No. 523.)

(See S. C. Reporter's ed. 444–450.)

Commerce — license tax — selling gasolene in original packages — inspection — excessive fees.

1. A state tax which is in effect a privilege tax upon the business of selling gasolene in the tank cars or other original packages in which the gasolene was brought into the state, and which provides for the levy of fees in excess of the cost of inspection, is invalid, as amounting to a direct burden on interstate commerce.

[For other cases, see Commerce, IV. b, 3; VI. c, in Digest Sup. Ct. 1908.]

Commerce — licenses and taxes — retail sales.

2. The business of selling gasolene at retail in quantities to suit customers, but not in the original packages, is properly taxable by the laws of the state, although the state itself producing no gasolene, it must of necessity have been brought into the state in interstate commerce.

[For other cases, see Commerce, IV. b, 1, in Digest Sup. Ct. 1908.]

[Nos. 521, 522, and 523.]

Argued January 5 and 6, 1920. Decided April 19, 1920.

THREE APPEALS from the District Court of the United States for the District of New Mexico to review decrees enjoining the enforcement of a state tax upon the sale of gasolene as amounting to an unlawful regulation of interstate commerce. Affirmed.

The facts are stated in the opinion.

Mr. **A. B. Renehan** argued the cause, and, with Mr. Harry S. Bowman and Mr. O. O. Askren, Attorney General of New Mexico, filed a brief for appellants:

The act does not lay an impost or duty upon imports or exports.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

The goods will have reached their destination and ceased to be in interstate commerce when the tax attaches.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct.

Note.—As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On original-package doctrine—see note to Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

On inspection laws as regulation of commerce—see notes to Pure Oil Co. v. Minnesota, 63 L. ed. U. S. 180, and New Mexico ex rel. McLean v. Denver & R. G. R. Co. 51 L. ed. U. S. 78.

On validity of state inspection laws as applied to commodities in interstate commerce—see note to State v. Bartles Oil Co. L.R.A.1916D, 196.

Rep. 365; Arkadelphia Mill. Co. v. St. Louis Southwestern R. Co. 249 U. S. 134, 63 L. ed. 517, P.U.R.1919C, 710, 39 Sup. Ct. Rep. 237; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. ed. 632, 38 Sup. Ct. Rep. 295; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Dalton Adding Mach. Co. v. Virginia, 246 U. S. 498, 62 L. ed. 851, 38 Sup. Ct. Rep. 361; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; General R. Signal Co. v. Virginia, 246 U. S. 500, 62 L. ed. 854, 38 Sup. Ct. Rep. 360; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Watters v. Michigan, 248 U. S. 65, 63 L. ed. 129, 39 Sup. Ct. Rep. 29; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; License Cases, 5 How. 594, 12 L. ed. 296; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1090, 18 Sup. Ct. Rep. 664; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320; Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181, 37 Sup. Ct. Rep. 623; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382; Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 57 L. ed. 1015, 33 Sup. Ct. Rep. 712.

Occupation, excise, and privilege taxes are not rendered unconstitutional merely because limited to certain designated classes of business.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Cook v. Marshall County, 196 U. S. 268, 49 L. ed. 473, 25 Sup. Ct. Rep. 233; Kentucky R. Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Ohio River & W. R. Co. v. Dittey, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct. Rep. 372; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Southwestern Oil Co. v. Texas, 217 U. S. 117, 54 L. ed. 691, 30 Sup. Ct. Rep. 496.

The act will be construed to apply only to intrastate or local commerce.

Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Ohio River & W. R. Co. v. Dittey, 232 U. S. 590, 58 L. ed. 745, 34 Sup. Ct. Rep. 372; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; United States v. Reese, 92 U. S. 214, 23 L. ed. 563.

The tax in question is an excise or privilege tax, not a property tax.

Armour & Co. v. Virginia, 246 U. S. 1, 62 L. ed. 547, 38 Sup. Ct. Rep. 267; Ohio River & W. R. Co. v. Dittey, 232 U. S. 590, 58 L. ed. 745, 34 Sup. Ct. Rep. 372; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

Messrs. **Charles R. Brock** and **E. R. Wright** argued the cause, and, with Messrs. Stephen B. Davis, Jr., Milton Smith, W. H. Ferguson, and Elmer L. Brock, filed a brief for appellees:

The New Mexico statute constitutes an unlawful burden upon and discrimination against interstate commerce.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Armour & Co. v. Virginia, 246 U. S. 1, 62 L. ed. 547, 38 Sup. Ct. Rep. 267; Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; D. E. Foote & Co. v. Stanley, 232 U. S. 494,

58 L. ed. 698, 34 Sup. Ct. Rep. 377; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Morgan's L. & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Ohio River & W. R. Co. v. Dittey, 232 U. S. 577, 58 L. ed. 738, 34 Sup. Ct. Rep. 372; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; Pure Oil Co. v. Minnesota, 248 U. S. 158, 63 L. ed. 180, 39 Sup. Ct. Rep. 35; Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Southwestern Oil Co. v. Texas, 217 U. S. 115, 54 L. ed. 690, 30 Sup. Ct. Rep. 496; Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320; Susquehanna Coal Co. v. South Amboy, 228 U. S. 665, 57 L. ed. 1015, 33 Sup. Ct. Rep. 712; Voight v. Wright, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

The New Mexico statute singles out an article of commerce not produced in the state of New Mexico, and which reaches that state only by interstate commerce, and imposes the tax upon the right to sell or use that article.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; 1 Carson's History of U. S. Sup. Ct. p. 11; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; License Cases, 5 How. 504, 12 L. ed. 256; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Passenger Cases, 7 How. 284, 12 L. ed. 702; Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 473, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

The statute of New Mexico is a manifest violation of what is known as the original-package rule.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; May v. New Orleans, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Re Wilson, 10 N. M. 32, 48 L.R.A. 417, 60 Pac. 73; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; License Cases (Peirce v. New Hampshire) 5 How. 504, 12 L. ed. 256; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

The appellees cannot be classed as merely local merchants, nor can their

particular commodities be said to have come to rest within the state as to original packages, so as to be subject either to the license tax or the so-called excise tax of 2 cents per gallon.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Dalton Adding Mach. Co. v. Virginia, 246 U. S. 498, 62 L. ed. 851, 38 Sup. Ct. Rep. 361; General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; General R. Signal Co. v. Virginia, 246 U. S. 500, 62 L. ed. 854, 38 Sup. Ct. Rep. 360; Hinson v. Lott, 8 Wall. 148, 19 L. ed. 387; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Ex parte Kieffer, 40 Fed. 402; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320; Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382.

The New Mexico statute cannot be construed as applied only to intrastate or local commerce.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 119, 34 L. ed. 394, 397, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Ohio River & W. R. Co. v. Dittey, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct. Rep. 372; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Williams v. Talladega, 226 U. S. 404, 419, 57 L. ed. 275, 281, 33 Sup. Ct. Rep. 116.

Assuming that the tax is void, as it imposes a burden upon interstate shipments of gasolene sold in original packages, will that vitiate the entire act, or may the court properly declare the law to be invalid as to interstate shipments of the character mentioned, and nevertheless sustain it as to intrastate sales, use, and distribution?

Caldwell v. State, 187 Ind. 617, 119 N. E. 999; Hannibal v. Missouri & K. Teleph. Co. 31 Mo. App. 23; Cooley, Const. Lim. 5th ed. 213; D. E. Foote & Co. v. Clagett, 116 Md. 228, 81 Atl. 511; Gilbert-Arnold Land Co. v. Superior, 91 Wis. 353, 64 N. W. 999; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Martin v. Tylor, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392; Passaic Water Co. v. Paterson, 65 N. J. L. 475, 47 Atl. 462; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; State v. Cumberland & P. R. Co. 40 Md. 22; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co. 28 Kan. 453; Saratoga Springs v. Van Norder, 75 App. Div. 204, 77 N. Y. Supp. 1020; Warren v. Charlestown, 2 Gray, 84; Western U. Teleg. Co. v. Austin, 67 Kan. 208, 72 Pac. 850; Re Wilson, 10 N. M. 32, 48 L.R.A. 417, 60 Pac. 73.

The New Mexico statute is void under the 14th Amendment.

Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Cook v. Marshall County, 196 U. S. 268, 49 L. ed. 474, 25 Sup. Ct. Rep. 233; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Mr. Justice **Day** delivered the opinion of the court:

These suits were brought by the three companies, appellees, in the district court of the United States for the [**446**] district of New Mexico, to enjoin the enforcement of an act of the legislature of the state, entitled: "An Act Providing for an Excise Tax upon the Sale or Use of Gasolene, and for a License Tax to be Paid by Distributers and Retail Dealers therein; Providing for Collection and Application of Such Taxes; Providing for the Inspection of Gasolene, and Making It Unlawful to Sell below a Certain Grade without Notifying Purchaser Thereof; Providing Penalties for Violations of This Act, and for Other Purposes." The law is found in Session Laws of New Mexico, 1919, chap. 93, page 182.

The cause came before three judges upon an application for temporary injunction and a countermotion to dismiss the

bills of complaint. The temporary injunction was granted, and a direct appeal taken to this court.

The provisions of the act, so far as necessary to be considered, define a distributer of gasolene as meaning "every person, corporation, firm, copartnership, and association who sells gasolene from tank cars, receiving tanks, or stations, or in or from tanks, barrels, or packages not purchased from a licensed distributer of gasolene in this state." A retail dealer is defined as meaning: "A person other than a distributer of gasolene who sells gasolene in quantities of 50 gallons or less." Every distributer is required to pay an annual license tax of $50 for each distributing station, or place of business, and agency. Every retail dealer is required to pay an annual license tax of $5 for every place of business or agency. An excise tax is imposed upon the sale or use of gasolene sold or used in the state after July 1, 1919; such tax to be 2 cents per gallon on all gasolene so sold or used. Any distributer or dealer who shall fail to make return or statement, as required in the act, or shall refuse, neglect, or fail to pay the tax upon all sales or use of gasolene, or who shall make any false return or statement, or shall knowingly sell, distribute, or use any gasolene without the tax upon the sale or use thereof [447] having been paid, as provided in the act, shall be deemed guilty of a misdemeanor, and punished by a fine and forfeiture of his license. It is made unlawful for any person (except tourists or travelers to the extent provided in the act) to use any gasolene not purchased from a licensed distributer or retail dealer without paying the tax of 2 cents per gallon. Inspectors are provided for for each of the eight judicial districts of the state, who are required to see that the provisions of the act are enforced, and privileged to examine books and accounts of distributers and retail dealers, or warehousemen or others receiving and storing gasolene, and of railroad and transportation companies, relating to purchases, receipts, shipments, or sales of gasolene; their salaries are provided, and salaries and expense bills are to be paid out of the state road fund. Any person who shall engage or continue in the business of selling gasolene without a license, or after such license has been forfeited, or shall fail to render any statement, or make any false statement therein, or who shall violate any provision of the act the punishment for which has not been theretofore provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both. The state treasurer is required to set aside from the license fees and taxes collected under the provisions of the act a sufficient sum to pay the salaries and traveling expenses of the inspectors out of the money received from such collections, and to place the balance to the credit of the state road fund, to be used for the construction, improvement, and maintenance of public highways.

It is evident from the provisions of the act thus stated that it is not an inspection act merely; indeed, the inspectors do not seem to be required to make any inspection beyond seeing that the provisions of the act are enforced, and the excess of the salaries and fees of the inspectors is to be used in making roads within the state. Considering [448] its provisions and the effect of the act, it is a tax upon the privilege of dealing in gasolene in the state of New Mexico.

The bills in the three cases are identical except as to the number of distributing stations alleged to belong to the companies respectively. As there was no answer, and the bills were considered upon application for injunction, and motion to dismiss, their allegations must be taken to be true.

Plaintiffs are engaged in the business of buying and selling gasolene and other petroleum products. The bills state that they purchase gasolene in the states of Colorado, California, Oklahoma, Texas, and Kansas, and ship it into the state of New Mexico, there to be sold and delivered. The bills describe two classes of business: first, that they purchase in the states mentioned, or in some one of said states, gasolene, and ship it in tank cars from the state in which purchased into the state of New Mexico, and there, according to their custom and the ordinary method in the conduct of their business, sell in tank cars the whole of the contents thereof to a single customer, before the package or packages in which the gasolene was shipped have been broken. In the usual and regular course of their business they purchase gasolene in one of the states, other than the state of New Mexico, and ship it, so purchased, from that state, in barrels and packages containing not less than two 5-gallon cans, into the state of New Mexico, and there, in the usual and ordinary course of their business, without breaking the barrels and packages containing the cans, it is their custom to sell the gasolene in the original packages and barrels. The

gasolene is sold and delivered to the customers in precisely the same form and condition as when received in the state of New Mexico; that this manner of sale makes the plaintiffs distributers of gasolene as the term is defined in the statute, and they are required to pay the sum of $50 per annum for each of their stations [449] as an annual license tax for purchasing, shipping, and selling gasolene as aforesaid.

A second method of dealing in gasolene is described in the bills: That the gasolene shipped to the plaintiffs from the other states, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell such gasolene from such tank cars, barrels, and packages in such quantities as the purchaser requires.

As to the gasolene brought into the state in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another state into his own state, for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasolene brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state.

The plaintiffs state in the bills that their business in part consists in selling gasolene in retail in quantities to suit purchasers. A business of this sort, although the gasolene was brought into the state in interstate commerce, is properly taxable by the laws of the state.

Much is made of the fact that New Mexico does not produce gasolene, and all of it that is dealt in within that [450] state must be brought in from other states. But, so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasolene is produced in another state, the gasolene thus stored and dealt in is not beyond the taxing power of the state. Wagner v. Covington, decided December 8, 1919 [251 U. S. 95, ante, 157, 40 Sup. Ct. Rep. 93], and the cases from this court cited therein.

Sales of the class last mentioned would be a subject of taxation within the legitimate power of the state. But from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is nontaxable, and at this preliminary stage of the cases we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing. The District Court did not err in granting the temporary injunctions, and its orders are affirmed.

RALPH H. CAMERON et al., Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 450-465.)

Public lands — monument reserve — Grand Canyon.

1. The Grand Canyon of the Colorado could be created as a monument reserve by the President under the power conferred upon him by the Act of June 8, 1906, to establish reserves embracing objects of historic or scientific interest.

[For other cases, see Public Lands, I. a, in Digest Sup. Ct. 1908.]

Mines — lode location — discovery.

2. To make a lode mining claim valid, or to invest the locator with a right to possession, it is essential that the lands be mineral in character, and that there be an adequate mineral discovery within the limits of the claim as located.

[For other cases, see Mines, I. b, in Digest Sup. Ct. 1908.]

Public lands — withdrawal for monument reserve — saving clause — lode mining claim — discovery.

3. To bring a lode mining claim within the saving clause in the withdrawal of public lands for a monument reserve, under the Act of June 8, 1906, in respect of any "valid" mining claim theretofore acquired,

---

Note.—As to location of mining claim see note to Dwinnell v. Dyer, 7 L.R.A. (N.S.) 763.

bills of complaint. The temporary injunction was granted, and a direct appeal taken to this court.

The provisions of the act, so far as necessary to be considered, define a distributer of gasolene as meaning "every person, corporation, firm, copartnership, and association who sells gasolene from tank cars, receiving tanks, or stations, or in or from tanks, barrels, or packages not purchased from a licensed distributer of gasolene in this state." A retail dealer is defined as meaning: "A person other than a distributer of gasolene who sells gasolene in quantities of 50 gallons or less." Every distributer is required to pay an annual license tax of $50 for each distributing station, or place of business, and agency. Every retail dealer is required to pay an annual license tax of $5 for every place of business or agency. An excise tax is imposed upon the sale or use of gasolene sold or used in the state after July 1, 1919; such tax to be 2 cents per gallon on all gasolene so sold or used. Any distributer or dealer who shall fail to make return or statement, as required in the act, or shall refuse, neglect, or fail to pay the tax upon all sales or use of gasolene, or who shall make any false return or statement, or shall knowingly sell, distribute, or use any gasolene without the tax upon the sale or use thereof [447] having been paid, as provided in the act, shall be deemed guilty of a misdemeanor, and punished by a fine and forfeiture of his license. It is made unlawful for any person (except tourists or travelers to the extent provided in the act) to use any gasolene not purchased from a licensed distributer or retail dealer without paying the tax of 2 cents per gallon. Inspectors are provided for for each of the eight judicial districts of the state, who are required to see that the provisions of the act are enforced, and privileged to examine books and accounts of distributers and retail dealers, or warehousemen or others receiving and storing gasolene, and of railroad and transportation companies, relating to purchases, receipts, shipments, or sales of gasolene; their salaries are provided, and salaries and expense bills are to be paid out of the state road fund. Any person who shall engage or continue in the business of selling gasolene without a license, or after such license has been forfeited, or shall fail to render any statement, or make any false statement therein, or who shall violate any provision of the act the punishment for which has not been theretofore provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both. The state treasurer is required to set aside from the license fees and taxes collected under the provisions of the act a sufficient sum to pay the salaries and traveling expenses of the inspectors out of the money received from such collections, and to place the balance to the credit of the state road fund, to be used for the construction, improvement, and maintenance of public highways.

It is evident from the provisions of the act thus stated that it is not an inspection act merely; indeed, the inspectors do not seem to be required to make any inspection beyond seeing that the provisions of the act are enforced, and the excess of the salaries and fees of the inspectors is to be used in making roads within the state. Considering [448] its provisions and the effect of the act, it is a tax upon the privilege of dealing in gasolene in the state of New Mexico.

The bills in the three cases are identical except as to the number of distributing stations alleged to belong to the companies respectively. As there was no answer, and the bills were considered upon application for injunction, and motion to dismiss, their allegations must be taken to be true.

Plaintiffs are engaged in the business of buying and selling gasolene and other petroleum products. The bills state that they purchase gasolene in the states of Colorado, California, Oklahoma, Texas, and Kansas, and ship it into the state of New Mexico, there to be sold and delivered. The bills describe two classes of business: first, that they purchase in the states mentioned, or in some one of said states, gasolene, and ship it in tank cars from the state in which purchased into the state of New Mexico, and there, according to their custom and the ordinary method in the conduct of their business, sell in tank cars the whole of the contents thereof to a single customer, before the package or packages in which the gasolene was shipped have been broken. In the usual and regular course of their business they purchase gasolene in one of the states, other than the state of New Mexico, and ship it, so purchased, from that state, in barrels and packages containing not less than two 5-gallon cans, into the state of New Mexico, and there, in the usual and ordinary course of their business, without breaking the barrels and packages containing the cans, it is their custom to sell the gasolene in the original packages and barrels. The

gasolene is sold and delivered to the customers in precisely the same form and condition as when received in the state of New Mexico; that this manner of sale makes the plaintiffs distributers of gasolene as the term is defined in the statute, and they are required to pay the sum of $50 per annum for each of their stations [449] as an annual license tax for purchasing, shipping, and selling gasolene as aforesaid.

A second method of dealing in gasolene is described in the bills: That the gasolene shipped to the plaintiffs from the other states, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell such gasolene from such tank cars, barrels, and packages in such quantities as the purchaser requires.

As to the gasolene brought into the state in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another state into his own state, for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasolene brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state.

The plaintiffs state in the bills that their business in part consists in selling gasolene in retail in quantities to suit purchasers. A business of this sort, although the gasolene was brought into the state in interstate commerce, is properly taxable by the laws of the state.

Much is made of the fact that New Mexico does not produce gasolene, and all of it that is dealt in within that [450] state must be brought in from other states. But, so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasolene is produced in another state, the gasolene thus stored and dealt in is not beyond the taxing power of the state. Wagner v. Covington, decided December 8, 1919 [251 U. S. 95, ante, 157, 40 Sup. Ct. Rep. 93], and the cases from this court cited therein.

Sales of the class last mentioned would be a subject of taxation within the legitimate power of the state. But from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is nontaxable, and at this preliminary stage of the cases we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing. The District Court did not err in granting the temporary injunctions, and its orders are affirmed.

RALPH H. CAMERON et al., Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 450-465.)

Public lands — monument reserve — Grand Canyon.

1. The Grand Canyon of the Colorado could be created as a monument reserve by the President under the power conferred upon him by the Act of June 8, 1906, to establish reserves embracing objects of historic or scientific interest.

[For other cases, see Public Lands, I. a, in Digest Sup. Ct. 1908.]

Mines — lode location — discovery.

2. To make a lode mining claim valid, or to invest the locator with a right to possession, it is essential that the lands be mineral in character, and that there be an adequate mineral discovery within the limits of the claim as located.

[For other cases, see Mines, I. b, in Digest Sup. Ct. 1908.]

Public lands — withdrawal for monument reserve — saving clause — lode mining claim — discovery.

3. To bring a lode mining claim within the saving clause in the withdrawal of public lands for a monument reserve, under the Act of June 8, 1906, in respect of any "valid" mining claim theretofore acquired,

---

Note.—As to location of mining claim see note to Dwinnell v. Dyer, 7 L.R.A. (N.S.) 763.

bills of complaint. The temporary injunction was granted, and a direct appeal taken to this court.

The provisions of the act, so far as necessary to be considered, define a distributer of gasolene as meaning "every person, corporation, firm, copartnership, and association who sells gasolene from tank cars, receiving tanks, or stations, or in or from tanks, barrels, or packages not purchased from a licensed distributer of gasolene in this state." A retail dealer is defined as meaning: "A person other than a distributer of gasolene who sells gasolene in quantities of 50 gallons or less." Every distributer is required to pay an annual license tax of $50 for each distributing station, or place of business, and agency. Every retail dealer is required to pay an annual license tax of $5 for every place of business or agency. An excise tax is imposed upon the sale or use of gasolene sold or used in the state after July 1, 1919; such tax to be 2 cents per gallon on all gasolene so sold or used. Any distributer or dealer who shall fail to make return or statement, as required in the act, or shall refuse, neglect, or fail to pay the tax upon all sales or use of gasolene, or who shall make any false return or statement, or shall knowingly sell, distribute, or use any gasolene without the tax upon the sale or use thereof [447] having been paid, as provided in the act, shall be deemed guilty of a misdemeanor, and punished by a fine and forfeiture of his license. It is made unlawful for any person (except tourists or travelers to the extent provided in the act) to use any gasolene not purchased from a licensed distributer or retail dealer without paying the tax of 2 cents per gallon. Inspectors are provided for for each of the eight judicial districts of the state, who are required to see that the provisions of the act are enforced, and privileged to examine books and accounts of distributers and retail dealers, or warehousemen or others receiving and storing gasolene, and of railroad and transportation companies, relating to purchases, receipts, shipments, or sales of gasolene; their salaries are provided, and salaries and expense bills are to be paid out of the state road fund. Any person who shall engage or continue in the business of selling gasolene without a license, or after such license has been forfeited, or shall fail to render any statement, or make any false statement therein, or who shall violate any provision of the act the punishment for which has not been theretofore provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both. The state treasurer is required to set aside from the license fees and taxes collected under the provisions of the act a sufficient sum to pay the salaries and traveling expenses of the inspectors out of the money received from such collections, and to place the balance to the credit of the state road fund, to be used for the construction, improvement, and maintenance of public highways.

It is evident from the provisions of the act thus stated that it is not an inspection act merely; indeed, the inspectors do not seem to be required to make any inspection beyond seeing that the provisions of the act are enforced, and the excess of the salaries and fees of the inspectors is to be used in making roads within the state. Considering [448] its provisions and the effect of the act, it is a tax upon the privilege of dealing in gasolene in the state of New Mexico.

The bills in the three cases are identical except as to the number of distributing stations alleged to belong to the companies respectively. As there was no answer, and the bills were considered upon application for injunction, and motion to dismiss, their allegations must be taken to be true.

Plaintiffs are engaged in the business of buying and selling gasolene and other petroleum products. The bills state that they purchase gasolene in the states of Colorado, California, Oklahoma, Texas, and Kansas, and ship it into the state of New Mexico, there to be sold and delivered. The bills describe two classes of business: first, that they purchase in the states mentioned, or in some one of said states, gasolene, and ship it in tank cars from the state in which purchased into the state of New Mexico, and there, according to their custom and the ordinary method in the conduct of their business, sell in tank cars the whole of the contents thereof to a single customer, before the package or packages in which the gasolene was shipped have been broken. In the usual and regular course of their business they purchase gasolene in one of the states, other than the state of New Mexico, and ship it, so purchased, from that state, in barrels and packages containing not less than two 5-gallon cans, into the state of New Mexico, and there, in the usual and ordinary course of their business, without breaking the barrels and packages containing the cans, it is their custom to sell the gasolene in the original packages and barrels. The

gasolene is sold and delivered to the customers in precisely the same form and condition as when received in the state of New Mexico; that this manner of sale makes the plaintiffs distributers of gasolene as the term is defined in the statute, and they are required to pay the sum of $50 per annum for each of their stations [449] as an annual license tax for purchasing, shipping, and selling gasolene as aforesaid.

A second method of dealing in gasolene is described in the bills: That the gasolene shipped to the plaintiffs from the other states, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell such gasolene from such tank cars, barrels, and packages in such quantities as the purchaser requires.

As to the gasolene brought into the state in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in Standard Oil Co. v. Graves, 249 U. S. 389, 63 L. ed. 662, 39 Sup. Ct. Rep. 320, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another state into his own state, for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasolene brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state.

The plaintiffs state in the bills that their business in part consists in selling gasolene in retail in quantities to suit purchasers. A business of this sort, although the gasolene was brought into the state in interstate commerce, is properly taxable by the laws of the state.

Much is made of the fact that New Mexico does not produce gasolene, and all of it that is dealt in within that [450] state must be brought in from other states. But, so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasolene is produced in another state, the gasolene thus stored and dealt in is not beyond the taxing power of the state. Wagner v. Covington, decided December 8, 1919 [251 U. S. 95, ante, 157, 40 Sup. Ct. Rep. 93], and the cases from this court cited therein.

Sales of the class last mentioned would be a subject of taxation within the legitimate power of the state. But from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is nontaxable, and at this preliminary stage of the cases we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing. The District Court did not err in granting the temporary injunctions, and its orders are affirmed.

RALPH H. CAMERON et al., Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 450-465.)

Public lands — monument reserve — Grand Canyon.

1. The Grand Canyon of the Colorado could be created as a monument reserve by the President under the power conferred upon him by the Act of June 8, 1906, to establish reserves embracing objects of historic or scientific interest.

[For other cases, see Public Lands, I. a, in Digest Sup. Ct. 1908.]

Mines — lode location — discovery.

2. To make a lode mining claim valid, or to invest the locator with a right to possession, it is essential that the lands be mineral in character, and that there be an adequate mineral discovery within the limits of the claim as located.

[For other cases, see Mines, I. b, in Digest Sup. Ct. 1908.]

Public lands — withdrawal for monument reserve — saving clause — lode mining claim — discovery.

3. To bring a lode mining claim within the saving clause in the withdrawal of public lands for a monument reserve, under the Act of June 8, 1906, in respect of any "valid" mining claim theretofore acquired,

---

Note.—As to location of mining claim see note to Dwinnell v. Dyer, 7 L.R.A. (N.S.) 763.

the discovery must have preceded the creation of that reserve.

[For other cases, see Public Lands, I. e, 3, in Digest Sup. Ct. 1908.]

Mines — lode location — discovery.

4. To support a lode mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine.

[For other cases, see Mines, I. b, in Digest Sup. Ct. 1908.]

Mines — invalid lode locations — avoidance by Land Department.

5. The Secretary of the Interior, by virtue of the general powers conferred by U. S. Rev. Stat. §§ 441, 453, 2478, may determine, after proper notice and upon adequate hearing, whether an asserted lode mining location which has not gone to patent, under which the locator is occupying and using a part of the public reserves, is a valid claim, and, if found to be invalid, may declare it void and recognize the rights of the public.

[For other cases, see Mines, I. b, in Digest Sup. Ct. 1908.]

Public lands — judicial review of action of Land Department — matters concluded.

6. Whether a part of a public reserve covered by an unpatented lode mining claim was mineral, and whether there had been the requisite discovery, were questions of fact the decision of which by the Secretary of the Interior was conclusive on the courts, in the absence of fraud or imposition.

[For other cases, see Public Lands, I. h, 2, c, in Digest Sup. Ct. 1908.]

[No. 205.]

Argued January 29 and 30, 1920. Decided April 19, 1920.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the District Court for the District of Arizona, enjoining the occupation and use of a part of the Grand Canyon Forest Reserve under an asserted lode mining claim. Affirmed.

See same case below, 163 C. C. A. 193, 250 Fed. 943.

The facts are stated in the opinion.

Mr. **William C. Prentiss** argued the cause, and, with Messrs. Robert E. Morrison and Joseph E. Morrison, filed a brief for appellants.

Assistant Attorney General **Nebeker** argued the cause, and, with Mr. H. L. Underwood, Special Assistant to the Attorney General, filed a brief for appellee.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit by the United States to enjoin Ralph H. Cameron and others from occupying, using for business purposes, asserting any right to, or interfering with the public use of, a tract of land in Arizona, approximately 1,500 feet long and 600 feet wide, which Cameron is claiming as a lode mining claim, and to require the defendants to remove therefrom certain buildings, filth, and refuse placed thereon in the course of its use by them as a livery stable site and otherwise. In the district court there was a decree for the United States, and this was affirmed by the circuit court of appeals. 163 C. C. A. 193, 250 Fed. 943.

The tract is on the southern rim of the Grand Canyon of the Colorado, is immediately adjacent to the railroad [455] terminal and hotel buildings used by visitors to the canyon, and embraces the head of the trail[1] over which visitors descend to and ascend from the bottom of the canyon. Formerly it was public land and open to acquisition under the Public Land Laws. But since February 20, 1893, it has been within a public forest reserve[2] established and continued by proclamations of the President under the Acts of March 3, 1891, § 24, 26 Stat. at L. 1095, 1103, chap. 561, Comp. Stat. §§ 5116, 5121, 8 Fed. Stat. Anno. 2d ed. p. 825, 9 Fed. Stat. Anno. 2d ed. p. 579, and June 4, 1897, chap. 2, 30 Stat. at L. 34–36, 9 Fed. Stat. Anno. 2d ed. pp. 583, 587, and since January 11, 1908, all but a minor part of it has been within a monument reserve[3] established by a proclamation of the President under the Act of June 8, 1906, chap. 3060, 34 Stat. at L. 225, Comp. Stat. § 5278, 8 Fed. Stat. Anno. 2d ed. p. 1017. The forest reserve remained effective after the creation of the monument reserve, but, in so far as both embraced the same land, the monument reserve became the dominant one. January 11, 1908, 35 Stat. at L. 2175. The inclusion of the tract in the forest reserve withdrew it from the operation of the Public Land Laws, other than the Mineral Land Law; and the inclusion of the major part of it in the monument reserve withdrew that part from the operation of the Mineral Land Law, but there was a saving clause in respect of any "valid" mining claim theretofore acquired. The United States still has the paramount legal title to the tract, and also has the full beneficial ownership if

[1] The Bright Angel Trail.

[2] Originally the Grand Canyon Forest Reserve and now the Tusayan National Forest.

[3] Called the Grand Canyon National Monument.

Cameron's asserted mining claim is not valid.

The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." [456] It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

The defendants also insist that in holding the United States entitled to the relief sought the courts below gave undue effect and weight to decisions of the Secretary of the Interior dealing with Cameron's asserted claim and pronouncing it invalid. Rightly to appreciate and dispose of this contention requires a further statement.

The claim in question is known as the Cape Horn lode claim and was located by Cameron in 1902, after the creation of the forest reserve, and before the creation of the monument reserve. To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character, and that there be an adequate mineral discovery within the limits of the claim as located (Rev. Stat. § 2320, Comp. Stat. § 4615, 6 Fed. Stat. Anno. 2d ed. p. 512; Cole v. Ralph, 252 U. S. 286, ante, 567, 40 Sup. Ct. Rep. 321); and to bring the claim within the saving clause in the withdrawal for the monument reserve, the discovery must have preceded the creation of that reserve.

Cameron applied to the Land Department for the issue to him of a patent for the claim, and similarly sought patents for other claims embracing other portions of the trail into the canyon. A protest was interposed, charging that the land was not mineral, that there had been no supporting mineral discoveries, and that the claims were located and used for purposes not contemplated by the Mineral Land Law; and the Secretary of the Interior directed that a hearing be had in the local land office to enable the parties concerned—the protestant, Cameron, and the government—to produce evidence bearing on the questions thus presented. 35 Land Dec. 495, 36 Land Dec. 66. After due notice the hearing was had, Cameron fully [457] participating in it. This was shortly after the creation of the monument reserve. In due course the evidence was laid before the Commissioner of the General Land Office, and he concluded therefrom that the claims were not valuable for mining purposes, and therefore were invalid. The matter was then taken before the Secretary of the Interior, and that officer rendered a decision in which, after reviewing the evidence, he said:

"It is not pretended that the applicant has as yet actually disclosed any body of workable ore of commercial value; nor does the evidence reveal such indications and conditions as would warrant the belief or lead to the conclusion that valuable deposits are to be found, save, apparently, in the case of the Magician lode claim. With that possible exception, the probabilities of such deposits occurring are no stronger or more evident at the present time than upon the day the claims were located. The evidence wholly fails to show that there are veins or lodes carrying valuable and workable deposits of gold, silver, or copper, or any other minerals within the limits of the locations. Sufficient time has elapsed since these claims were located for a fair demonstration of their mineral possibilities."

And further:

"It follows from the foregoing that each of Cameron's applications for patent . . . must be rejected and canceled, and it is so ordered.

"It is the further result of the evidence, and the Department holds, that the several mining locations, with the apparent exception of the Magician lode claim, do not stand upon such disclosures or indications of valuable mineral in rock in place therein, prior to the establishment of the National Monument, and the withdrawal of the lands therein embraced, as to bring them within the saving clause of the Executive Order. The right of Cameron to continue possession or exploration of those claims [458] is hereby denied, and the land covered thereby is declared to be and remain part of the Grand Canyon National Monument, as if such locations had not been attempted."

Directions were given for a further hearing respecting the Magician claim, but this is of no moment here.

That decision was adhered to on a motion for review, and in a later decision

denying a renewed application by Cameron for a patent for the claim here in question the Secretary said:

"As the result of a hearing had after the creation of the National Monument, the Department expressly found that no discovery of mineral had been made within the limits of the Cape Horn location, and that there was no evidence before the Department showing the existence of any valuable deposits or any minerals within the limits of the location. . . . So far as the portion of the claim included within the exterior limits of the National Monument is concerned, no discovery which would defeat the said monument can have been made since the date of the previous hearing in this case, nor do I find that one is claimed to have been made since the former decision in any part of the alleged location."

After and notwithstanding these decisions, Cameron asserted an exclusive right to the possession and enjoyment of the tract, as if the lode claim were valid; and he and his codefendants, who were acting for or under him, continued to occupy and use the ground for livery and other business purposes, and in that and other ways obstructed its use by the public as a part of the reserves. In this situation, and to put an end to what the government deemed a continuing trespass, purpresture, and public nuisance, the present suit was brought.

The courts below ruled that the decisions of the Secretary of the Interior should be taken as conclusively determining the nonmineral character of the land and the absence of an adequate mineral discovery, and also as [459] showing that the matter before the Secretary was not merely the application for a patent, but also the status of the claim,—whether it was valid or was wanting in essential elements of validity, and whether it entitled Cameron to the use of the land as against the public and the government. As before stated, the defendants complain of that ruling. The objections urged against it are, first, that the Secretary's decisions show that he proceeded upon a misconception of what, under the law, constitutes an adequate mineral discovery, and, second, that although the Secretary had ample authority to determine whether Cameron was entitled to a patent, he was without authority to determine the character of the land or the question of discovery, or to pronounce the claim invalid.

As to the first objection, little need be said. A reading of each decision in its entirety, and not merely the excerpts to which the defendants invite attention, makes it plain that the Secretary proceeded upon the theory that to support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. That is not a novel or mistaken test, but is one which the Land Department long has applied and this court has approved. Chrisman v. Miller, 197 U. S. 313, 322, 49 L. ed. 770, 773, 25 Sup. Ct. Rep. 468.

The second objection rests on the naked proposition that the Secretary was without power to determine whether the asserted lode claim, under which Cameron was occupying and using a part of the reserves to the exclusion of the public and the reserve officers, was a valid claim. We say "naked proposition," because it is not objected that Cameron did not have a full and fair hearing, or that any fraud was practised against him, but only that the Secretary was without any power of decision in the matter. In our opinion the proposition is not tenable.

By general statutory provisions the execution of the [460] laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stat. §§ 441, 453, 2478; United States v. Schurz, 102 U. S. 378, 395, 26 L. ed. 167, 171; Lee v. Johnson, 116 U. S. 48, 52, 29 L. ed. 570, 571, 6 Sup. Ct. Rep. 249; Knight v. United Land Asso. 142 U. S. 161, 177, 181, 35 L. ed. 974, 979, 981, 12 Sup. Ct. Rep. 258; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698.

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

Of course, the Land Department has

no power to strike down any claim arbitrarily, but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void. This is well illustrated in Orchard v. Alexander, 157 U. S. 372, 383, 39 L. ed. 737, 741, 15 Sup. Ct. Rep. 635, where, in giving effect to a decision of the Secretary of the Interior, canceling a pre-emption claim theretofore passed to cash entry, but still unpatented, this court said: "The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339. The [461] government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department." And to the same effect is Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208, where, in giving effect to a decision of the Secretary canceling a swamp land selection by the state of Michigan, theretofore approved, but as yet unpatented, it was said: "It is, of course, not pretended that when an equitable title has passed, the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. Cornelius v. Kessel, 128 U. S. 456, 22 L. ed. 482, 9 Sup. Ct. Rep. 122; Orchard v. Alexander, 157 U. S. 372, 383, 39 L. ed. 737, 741, 15 Sup. Ct. Rep. 635; Parsons v. Venzke, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27. In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed."

True, the Mineral Land Law does not in itself confer such authority on the Land Department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the Land Department. This is a necessary conclusion from this court's decisions. By an Act of August 14, 1848 [9 Stat. at L. 323, chap. 177], the title to public land in Oregon then occupied as missionary stations, not exceeding 640 acres in any instance, was confirmed to the several religious associations maintaining those stations, but the act made no provision for determining where the stations were, by whom they were maintained, or the area occupied. The Land Department proceeded to a determination of these questions in the [462] exercise of its general authority, and in Catholic Bishop v. Gibbon, 158 U. S. 155, 166, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779, where that determination was challenged as to a particular tract, it was said: "While there may be no specific reference in the Act of 1848 of questions arising under this grant to the Land Department, yet its administration comes within the scope of the general powers vested in that Department. . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary." And in Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 308, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860, where a claimant asserting a full equitable title under the lieu-land provision of the Forest Reserve Act of 1897 questioned the authority of the Land Department to inquire into and pass on the validity of his claim, and sought to have it recognized and enforced by a suit in equity, it was said: "There can be, as we think, no doubt that the general administration of the Forest Reserve Act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department. The Statute of 1897 does not in terms refer any question that might arise under it to that Department, but the subject-matter of that act relates to the relinquishment of land in the various forest reservations to the

United States, and to the selection of lands, in lieu thereof, from the public lands of the United States, and the administration of the act is to be governed by the general system adopted by the United States for the administration of [463] the laws regarding its public lands. Unless taken away by some affirmative provision of law, the Land Department has jurisdiction over the subject." There is in the Mineral Land Law a provision referring to the courts controversies between rival mineral claimants arising out of conflicting mining locations (Rev. Stat. §§ 2325, 2326, Comp. Stat. §§ 4622, 4623, 6 Fed. Stat. Anno. 2d ed. pp. 555, 563), but it does not reach or affect other controversies, and so is without present bearing. Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. 196 U. S. 337, 356, et seq. 49 L. ed. 501, 511, 25 Sup. Ct. Rep. 266.

It is rightly conceded that in the case of a conflict between a mining location and a homestead claim, the Department has authority to inquire into and determine the validity of both; and, if the mining location be found invalid and the homestead claim valid, to declare the former null and void and to give full effect to the latter; and yet it is insisted that the Department is without authority, on a complaint preferred in the public interest, to inquire into and determine the validity of a mining location, and, if it be found invalid, to declare it of no effect and recognize the rights of the public. We think the attempted distinction is not sound. It has no support in the terms of the Mineral Land Law, is not consistent with the general statutory provisions before mentioned, and, if upheld, would encourage the use of merely colorable mining locations in the wrongful private appropriation of lands belonging to the public.

Instances in which this power has been exercised in respect of mining locations are shown in the Yard Case, 38 Land Dec. 59, and the Nichols Case (on rehearing), 46 Land Dec. 20; instances in which its exercise has received judicial sanction are found in Lane v. Cameron, 45 App. D. C. 404, and Cameron v. Bass, 19 Ariz. 246, 168 Pac. 645; and an instance in which its existence received substantial, if not decisive, recognition by this court, is found in Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 223, 234, 48 L. ed. 944, 948, 953, 24 Sup. Ct. Rep. 632.

[464] The argument is advanced that the Department necessarily is without authority to pronounce a mining location invalid, because it has within itself no means of executing its decision, such as dispossessing the locator. But this is not a proper test of the existence of the authority, for the Department is without the means of executing most of its decisions in the sense suggested. When it issues a patent it has no means of putting the grantee in possession, and yet its authority to issue patents is beyond question. When it awards a tract to one of two rival homestead claimants it has no means of putting the successful one in possession or the other one out, and yet its authority to determine which has the better claim is settled by repeated decisions of this court. And a similar situation exists in respect of most of the claims or controversies on which the Department must pass in regular course. Its province is that of determining questions of fact and right under the Public Land Laws, of recognizing or disapproving claims according to their merits, and of granting or refusing patents as the law may give sanction for the one or the other. When there is occasion to enforce its decisions in the sense suggested, this is done through suits instituted by the successful claimants or by the government, as the one or the other may have the requisite interest.

Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, and none was claimed. Catholic Bishop v. Gibbon, supra; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018. Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below.

[465] Of other complaints made by the defendants, it suffices to say that in our opinion, the record shows that the government was entitled to the relief sought and awarded.

Decree affirmed.

UNITED STATES, Plff. in Err.,
v.
EVERETT L. SIMPSON.

(See S. C. Reporter's ed. 465-468.)

Commerce — transportation of intoxicating liquors — Federal regulations — carriage by private automobile — personal use.

The transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, § 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes.

[For other cases, see Commerce, I. b; III. c, in Digest Sup. Ct. 1908.]

[No. 444.]

Submitted March 5, 1920. Decided April 19, 1920.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment sustaining a demurrer to an indictment for transporting intoxicating liquors into a prohibition state. Reversed.

See same case below, 257 Fed. 860.

The facts are stated in the opinion.

Assistant Attorney General **Frierson** submitted the cause for plaintiff in error:

This case is clearly ruled by United States v. Hill, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. Rep. 143.

Transportation, in order to constitute interstate commerce, need not be by common carrier, and may consist of the transportation by one of his own goods.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 469, 470, 24 L. ed. 527, 529, 530; Kirmeyer v. Kansas, 236 U. S. 568, 572, 59 L. ed. 721, 724, 35 Sup. Ct. Rep. 419; Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956; Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159.

No counsel appeared for defendant in error.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is an indictment under § 5 of the Act of March 3, 1917, known as the Reed Amendment, chap. 162, 39 Stat. at L. 1069, Comp. Stat. § 8739a, Fed. Stat. Anno. Supp. 1918, p. 394, which declares that "whoever shall . . . cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any state . . . the laws of which . . . prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished," etc.; and the question for decision is whether the statute was applicable where the liquor—5 quarts of whisky—was transported by its owner in his own automobile, and was for his personal use, and not for an excepted purpose. The district court answered the question in the negative, and on that ground sustained a demurrer to the third count, which is all that is here in question, and discharged the accused. 257 Fed. 860.

We think the question should have been answered the other way. The evil against which the statute was directed was the introduction of intoxicating liquor into a prohibition state from another state for purposes other than those specially excepted,—a matter which Congress could, and the states could not, control. Danciger v. Cooley, 248 U. S. 319, 323, 63 L. ed. 266, 268, 39 Sup. Ct. Rep. 119. The introduction could be effected only through transportation, and whether this took one form or another, it was transportation in interstate commerce. Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; United States v. Chavez, 228 U. S. 525, 532, 533, 57 L. ed. 950, 952, 953, 33 Sup. Ct. Rep.

Note.—On transportation by private means as affecting character of transaction as interstate commerce—see note to this case as reported in 10 A.L.R. 512.

On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On power to prohibit the use of intoxicating liquors irrespective of any intention to traffic in them—see note to State ex rel. Frances v. Moran, 2 A.L.R. 1085.

595; United States v. Mesa, 228 U. S. 533, 57 L. ed. 953, 33 Sup. Ct. Rep. 597; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956; United States v. Hill, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. Rep. 143. The statute makes no distinction between different modes of transportation, and we think it was intended to include them all, that being [467] the natural import of its words. Had Congress intended to confine it to transportation by railroads and other common carriers it well may be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, autotrucks, and other private vehicles, that it would not be of much practical benefit. See Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419. At all events, we perceive no reason for rejecting the natural import of its words, and holding that it was confined to transportation for hire or by public carriers.

The published decisions show that a number of the Federal courts have regarded the statute as embracing transportation by automobile, and have applied it in cases where the transportation was personal and private, as here. Ex parte Westbrook, 250 Fed. 636; Malcolm v. United States, 167 C. C. A. 533, 256 Fed. 363; Jones v. United States, 170 C. C. A. 172, 259 Fed. 104; Berryman v. United States, 170 C. C. A. 276, 259 Fed. 208.

That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. This was settled in United States v. Hill, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. Rep. 143.

We conclude that the District Court erred in construing the statute and sustaining the demurrer.

Judgment reversed.

Mr. Justice **Clarke**, dissenting:

The indictment in this case charges that the defendant, being in the city of Cheyenne, Wyoming, "bought, paid for, and owned" 5 quarts of whisky, and thereafter in his own automobile, driven by himself, transported it into the city of Denver, Colorado, intending to there devote it to his own personal use. Colorado prohibited the manufacture [468] and sale therein of intoxicating liquor for beverage purposes. The court decides that this liquor was unlawfully "transported in interstate commerce" from Wyoming into Colorado, within the meaning of the Act of Congress of March 3, 1917 (39 Stat. at L. 1069, chap. 162, Comp. Stat. § 8739a).

With this conclusion I cannot agree.

By early (Gibbons v. Ogden, 9 Wheat. 1, 193, 6 L. ed. 23, 69) and by recent decisions (Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 46, 56 L. ed. 327, 344, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875) of this court and by the latest authoritative dictionaries, interstate commerce, in the constitutional sense, is defined to mean commercial—business—intercourse, including the transportation of passengers and property, carried on between the inhabitants of two or more of the United States,—especially (we are dealing here with property) the exchange, buying or selling of commodities, of merchandise, on a large scale, between the inhabitants of different states. The liquor involved in this case, after it was purchased, and while it was being held for the personal use of the defendant, was certainly withdrawn from trade or commerce as thus defined, —it was no longer in the channels of commerce, of trade, or of business of any kind,—and when it was carried by its owner, for his personal use, across a state line, in my judgment it was not moved or transported in interstate commerce, within the scope of the act of Congress relied upon, or of any legislation which Congress had the constitutional power to enact with respect to it at the time the Reed Amendment was approved. The grant of power to Congress is over commerce,—not over isolated movements of small amounts of private property, by private persons, for their personal use.

I think the Hill Case, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. Rep. 143, was wrongly decided, and that the judgment of the district court in this case should be affirmed.

[469] DAVID F. HOUSTON,[1] Secretary of the Treasury, and John Burke, Treasurer of the United States, Appts.,

v.

DE FOREST L. ORMES, Administrator of the Estate of Belva A. Lockwood, Deceased.

(See S. C. Reporter's ed. 469–474.)

United States — immunity from suit — suit against Federal officers.

1. A suit against Treasury officials to establish an equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress for payment to a specified person, also made a party defendant, in satisfaction of a finding of the court of claims, is not one against the United States, since the suit is one to compel the performance of a ministerial duty in which the party complainant has a particular interest.

[For other cases, see United States, IV. b, in Digest Sup. Ct. 1908.]

Claims — against United States — regulating assignment — effect of suit to compel payment.

2. The restrictions imposed by U. S. Rev. Stat. § 3477, upon the assignment of claims against the United States, form no obstacle to a suit against Treasury officials to establish an equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress for payment to a specified person, also made a party defendant, in satisfaction of a finding of the court of claims.

[For other cases, see Claims, I, c, in Digest Sup. Ct. 1908.]

Injunction — against Federal officials — compelling ministerial duty — receivers.

3. A court of equity may grant relief against Treasury officials by way of mandatory injunction or a receivership to one who has an equitable right in a fund appropriated by Congress to pay a specified person, conformably to a finding of the court of claims, where such person is made a party so as to bind her, and so that a decree may afford a proper acquittance to the government.

[For other cases, see Injunction, I. j; Receivers, I. in Digest Sup. Ct. 1908.]

Courts — of District of Columbia — jurisdiction — suit against Federal officers — waiver — appearance by real party in interest.

4. Treasury officials joined with a nonresident claimant as defendants in a suit to establish an equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress to pay claimant, conformably to a finding of the court of claims, may not successfully challenge the jurisdiction of the District of Columbia courts on the ground that debts due from the United States have no situs in the District, where claimant voluntarily appeared and answered the bill without objection, since the decree will bind her, and constitute a good acquittance to the government.

[For other cases, see Courts, IV.; Appearance, II. in Digest Sup. Ct. 1908.]

[No. 86.]

Argued January 23, 1920. Decided April 19, 1920.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, granting equitable relief against Treasury officials by way of mandatory injunction and receivership to one adjudged to have an equitable right in a fund appropriated by Congress to pay an award of the Court of Claims. Affirmed.

See same case below, 47 App. D. C. 364.

The facts are stated in the opinion.

Solicitor General **King** argued the cause, and, with Messrs. A. F. Myers and Morgan H. Beach, filed a brief for appellants:

The Secretary of the Treasury and the Treasurer of the United States hold the fund in question solely in their official capacity. The suit is, therefore, in effect a suit against the United States.

Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 56 L. ed. 570, 576, 32 Sup. Ct. Rep. 340; Wells v. Roper, 246 U. S. 335, 337, 62 L. ed. 755, 760, 38 Sup. Ct. Rep.

[1] Motion to substitute as one of the appellants Carter Glass, Secretary of the Treasury, in place of William G. McAdoo, former Secretary of the Treasury, granted October 13, 1919, on motion of counsel for the appellants.

Motion to substitute as one of the appellants David F. Houston, present Secretary of the Treasury, in the place of Carter Glass, former Secretary of the Treasury, granted March 1, 1920, on motion of counsel for the appellants.

Note.—On immunity of the United States from suit—see note to Beers v. Arkansas, 15 L. ed. U. S. 991.

On suit against Federal officer as suit against United States—see notes to Wells v. Roper, 62 L. ed. U. S. 756, and Louisiana v. Garfield, 53 L. ed. U. S. 92.

As to validity of assignment of claims against United States—see note to Lopez v. United States, 2 L.R.A. 571.

On power of courts to enforce ministerial duties of heads of departments—see note to Cooke v. Iverson, 52 L.R.A. (N.S.) 415.

317; United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; United States ex rel. Goldberg v. Daniels, 231 U. S. 218, 58 L. ed. 191, 34 Sup. Ct. Rep. 84; Morgan v. Rust, 100 Ga. 346, 28 S. E. 419.

Debts due from the United States have no situs at the seat of government.

Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639; Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; Borcherling v. United States, 35 Ct. Cl. 311, 185 U. S. 223, 46 L. ed. 884, 22 Sup. Ct. Rep. 607.

Miss **Mary O'Toole** argued the cause and filed a brief for appellee:

The suit is not one against the United States.

Re Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; Minnesota v. Hitchcock, 185 U. S. 373, 386, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340.

The trial court had jurisdiction.

Roberts v. Consaul, 24 App. D. C. 551; Borcherling v. United States, 35 Ct. Cl. 311, 185 U. S. 223, 46 L. ed. 884, 22 Sup. Ct. Rep. 607; Jones v. Rutherford, 26 App. D. C. 114; Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434.

The fund in question had a situs within the District of Columbia.

Roberts v. Consaul, 24 App. D. C. 551; Borcherling v. United States, 35 Ct. Cl. 311, 185 U. S. 223, 46 L. ed. 884, 22 Sup. Ct. Rep. 607.

Mr. Chapman W. Maupin filed a brief as amicus curiæ:

There is no doubt that a bill may be maintained against individuals to establish an equitable interest in or lien upon a fund held by the United States in the capacity of a stakeholder; to enjoin collection of such fund by a claimant thereof; and to compel, by the appointment of a receiver, the application of such fund to the satisfaction of the plaintiff's lien.

Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Peugh v. Porter, 112 U. S. 742, 28 L. ed. 860, 5 Sup. Ct. Rep. 361; Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434; United States v. Borcherling, 185 U. S. 223, 46 L. ed. 884, 22 Sup. Ct. Rep. 607; Roberts v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556; Smith v. Jackson, 246 U. S. 388, 62 L. ed. 788, 38 Sup. Ct. Rep. 353.

As a consequence of these decisions, but more particularly of those which obligate the government to make payment to a duly appointed receiver, it has become a common practice in suits in the District of Columbia for the enforcement of an equitable lien upon or interest in a fund held by the government as a stakeholder, to join the head of the Department having control of the fund as a defendant to the bill, and to obtain a preliminary injunction to prevent disposition of the fund by him pending the suit. The argument in support of this practice has been that, if it be the mere ministerial duty of the head of the Department to make payment of the fund to a receiver, and if performance of that duty may be compelled by mandamus or mandatory injunction, it follows that an injunction will lie to prevent disposition of the fund pending the suit.

Roberts v. Consaul, 24 App. D. C. 551; Lyttle v. National Surety Co. 43 App. D. C. 136.

This court has decided, also, that the surety on the bond of a government contractor has an equitable lien upon or interest in a retained percentage of the contract price in the hands of the government, which lien or interest relates back to the moment when the surety signed the bond, and takes precedence of any claim to the fund by, through, or under, the contractor.

Prairie State Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142; Henningsen v. United States Fidelity & G. Co. 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389; Hardaway v. National Surety Co. 211 U. S. 552, 53 L. ed. 321, 29 Sup. Ct. Rep. 202.

It is impossible to reconcile Smith v. Jackson, 246 U. S. 388, 62 L. ed. 788, 38 Sup. Ct. Rep. 353, 154 C. C. A. 449, 241 Fed. 747, with the rulings of the Comptroller that the courts have no power to direct a payment of public money that is not sanctioned by him.

Where complainant does not ask the court to interfere with an officer of the United States, acting within his official discretion, but challenges his authority to do the act complained of, the suit is not against the United States.

Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570, 32 Sup. Ct. Rep. 340.

Where a government contract has been fully performed, the accounts of the contractor settled, and nothing remains to be done except to make payment of such

balance to the proper party, are the head of the Department and the Comptroller of the Treasury charged with the duty of ascertaining and establishing the rights of the surety in that balance? Is not that the exclusive province and duty of the courts of the land? And is it not the duty of the head of the Department to abide by the decision of the court in that respect, and make payment of such balance as the court may direct? And is not the surety entitled to the aid of the courts to compel the performance of that duty by him?

Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181; Roberts v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376; United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556; Smith v. Jackson, 246 U. S. 388, 63 L. ed. 788, 38 Sup. Ct. Rep. 353.

Mr. Justice **Pitney** delivered the opinion of the court:

This was a suit in equity, brought by the late Belva A. Lockwood in her lifetime in the supreme court of the District of Columbia, to establish an equitable lien for attorney's fees upon a fund of $1,200 in the Treasury of the United States, appropriated by Congress (Act of March 4, 1915, chap. 140, 38 Stat. at L. 962, 981) to pay a claim found by the court of claims to be due to one Susan Sanders, who was made defendant together with the Secretary of the Treasury and the Treasurer of the United States. There were appropriate prayers for relief by injunction and the appointment of a receiver. Defendant Sanders voluntarily appeared and answered, denying her indebtedness to plaintiff; the other defendants answered, admitting the existence of the fund, and declaring that, as a matter of comity, and out of deference to the court, it would be retained under their control to await the final disposition of the case; but objecting to the jurisdiction of the court over the cause upon the ground that debts due from the United States have no situs in the District of Columbia, that there was nothing to show that either the United States or the defendant Sanders had elected to make the sum alleged to be due from the United States payable to her in the District, and that, in the absence of personal service upon her, the court could make no decree that would protect the United States. There was a final decree adjudging that [**472**] the sum of $90 was due from the defendant Sanders to Mrs. Lockwood, with costs, and appointing a receiver to collect and receive from the Secretary of the Treasury the $1,200 appropriated in favor of Sanders, directing the Secretary to pay the latter sum to the receiver, and decreeing that his receipt should be a full acquittance to the United States for any and all claims and demands of the parties arising out of or connected with said claim. The Secretary of the Treasury and the Treasurer appealed to the court of appeals of the District of Columbia, the defendant Sanders not appealing. That court affirmed the decree (47 App. D. C. 364); and a further appeal taken by the officials of the Treasury under § 250, Judicial Code [36 Stat. at L. 1159, chap. 231, Comp. Stat. § 1227, 5 Fed. Stat. Anno. 2d ed. p. 913], brings the case here.

The principal contention is that because the object of the suit and the effect of the decree were to control the action of the appellants in the performance of their official duties the suit was in effect one against the United States. But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the court of claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the government. So it has been declared by this court in many cases relating to state officers. Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. ed. 623, 628; Louisiana v. Jumel, 107 U. S. 711, 727, 27 L. ed. 448, 453, 2 Sup. Ct. Rep. 128; Re Ayers, 123 U. S. 443, 506, 31 L. ed. 216, 230, 8 Sup. Ct. Rep. 164. In Minnesota v. Hitchcock, 185 U. S. 373, 386, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650, while holding that a suit against officers of the United States might be in effect a suit against the United States, the court said (p. 386): "Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate [**473**] form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the government cannot be sued except by its con-

sent, nor within the rule established in the Ayers Case." And in United States ex rel. Parish v. MacVeagh, 214 U. S. 124, 53 L. ed. 936, 29 Sup. Ct. Rep. 556, the court upheld the right of a claimant, in whose favor an appropriation had been made by Congress, to have a mandamus against the Secretary of the Treasury, requiring him to pay the claim. To the same effect, Roberts v. United States, 176 U. S. 221, 231, 44 L. ed. 443, 447, 20 Sup. Ct. Rep. 376.

In the present case it is conceded, and properly conceded, that payment of the fund in question to the defendant Sanders is a ministerial duty, the performance of which could be compelled by mandamus. But from this it is a necessary consequence that one who has an equitable right in the fund as against Sanders may have relief against the officials of the Treasury through a mandatory writ of injunction, or a receivership, which is its equivalent, making Sanders a party so as to bind her, and so that the decree may afford a proper acquittance to the government. The practice of bringing suits in equity for this purpose is well established in the courts of the District (Sanborn v. Maxwell, 18 App. D. C. 245; Roberts v. Consaul, 24 App. D. C. 551, 562; Jones v. Rutherford, 26 App. D. C. 114; Parish v. McGowan, 39 App. D. C. 184; s. c. on appeal, McGowan v. Parish, 237 U. S. 285, 295, 59 L. ed. 955, 963, 35 Sup. Ct. Rep. 543). Confined, as it necessarily must be, to cases where the officials of the government have only a ministerial duty to perform, and one in which the party complainant has a particular interest, the practice is a convenient one, well supported by both principle and precedent.

Sec. 3477, Rev. Stat. (Comp. Stat. § 6383, 2 Fed. Stat. Anno. 2d ed. p. 179), regulating the assignment of claims against the United States, is not an obstacle. As has been held many times, the object of Congress in this legislation [474] was to protect the government, not the claimant; and it does not stand in the way of giving effect to an assignment by operation of law after the claim has been allowed. Erwin v. United States, 97 U. S. 392, 397, 24 L. ed. 1065, 1067; Goodman v. Niblack, 102 U. S. 556, 560, 26 L. ed. 229, 231; Price v. Forrest, 173 U. S. 410, 423-425, 43 L. ed. 749, 753, 754, 19 Sup. Ct. Rep. 434.

In support of the contention that a court of equity may not control the action of an officer of the United States within the scope of his authority, Wells v. Roper, 246 U. S. 335, 62 L. ed. 755, 38 Sup. Ct. Rep. 317, is cited; but it is not in point; the official duty sought to be subjected to control in that case was not ministerial, but required an exercise of official discretion, as the opinion shows (p. 338).

It is further objected that debts due from the United States have no situs at the seat of government, and Vaughan v. Northup, 15 Pet. 1, 6, 10 L. ed. 639, 641; United States use of Mackey v. Coxe, 18 How. 100, 105, 15 L. ed. 299, 301; Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 657, 27 L. ed. 1068, 1069, 3 Sup. Ct. Rep. 417, are cited. But in the present case the question of situs is not material. If the jurisdiction as to the defendant Sanders had depended upon publication of process against her as a nonresident under § 105 of the District Code (Act of March 3, 1901, chap. 854, 31 Stat. at L. 1189, 1206), upon the theory that her claim against the government was "property within the District," the point would require consideration. But the jurisdiction over her rests upon her having voluntarily appeared and answered the bill without objection. Hence there is no question that the decree binds her, and so constitutes a good acquittance to the United States as against her.

The decree will be affirmed.

---

[475] ELIZABETH HULL, Administratrix of John M. Hull, Deceased, for the Benefit of Elizabeth Hull, Mother of Deceased, Petitioner,

v.

PHILADELPHIA & READING RAILWAY COMPANY.

(See S. C. Reporter's ed. 475-484.)

Master and servant — employers' liability — when servant is in defendant's employ.

A brakeman in the general employ of an interstate railway company, which had

---

Note—As to constitutionality, application, and effect of Employers' Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

As to who are employers within the meaning of the Compensation Statutes—see note to Claremont Country Club v. Industrial Acci. Commission, L.R.A. 1918F, 179.

As to who are employees within the meaning of the Compensation Statutes—see note to State ex rel. Nienaber v. District Ct. L.R.A.1918F, 201.

a contract arrangement with a connecting railway company for through freight service without change of crews, was not in the employ of the latter company within the meaning of the Federal Employers' Liability Act while his train was on that company's line, where, under such contract, each company retained control of its own train crews, what they did upon the line of the other railroad was done as a part of their duty to the general employer, and so far as they were subject, while upon the tracks of the other company, to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies.

[For other cases, see Master and Servant, I. a; II. a, in Digest Sup. Ct. 1908.]

[No. 151.]

Argued January 16, 1920. Decided April 19, 1920.

ON WRIT of Certiorari to the Court of Appeals of the State of Maryland to review a judgment which affirmed a judgment of the Circuit Court of Washington County, in that state, in favor of defendant in an action brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 132 Md. 540, 104 Atl. 274.

The facts are stated in the opinion.

Mr. Charles D. Wagaman argued the cause, and, with Messrs. Omer T. Kaylor and Frank G. Wagaman, filed a brief for petitioner:

Where one in the general service of another performs work in which that other and a third person are both interested, he remains the servant of that other, or becomes the servant of the third person, according as the work in its doing is the work of that other, or is, in its doing, the work of the third person. And this principle is true no matter who hires, pays, or has the power to discharge the servant.

Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252; Murray v. Currie, L. R. 6 C. P. 24, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104; Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, 36 L. T. N. S. 49, 25 Week. Rep. 263; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; Donovan v. Laing, W. & D. Constr. Syndicate [1893] 1 Q. B. 629, 63 L. J. Q. B. N. S. 25, 4 Reports, 317, 68 L. T. N. S. 512, 41 Week. Rep. 455, 57 J. P. 583; Powell v. Virginia Constr. Co. 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; Miller v. Minnesota & N. W. R. Co. 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188.

The law imposes upon a railroad corporation the nondelegable duty of the operation of its road.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

One who performs the nondelegable duty of another with the knowledge and assent of that other becomes the employee of him for whom he is performing the work.

Atlantic Coast Line R. Co. v. Treadway, 120 Va. 735, — A.L.R. —, 93 S. E. 560.

Responsibility of one for the manner of the performance of the work of another always creates the relation of employee and employer.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109.

Mr. Henry H. Keedy, Jr., argued the cause and filed a brief for respondent:

Plaintiff's decedent was not a servant or an employee of the defendant, within the meaning of the Federal Employers' Liability Act.

Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1; Chicago & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. 379, 36 Sup. Ct. Rep. 135, 11 N. C. C. A. 1087; Fowler v. Pennsylvania R. Co. 143 C. C. A. 493, 229 Fed. 375; Missouri, K. & T. R. Co. v. West, 38 Okla. 581, 134 Pac. 658; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Bentley v. Edwards, 100 Md. 652, 60 Atl. 283; Quarman v. Burnett, 6 Mees. & W. 499, 151 Eng. Reprint, 509, 9 L. J. Exch. N. S. 308, 4 Jur. 969; Zeigler v. Danbury & N. R. Co. 52 Conn. 543, 2 Atl. 462; Tierney v. Syracuse, B. & N. Y. R. Co. 85 Hun, 146, 32 N. Y. Supp. 627; Sullivan v. Tioga R. Co. 112 N. Y. 643, 8 Am. St. Rep. 793, 20 N. E. 569; Bosworth v. Rogers, 27 C. C. A. 385, 53 U. S. App. 620, 82 Fed. 975; Hamble v. Atchison, T. & S. F. R. Co. 22 L.R.A. (N.S.) 323, 92 C. C. A. 147, 164 Fed. 410; Phillips v. Chicago, M. & St. P. R. Co. 64 Wis. 475, 25 N. W. 544; McAdow v. Kansas City Western R. Co. 192 Mo. App. 540, 164 S. W. 188; Kastl v. Wabash R. Co. 114 Mich. 53, 72 N. W. 28; Labatt, Mast. & S. 2d ed. 83 note (C); Philadelphia, W. & B. R. Co. v. State, 58 Md. 372; Delaware, L. & W. R. Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986;

Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Berry v. New York C. & H. R. R. Co. 202 Mass. 197, 88 N. E. 588.

For the conventional relation of employer and employee to exist, there must be a coming together or an agreement by the parties that the relation shall be created.

Bouvier's Law Dict. 360; 2 Bl. Com. 120; Mutual Transit Co. v. United States, 102 C. C. A. 164, 178 Fed. 668; Disley v. Disley, 30 R. I. 366, 75 Atl. 481; 4 Kent, Com. 12th ed. p. 25.

Mr. Justice **Pitney** delivered the opinion of the court:

This was an action brought in a state court of Maryland under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. § 8662, 8 Fed. Stat. Anno. 2d ed. p. 1369), by petitioner as administratrix of John M. Hull, deceased, to recover damages because of his death, occurring, as alleged, while he was employed by defendant in interstate commerce. The trial court directed a verdict in favor of defendant, the court of appeals of Maryland affirmed the resulting judgment upon the ground that the deceased, at the time he was killed, was not in the employ of defendant within the meaning of the act of Congress (132 Md. 540, 104 Atl. 274), and upon this Federal question the case is brought here by certiorari.

The pertinent facts are not in dispute. John M. Hull, at the time he was killed and for a long time before, was in the general employ of the Western Maryland Railway Company, an interstate carrier operating, among other lines, a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania, at which point it connected with a railway owned and operated by defendant, the Philadelphia & Reading Railway Company, which extended from Lurgan to Rutherford, in the same state. Through freight trains were operated from Hagerstown to Rutherford over these two lines, and Hull was employed as a brakeman on such a train at the time he received the fatal injuries. On the previous day a crew employed by the Western Maryland Railway Company, and of which he was a member, had taken a train hauled by a Western Maryland engine from Hagerstown to Rutherford, and at the time in question the same crew was returning with a train from Rutherford [**478**] to Hagerstown. Before starting they received instructions from the yardmaster at Rutherford (an employee of defendant company) as to the operation of the train, including directions to pick up seven cars at Harrisburg. They proceeded from Rutherford to Harrisburg, stopped there for the purpose of picking up the seven cars, and while this was being done Hull was run over and killed by one of defendant's locomotives.

The through freight service was conducted under a written agreement between the two railway companies, which was introduced in evidence and constitutes the chief reliance of petitioner. Its provisions, so far as they need to be quoted, are as follows:

"2. Freight trains to run through between Hagerstown and Rutherford in both directions, and each company agrees to supply motive power in the above proportions [based upon mileage] so as to equalize the service performed.

. . . . . .

"4. Crews of each road to run through with their engines over the line of the other company.

"5. Each company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour: . . . Time to begin at Rutherford and Hagerstown when crew is called for. . . . Time to cease when the engines arrive on the fire track at Rutherford and Hagerstown. . . .

"6. The division of earnings of the traffic not to be disturbed or in any way affected by this arrangement.

"7. Each company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

. . . . . .

"9. Neither company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five (75) cents per engine to be made.

[**479**] "10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road.

. . . . . .

"16. Each company to relieve and turn as promptly as practicable the engines and crews of the other at ends of runs.

"17. Each company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its lines.

"18. All cases of violation of rules or other derelictions by the employees of one company while upon the road of the other shall be promptly investigated by the owning company, and the result re-

ported to the employing company, with or without suggestions for disciplining, the employing company to report to the other the action taken.

"19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one company is operating upon the road of the other, a copy must be sent to the proper officer of each company.

"20. Employees of each company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest co-operation to be given by the one company to the other in all such matters.

"21. The employees of each company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline, and orders of the owning company."

We hardly need repeat the statement made in Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 94, 59 L. ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1, that in the Employers' Liability Act Congress used the words "employee" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the [480] facts as recited, and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Company only. It it clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See Standard Oil Co. v. Anderson, 212 U. S. 215, 226, 53 L. ed. 480, 485, 29 Sup. Ct. Rep. 252.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159, is cited, but is not in point, since in that case the relation of the parties was controlled by a dominant rule of local law, to which the agreement here operative has no analogy.

The Court of Appeals of Maryland did not err in its disposition of the Federal question, and hence its judgment is affirmed.

Mr. Justice **Clarke**, dissenting:

The Western Maryland Railroad Company owned a line of railroad extending from Hagerstown, Maryland, to Lurgan, where it connected with the line of the Reading [481] Company, extending to Rutherford, in Pennsylvania. The two companies entered into a contract by which through freight trains, made up and manned by crews primarily employed by either, should run through over the rails of the other company to Rutherford or Hagerstown, as the case might be. A crew from either line, arriving at the terminus of the other, should return with a train made up by the company operating the latter, together with any cars which might be "picked up" on the way.

Thus, for the purposes of operation, the line over which train crews worked was 81 miles in length, 34 miles of Western Maryland track and 47 miles of Reading track, and the relation of the men to the company, other than the one which originally employed them, while on its line, was defined by the contract quoted from in the opinion of the court.

Five of the paragraphs of this contract seem to me decisive of what that relation was, and of this case, viz.:

5. Each company to pay the other an agreed compensation for the service of its engines and crews while on its line.

"10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents on its road."

"17. Each company to have the right to object to, *and to enforce objection to*, any unsatisfactory employee of the other running upon its lines.

"18. All violations of rules or other derelictions by employees of one company while on the road of the other shall be promptly investigated by the owning company and the result reported to the employing company, *with or without suggestions for disciplining*, the employing company to report to the other the action taken."

"21. *The employees of each company while upon the* [482] *tracks of the other shall be subject to and conform to the rules, regulations, discipline, and orders of the owning company.*"

The deceased brakeman, Hull, was killed on the Reading tracks at Harrisburg, 30 miles away from any Western Maryland track, by the alleged negligence of a Reading engineer, when engaged, under the direction of a local Reading yardmaster, in "picking up" cars to be added to a train which was made up by the Reading Company at Rutherford and despatched by Reading officials from that terminal.

Thus, when he was killed, Hull was working on the Reading Railroad, subject to the "rules, regulations, discipline, and orders" of the Reading Company, and at the moment was acting under specific direction of a Reading yardmaster. The Reading Company was paying for the service which he was rendering when he was killed, it had authority to cause his discharge if his service was not satisfactory to it (paragraphs 17 and 18 of the contract, supra), and it had specifically contracted to be responsible for all damage to persons and property caused by accidents on its line growing out of the joint operation.

It is admitted that the service he was rendering was in the movement of interstate commerce, but upon the facts thus stated it is concluded in the opinion that he was not within the scope of the act providing that "every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury *while he is employed* by such carrier in such commerce, or, in case of death," etc. (Act of April 22, 1908, 35 Stat. at L. chap. 149, § 1, p. 65, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208).

I cannot concur in this decision of the court for the reason that the case seems to me to be ruled by a conclusion as to the applicable law, stated in a strongly reasoned opinion in Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252, in this paragraph:

"One may be in the general service of another, and, [483] nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

By the contract of hiring Hull was in the general service of the Maryland Company, but "by his consent and acquiescence," he was transferred to the service of the Reading Company whenever his train passed onto its tracks. From that moment until his return to the Maryland Company's tracks again he was engaged exclusively in the work of the Reading Company, that company paid for his services, he was under its "rules, regulations, discipline, and orders," and it had authority to cause his discharge if his service was not satisfactory. He was under the control of that company as to what he was to do and as to the details of the manner of doing it as completely as if he had no other employer. He ceased for the time being to be the servant of the Maryland Company and became the servant of the Reading Company (212 U. S. 215, 234, 53 L. ed. 480, 484, 29 Sup. Ct. Rep. 252).

The Federal Employers' Liability Act does not require that a person shall be in the exclusive employ of a railroad common carrier in order to come within its scope. It provides that such carrier shall be "liable in damages to any person injured *while he is employed* (*engaged*) *by it in interstate commerce*," and it is impossible for me to accept the conclusion that Hull, when in the pay of the Reading Company, assisting in operating Reading interstate trains on Reading tracks, under the direction solely of Reading officials, general and local, was not "employed" by it in interstate commerce, within the meaning of this provision.

We are not dealing here with mere words or with merely "conventional relations," but with very serious realities. Enacted, as the Federal Employers' Liability Act was, to bring the United States law up to the humanitarian level [484] of the laws of many of the states by abolishing the unjust and irritating fellow-servant rule, by modifying the often harsh contributory-negligence rule, and by otherwise changing the common-law liability of interstate rail carriers to their employees, it should receive a liberal construction to promote its important purpose. Its terms invite the application of the rule, widely applied by other courts and clearly approved by this court, in the case cited, that a man may be in the general service of one, and also, with respect to a part of his service,—to particular work,—be in the service of another employer, so that he becomes for the time being the servant of the latter, "with all the legal consequences of that relation." The line of demarcation could not be more clearly drawn than it was

in this case, and the rule seems to me to be sharply and decisively applicable.

In the opinion of the court it is said: "It is clear that each company retained control of its own train crews." Upon the contrary, it seems to me, it is clear that neither company retained any control whatever over the crews primarily employed by it while they were on the line of the other company. "21. The employees of each company, while upon the tracks of the other, shall be subject to and conform to the rules, regulations, discipline, and orders of the owning company," was the contract between the two companies under which they were operating when Hull was negligently killed.

---

[485] UNITED STATES OF AMERICA, Plff. in Err.,
v.
CHASE NATIONAL BANK.

(See S. C. Reporter's ed. 485–496.)

Assumpsit — recovering back payments — mistake — forged draft.

The United States as the drawee of a forged draft cannot recover as for money paid out under a mistake of fact the sum paid by it on such draft to an innocent collecting bank, even though the signature of the indorser as well as that of the drawer was forged.

[For other cases, see Assumpsit, II. c, 1, in Digest Sup. Ct. 1908.]

[No. 134.]

Argued January 14 and 15, 1920. Decided April 19, 1920.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of New York, directing a verdict in favor of defendant in a suit by the United States to recover as for money paid out under a mistake of fact the sum paid by it to an innocent collecting bank upon a forged draft. Affirmed.

See same case below, 162 C. C. A. 277, 250 Fed. 105.

The facts are stated in the opinion.

Assistant Attorney General **Spellacy** argued the cause, and, with Messrs. Leonard B. Zeisler and Charles H. Weston, filed a brief for plaintiff in error:

The plaintiff may recover of the defendant money paid the latter on a forged check, since the defendant did not change its position to its prejudice, in reliance on the fact of payment, and since its indorser was guilty of acts of negligence contributing to the success of the forgery.

Morse, Banks & Bkg. 5th ed. § 391; First Nat. Bank v. First Nat. Bank, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; Ford v. People's Bank, 74 S. C. 180, 10 L.R.A.(N.S.) 63, 114 Am. St. Rep. 986, 54 S. E. 204, 7 Ann. Cas. 744; People's Bank v. Franklin Bank, 88 Tenn. 299, 6 L.R.A. 724, 17 Am. St. Rep. 884, 12 S. W. 716; Greenwald v. Ford, 21 S. D. 28, 109 N. W. 516; McCall v. Corning, 3 La. Ann. 409, 48 Am. Dec. 454; Farmers Nat. Bank v. Farmers & Traders Bank, 159 Ky. 141, L.R.A.1915A, 77, 166 S. W. 986; Canadian Bank v. Bingham, 30 Wash. 484, 60 L.R.A. 955, 71 Pac. 43; National Bank v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; Williamsburgh Trust Co. v. Tum Suden, 120 App. Div. 518, 105 N. Y. Supp. 335; Rouvant v. San Antonio Nat. Bank, 63 Tex. 610; Ellis v. Ohio Life Ins. & T. Co. 4 Ohio St. 628, 64 Am. Dec. 610; First Nat. Bank v. State Bank, 22 Neb. 769, 3 Am. St. Rep. 294, 36 N. W. 289; Woods v. Colony Bank, 114 Ga. 683, 56 L.R.A. 929, 40 S. E. 720; Newberry Sav. Bank v. Bank of Columbia, 91 S. C. 294, 38 L.R.A.(N.S.) 1200, 74 S. E. 615.

The defendant is liable to the plaintiff as guarantor of the indorsements of the check.

Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank, 128 U. S. 26, 32 L. ed. 342, 7 Sup. Ct. Rep. 3; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 26 L.R.A. 289, 43 Am. St. Rep. 247, 38 N. E. 739; Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26, 22 L.R.A. (N.S.) 499, 85 N. E. 829; Boles v. Harding, 201 Mass. 103, 87 N. E. 481; Jordan Marsh Co. v. National Shawmut Bank,

---

Note.—As to right of drawee of forged check or draft to recover money paid thereon—see notes to Farmers' Nat. Bank v. Farmers & Traders' Bank, L.R.A.1915A, 77; State Bank v. First Nat. Bank, 29 L.R.A.(N.S.) 100; Title Guarantee & T. Co. v. Haven, 25 L.R.A. (N.S.) 1308; and First Nat. Bank v. Bank of Wyndmere, 10 L.R.A.(N.S.) 49.

As to recovery of money paid by mistake—see note to United States v. Barlow, 33 L. ed. U. S. 346.

201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740; United States v. National Bank, 123 C. C. A. 501, 205 Fed. 433, 140 C. C. A. 219, 224 Fed. 679; Floyd Acceptances (Pierce v. United States) 7 Wall. 666, 19 L. ed. 169; Bank of England v. Vagliano Bros. [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695; McCall v. Corning, 3 La. Ann. 409, 48 Am. Dec. 454; Grand Lodge, A. O. U. W. v. Emporia Nat. Bank, 101 Kan. 369, 166 Pac. 490.

The plaintiff is not barred from recovery in this case by negligence in failing sooner to discover and notify the bank of the forgery.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; New York Produce Exch. Bank v. Houston, 95 C. C. A. 251, 169 Fed. 785; Merchants' Nat. Bank v. Nichols & S. Co. 223 Ill. 41, 7 L.R.A.(N.S.) 752, 79 N. E. 38; National Dredging Co. v. Farmers Bank, 6 Penn. (Del.) 580, 16 L.R.A. (N. S.) 593, 130 Am. St. Rep. 158, 69 Atl. 607; Brixen v. Deseret Nat. Bank, 5 Utah, 504, 18 Pac. 43; United States v. National Bank, 123 C. C. A. 501, 205 Fed. 433; First Nat. Bank v. First Nat. Bank, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44.

Mr. **Henry Root Stern** argued the cause and filed a brief for defendant in error:

The drawee of a forged check or draft is bound, at his peril, to know the drawer's signature, and cannot, after payment of such check to an innocent holder for value, recover back the amount of such payment from the latter.

Price v. Neal, 3 Burr. 1354, 97 Eng. Reprint, 871, 1 W. B. 390, 96 Eng. Reprint, 221; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; United States v. Bank of New York, Nat. Bkg. Asso. L.R.A.1915D, 797, 134 C. C. A. 579, 219 Fed. 648; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Bank of St. Albans v. Farmers & M. Bank, 10 Vt. 141, 33 Am. Dec. 188; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 41 L.R.A. 584, 65 Am. St. Rep. 748, 50 N. E. 723; State Nat. Bank v. Bank of Magdalena, 21 N. M. 653, L.R.A.1916E, 1296, 157 Pac. 498, 14 N. C. C. A. 567; Bergstrom v. Ritz-Carlton Restaurant & Hotel Co. 171 App. Div. 776, 157 N. Y. Supp. 959; Germania Bank v. Boutell, 60 Minn. 189, 27 L.R.A. 635, 51 Am. St. Rep. 519, 62 N. W. 327; Ames, 4 Harvard L. Rev. 297.

This is equally true, even though the indorsement of the purported payee also is forged.

Postal Teleg. Cable Co. v. Citizens' Nat. Bank, 143 C. C. A. 601, 228 Fed. 601; State Bank v. Cumberland Sav. & T. Co. 168 N. C. 605, L.R.A.1915D, 1138, 85 S. E. 5; Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10, 7 L.R.A. 849, 13 S. W. 339; First Nat. Bank v. Marshalltown State Bank, 107 Iowa, 327, 44 L.R.A. 131, 77 N. W. 1045; Howard v. Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105; Bank of England v. Vagliano Bros. [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; National Bank v. United States, 140 C. C. A. 219, 224 Fed. 679, s. c. 123 C. C. A. 501, 205 Fed. 433; 2 Parsons, Bills & Notes, 591; Robinson v. Yarrow, 7 Taunt. 455, 129 Eng. Reprint, 183, 1 J. B. Moore, 150, 18 Revised Rep. 537; Cooper v. Meyer, 10 Barn. & C. 468, 109 Eng. Reprint, 525, 8 L. J. K. B. 171; Beeman v. Duck, 11 Mees. & W. 251, 152 Eng. Reprint, 796, 12 L. J. Exch. N. S. 198, 4 Eng. Rul. Cas. 622; Williams v. Drexel, 14 Md. 566.

Inasmuch as the individual drawing the instrument did not intend that the person named as payee therein should have any interest in it, or even possession thereof, such payee was, within the Negotiable Instruments Law, a fictitious payee, and hence the instrument was payable to bearer, and the indorsement surplusage.

Bank of England v. Vagliano Bros. [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695; Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 N. Y. Supp. 84; Snyder v. Corn Exch. Bank, 221 Pa. 599, 128 Am. St. Rep. 780, 70 Atl. 876; Bartlett v. First Nat. Bank, 247 Ill. 490, 93 N. E. 337; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 23 L.R.A. 584, 37 Am. St. Rep. 596, 35 N. E. 982; Clutton v. Attenborough & Sons [1897] A. C. 90, 66 L. J. Q. B. N. S. 122, 75 L. T. N. S. 556, 45 Week. Rep. 276; Coggill v. American Exch. Bank, 1 N. Y. 113, 49 Am. Dec. 310; Phillips v. Im Thurn, 18 C. B. N. S. 694, 144 Eng. Reprint, 617, 11 Jur. N. S. 489, 13 Week. Rep. 750; Kohn v. Watkins, 26 Kan. 691, 40 Am.

Rep. 336; Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; Lane v. Krekle, 22 Iowa, 405; Farnsworth v. Drake, 11 Ind. 101; Blodgett v. Jackson, 40 N. H. 21; Re Pendleton Hardware Co. 24 Or. 330, 33 Pac. 544.

The record fails to disclose any facts sufficient to justify a finding that the Howard National Bank was negligent.

Dedham Nat. Bank. v. Everett Nat. Bank, 177 Mass. 392, 83 Am. St. Rep. 286, 59 N. E. 62.

Both parties having moved for the direction of a verdict, the exception to the finding of the trial judge in favor of the defendant does not permit the plaintiff to raise the question of the negligence of the Howard National Bank for review by this court upon writ of error.

4 Wigmore, Ev. § 2552 (c), p. 3593; Beutell v. Magone, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566; Williams v. Vreeland, 250 U. S. 295, 63 L. ed. 989, 3 A.L.R. 1038, 39 Sup. Ct. Rep. 438; Sena v. American Turquoise Co. 220 U. S. 497, 55 L. ed. 559, 31 Sup. Ct. Rep. 488; Bowen v. Chase, 98 U. S. 254, 25 L. ed. 47; Martinton v. Fairbanks, 112 U. S. 670, 28 L. ed. 862, 5 Sup. Ct. Rep. 321; Kentucky Life & Acci. Ins. Co. v. Hamilton, 11 C. C. A. 42, 22 U. S. App. 386, 548, 63 Fed. 93; Wilson v. Merchants' Loan & T. Co. 183 U. S. 121, 46 L. ed. 113, 22 Sup. Ct. Rep. 55; Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; Otoe County v. Baldwin, 111 U. S. 1, 12, 28 L. ed. 331, 335, 4 Sup. Ct. Rep. 265; Basset v. United States, 9 Wall. 38, 40, 19 L. ed. 548, 549; Dooley v. Pease, 180 U. S. 126, 131, 45 L. ed. 457, 460, 21 Sup. Ct. Rep. 329; Hepburn v. Dubois, 12 Pet. 345, 9 L. ed. 1111.

Even assuming that the Howard National Bank was negligent in cashing the check, such negligence could not be charged to the defendant bank, which was a bona fide purchaser for value.

Merchants Nat. Bank v. Santa Maria Sugar Co. 162 App. Div. 248, 147 N. Y. Supp. 498; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 11 Am. St. Rep. 612, 20 N. E. 632; Rickerson Roller-Mill Co. v. Farrell Foundry & Mach. Co. 23 C. C. A. 302, 43 U. S. App. 452, 75 Fed. 554; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Jones v. Miners & M. Bank, 144 Mo. App. 428, 128 S. W. 829; Pennington County Bank v. First State Bank, 110 Minn. 263, 26 L.R.A.(N.S.) 849, 136 Am. St. Rep. 496, 125 N. W. 119; Raphael v. Bank of England, 17 C. B. 161, 139 Eng. Reprint, 1030, 25 L. J. C. P. N. S. 33, 4 Week. Rep. 10; United States v. Bank of New York, Nat. Bkg. Asso. L.R.A. 1915D, 797, 134 C. C. A. 579, 219 Fed. 648.

The stipulated facts set forth in the record establish such negligence on the part of the plaintiff as will, irrespective of any other question in this case, preclude its right to recovery. The general verdict directed in favor of the defendant necessarily constituted a finding of such negligence, which this court will not disturb upon writ of error.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 115, 29 L. ed. 811, 818, 6 Sup. Ct. Rep. 657; Marks v. Anchor Sav. Bank, 252 Pa. 310, L.R.A.1916E, 906, 97 Atl. 399, 14 N. C. C. A. 812; Gloucester Bank v. Salem Bank, 17 Mass. 33; United States v. Central Nat. Bank, 6 Fed. 134; Salas v. United States, 148 C. C. A. 440, 234 Fed. 842; United States v. Bank of New York, Nat. Bkg. Asso. L.R.A.1915D, 797, 134 C. C. A. 579, 219 Fed. 649.

Mr. Justice **McReynolds** delivered the opinion of the court:

Plaintiff in error sued the defendant bank, at law, to recover money paid out under mistake of fact. The complaint alleged:

"First. That at all times hereinafter mentioned, the plaintiff was and is a corporation sovereign, and the defendant was and is an association organized for and transacting the business of banking in the city, state, and southern district of New York, under and pursuant to the provisions of the acts of Congress in such case made and provided;

"Second. That on or about the 18th day of December, 1914, the defendant presented to the Treasurer of the United States at Washington, District of Columbia, for payment, a draft in the sum of $3,571.47, drawn on the Treasurer of the United States, payable to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., and purporting to be drawn by E. V. Sumner, Acting Quartermaster, U. S. A., and to be indorsed by E. V. Sumner, 2d Lt., 2d Cav. A. Q. M., the [491] Howard National Bank, and the defendant; a copy of said draft and the indorsements on the back thereof is hereto attached

and marked exhibit A,[1] and made a part hereof;

[492] "Third. That at the date of the presentation of said draft by the defendant to the Treasurer of the United States, the defendant was a depository of the funds of the United States of America, and payment of said draft to the defendant was thereupon made by the plaintiff, by passing a credit for the amount of said draft to the defendant upon the accounts of the defendant, as depository for the funds of the plaintiff;

"Fourth. That the name of said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., indorsed upon the back of said draft, was forged and had been wrongfully and fraudulently written upon the same by a person other than the said E. V. Sumner, without his knowledge or consent, and no part of the proceeds of said draft were ever received by him;

"Fifth. That the payment of said draft made by the plaintiff to the defendant, as described in paragraph three of this complaint, was made under a mistake of fact and without knowledge that the signature of the said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., payee thereof, had been forged upon the back of said draft;

"Sixth. That the plaintiff has duly requested the defendant to repay to it the amount of said draft, to wit, $3,571.47, but the defendant has failed and refused to pay the same or any part thereof to the plaintiff.

"Wherefore, the plaintiff demands judgment against the defendant in the sum of $3,571.47, with interest thereon from the 18th day of December, 1914, together with the costs and disbursements of this action."

The bank denied liability, and among other things claimed that the same person wrote the name E. V. Sumner upon the draft both as drawer and indorser. The facts were stipulated.

It appears: Lieutenant Sumner, Quartermaster and Disbursing Officer at Fort Ethan Allen, near Burlington, Vermont, had authority to draw on the United States Treasurer. Sergeant Howard was his finance clerk and so [493] known at the Howard National Bank of Burlington. Utilizing the official blank form, Howard manufactured in toto the draft in question,—exhibit A. Having forged Lieutenant Sumner's name both as drawer and indorser, he cashed the instrument over the counter at the Howard National Bank without adding his own name. That bank immediately indorsed and forwarded it for collection and credit to the defendant at New York city; the latter promptly presented it to the drawee (the Treasurer), received payment, and credited the proceeds as directed. Two weeks thereafter the Treasurer discovered the forgery and at once demanded repayment, which was refused. Before discovery of the forgery the Howard National Bank withdrew from the Chase National Bank sums aggregating more than its total balance immediately after such proceeds were credited; but additional subsequent credit items had maintained its balance continuously above the amount of the draft.

Both sides asked for an instructed verdict without more. The trial court directed one for the defendant (241 Fed. 535), and judgment thereon was af-

[1] (Ex. A.) [Face.]

Office of the Quartermaster.
Fort Ethan Allen, Vermont.

War December
Quartermaster 15, 1914.
Thesaur Amer 444
(Shield) Treasurer of the United States 15-51
Septent Sigil.

Pay to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M. $3,571.47
Thirty-five hundred seventy-one & 47/100 dollars.
Object for which drawn: Vo. No. Cash transfers.

E. V. Sumner.
Acting Quartermaster, U. S. A. 21,739.

(Ex. A.) [Back.]
Form Approved by the Comptroller of the Treasury
January 27, 1913.

This check must be indorsed on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

E. V. Sumner,
(Sign on this line)
2d Lt., 2 Cav., AQM.
Pay Chase National Bank
New York, or Order,
Restrictive indorsements guaranteed.
Howard Nat'l Bank,
58-3 Burlington, Vt. 58-3,
M. T. Rutter, Cashier.
Received payment from
The Treasurer of the United States
Dec. 16. 1914.
1-74 The Chase National Bank 1-74
Of the city of New York.

firmed by the circuit court of appeals. 162 C. C. A. 277, 250 Fed. 105. If important, the record discloses substantial evidence to support the finding necessarily involved that no actual negligence or bad faith, attributable to defendant, contributed to success of the forgery. Williams v. Vreeland, 250 U. S. 295, 298, 63 L. ed. 989, 991, 3 A.L.R. 1038, 39 Sup. Ct. Rep. 438.

The complaint placed the demand for recovery solely upon the forged indorsement,—neither negligence nor bad faith is set up. If the draft had been a valid instrument, with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake. Hortsman v. Henshaw, 11 How. 177, 183, 13 L. ed. 653, 656. But here the whole instrument was forged, never valid, and nobody had better right to it than the collecting bank.

[494] Price v. Neal (1762) 3 Burr. 1354, 1357, 97 Eng. Reprint, 871, held that it is incumbent on the drawee to know the drawer's hand, and that if the former pay a draft upon the latter's forged name to an innocent holder not chargeable with fault, there can be no recovery. "The plaintiff cannot recover the money unless it be against conscience in the defendant to retain it." "But it can never be thought unconscientious in the defendant to retain this money when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration which he had bona fide paid without the least privity or suspicion of any forgery." And the doctrine so announced has been approved and adopted by this court. Bank of United States v. Bank of Georgia, 10 Wheat. 333, 348, 6 L. ed. 334, 339; Hoffman v. National City Bank, 12 Wall. 181, 192, 20 L. ed. 366, 369; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 109, 29 L. ed. 811, 816, 6 Sup. Ct. Rep. 657; United States v. National Exch. Bank, 214 U. S. 302, 311, 53 L. ed. 1006, 1009, 29 Sup. Ct. Rep. 665, 16 Ann. Cas. 1184.

In Bank of United States v. Bank of Georgia, through Mr. Justice Story, this court said concerning Price v. Neal:

"There were two bills of exchange, which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said: 'Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it. But it was not incumbent upon the defendant [495] to inquire into it. There was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up. The other bill he actually accepts, after which the defendant, innocently and bona fide, discounts it. The plaintiff lies by a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But, in this case, if there was any fault or negligence in anyone, it certainly was in the plaintiff, and not in the defendant.' The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it before the time it was paid or acknowledged. So that there is no pretense to allege that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of Price v. Neal has never since been departed from; and in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority."

Does the mere fact that the name of Lieutenant Sumner was forged as indorser as well as drawer prevent application here of the established rule?

We think not. In order to recover, plaintiff must show that the defendant cannot retain the money with good conscience. Both are [496] innocent of intentional fault. The drawee failed to detect the forged signature of the drawer. The forged indorsement puts him in no worse position than he would occupy if that were genuine. He cannot be called upon to pay again, and the collecting bank has not received the proceeds of an instrument to which another held a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank, who had full right to act upon the assumption that the former knew the drawer's signature, or at least took the risk of a mistake concerning it. Bank of England v. Vagliano Bros. [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 395, 83 Am. St. Rep. 286, 59 N. E. 62; Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10, 7 L.R.A. 849, 13 S. W. 339; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 80, 7 Am. Rep. 310; Howard v. Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105; First Nat. Bank v. Marshalltown State Bank, 107 Iowa, 327, 44 L.R.A. 131, 77 N. W. 1045; State Bank v. Cumberland Sav. & T. Co. 168 N. C. 606, L.R.A.1915D, 1138, 85 S. E. 5; 4 Harvard L. Rev. 297, Article by Prof. Ames. And see Cooke v. United States, 91 U. S. 389, 396, 23 L. ed. 237, 242.

The judgment of the court below is affirmed.

Mr. Justice **Clarke** dissents.

MICHAEL U. BOEHMER, Petitioner,
v.
PENNSYLVANIA RAILROAD COMPANY.

(See S. C. Reporter's ed. 496–498.)

Master and servant — safety appliances — handholds or grab irons.

1. Handholds or grab irons on all four outside corners of freight cars are not required by the provision of the Safety Appliance Act of March 2, 1893, making unlawful the use of any car in interstate commerce unless such car is provided with secure grab irons or handholds in the ends and sides for greater security to men in coupling and uncoupling cars. The commands of the statute are met by secure and adequate handholds at two diagonal corners of the car.

[For other cases, see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

Appeal — review of facts — negligence — concurrent findings.

2. The concurrent judgment of the two courts below that a railway carrier was not negligent in failing to give warning to a brakeman concerning the use of freight cars with handholds only at two diagonal corners, will not be disturbed by the Federal Supreme Court.

[For other cases, see Appeal and Error, 4931–4959, in Digest Sup. Ct. 1908.]

[No. 191.]

Argued March 10 and 11, 1920. Decided April 19, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of New York, directing a verdict in favor of defendant in a suit based upon the Federal Employers' Liability and Safety Appliance Acts. Affirmed.

See same case below, 165 C. C. A. 3, 252 Fed. 553.

The facts are stated in the opinion.

Messrs. **Edwin C. Brandenburg** and **Thomas A. Sullivan** argued the cause and filed a brief for petitioner:

The Safety Appliance Acts require secure handholds, grab irons, and sill steps at all four corners on the outside.

United States v. Baltimore & O. R. Co. 184 Fed. 94; United States v. Norfolk & W. R. Co. 184 Fed. 99; United States v. Central of Georgia R. Co. 157 Fed. 893.

The Safety Appliance Acts are remedial statutes, and must be construed so as to accomplish the intent of Congress.

Johnson v. Southern P. Co. 196 U. S. 473; and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

On state regulation of equipment of rolling stock as interference with interstate commerce—see note to Atlantic Coast Line R. Co. v. State, 32 L.R.A. (N.S.) 20.

On liability of railway company for injury to servant while using as handhold an appliance not designed for that

Note.—On the constitutionality, application, and effect of the Federal Employers' Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

On duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.)

1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

They impose an absolute and unqualified duty on carriers engaged in interstate commerce to equip all cars with the appliances provided by the statute, and to maintain the same in a secure condition.

Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. Rep. 482; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; United States v. Pere Marquette R. Co. 211 Fed. 220.

The statutes are not satisfied by equivalents or anything less than literal compliance with what is prescribed. A pin lifter or uncoupling lever extending across the tender just above the coupler cannot be held in effect a substitute for the grab irons and handholds required by the statute.

St. Joseph & G. I. R. Co. v. Moore, 243 U. S. 311, 61 L. ed. 741, 37 Sup. Ct. Rep. 278.

Providing an automatic coupler which could be operated from one side of a car is not a compliance if an employee would have to go between the cars to make coupling if at the other side thereof.

United States v. Central of Georgia R. Co. 157 Fed. 893.

Any variation from the customary and usual location and style of handhold, grab iron, or sill step, or in the placing of the lights, may lead to injury to the employee.

Erie R. Co. v. Schleenbaker, 168 C. C. A. 617, 257 Fed. 667.

Where an employee is injured by reason of the failure to equip a car with the necessary and required safety appliances, liability for the damages suffered is implied, and the right thereto seems absolute.

Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. Rep. 482; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct.

---

purpose—see note to El Paso & S. W. R. Co. v. Vizard, 53 L. ed. U. S. 348.

Measure of duty under requirements of Safety Appliance Acts as to handholds or grab irons on railway cars.

The present note is confined to a discussion as to what equipment is a compliance with the statutes requiring grab irons or handholds, and does not enter into a discussion of the duty to inspect such appliances and maintain them in proper shape.

Section 3 of the Act of April 14, 1910, conferred upon the Interstate Commerce Commission, after hearing, the right to designate "the numbers, dimensions, location and manner of application, of the appliances provided for by § 2 of the act," among which appliances were handholds or grab irons. The rules of this Commission are beyond the scope of this discussion.

The construction of the requirements of the Federal Safety Appliance Act as to the necessity of locating the grab irons or handholds on each of the four corners of the car is settled by the decision in BOEHMER v. PENNSYLVANIA R. Co. This is contrary to the decision in Ewing v. Coal & Coke R. Co. 82 W. Va. 427, 96 S. E. 73, to which certiorari was denied by the United States Supreme Court in 247 U. S. 521, 62 L. ed. 1246, 38 Sup. Ct. Rep. 583.

The maintenance of a grab iron or handhold on each side of a car near the "B" end was held not to be a compliance with the Federal Safety Appliance Act, in United States v. Wabash-Pittsburgh Terminal R. Co., reported in Thornton, Federal Employers' Liability, 2d ed. Appx. G, p. 660.

It seems to be the opinion of the court in Daly v. Illinois C. R. Co. 170 Ill. App. 185, that the Federal Safety Appliance Act required grab irons, not only at the end of a tender, but also on the sides of the tender.

A state statute requiring "secure grab irons or handholds in the side or end" of each car is stated in Southern R. Co. v. Railroad Commission, 179 Ind. 23, 100 N. E. 337, to require grab irons either in the side or end of the car, while the Federal statute requiring secure grab irons and handholds "in the end and sides" of each car is broader in its requirements. This case was subsequently reversed by the Supreme Court of the United States on the theory that Congress had covered the field occupied by the state statute, and therefore the state statute was ineffective, in 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304. The Federal Safety Appliance Act was held to invalidate the state act even as applied to freight cars moving between points within the state on a railway engaged in interstate commerce.

Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. ed. 1110, 36 Sup. Ct. Rep. 630.

If the injury results from a failure to comply with the Safety Appliance Acts, then, under the provisions of such acts and of the Employers' Liability Acts, assumption of risk and contributory negligence are eliminated, and do not constitute a defense.

Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 60 L. ed. 1110, 36 Sup. Ct. Rep. 626; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 60 L. ed. 874, 36 Sup. Ct. Rep. 482.

The defendant was guilty of negligence in not instructing and warning the plaintiff that it would require him to work in and about cars not fitted and equipped with the necessary handholds, grab irons, and steps provided for by the Safety Appliance Acts.

Illinois C. R. Co. v. Williams, 242 U. S. 462, 466, 61 L. ed. 437, 440, 37 Sup. Ct. Rep. 128; McCalman v. Illinois C. R. Co. 132 C. C. A. 15, 215 Fed. 469.

A question upon which there is some conflict is whether the presence of other projections on a car which may serve the purpose of handholds relieves the carrier of the duty of supplying handholds.

Dodge, District Judge, in charging the jury in United States v. Boston & M. R. Co. 168 Fed. 148, says that the Federal Safety Appliance Act of March 2, 1893, making it unlawful for any railroad company to use any car in interstate commerce "that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars," requires "secure grab irons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab iron or handhold at that point, or of any appliance affording equal security with a grab iron or handhold. If, at any place in the end of this car, there was not a grab iron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, or whatever else you please, which afforded equal security with a grab iron or a handhold at that point, then I shall instruct you that the law has not been violated, so far as a grab iron or handhold at that point is concerned. . . . It may not be possible to say that a coupling lever or a ladder is a grab iron or a handhold, but if it affords the same security to a man who may need to use one that a grab iron or a handhold, properly speaking, would afford, then, in my judgment, the statute has not been violated."

It was left to the jury to say whether a coupling lever was a grab iron or handhold within the meaning of the Federal Safety Appliance Act, in United States v. Atchison, T. & S. F. R. Co., reported in Thornton, Federal Employers' Liability, 2d ed. Appx. G, p. 665.

A similar decision was made by the district court for the northern district of West Virginia in United States v. Baltimore & O. R. Co., reported in Thornton, Federal Employers' Liability, 2d ed. App. G, p. 608.

The contrary opinion is expressed by the district court for the western district of Virginia in United States v. Baltimore & O. R. Co. 184 Fed. 94, in which a railroad company is held guilty of a violation of the Federal Safety Appliance Act, where two of its yard engines had no handholds in the side, near the rear end of the tenders, although each of the tenders had, across its rear end and projecting slightly beyond its side, a running board or low platform and also an uncoupling lever bar which ran nearly across the entire end, and so located and of such a character that it served as a handhold in the end of the tender. The court states that although the uncoupling lever might, in some situations, serve as a handhold, it is impossible to contend that a properly placed handhold in addition to the uncoupling lever might not, under some circumstances, be of decided use to some brakeman not of average height or length of arm, and it is stated that if the railroad company's witnesses intended to testify that a handhold in the side, near the rear end, would be, under all circumstances, of absolutely no use to an employee running along at night beside the moving tender, and near its rear end, preparatory to uncoupling, the "testimony is, to my mind, simply unbelievable."

In a companion case the opinion of which was filed at the same time, it was

Mr. **Frederic D. McKenney** argued the cause, and, with Mr. John Spalding Flannery, filed a brief for respondent:

This court is not called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw inferences therefrom which may possibly conflict with the conclusions below.

Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Southern R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69; Seaboard Air Line R. Co. v. Kenney, 240 U. S. 489, 60 L. ed. 762, 36 Sup. Ct. Rep. 458; Baugham v. New York, P. & N. R. Co. 241 U. S. 237, 60 L. ed. 977, 36 Sup. Ct. Rep. 592, 13 N. C. C. A. 138; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82.

Mr. Justice **McReynolds** delivered the opinion of the court:

Relying upon the Federal Employers' Liability Act, petitioner sought damages for personal injuries sustained by him November 8, 1915, while employed by respondent as brakeman. He claimed that

---

contended that the railroad company was not required to have grab irons on passenger coaches, because the presence of air hose, signal hose, steam hose, uncoupling chains, breakshafts, dummy coupling chains, handbreak shafts, and operating rods of the steam hose, rendered handholds in the ends of the coaches unnecessary. This contention was denied. It is stated that the appliances above mentioned were in use at the time of the passage of the Safety Appliance Act, and it must be assumed that Congress knew thereof, and of the measure of protection afforded thereby to employees. With this knowledge the Safety Appliance Act requiring grab irons was enacted, and it is stated to be a fair interpretation that the intent of Congress was to require protection in addition to that afforded by the appliances in use to some extent, at least, prior to the passage of the act. United States v. Norfolk & W. R. Co. 184 Fed. 99.

That some other appliance so constructed that it may be grasped may serve instead of grab irons, and excuse their omission, is denied also in Moore v. St. Joseph & G. I. R. Co. 268 Mo. 31, 186 S. W. 1035. Accordingly an instruction to the effect that "any iron rod or iron device securely fastened upon the end of the tender, of which employees could conveniently catch hold, was a handhold or grab iron within the meaning of the law," was disapproved.

In Missouri, K. & T. R. Co. v. Barrington, — Tex. Civ. App. —, 173 S. W. 595, an action for personal injuries due to a defective handhold on the top or roof of a car, the court states that "the fact that the handhold in question was on the top of the car, and not on the side or end thereof, is unimportant. It was a necessary appliance for the safety of the railway company's employees in performing the duties required of them, and is clearly included in the statute." Federal Safety Appliance Act, passed April 14, 1910, to supplement an Act to Promote the Safety of Employees, etc., providing, among other things, that "all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladder."

The statute requiring grab irons to be attached to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce," requires grab irons upon passenger cars. Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 623; United States v. Norfolk & W. R. Co. supra.

The statute applies to cars, whether empty or loaded. Malott v. Hood, 201 Ill. 202, 66 N. E. 247.

The validity of the Texas Safety Appliance Act, which made it unlawful for any common carrier engaged in commerce to use, in moving intrastate traffic within the state, any locomotive, tender, cars, or similar vehicle "which is not provided with sufficient secure grab irons, handholds, and foot stirrups," was attacked in Galveston, H. & S. A. R. Co. v. Enderle, — Tex. Civ. App. —, 170 S. W. 276, on the ground that it did not designate the numbers, dimensions, location, and manner of application of the appliances provided for, or prescribe any means by which the legislative intent in that regard could be ascertained. The court, after stating in a general way that the language seems to be plain and simple, and capable of being understood, continues that the requirements thereof were not complied with by furnishing a handhold which gave way when used by an employee.

the railroad was negligent in using a freight car not equipped with handholds or grab irons on all *four* outside corners; and also in failing to instruct him that he would be required to work about cars not so equipped. The car in question had secure and adequate handholds on the diagonally opposite corners. Being of opinion that this equipment sufficed to meet the commands of the statute, and that, under the circumstances disclosed, failure to instruct the petitioner concerning possible use of such car did not constitute negligence, the trial court directed verdict for respondent.

The circuit court of appeals affirmed the consequent judgment. 165 C. C. A. 31, 252 Fed. 553.

[**498**] Section 4 of the Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. § 8608, 8 Fed. Stat. Anno. 2d ed. p. 1174) provides:

"That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Petitioner insists that the Act of 1893 was designed for the safety of employees, and specified grab irons or handholds in the end and sides of each car as one of the essential requirements. That while it did not specifically command that these should be placed at all four corners, this was the obvious intent. But the courts below concurred in rejecting that construction, and we cannot say they erred in so doing. Section 4 must be interpreted and applied in view of practical railroad operations; and having considered these, the courts below ruled against petitioner's theory.

Likewise we accept the concurrent judgment of the lower courts that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances, where two courts have agreed, we will not enter upon a minute analysis of the evidence. Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

The judgment is affirmed.

[**499**] C. B. MUNDAY, Trustee, et al., Plffs. in Err.,
v.
WISCONSIN TRUST COMPANY et al.[1]

(See S. C. Reporter's ed. 499–503.)

Error to state court — review — non-Federal question.

1. Whether a state statute did or did not validate a contract theretofore unenforceable is a question for the state courts to decide, and their decision is not subject to review in the Federal Supreme Court.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — legislation antedating contract.

2. The contract clause of the Federal Constitution applies only to legislation subsequent in time to the contract alleged to have been impaired.

[For other cases, see Constitutional Law, 1273–1288, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — acquisition of property by foreign corporation.

3. A state statute under which conveyances to a foreign corporation of real property situated within the state are invalid, though executed and delivered in another state, if the grantee had not theretofore filed a copy of its charter with the secretary of state, does not take property without due process of law.

[For other cases, see Constitutional Law, 441–449, in Digest Sup. Ct. 1908.]

[No. 288.]

Argued and submitted March 25, 1920. Decided April 19, 1920.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which modified, and affirmed as modified, a judgment of the Circuit Court for Racine County, in that state, invalidating certain conveyances of real property to a foreign corporation. Affirmed.

See same case below, 168 Wis. 31, 168 N. W. 393, 169 N. W. 612.

The facts are stated in the opinion.

[1] Death of Frederick Robinson, one of the defendants in error herein, suggested, and appearance of Farmers Loan & Trust Company, executor of Frederick Robinson, deceased, as a party defendant in error herein, filed and entered March 25, 1920, on motion of counsel in that behalf.

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97.

Messrs. **Walter Bachrach** and **Hamilton Moses** submitted the cause for plaintiffs in error. Mr. Thomas M. Kearney was on the brief:

Under § 1770b, of the Wisconsin Statutes, and more particularly subsec. 10 thereof, both as written and construed by the supreme court of Wisconsin prior to the making of the contract and the execution and delivery of the deeds in controversy, such deeds were merely voidable, and not void. Such statute, as now administered and enforced against plaintiffs in error by the supreme court of Wisconsin, so as to render such deeds absolutely void, impairs the obligation of such contract and deeds, and deprives plaintiffs in error of their property without due process of law.

Lanz-Owen & Co. v. Garage Equipment Mfg. Co. 151 Wis. 555, 139 N. W. 393; Mortenson v. Murphy, 153 Wis. 389, 141 N. W. 273; Allen v. Fulton, 167 Wis. 352, 167 N. W. 429; Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 60 L. ed. 392, L.R.A.1918E, 190, 36 Sup. Ct. Rep. 204; Mackay Teleg. & Cable Co. v. Little Rock, 250 U. S. 94, 98, 63 L. ed. 863, 868, 39 Sup. Ct. Rep. 428; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 269, 35 L. ed. 1009, 12 Sup. Ct. Rep. 173; Muhlker v. New York & H. R. Co. 197 U. S. 544, 570, 49 L. ed. 872, 877, 25 Sup. Ct. Rep. 522; Sauer v. New York, 206 U. S. 536, 549, 51 L. ed. 1176, 1182, 27 Sup. Ct. Rep. 686; Ohio Life Ins. & T. Co. v. Debolt, 16 How. 432, 14 L. ed. 1003; Gelpcke v. Dubuque, 1 Wall. 206, 17 L. ed. 525; Douglass v. Pike County, 101 U. S. 687, 25 L. ed. 971; Allgeyer v. Louisiana, 165 U. S. 591, 41 L. ed. 836, 17 Sup. Ct. Rep. 427.

The judgment of the supreme court of Wisconsin in declaring the deeds void, and in refusing to give them efficacy, notwithstanding the validating Statute of 1917, deprived plaintiffs in error of their property without due process of law, in violation of the 14th Amendment.

Bennington County Sav. Bank v. Lowry, 160 Wis. 659, 152 N. W. 463; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 233, 234, 41 L. ed. 983, 984, 17 Sup. Ct. Rep. 581; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 59 L. ed. 175, 35 Sup. Ct. Rep. 62; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; Houston & T. C. R. Co. v. Texas, 177 U. S. 77, 44 L. ed. 680, 20 Sup. Ct. Rep. 545; McCullough v. Virginia, 172 U. S. 109, 43 L. ed. 384, 19 Sup. Ct. Rep. 134.

The legislature of Wisconsin, by the passage of the amendatory Act of May 11, 1917, amending, inter alia, § 1770j, subsec. 1, of the Act of May 10, 1913, confirmed the title of the Realty Company, its grantee and successors in title, and absolutely and unconditionally validated the title theretofore attempted to be granted by the Trust Company and Robinson.

People ex rel. Parsons v. Circuit Judge, 37 Mich. 287.

Mr. **William E. Black** argued the cause, and, with Mr. John B. Simmons, filed a brief for defendants in error:

The Wisconsin decisions are uniformly to the effect that conveyances to unlicensed corporations are absolutely void.

Ashland Lumber Co. v. Detroit Salt Co. 114 Wis. 66, 89 N. W. 904; Allen v. Milwaukee, 128 Wis. 678, 5 L.R.A.(N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8 Ann. Cas. 392; Duluth Music Co. v. Clancy, 139 Wis. 189, 131 Am. St. Rep. 1051, 120 N. W. 854; Lanz-Owen & Co. v. Garage Equipment Mfg. Co. 151 Wis. 555, 139 N. W. 393; Loomis v. People's Constr. Co. 128 C. C. A. 125, 211 Fed. 453; Mortenson v. Murphy, 153 Wis. 389, 141 N. W. 273; Southwestern

---

Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

Generally, as to what laws are void as impairing the obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

Slate Co. v. Stephens, 139 Wis. 616, 29 L.R.A.(N.S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408; Hanna v. Kelsey Realty Co. 145 Wis. 276, 33 L.R.A.(N.S.) 255, 140 Am. St. Rep. 1075, 129 N. W. 1080; Independent Tug Line v. Lake Superior Lumber & Box Co. 146 Wis. 121, 131 N. W. 408; Indiana Road Mach. Co. v. Lake, 149 Wis. 541, 136 N. W. 178; Sprout, W. & Co. v. Amery Mercantile Co. 162 Wis. 279, 156 N. W. 158; Phœnix Nursery Co. v. Trostel, 166 Wis. 215, L.R.A.1918B, 311, 164 N. W. 995.

The obligations of a contract cannot be impaired, within the meaning of U. S. Const. art. 1, § 10, by a statute in force when the contract was made.

Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 615, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206; Pinney v. Nelson, 183 U. S. 144, 147, 46 L. ed. 125, 127, 22 Sup. Ct. Rep. 52; Skaneateles Waterworks Co. v. Skaneateles, 184 U. S. 367, 46 L. ed. 592, 22 Sup. Ct. Rep. 400; Chicago & A. R. Co. v. McWhirt, 243 U. S. 422, 61 L. ed. 826, 37 Sup. Ct. Rep. 392; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. Louisville Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

The contract clause of the Constitution is not addressed to such impairment as may arise by mere judicial decisions in the state courts, without action by the legislature, even though such courts may have changed their decisions.

Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Gelpcke v. Dubuque, 1 Wall. 175, 17 L. ed. 520; Mississippi & M. R. Co. v. McClure, 10 Wall. 511, 19 L. ed. 997; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; New Orleans Waterworks Co. v. Louisville Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; Mobile Transp. Co. v. Mobile, 187 U. S. 488, 47 L. ed. 272, 23 Sup. Ct. Rep. 170; Weber v. Rogan, 188 U. S. 14, 47 L. ed. 365, 23 Sup. Ct. Rep. 263; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 647, 48 L. ed. 828, 24 Sup. Ct. Rep. 532; Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 639, 56 L. ed. 928, 32 Sup. Ct. Rep. 577; Ross v. Oregon, 227 U. S. 150, 161, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 58 L. ed. 1503, 34 Sup. Ct. Rep. 941; Frank v. Mangum, 237 U. S. 309, 344, 59 L. ed. 969, 987, 35 Sup. Ct. Rep. 582; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21; O'Neil v. Northern Colorado Irrig. Co. 242 U. S. 20, 61 L. ed. 123, 37 Sup. Ct. Rep. 7; Turner v. Wilkes County, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464.

Every state has the right, without infringement of any constitutional guaranty, to impose such conditions as it chooses (with certain limitations, not here in question) upon the exercise by corporations of other states of their corporate functions, such as the transaction of business and the acquisition of property within the state.

Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206; Hooper v. California, 155 U. S. 648, 652, 39 L. ed. 297, 298, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 647, 48 L. ed. 828, 24 Sup. Ct. Rep. 532; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, 34 Sup. Ct. Rep. 15; South Carolina ex rel. Phœnix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63, 59 L. ed. 839, 35 Sup. Ct. Rep. 504; Interstate Amusement Co. v. Albert, 239 U. S. 560, 568, 60 L. ed. 439, 443, 36 Sup. Ct. Rep. 168.

And whether or not a corporate contract entered into in contravention of a statute regulating foreign corporations was, under the proper construction of such statute, ipso facto void, and therefore unenforceable in the courts of another state, does not present a Federal question under the full faith and credit clause of the United States Constitution, which will sustain a writ of error from the Supreme Court.

Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70.

So, if the state statute renders contracts by foreign corporations within its operation void, no action can be maintained on them in a Federal court, though sitting in another state.

Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206; McCanna & F. Co. v. Citizen's Trust & Surety Co. 35 L.R.A. 236, 24 C. C. A. 11, 39 U. S. App. 332, 76 Fed. 420; Cyclone Min. Co. v. Baker Light & P. Co. 165 Fed. 996; Pittsburgh Constr. Co. v. West Side Belt R. Co. 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154

Fed. 929; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.

The highest court of a state, having held that an act in the exercise of corporate functions is forbidden to foreign corporations which have not complied with the Constitution or statute of the states as to admission, and that the contracts thence resulting are illegal and cannot be enforced in the courts, the Federal court should follow it.

Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206.

All contracts and deeds for the sale and conveyance of land are local, and belong to the jurisdiction where the land lies, and will not be enforced when they are in violation of the laws and settled policy of the state.

Story, Confl. L. 8th ed. 38, 474, note a; Wharton, Confl. L. §§ 278, 305, 331; Meroney v. Atlantic Bldg. & L. Asso. 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924; Armstrong v. Best, 112 N. C. 59, 25 L.R.A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Fisher v. Otis, 3 Pinney (Wis.) 78; Bissell v. Terry, 69 Ill. 190; Fuss v. Fuss, 24 Wis. 256, 1 Am. Rep. 180; 39 Cyc. 1182; Miller v. Wilson, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111; 22 Am. & Eng. Enc. Law, 1336; Story, Confl. L. §§ 373, 424, 428, 430, 431; Rorer, Interstate Law, 263; 1 Devlin, Deeds, § 65; 32 Cyc. 674; 2 Whart. International Law Dig. 490; Wunderle v. Wunderle, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; Hanna v. Kelsey Realty Co. 145 Wis. 276, 33 L.R.A.(N.S.) 255, 140 Am. St. Rep. 1075, 129 N. W. 1080; Fox v. Postal Teleg. Cable Co. 138 Wis. 648, 28 L.R.A.(N.S.) 490, 120 N. W. 399; 9 Cyc. 674, note 49; United States v. Crosby, 7 Cranch, 114, 3 L. ed. 287.

No mere error of the supreme court of the state in interpreting or applying the law of the state (if such there should be) can avail the plaintiffs in error here.

Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 171, 36 L. ed. 925, 930, 13 Sup. Ct. Rep. 54; Bergemann v. Backer, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; Knox v. Exchange Bank, 12 Wall. 379, 383, 20 L. ed. 414, 415.

The Supreme Court of the United States, in cases involving the application of state statutes, will be governed by the interpretation of such statutes placed thereon by the highest tribunal of the state, which is regarded as a part of the statute.

Leffingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Stone v. Wisconsin, 94 U. S. 181, 24 L. ed. 102.

The proper construction of state legislation being a question of local, and not of Federal, law, the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to that court.

Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; Lombard v. West Chicago Park, 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; Harrison v. Myer, 92 U. S. 111, 23 L. ed. 606; Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

And this principle controls although the Supreme Court of the United States may doubt the correctness of the state court's construction, and may have already accepted and adopted a different construction of similar legislation of another state, in deference to the highest court of that state.

Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. ed. 595; Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013.

The construction of a state law by its highest court upon a question affecting the title to real property in the state is accepted as binding by the Federal Supreme Court.

Williams v. Kirtland, 13 Wall. 306, 20 L. ed. 683; Barrett v. Holmes, 102 U. S. 655, 26 L. ed. 292; McArthur v. Scott, 113 U. S. 391, 28 L. ed. 1031, 5 Sup. Ct. Rep. 652; Polk v. Wendal, 9 Cranch, 87, 3 L. ed. 665; Slaughter v. Glenn, 98 U. S. 242, 25 L. ed. 122.

And the same rule applies as to the validity (under the state Constitution), construction, and effect of statutes in relation to foreign corporations.

Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44

L. ed. 1116, 20 Sup. Ct. Rep. 962; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; National Mut. Bldg. & L. Asso. v. Brahan, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; Stone v. Southern Illinois & M. Bridge Co. 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. Rep. 615; Pittsburgh Constr. Co. v. West Side Belt R. Co. 11 L.R.A.(N.S.) 1145, 83 C. C. A. 501, 154 Fed. 929.

The construction by a state of the Constitution or statutes of the state is conclusive on the Supreme Court of the United States.

Arkansas Southern R. Co. v. Louisiana & A. R. Co. 218 U. S. 431, 54 L. ed. 1097, 31 Sup. Ct. Rep. 56; Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936; Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229, 37 Sup. Ct. Rep. 34; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, L.R.A.1918A, 136, 37 Sup. Ct. Rep. 190; Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511; International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. ed. 147, 34 Sup. Ct. Rep. 31; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. ed. 721, 34 Sup. Ct. Rep. 364.

Even when the question involved, on a writ of error from the Federal Supreme Court to a state court, is the conformity of state legislation to the Federal Constitution, the construction placed upon such legislation by the highest state court must be accepted by the Supreme Court of the United States.

Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; First Nat. Bank v. Chehalis County, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; Nobles v. Georgia, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Commercial Nat. Bank v. Chambers, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Manley v. Park, 187 U. S. 547, 47 L. ed. 296, 23 Sup. Ct. Rep. 208; Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; Gasquet v. Lapeyre, 242 U. S. 367, 61 L. ed. 367, 37 Sup. Ct. Rep. 165; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. 243 U. S. 157, 61 L. ed. 644, 37 Sup. Ct. Rep. 318; Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 L. ed. 472, L.R.A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594.

The supreme court of Wisconsin correctly construed the Act of May 11, 1917, amending subsection 2 of § 1770b, and subsection 1 of § 1770j, in holding that it applied only to corporations not organized or conducted for profit, and did not operate to validate the title of the Realty Realization Company to the property in question.

Black, Interpretation of Laws, 2d ed. § 168, p. 179; Dallmann v. Dallmann, 159 Wis. 486, 149 N. W. 137; Glentz v. State, 38 Wis. 549; State v. Gumber, 37 Wis. 303; Hurley v. Texas, 20 Wis. 634; State ex rel. Ohlenforst v. Beck, 139 Wis. 40, 119 N. W. 300; Scheftels v. Tabert, 46 Wis. 446, 1 N. W. 156; Laude v. Chicago & N. W. R. Co. 33 Wis. 643; Fullerton v. Spring, 3 Wis. 667.

[501] Mr. Justice **McReynolds** delivered the opinion of the court:

The court below declared null and void two separate deeds whereby defendants in error undertook to convey to the Realty Realization Company, a Maine corporation, certain land in Wisconsin, upon the ground that the grantee had failed to comply with the statute of the state, prescribing conditions under which foreign corporations might acquire title to property therein. The deeds were dated and delivered in Illinois February 28, 1913.

A subsequent deed from the Realty Company and a mortgage by its grantee were also declared ineffective, but they need not be separately considered here. 168 Wis. 31, 168 N. W. 393, 169 N. W. 612.

At the time of the transactions in question the applicable statutory provisions concerning foreign corporations were subsections 2 and 10 of § 1770B, Wisconsin Statutes 1911, which follow:

"Sec. 1770B. 2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the Secretary of State, a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the Secretary of State of the state wherein the corporation was organized. . . .

"Sec. 1770B. 10. Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof, or relating to property within this state, before it shall have complied with the provisions [**502**] of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

The original proceeding was instituted March 30, 1913. While it was pending in the circuit court the Realty Company complied with § 1770B and obtained a license to do business and hold property in Wisconsin October, 1915. On May 11, 1917, the legislature enacted chapter 212, Laws of 1917, which amended subsection 1 of § 1770J of the statute to read:

"Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of § 1770B of the statutes, and which is now not required to comply with said section or which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired and the title so acquired, or attempted to be acquired, is hereby confirmed."

Plaintiffs in error unsuccessfully challenged the validity of § 1770B upon the ground of conflict with the contract clause, § 10, article 1 of the Federal Constitution, and the due process clause of the 14th Amendment. They further insisted that if § 1770J, as amended by chapter 212, Laws of 1917, was not so applied as to validate the deeds in question, rights, privileges, and immunities guaranteed to them by the 14th Amendment would be infringed.

Obviously, no impairment of any Federal right resulted from the construction placed upon § 1770J, as amended in 1917. Whether that section did or did not validate a contract theretofore unenforceable was a question for the [**503**] state court finally to decide,—it involved no right under the Constitution or laws of the United States.

Section 1770B was enacted prior to the transactions here in question, and the settled doctrine is that the contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired. Cross Lake Shooting & Fishing Club v. Louisiana, 224 U. S. 632, 639, 56 L. ed. 924, 928, 32 Sup. Ct. Rep. 577.

In support of the claim that subsection 10, § 1770B, as construed by the court below, conflicts with the due process clause, it is said: "The contract between the defendants in error and the Realty Company, and the deeds delivered in compliance therewith, were all made in Illinois. They have been declared void in the state of Wisconsin. So applied, the statute deprives plaintiffs in error of their property without due process of law."

Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427, is relied upon as adequate authority to support the point presented; but we think it is wholly irrelevant.

Where interstate commerce is not directly affected, a state may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute. Fritts v. Palmer, 132 U. S. 282, 288, 33 L. ed. 317, 319, 10 Sup. Ct. Rep. 93; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; Interstate Amusement Co. v. Albert, 239 U. S. 560, 568, 60 L. ed. 439, 443, 36 Sup. Ct. Rep. 168.

No interstate commerce was directly involved in the transactions here questioned. Moreover, this court long ago declared:

"The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated." United States v. Crosby, 7 Cranch, 115, 116, 3 L. ed. 287.

The judgment of the court below is affirmed.

---

[504] FIRST NATIONAL BANK OF CANTON, PENNSYLVANIA, Appt.,
v.
JOHN SKELTON WILLIAMS, Comptroller of the Currency.

(See S. C. Reporter's ed. 504–512.)

Federal courts — proper district for suit — action to enjoin Comptroller of Currency — service of process outside district.

A suit by a national bank to enjoin the Comptroller of the Currency from doing certain things under color of his office, declared to be threatened, unlawful, arbitrary, and oppressive, is one brought under the National Banking Law, within the true intendment of the provisions of the Judicial Code, §§ 24 and 49, which restrict suits, brought by national banking associations to enjoin the Comptroller under such law, to the district in which the bank is located, and such restriction operates pro tanto to displace the general provisions of § 51, respecting the proper district for suits, and authorizes service of process upon the Comptroller wherever found.

[For other cases, see Courts, V. c, 7, in Digest Sup. Ct. 1908.]

[No. 618.]

Argued March 3, 1920. Decided April 19, 1920.

APPEAL from the District Court of the United States for the Middle District of Pennsylvania to review a decree quashing the service of process, and dismissing, for want of jurisdiction, a suit by a national bank to enjoin the Comptroller of the Currency from doing certain acts alleged to be in excess of his authority. Reversed.

See same case below, 260 Fed. 674.

The facts are stated in the opinion.

Mr. **John B. Stanchfield** argued the cause, and, with Messrs. Charles A. Collin, Henry P. Wolff, M. J. Martin, and John P. Kelly, filed a brief for appellant:

The court below acquired jurisdiction of the person of the defendant, in this suit, by virtue of the service of its process upon him in the city of Washington, in the District of Columbia.

Macon Grocery Co. v. Atlantic Coast Line R. Co. 215 U. S. 501, 507, 508, 54 L. ed. 300, 303, 304, 30 Sup. Ct. Rep. 184; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730, 731; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Kennedy v. Gibson, 8 Wall. 498, 506, 19 L. ed. 476, 479; United States v. Congress Constr. Co. 222 U. S. 199, 203, 204, 56 L. ed. 163, 165, 32 Sup. Ct. Rep. 44; Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 301, 21 L. ed. 841, 844; Van Antwerp v. Hulburd, 7 Blatchf. 426, Fed. Cas. No. 16,826; United States v. Illinois Surety Co. 238 Fed. 843; Butterworth v. Hill, 114 U. S. 128, 133, 29 L. ed. 119, 120, 5 Sup. Ct. Rep. 786.

Solicitor General **King** and Mr. **La Rue Brown** argued the cause, and, with Mr. A. F. Myers, filed a brief for appellee:

The court did not have jurisdiction of the person of the defendant.

Winter v. Koon, 132 Fed. 273; Cely v. Griffin, 113 Fed. 981; Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Hughes, Fed. Proc. pp. 264, 265; Rose, Fed. Courts, § 239.

The court did not have jurisdiction of the subject-matter of the suit.

First Nat. Bank v. Morgan, 132 U. S. 141, 143, 144, 33 L. ed. 282–284, 10 Sup. Ct. Rep. 37; Van Antwerp v. Hulburd, 7 Blatchf. 426, Fed. Cas. No. 16,826.

The suit is one between citizens of different states, and involves Federal questions. It cannot, therefore, be maintained in the middle district of Pennsylvania.

Macon Grocery Co. v. Atlantic Coast Line R. Co. 215 U. S. 501, 54 L. ed. 300, 30 Sup. Ct. Rep. 184; Male v. Atchison, T. & S. F. R. Co. 240 U. S. 97, 102, 60 L. ed. 544, 546, 36 Sup. Ct. Rep. 351; Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 527; Memphis v. St. Francis Levee Dist. 228 Fed. 802; Whittaker v. Illinois C. R. Co. 176 Fed. 130; Sunderland Bros. v. Chicago, R. I. & P. R. Co. 158 Fed. 877; Smith v. Detroit & T. Short Line R. Co. 175 Fed. 506; Newell v. Baltimore & O. R. Co. 181 Fed. 698.

Mr. Justice **McReynolds** delivered the opinion of the court:

Appellant, whose place of business is

Note.—On proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

within the middle district of Pennsylvania, brought this suit in the United States district court for that district, seeking an injunction to prevent John Skelton Williams, Comptroller of the Currency, from doing certain things under color of his office declared to be threatened, unlawful, arbitrary, and oppressive.

The bill alleges that, in order to injure complainant's president, towards whom he entertained personal ill will, the Comptroller determined to destroy its business, and to that end he had maliciously persecuted and oppressed it for three years, in the following ways among others: By often demanding special reports and information beyond the powers conferred upon him by law; by disclosing confidential and official information concerning it to banks, members of Congress, representatives of the press, and the public generally; by inciting litigation against it and its officers; by publishing and disseminating false statements charging it with unlawful acts and improper conduct, and reflecting upon its solvency; and by distributing to depositors, stockholders, and others alarming statements intended to affect its credit, etc., etc. And further that, unless restrained, he would continue these and similar malicious and oppressive practices.

Williams is a citizen of Virginia, officially stationed at Washington. He was not summoned while in the middle district of Pennsylvania, but a subpœna was served upon him in Washington by the United States marshal. Having [509] specially appeared, he successfully challenged the jurisdiction of the court; and the cause is here upon certificate to that effect.

Generally, a district court cannot acquire jurisdiction over an individual without service of process upon him while in the district for which it is held. But here a national bank seeks to enjoin the Comptroller, and the claim is that by statutory direction the proceeding must be had in the district where the association is located, and not elsewhere. The court below took the contrary view. 260 Fed. 674.

Determination of the matter requires consideration of three sections of the Judicial Code [36 Stat. at L. 1092, 1100, 1101, chap. 231, Comp. Stat. § 991 (16), 4 Fed. Stat. Anno. 2d ed. p. 838, 5 Fed. Stat. Anno. 2d ed. pp. 482, 486]:

"Sec. 24. The district courts shall have original jurisdiction as follows:

. . . .

"Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located."

"Sec. 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located."

"Sec. 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial [510] in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

If §§ 24 and 49, properly construed, restrict this proceeding to the district where the bank is located, they displace § 51 pro tanto, and authorize service of process upon defendant wherever found. United States v. Congress Constr. Co. 222 U. S. 199, 203, 56 L. ed. 163, 165, 32 Sup. Ct. Rep. 44.

It is said for appellee that both §§ 24 and 49 relate to injunction proceedings brought *under* the National Banking Law,—such proceedings as are thereby expressly authorized, and no others. And, further, that such law only authorizes suit by a bank to enjoin the Comptroller when he undertakes to act because of its alleged refusal to redeem circulating notes. Rev. Stat. § 5237, Comp. Stat. § 9824, 6 Fed. Stat. Anno. 2d ed. p. 872.

The Act of February 25, 1863, estab-

lishing national banks, chap. 58, 12 Stat. at L. 665, 681:

"Sec. 59. And be it further enacted, That suits, actions, and proceedings by and against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

An "Act to Provide a National Currency, Secured by a Pledge of United States Bonds," approved June 3, 1864, chap. 106, 13 Stat. at L. 99, 116:

"Sec. 57. And be it further enacted, That suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or [511] municipal court in the county or city in which said association is located, having jurisdiction in similar cases: Provided, however, That all proceedings to enjoin the Comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

In Kennedy v. Gibson (1869) 8 Wall. 498, 506, 19 L. ed. 476, 479, this court ruled that § 57 should be construed as if it read: "And be it further enacted, That suits, actions and proceedings *by and* against," etc., the words "by and" having been accidentally omitted. "It is not to be supposed that Congress intended to exclude associations from suing in the courts where they can be sued." "Such suits may still be brought by the associations in the courts of the United States." And it further held "that receivers also may be sued in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship."

The Revised Statutes:

"Sec. 629. The circuit courts shall have original jurisdiction as follows:

"Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

"Eleventh. Of all suits brought by [*or against*] any banking association established in the district for which the court is held, under the provisions of title, 'The National Banks,' to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title." Comp. Stat. § 991 (16).

"Sec. 736. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located." Comp. Stat. § 1031.

Parts of the foregoing subsections 10 and 11 were [512] joined in subsection 16, § 24, and § 736 became § 49, Judicial Code.

What constitutes a cause arising "under" the laws of the United States has been often pointed out by this court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; Taylor v. Anderson, 234 U. S. 74, 58 L. ed. 1218, 34 Sup. Ct. Rep. 724; Hopkins v. Walker, 244 U. S. 486, 489, 61 L. ed. 1270, 1274, 37 Sup. Ct. Rep. 711. Clearly the plaintiff's bill discloses a case wherein his right to recover turns on the construction and application of the National Banking Law; and we think the proceeding is one to enjoin the Comptroller under provisions of that law, within the true intendment of the Judicial Code.

The decree below must be reversed.

GEORGE E. BURNAP, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 512-520.)

Officers — appointment — removal — suspension.

1. The power to remove an official is, in the absence of statutory provision to the contrary, an incident of the power to ap-

---

Note.—On the right to remove officers summarily—see note to Trainor v. Wayne County Auditors, 15 L.R.A. 95.

point, and the power of suspension is an incident of the power of removal.

[For other cases, see Officers, III. in Digest Sup. Ct. 1908.]

United States — employees — landscape architect — who may appoint.

2. The appointment of a landscape architect in the Office of Public Buildings and Grounds by the Secretary of War instead of by the Chief of Engineers must be deemed to have been unauthorized, in view of the provision of U. S. Rev. Stat. § 1799, that "the Chief of Engineers in charge of public buildings and grounds is authorized to employ in his office and about the public buildings and grounds under his control such number of persons for such employments and at such rates of compensation as may be appropriated for by Congress from year to year," which excludes positions in such office from the operation of the general provisions of § 169, conferring the power of appointment upon the heads of Departments.

[For other cases, see United States, III. a, in Digest Sup. Ct. 1908.]

United States — employees — defective appointment — removal.

3. The fact that a landscape architect in the Office of Public Buildings and Grounds was, by inadvertence, appointed by the Secretary of War instead of by the Chief of Engineers, does not preclude the latter from exercising in respect to such employee the general power to remove employees in his office, conferred by implication in U. S. Rev. Stat. § 1799, which gives the Chief of Engineers the power of appointment.

[For other cases, see United States, III. a, in Digest Sup. Ct. 1908.]

United States — employees — defective appointment — acquiescence.

4. The defect in the appointment of a landscape architect in the Office of Public Buildings and Grounds, because made by the Secretary of War instead of by the Chief of Engineers, is cured by the acquiescence of the latter throughout five years, so that the appointee's status is better than that of a mere de facto officer, but it is not superior to what it would have been if he had been regularly appointed by the Chief of Engineers.

[For other cases, see United States, III. a, in Digest Sup. Ct. 1908.]

United States — employees — removal and suspension — landscape architect.

5. If the regulations governing suspension and discharge in the classified civil service, as applied to the Engineer Department at large, approved by the Civil Service Commission and the Secretary of War, do not apply to the position of landscape architect in the Office of Public Buildings and Grounds, the exercise of the right of removal which rests in the Chief of Engineers is governed by the provisions of the Act of August 24, 1912, § 6, and Civil Service Rule 12, since no applicable regulations have been prescribed by the President through the War Department, under the authority reserved in U. S. Rev. Stat. § 1797, as amended.

[For other cases, see United States, III. a, in Digest Sup. Ct. 1908.]

[No. 228.]

Argued March 12, 1920. Decided April 19, 1920.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a discharged government employee for compensation until his successor was appointed. Affirmed.

See same case below, 53 Ct. Cl. 605.

The facts are stated in the opinion.

Mr. **George A. King** argued the cause, and, with Messrs. William B. King and William E. Harvey, filed a brief for appellant:

It was not constitutionally competent for the Secretary of War, even had he desired to do so, to make a regulation which should annul the constitutional rule that an officer appointed by the head of a Department can be removed only by the same power which appoints him.

Ex parte Hennen, 13 Pet. 230, 10 L. ed. 138; Parsons v. United States, 167 U. S. 324, 331, 42 L. ed. 185, 187, 17 Sup. Ct. Rep. 880; Keim v. United States, 177 U. S. 290, 293, 294, 44 L. ed. 774–776, 20 Sup. Ct. Rep. 574; Reagan v. United States, 182 U. S. 419, 424, 45 L. ed. 1162, 1164, 21 Sup. Ct. Rep. 842; United States v. Wickersham, 201 U. S. 390, 50 L. ed. 798, 26 Sup. Ct. Rep. 469; Shurtleff v. United States, 189 U. S. 311, 316, 47 L. ed. 828, 831, 23 Sup. Ct. Rep. 535; Stilling v. United States, 41 Ct. Cl. 61; Costello v. United States, 51 Ct. Cl. 262; United States ex rel. Palmer v. Lapp, 157 C. C. A. 3, 244 Fed. 382.

The claimant was not in the Engineer Department at large, but in the War Department at Washington, District of Columbia.

United States v. Ashfield, 91 U. S. 317, 23 L. ed. 396.

The claimant was not an employee, to whom alone the regulation applies, but an officer of the United States. Hence the regulation has no application to his case.

People ex rel. Satterlee v. Board of Police, 75 N. Y. 41; People v. Buffalo, 57 Hun, 577, 11 N. Y. Supp. 315; People v. E. Remington & Sons, 45 Hun, 329, affirmed in 109 N. Y. 631, 16 N. E. 680; State ex rel. Atty. Gen. v. Craig, 69 Ohio St. 236, 69 N. E. 228; United States v. Schlierholz, 137 Fed. 616; Palmer v. Van Santvoord, 153 N. Y. 612, 38 L.R.A. 402, 47 N. E. 915.

Assistant Attorney General **Davis** argued the cause, and, with Mr. Harvey D. Jacob, filed a brief for appellee.

Mr. Justice **Brandeis** delivered the opinion of the court:

On July 1, 1910, Burnap entered upon duty in the Office of Public Buildings and Grounds as landscape architect at the salary of $2,400 a year, having been appointed to that position by the Secretary of War. On September 14, 1915, he was suspended, upon charges, from duty and pay; and on August 3, 1916, he was discharged "in order to promote the efficiency of the service." His successor was not appointed until July 28, 1917. Burnap contends that his suspension and discharge were illegal and hence inoperative; that he retained his position until his successor was appointed; and that until such appointment he was entitled to his full salary. United States v. Wickersham, 201 U. S. 390, 50 L. ed. 798, 26 Sup. Ct. Rep. 469. His claim for such salary was rejected by the Auditor of the War Department (of which the Office of Public Buildings and Grounds is a part), and, upon appeal, also by the Comptroller of the Treasury. Then this suit was brought in the court of claims. There his petition was dismissed and the case comes here on appeal.

Burnap rests his claim mainly upon the fact that he was appointed by the Secretary of War, contending that, therefore, only the Secretary of War could remove him (21 Ops. Atty. Gen. 355), and that no action tantamount to a removal by the Secretary was taken until his successor was appointed. Before discussing the nature and effect of the action taken, it is necessary to consider the general rules of law governing appointment and removal in the civil service of the United States, the statutes relating to the Office of Public Buildings and Grounds, and those providing for the appointment of a landscape architect therein.

First. The Constitution (art. 2, § 2) confers upon the [**515**] President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law, or in the heads of Departments (6 Ops. Atty. Gen. 1). The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint. Ex parte Hennen, 13 Pet. 230, 259, 260, 10 L. ed. 138, 152, 153; Blake v. United States, 103 U. S. 227, 231, 26 L. ed. 462, 463; United States v. Allred, 155 U. S. 591, 594, 39 L. ed. 273, 274, 15 Sup. Ct. Rep. 231; Keim v. United States, 177 U. S. 290, 293, 294, 44 L. ed. 774–776, 20 Sup. Ct. Rep. 574; Reagan v. United States, 182 U. S. 419, 426, 45 L. ed. 1162, 1165, 21 Sup. Ct. Rep. 842; Shurtleff v. United States, 189 U. S. 311, 316, 47 L. ed. 828, 831, 23 Sup. Ct. Rep. 535. And the power of suspension is an incident of the power of removal.

Section 169 of the Revised Statutes (Comp. Stat. § 248, 2 Fed. Stat. Anno. 2d ed. p. 148) provides that:

"Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messenger, copyists, watchmen, laborers, and other employees, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year."

The term "head of a Department" means, in this connection, the Secretary in charge of a great division of the executive branch of the government, like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. United States v. Germaine, 99 U. S. 508, 510, 25 L. ed. 482, 483. Persons employed in a bureau or division of a Department are as much employees in the Department within the meaning of § 169 of the Revised Statutes as clerks or messengers rendering service under the immediate supervision of the Secretary. Manning's Case, 13 Wall. 578, 580, 20 L. ed. 706, 707; United States v. Ashfield, 91 U. S. 317, 319, 23 L. ed. 396, 397. The term "employ" is used as the equivalent of "appoint." 21 Ops. Atty. Gen. 355, 356. The term "clerks and other employees," as there [**516**] used, is sufficiently broad to include persons filling positions which require technical skill, learning, and professional training. 29 Ops. Atty. Gen. 116, 123; 21 Ops. Atty. Gen. 363, 364; 20 Ops. Atty. Gen. 728. The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions, or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. 15 Ops. Atty. Gen. 3;

17 Ops. Atty. Gen. 532; 26 Ops. Atty. Gen. 627; 29 Ops. Atty. Gen. 116; United States v. Hartwell, 6 Wall. 385, 18 L. ed. 830; United States v. Moore, 95 U. S. 760, 762, 24 L. ed. 588, 589; United States v. Perkins, 116 U. S. 483, 29 L. ed. 700, 6 Sup. Ct. Rep. 449; United States v. Mouat, 124 U. S. 303, 31 L. ed. 463, 8 Sup. Ct. Rep. 505; United States v. Hendee, 124 U. S. 309, 31 L. ed. 465, 8 Sup. Ct. Rep. 507; United States v. Smith, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595; Auffmordt v. Hedden, 137 U. S. 310, 34 L. ed. 674, 11 Sup. Ct. Rep. 103; United States v. Schlierholz, 137 Fed. 616; Martin v. United States, 93 C. C. A. 484, 168 Fed. 198.

Second. The powers and duties of the Office of Public Buildings and Grounds had their origin in the Act of July 16, 1790, chap. 28, 1 Stat. at L. 130, Comp. Stat. § 3306, 8 Fed. Stat. Anno. 2d ed. p. 1072, which authorized the President to appoint three Commissioners to lay out a district for the permanent seat of the government. By Act of May 1, 1802, chap. 41, 2 Stat. at L. 175, the offices of Commissioners were abolished and their duties devolved upon a Superintendent, to be appointed by the President. By Act of April 29, 1816, chap. 150, 3 Stat. at L. 324, the office of Superintendent was abolished and his duties devolved upon a Commissioner of Public Buildings. By Act of March 2, 1867, chap. 167, § 2, 14 Stat. at L. 466, the office of Commissioner was abolished and his duties devolved upon the Chief of Engineers. By § 1797 of the Revised Statutes as amended by Act of April 28, 1902, chap. 594, 32 Stat. at L. 152, Comp. Stat. § 3308, 8 Fed. Stat. Anno. 2d ed. p. 1072, it is declared that the Chief of Engineers has "charge of the public buildings and grounds in the District of Columbia, under such regulations [517] as may be prescribed by the President through the War Department." And § 1812 (Comp. Stat. § 3327, 8 Fed. Stat. Anno. 2d ed. p. 1075) requires the Chief of Engineers, as Superintendent of Public Buildings and Grounds, to submit annual reports to the Secretary of War to accompany the annual message of the President to Congress.

Third. There is no statute which creates an office of landscape architect in the Office of Public Buildings and Grounds, nor any which defines the duties of the position. The only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910, chap. 297, 36 Stat. at L. 504 (and later appropriation acts in the same form, Act of March 4, 1911, chap. 237, 36 Stat. at L. 1207, Act of August 23, 1912, chap. 350, 37 Stat. at L. 388; Act of March 4, 1913, chap. 142, 37 Stat. at L. 766, Act of July 16, 1914, chap. 141, 38 Stat. at L. 482; Act of March 4, 1915, chap. 141, 38 Stat. at L. 1024; Act of May 10, 1916, chap. 117, 39 Stat. at L. 93), which reads as follows:

Public Buildings and Grounds.

Office of Public Buildings and Grounds: Assistant Engineer, two thousand four hundred dollars; assistant and chief clerk, two thousand four hundred dollars; clerk of class four; clerk of class three; clerk and stenographer, one thousand four hundred dollars; messenger; landscape architect, two thousand four hundred dollars; surveyor and draftsman, one thousand five hundred dollars; in all fourteen thousand three hundred and forty dollars. (Then follow the foremen and night and day watchmen in the parks.)

Prior to July 1, 1910, similar appropriation acts had provided for a "landscape gardener" at the same salary. There is no statute which provides specifically by whom the landscape architect in the Office of Public Buildings and Grounds shall be appointed. As the Office of Public Buildings and Grounds is a part of the bureau of the Chief of Engineers, and that bureau is in the War Department, the Secretary of War would, under § 169 (Comp. Stat. § 248, 2 Fed. Stat. Anno. 2d ed. p. 148), have the power to appoint the landscape architect as an employee in his department, in the absence of other provision dealing with [518] the subject. 21 Ops. Atty. Gen. 355. But § 1799 of the Revised Statutes (Comp. Stat. § 3310, 8 Fed. Stat. Anno. 2d ed. p. 1073) provides that:

"The Chief of Engineers in charge of public buildings and grounds is authorized to employ in his office and about the public buildings and grounds under his control such number of persons for such employments, and at such rates of compensation, as may be appropriated for by Congress from year to year."

This more specific provision excludes positions in the Office of Public Buildings and Grounds from the operation of the general provision of § 169, conferring the power of appointment upon the heads of Departments. Compare 10 Dec. of Comptroller of Treas. 577, 583. The appointment of Burnap by the Secretary of War,

instead of by the Chief of Engineers, was without authority in law.

Fourth. As the power to remove is an incident of the power to appoint, the Chief of Engineers would clearly have had power to remove Burnap, if the appointment had been made by him instead of by the Secretary of War. The fact that Burnap was, by inadvertence, appointed by the Secretary, does not preclude the Chief of Engineers from exercising in respect to him the general power to remove employees in his office conferred, by implication, in § 1799 of the Revised Statutes. The defect in Burnap's original appointment was cured by the acquiescence of the Chief of Engineers throughout five years, so that Burnap's status was better than that of a mere de facto officer. But it was not superior to what it would have been if he had been regularly appointed by the Chief of Engineers. United States v. Mouat, 124 U. S. 303, 31 L. ed. 463, 8 Sup. Ct. Rep. 505.

Fifth. The question remains, whether there was a legal exercise by the Chief of Engineers of his power of removal. The suspension of Burnap was by letter from his immediate superior, the officer in charge of the Office of Public Buildings and Grounds under the Chief of Engineers; and to the latter the papers were promptly transmitted. The [519] discharge was by direct command of the Chief of Engineers. Both the suspension and the discharge purported to be ordered pursuant to Paragraph 13 of § 5 of General Orders Number 5 of the Office of Chief of Engineers, 1915, being regulations governing the classified Civil Service as applied to the Engineer Department at Large, approved by the Civil Service Commission and the Secretary of War.[1] Burnap contends that the provisions of that paragraph were inapplicable to his position; (1) because these regulations relate to the Engineer Department at Large and the Office of Public Buildings and Grounds is not included therein; and (2) because they relate to employees, and that the landscape architect was an officer, not an employee. As has been shown, Burnap was an employee. But the main contention is wholly immaterial. If paragraph 13 does not apply to the position of landscape architect, the exercise of the right of removal which rested in the Chief of Engineers was governed only by the provisions of the Act of August 24, 1912, chap. 389, § 6, 37 Stat. at L. 555, Comp. Stat. § 3287, 8 Fed. Stat. Anno. 2d ed. p. 956,[2] and Civil Service Rule XII. For no regulations [520] relating to the matter appear to have been "prescribed by the President, through the War Department," under the authority reserved in Revised Statutes, § 1797, Comp. Stat. § 3308, 8 Fed. Stat. Anno. 2d ed. p. 1072, as amended. It is not contended that the procedure adopted in suspending and removing Burnap disregarded any requirement of the Act of 1912 or of the Civil Service Rule. Nor are we asked to review the discharge as having been made without adequate cause. The power of removal was legally exercised by the Chief of Engineers; and no irregularity has been pointed out in the suspension which was incident to it.

Sixth. As the power of discharge was vested in the Chief of Engineers and was unaffected by the fact that the appointment had been inadvertently made by the Secretary of War, we have no occasion to consider the contention of Burnap, that it was beyond the Secretary's power to delegate to the Chief of Engineers authority to remove employees in his bureau. Nor need we consider the contention of the government, that the action taken was tantamount to a removal by the Secretary, because the discharge was ordered by the Chief of Engineers after consideration of the matter of Burnap's request by the Secretary of War, a reference of it by him to the Judge Advocate General, and a return of the papers by the Secretary of War to the Chief of Engineers for

[1] Par. 13: "Discharge for Cause.—Discharge for cause of any regularly appointed classified employee will be subject to the provisions of Civil Service Rule XII. and cannot be made without the approval of the Chief of Engineers. An employee may be suspended without pay by the officer in charge, who should at once furnish the employee with a statement in writing of the charges against him and give him a reasonable time within which to make answer thereto in writing. As soon as reply is received, or in case no reply is received within the time given him, all papers should be submitted to the Chief of Engineers with full statement of the facts in the case and the officer's recommendations."

[2] Chap. 389, § 6: "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof, etc."

action in accordance with the Judge Advocate General's suggestions.

The judgment of the Court of Claims is affirmed.

---

[521] ONEIDA NAVIGATION CORPORATION, Claimant of the Sailing Vessel Percy R. Pyne 2d, etc., Appt.,
v.
W. & S. JOB & COMPANY, Inc.

(See S. C. Reporter's ed. 521, 522.)

Appeal — final judgment.

A decree of a Federal district court dismissing for lack of jurisdiction the petition of the defendant vessel owner in an admiralty suit to bring in as a party defendant a corporation which it is asserted would be liable as an indemnitor if the liability of the vessel should be established lacks the finality essential to support an appeal.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

[No. 259.]

Argued and submitted March 19, 1920. Decided April 19, 1920.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing, for want of jurisdiction, the petition of the defendant in an admiralty suit to bring in a party defendant. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. **George Whitefield Betts, Jr.**, argued the cause, and, with Mr. George C. Sprague, filed a brief for appellant.

Mr. **Peter S. Carter** submitted the cause for appellee.

Mr. Justice **Brandeis** delivered the opinion of the court:

James W. Smith and another libeled the schooner Percy R. Pyne 2d in the district court of the United States for the southern district of New York, claiming damages for injury to cargo resulting from unseaworthiness due to the cutting away of timbers and frame for the installation of an auxiliary engine. The Oneida Navigation Company claimed the vessel as owner, and answered, denying liability. Then it filed, by leave of court, a [522] petition to bring in, under Admiralty Rule 15 of that court, in analogy to Admiralty Rule 59 of this court, W. & S. Job & Co., Inc., as defendants, alleging them to be the party through whose fault, if any, the damages complained of had occurred, and that if liability should be established, it would be entitled to be indemnified by them. W. & S. Job & Co., Inc., excepted to the petition and denied jurisdiction on the ground that the petition did not set forth a cause of action in admiralty. Their exception was sustained and the petition was dismissed on that ground. The case comes here by direct appeal, the district judge having certified the question of jurisdiction.

The petition to make W. & S. Job & Co., Inc., party defendant, was merely an incident in the progress of the case in the district court. The liability of indemnitors thereby sought to be enforced would in no event arise unless the vessel should be held liable. The petitioner had, as claimant, denied liability in its answer to the libel, and the issue thus raised had not been tried. While the decree dismissing the petition as to W. & S. Job & Co., Inc., was final as to them, there was no decree disposing of the case below. A case may not be brought here in fragments. This court has jurisdiction under § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1215, 5 Fed. Stat. Anno. 2d ed. p. 794], as under other sections, only from judgments which are both final and complete. Collins v. Miller, decided by this court March 29, 1920 [252 U. S. 364, ante, 616, 40 Sup. Ct. Rep. 347]; Hohorst v. Hamburg-American Packet Co. 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590. The case was not ripe for appeal. Although the objection was not raised by the appellee, the appeal is dismissed for want of jurisdiction.

Note.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302; Schlosser v. Hemphill, 49 L. ed. U. S. 1001; and Detroit & M. R. Co. v. Michigan R. Commission, 60 L. ed. U. S. 802.

[523] PENN MUTUAL LIFE INSURANCE COMPANY, Petitioner,
v.
EPHRAIM LEDERER, Collector of Internal Revenue.

(See S. C. Reporter's ed. 523–538.)

Internal revenue — income tax — life insurance companies — gross income — excluding dividends.

1. The amounts paid by a mutual legal reserve level-premium life insurance company in cash dividends to its policyholders during any taxable year, representing excess in premiums over actual cost of insurance, if not applied by such policyholders during that period of reduction of renewal premiums, may not be excluded from gross income under the provision of the Income Tax Act of October 3, 1913, § II. G, that life insurance companies "shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder within such year."

[For other cases, see Internal Revenue, III. b, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — life insurance companies — deductions from gross income — dividends.

2. The deduction from the gross income of a mutual legal reserve level-premium life insurance company of cash dividends to policyholders, representing excess in premiums over actual cost of insurance, is expressly forbidden by the clause of the Income Tax Act of October 3, 1913, § II. G, defining allowable deductions from gross income of insurance companies as "the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts," except in so far as such dividends are excluded from computation of gross income under the so-called noninclusion clause of such section, as having been applied in reduction of renewal premiums.

[For other cases, see Internal Revenue, III. b, in Digest Sup. Ct. 1908.]

Statutes — construction — legislative history.

3. The legislative history of an act may, where the meaning of the words used is doubtful, be resorted to as an aid to construction, but no aid can possibly be derived from the legislative history of another act, passed nearly six years later.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

[No. 499.]

Argued March 22 and 23, 1920. Decided April 19, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which reversed a judgment of the District Court for the Eastern District of Pennsylvania for the recovery back of certain sums assessed and collected as an income tax from a mutual life insurance company. Affirmed.

See same case below, 169 C. C. A. 167, 258 Fed. 81.

The facts are stated in the opinion.

Mr. **George Wharton Pepper** argued the cause and filed a brief for petitioner:

The credit given to the policyholder out of the company's surplus was not a dividend, but represented nothing more than the excess of loading of the premium, which was being returned in some form to the policyholder from whom it came.

Herold v. Mutual Ben. L. Ins. Co. 120 C. C. A. 256, 201 Fed. 918, 198 Fed. 212; Connecticut General L. Ins. Co. v. Eaton, 218 Fed. 188.

The attempt to confuse statutory gross income with the sum total of actual receipts has been made many times by the government, and as often resisted by this court.

Southern P. Co. v. Lowe, 247 U. S. 334, 62 L. ed. 1146, 38 Sup. Ct. Rep. 540.

It is true that before the 16th Amendment, this court considered the specific sources of the income which Congress had sought to tax in order to determine whether or not the tax was wholly or in part a tax on the properties which were the sources of some of the income, and as such a direct tax, and unconstitutional unless apportioned (Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912). But, wherever it could properly be done, the court, even before the Amendment, recognized that the thing called "income" was to be considered apart from its source, and was the measure of an excise tax rather than itself a subject of taxation (Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312). In that case the Corporation Tax Act of 1909 was under consideration. "It was reasonable," said this court, in Strat-

Note.—On construction of statutes, generally—see notes to Riggs v. Palmer, 5 L.R.A. 340; Maillard v. Lawrence, 14 L. ed. U. S. 925; United States v. Saunders, 22 L. ed. U. S. 736; and Blake v. National City Bank, 23 L. ed. U. S. 119.

ton's Independence v. Howbert, 231 U. S. 417, 58 L. ed. 285, 34 Sup. Ct. Rep. 136, "that Congress should fix upon gross income, without distinction as to source, as a convenient and sufficiently accurate index of the importance of the business transacted."

The 16th Amendment disassociated income from its source, and so dissolved the rule by which alone such taxes were removed from the great class of excises, duties and imports.

Brushaber v. Union P. R. Co. 240 U. S. 19, 60 L. ed. 502, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713.

To require the payment of an excise tax measured in part by sums returned to mutual insurers is to impute to Congress an intention to ignore the nature of mutual insurance, and to impose a burden which ought not to rest upon such a form of activity unless the taxing statute clearly and manifestly discloses such an intention.

Gould v. Gould, 245 U. S. 153, 62 L. ed. 213, 38 Sup. Ct. Rep. 53.

Assistant Attorney General **Frierson** argued the cause, and filed a brief for respondent.

Mr. Justice **Brandeis** delivered the opinion of the court:

The Penn Mutual Life Insurance Company, a purely mutual legal reserve company which issues level-premium [524] insurance, brought this action in the district court of the United States for the eastern district of Pennsylvania to recover $6,865.03, which was assessed and collected as an income tax of 1 per cent upon the sum of $686,503, alleged to have been wrongly included as a part of its gross income, and hence also of its net income, for the period from March 1, 1913, to December 31, 1913. The latter sum equals the aggregate of the amounts paid during that period by the company to its policyholders in cash dividends which were *not* used by them during that period in payment of premiums. The several amounts making up this aggregate represent mainly a part of the so-called redundancy in premiums paid by the respective policyholders in some previous year or years. They are, in a sense, a repayment of that part of the premium previously paid which experience has proved was in excess of the amount which had been assumed would be required to meet the policy obligations (ordinarily termed losses) or the legal reserve and the expense of conducting the business.[1] The district court allowed recovery of the full amount, with interest. 247 Fed. 559. The circuit court of appeals for the third circuit, holding that nothing was recoverable except a single small item, reversed the judgment and awarded a new trial. 169 C. C. A. 167, 258 Fed. 81. A writ of certiorari from this court was then allowed. 250 U. S. 656, 63 L. ed. 1192, 40 Sup. Ct. Rep. 14.

Whether the plaintiff is entitled to recover depends wholly upon the construction to be given certain provisions in § II. G(b) of the Revenue Act of October 3, 1913, chap. 16, 38 Stat. at L. 114, 172, 173. The act enumerates among [525] the corporations upon which the income tax is imposed, "every insurance company" other than "fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under a lodge system." It provides (G (b) pp. 172–174) how the net income of insurance companies shall be ascertained for purposes of taxation, prescribing what shall be included to determine the gross income of any year, and also specifically what deductions from the ascertained gross income shall be made in order to determine the net income upon which the tax is assessed. Premium receipts are a part of the gross income to be accounted for.

In applying to insurance companies the system of income taxation in which the assessable net income is to be ascertained by making enumerated deductions from the gross income (including premium receipts), Congress naturally provided how, in making the computation,[2] repayment of the redundancy in the premium should

[1] The manner in which mutual level-premium life insurance companies conduct their business, and the nature and application of dividends, are fully set forth in Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 199; Connecticut General L. Ins. Co. v. Eaton, 218 Fed. 188; Connecticut Mut. L. Ins. Co. v. Eaton, 218 Fed. 206.

[2] The percentage of the redundancy to the premium varies, from year to year, greatly, in the several fields of insurance, and likewise in the same year in the several companies in the same field. Where the margin between the probable losses and those reasonably possible is very large, the return premiums rise often to 90 per cent or more of the premium paid. This is true of the manufacturers' mutual fire insurance companies of New England. See Report Massachusetts Insurance Commissioner (1913) vol. I., p. 16.

be dealt with. In a mutual company, whatever the field of its operation, the premium exacted is necessarily greater than the expected cost of the insurance, as the redundancy in the premium furnishes the guaranty fund out of which extraordinary losses may be met, while in a stock company they may be met from the capital stock subscribed. It is of the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the policyholder. Some payment to the [526] policyholder representing such excess is ordinarily made by every mutual company every year; but the so-called repayment or dividend is rarely made within the calendar year in which the premium (of which it is supposed to be the unused surplus) was paid. Congress treated the so-called repayments or dividends in this way (p. 173):

(a) Mutual fire companies "shall not return as income any portion of the premium deposits returned to their policyholders."

(b) Mutual marine companies "shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof."

(c) Life insurance companies (that is, both stock and strictly mutual) "shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year."

(d) For all insurance companies, whatever their field of operation, and whether stock or mutual, the act provides that there be deducted from gross income "the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts."

The government contends, in substance, for the rule that in figuring the gross income of life insurance companies, there shall be taken the aggregate of the year's net premium receipts, made up separately for each policyholder.[3] The Penn Mutual Company contends for the [527] rule that in figuring the gross income there shall be taken the aggregate full premiums received by the company, less the aggregate of all dividends paid by it to any policyholder by credit upon a premium or by abatement of a premium, and also of all dividends whatsoever paid to any policyholder in cash, whether applied in payment of a premium or not. The noninclusion clause, (c) above, excludes from gross income those premium-receipts which were actually or in effect paid by applying dividends. The company seeks to graft upon the clause so restricted a provision for what it calls nonincluding, but which in fact is deducting, all cash dividends not so applied. In support of this contention the company relies mainly, not upon the words of the statute, but upon arguments which it bases upon the nature of mutual insurance, upon the supposed analogy of the rules prescribed in the statute for mutual fire and marine companies, and upon the alleged requirements of consistency.

First: The reason for the particular provision made by Congress seems to be clear: Dividends may be made, and by many of the companies have been made largely, by way of abating or reducing the amount of the renewal premium.[4] Where the dividend is so made the actual premium receipt of the year is obviously only the reduced amount. But, as a matter of bookkeeping, the premium is [528] entered at the full rate, and the abatement (that is, the amount by which it was reduced) is entered as a credit. The financial result both to the company and to the policyholders is, however, exactly the same whether the renewal premium is reduced by a dividend, or whether the renewal premium remains unchanged, but is paid in part either by a credit or by

[3] A separate account is kept by the company with each policyholder. In that account there is entered each year the charges of the premiums payable and all credits either for cash payments or by way of credit of dividends, or by way of abatement of premium.

[4] The dividend provision of the Mutual Benefit Life Insurance Company involved in the Herold Case, supra, 198 Fed. 199, 204, was, in part: "After this policy shall have been in force one year, each year's premium subsequently paid shall be subject to reduction by such dividend as may be apportioned by the directors." The dividend provision in some of the participating policies involved in the Connecticut General L. Ins. Co. Case, supra, 218 Fed. 188, 192, was: "Reduction of premiums as determined by the company will be made annually, beginning at the second year, or the insured may pay the full premium, and instruct the company to apply the amount of the reduction apportioned to him in any one of the following plans:" (Then follow four plans.)

cash received as a dividend. And the entries in bookkeeping would be substantially the same. Because the several ways of paying a dividend are, as between the company and the policyholder, financial equivalents, Congress, doubtless, concluded to make the incidents the same, also, as respects income taxation. Where the dividend was used to abate or reduce the full or gross premium, the direction to eliminate from the apparent premium receipts is aptly expressed by the phrase "shall not include," used in clause (c) above. Where the premium was left unchanged, but was paid in part by a credit or cash derived from the dividend, the instruction would be more properly expressed by a direction to deduct those credits. Congress doubtless used the words "shall not include" as applied also to these credits because it eliminated them from the aggregate of taxable premiums as being the equivalent of abatement of premiums.

That such was the intention of Congress is confirmed by the history of the noninclusion clause, (c) above. The provision in the Revenue Act of 1913, for taxing the income of insurance companies, is in large part identical with the provision for the special excise tax upon them imposed by the Act of August 5, 1909, chap. 6, § 38, 36 Stat. at L. 112. By the latter act the net income of insurance companies was, also, to be ascertained by deducting from gross income "sums other than dividends, paid within the year on policy and renewal contracts;" but there was in that act no noninclusion clause whatsoever. The question arose whether the provision in the Act of 1913, identical with (c) [529] above, prevented using in the computation the reduced renewal premiums instead of the full premiums, where the reduction in the premium had been effected by means of dividends. In Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 199, decided July 29, 1912, it was held that the renewal premium, as reduced by such dividends, should be used in computing the gross premium; and it was said (p. 212) that dividends so applied in reduction of renewal premiums "should not be confused with dividends declared in the case of a full-paid participating policy, wherein the policyholder has no further premium payments to make. Such payments having been duly met, the policy has become at once a contract of insurance and of investment. The holder participates in the profits and income of the invested funds of the company." On writ of error sued out by the government the judgment entered in the district court was affirmed by the circuit court of appeals on January 27, 1913, 120 C. C. A. 256, 201 Fed. 918; but that court stated that it refrained from expressing any opinion concerning dividends on full-paid policies, saying that it did so "not because we wish to suggest disapproval, but merely because no opinion about these matters is called for now, as they do not seem to be directly involved." The noninclusion clause in the Revenue Act of 1913, (c) above, was doubtless framed to define what amounts involved in dividends should be "noninclued," or deducted, and thus to prevent any controversy arising over the questions which had been raised under the Act of 1909.[5] The petition for writ of certiorari applied for by the government was not denied by this court until December 15, 1913. 231 U. S. 755, 58 L. ed. 468, 34 Sup. Ct. Rep. 323; that is, after the passage of the act.

[530] Second: It is argued that the nature of life insurance dividends is the same, whatever the disposition made of them; and that Congress could not have intended to relieve the companies from taxation to the extent that dividends are applied in payment of premiums, and to tax them to the extent that dividends are not so applied. If Congress is to be assumed to have intended, in obedience to the demands of consistency, that all dividends declared under life insurance policies should be treated alike in connection with income taxation, regardless of their disposition, the rule of consistency would require deductions more far-reaching than those now claimed by the company. Why allow so-called noninclusion of amounts equal to the dividends paid in cash, but not applied in reduction of renewal premium, and disallow so-called noninclusion of amounts equal to the dividends paid by a credit representing amounts retained by the company for accumulation or to be otherwise used for the policyholders' benefit? The fact is, that Congress has acted with entire consistency in laying down the rule by which, in computing gross earnings, certain amounts only are excluded; but the company has failed to recognize what the principle is which Congress has consistently applied. The principle applied is that of basing the taxation on

[5] Substantially the same questions were involved, also, in Connecticut General L. Ins. Co. v. Eaton, 218 Fed. 188, and Connecticut Mut. L. Ins. Co. v. Eaton, 218 Fed. 206, in which decisions were not, however, reached until the following year.

receipts of net premiums, instead of on gross premiums. The amount equal to the aggregate of certain dividends is excluded, although they are dividends, because by reason of their application the net-premium receipts of the tax year are to that extent less. There is a striking difference between an aggregate of individual premiums, each reduced by means of dividends, and an aggregate of full premiums, from which it is sought to deduct amounts paid out by the company which have no relation whatever to premiums received within the tax year, but which relate to some other premiums which may have been received many years earlier. The difference between the two [531] cases is such as may well have seemed to Congress sufficient to justify the application of different rules of taxation.

There is also a further significant difference. All life insurance has in it the element of protection. That afforded by fraternal beneficiary societies, as originally devised, had in it only the element of protection. There the premiums paid by the member were supposed to be sufficient, and only sufficient, to pay the losses which will fall during the current year; just as premiums in fire, marine, or casualty insurance are supposed to cover only the losses of the year or other term for which the insurance is written. Fraternal life insurance has been exempted from all income taxation, Congress having differentiated these societies, in this respect as it had in others, from ordinary life insurance companies. Compare Supreme Council R. A. v. Behrend, 247 U. S. 394, 62 L. ed. 1182, 1 A.L.R. 966, 38 Sup. Ct. Rep. 522. But in level-premium life insurance, while the motive for taking it may be mainly protection, the business is largely that of savings investment. The premium is in the nature of a savings deposit. Except where there are stockholders, the savings bank pays back to the depositor his deposit, with the interest earned, less the necessary expense of management. The insurance company does the same, the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit, with interest; while the life insurance company undertakes to pay to each member of a class the average amount (regarding the chances of life and death); so that those who do not reach the average age get more than they have deposited, that is, paid in premiums (including interest), and those who exceed the average age less than they deposited (including interest). The dividend of a life insurance company may be regarded as paying back part of these deposits, called premiums. The dividend is made possible because the amounts paid in as premium have earned [532] more than it was assumed they would when the policy contract was made, or because the expense of conducting the business was less than it was then assumed it would be, or because the mortality, that is, the deaths in the class to which the policyholder belongs, proved to be less than had then been assumed in fixing the premium rate. When for any or all of these reasons the net cost of the investment (that is, the right to receive at death or at the endowment date, the agreed sum) has proved to be less than that for which provision was made, the difference may be regarded either as profit on the investment or as a saving in the expense of the protection. When the dividend is applied in reduction of the renewal premium, Congress might well regard the element of protection as predominant, and treat the reduction of the premium paid by means of a dividend as merely a lessening of the expense of protection. But after the policy is paid up, the element of investment predominates, and Congress might reasonably regard the dividend substantially as profit on the investment.

The dividends, aggregating $686,503, which the Penn Mutual Company insists should have been "noninclueded," or more properly deducted from the gross income, were, in part, dividends on the ordinary limited-payment life policies which had been paid-up. There are others which arose under policy contracts in which the investment feature is more striking; for instance, the accelerative endowment policy, or such special form of contract as the twenty-five-year "6 per cent investment bond" matured and paid March, 1913, on which the policyholder received, besides dividends, interest and a "share of forfeitures." In the latter, as in "deferred dividend" and other semitontine policies, the dividend represents in part what clearly could not be regarded as a repayment of excess premium of the policyholder receiving the dividend. For the "share of the forfeiture" which he receives is the share of the redundancy in premium of other policyholders who [533] did not persist in premium payments to the end of the contract period.

Third: The noninclusion clause here in question, (c) above, is found in § II. G(b), in juxtaposition to the provisions

concerning mutual fire and mutual marine companies, clauses (a) and (b) above. The fact that in three separate clauses three different rules are prescribed by Congress for the treatment of redundant premiums in the three classes of insurance would seem to be conclusive evidence that Congress acted with deliberation, and intended to differentiate between them in respect to income taxation. But the company, ignoring the differences in the provisions concerning fire and marine companies respectively, insists that mutual life insurance rests upon the same principles as mutual fire and marine, and that as the clauses concerning fire and marine companies provide specifically for noninclusion in or deduction from gross income of all portions of premiums returned, Congress must have intended to apply the same rule to all. Neither premise nor conclusion is sound.

Mutual fire, mutual marine, and mutual life insurance companies are analogous in that each performs the service called insuring wholly for the benefit of their policyholders, and not like stock insurance companies, in part for the benefit of persons who, as stockholders, have provided working capital on which they expect to receive dividends representing profits from their investment. In other words, these mutual companies are alike in that they are co-operative enterprises. But, in respect to the service performed, fire and marine companies differ fundamentally, as above pointed out, from legal reserve life companies. The thing for which a fire or marine insurance premium is paid is protection, which ceases at the end of the term. If, after the end of the term, a part of the premium is returned to the policyholder, it is not returned as something purchased with the premium, but as a part of the premium [534] which was not required to pay for the protection; that is, the expense was less than estimated. On the other hand, the service performed in level-premium life insurance is both protection and investment. Premiums paid—not in the tax year, but perhaps a generation earlier—have earned so much for the co-operators, that the company is able to pay to each not only the agreed amount, but also additional sums, called dividends; and have earned these additional sums, in part, at least, by transactions not among the members, but with others; as by lending the money of the co-operators to third persons, who pay a larger rate of interest than it was assumed would be received on investments. The fact that the investment resulting in accumulation or dividend is made by a co-operative, as distinguished from a capitalistic, concern, does not prevent the amount thereof being properly deemed a profit on the investment. Nor does the fact that the profit was earned by a co-operative concern afford basis for the argument that Congress did not intend to tax the profit. Congress exempted certain co-operative enterprises from all income taxation, among others, mutual savings banks; but, with the exception of fraternal beneficiary societies, it imposed in express terms such taxation upon "every insurance company." [6]

The purpose of Congress to differentiate between mutual fire and marine insurance companies, on the one hand, and life insurance companies, on the other, is further manifested by this: The provision concerning return premiums in computation of the gross income of fire and marine insurance companies is limited in terms to mutual companies, whereas the noninclusion clause, (c) above, relating to life [535] insurance companies, applies whether the company be a stock or a mutual one. There is good reason to believe that the failure to differentiate between stock and mutual life insurance companies was not inadvertent. For while there is a radical difference between stock fire and marine companies and mutual fire and marine companies, both in respect to the conduct of the business and in the results to policyholders, the participating policy commonly issued by the stock life insurance company is, both in rights conferred and in financial results, substantially the same as the policy issued by a purely mutual life insurance company. The real difference between the two classes of life companies as now conducted lies in the legal right of electing directors and officers. In the stock company stockholders have that right; in the mutual companies, the policyholders who are the members of the corporation.

The Penn Mutual Company, seeking to draw support for its argument from legislation subsequent to the Revenue Act of 1913, points also to the fact that by the Act of September 8, 1916, chap. 463, § 12, subsection 2, subdivision c, 39 Stat.

[6] The alleged unwisdom and injustice of taxing mutual life insurance companies while mutual savings banks were exempted had been strongly pressed upon Congress. Briefs and statements filed with Senate Committee on Finance on H. R. 3321—Sixty-third Congress, First Session, vol. 3, pp. 1955-2094.

at L. 756, 768, Comp. Stat. §§ 6336a, 6336l, Fed. Stat. Anno. Supp. 1918, p. 312, the rule for computing gross income there provided for mutual fire insurance companies was made applicable to mutual employers' liability, mutual workmen's compensation, and mutual casualty insurance companies. It asserts that thereby Congress has manifested a settled policy to treat the taxable income of mutual concerns as not including premium refunds; and that if mutual life insurance companies are not permitted to "exclude" them, these companies will be the only mutual concerns which are thus discriminated against. Casualty insurance, in its various forms, like fire and marine insurance, provides only protection, and the premium is wholly an expense. If such later legislation could be considered in construing the Act of 1913, the conclusion to be drawn from it would be clearly the opposite of that urged. The later act would tend to show that Congress [536] persists in its determination to differentiate between life and other forms of insurance.

Fourth: It is urged that in order to sustain the interpretation given to the *noninclusion* clause by the circuit court of appeals (which was, in effect, the interpretation set forth above), it is necessary to interpolate in the clause the words "within such year," as shown in italics in brackets, thus:

"And life insurance companies shall not include as income in any year such portion of any actual premiums received from any individual policyholder [*within such year*] as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year."

What has been said above shows that no such interpolation is necessary to sustain the construction given by the circuit court of appeals. That court did not hold that the permitted noninclusion in the year's gross income is limited to that portion of the premium received within the year which, by reason of a dividend, is paid back within the same year. What the court held was that the noninclusion is limited to that portion of the premium which, although entered on the books as received, was not actually received within the year, because the full premium was, by means of the dividend, either reduced, or otherwise wiped out to that extent. Nor does the government contend that any portion of a premium, not received within the tax year, shall be included in computing the year's gross income. On the other hand, what the company is seeking is not to have "nonincluded" a part of the premiums which were actually received within the year, or which appear, as matter of bookkeeping, to have been received, but actually were not. It is seeking to have the aggregate of premiums actually received within the year *reduced* by an amount which the company paid out within [537] the year; and which it paid out mainly on account of premiums received long before the tax year. What it seeks is not a *noninclusion* of amounts paid in, but a *deduction* of amounts paid out.

If the terms of the noninclusion clause, (c) above, standing alone, permitted of a doubt as to its proper construction, the doubt would disappear when it is read in connection with the deduction clause, (d) above. The deduction there prescribed is of "the sums other than dividends paid within the year on policy and annuity contracts." This is tantamount to a direction that dividends shall not be deducted. It was argued that the dividends there referred to are "commercial" dividends like those upon capital stock; and that those here involved are dividends of a different character. But the dividends, which the deduction clause says, in effect, shall not be deducted, are the very dividends here in question; that is, dividends "on policy and annuity contracts." None such may be deducted by any insurance company except as expressly provided for in the act, in clauses quoted above, (a), (b), and (c). That is, clauses (a), (b), and (c) are, in effect, exceptions to the general exclusion of dividends from the permissible deductions as prescribed in clause (d) above.

In support of the company's contention that the interpolation of the words "within the year" is necessary in order to support the construction given to the act by the circuit court of appeals, we are asked to consider the legislative history of the Revenue Act of 1918 (enacted February 24, 1919, chap. 18, 40 Stat. at L. 1057, Comp. Stat. § 6336¼p); and specifically the fact that in the bill, as introduced in and passed by the House, the corresponding section (233 (a)) contained the words "within the taxable year," and that these words were stricken out by the Conference Committee (Report No. 1037, Sixty-fifth Congress, Third Session). The legislative history of an act may, where the meaning of the words used is doubtful, [538] be resorted to as an aid to construction. Caminetti v. United States,

242 U. S. 470, 490, 61 L. ed. 442, 455, L.R.A.1917F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas. 1917B, 1168. But no aid could possibly be derived from the legislative history of another act passed nearly six years after the one in question. Further answer to the argument based on the legislative history of the later act would, therefore, be inappropriate.

We find no error in the judgment of the Circuit Court of Appeals. It is affirmed.

ESTATE OF P. D. BECKWITH, Inc., Petitioner,
v.
COMMISSIONER OF PATENTS.

(See S. C. Reporter's ed. 538-547.)

Trademark — right to registration — provisos.

1. The language of the Trademark Registration Act that no mark not within its prohibitions or provisos shall be denied registration is as imperative as the prohibition of a proviso against registration in cases specified.

[For other cases, see Trademark, VI. in Digest Sup. Ct. 1908.]

Trademark — registration — composite mark — descriptive words — disclaimer.

2. The words "Moistair Heating System," though descriptive, may not be denied registration when combined with the words "Round Oak" as a part of a purely fanciful and arbitrary trademark design, where claim to exclusive use of these descriptive words apart from the mark shown in the drawing filed is disclaimed on the record. Such a case does not fall within the prohibition of the proviso in the Trademark Registration Act against the registration of any mark which consists merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, but is governed by the equally imperative language of the statute that no mark not within its prohibitions or provisos shall be denied registration.

[For other cases, see Trademark, VI. in Digest Sup. Ct. 1908.]

[No. 178.]

Argued and submitted January 23, 1920. Decided April 19, 1920.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed the decision of the Commissioner of Patents, denying an application for the registration of a trademark. Reversed.

See same case below, 48 App. D. C. 110.

The facts are stated in the opinion.

Mr. **Harry C. Howard** argued the cause and filed a brief for petitioner.

Assistant Attorney General **Davis** submitted the cause for respondent. Special Assistant to the Attorney General Curtis was on the brief.

Mr. Justice Clarke delivered the opinion of the court:

The petitioner, a corporation, filed an application in the Patent Office for the registration of a trademark, which is described as follows:

"A design like a seal, comprising the head of an Indian chief surmounting a scroll bearing his name, 'Doe-Wah-Jack' and surrounded by a circle, outside of which appeared the words 'Round Oak' and 'Moistair Heating System' in a circle, and the whole being surrounded by a wreath of oak leaves."

It will be useful to reproduce the drawing filed with this application:

It was averred that the petitioner had used the mark for more than eighteen months before the application [540] was made by applying it to "hot air and combined hot air and hot water heaters and furnaces by having the same cast

---

Note.—On descriptive words as trademarks—see notes to Lawrence Mfg. Co. v. Tennessee Mfg. Co. 34 L. ed. U. S. 997; Coats v. Merrick Thread Co. 37 L. ed. U. S. 847; and Dr. S. A. Richmond Nervine Co. v. Richmond, 40 L. ed. U. S. 155.

On protection of descriptive word or phrase as trademark, or on the ground of unfair competition—see note to O K Bus & Baggage Co. v. O K Transfer & Storage Co. L.R.A. 1918A, 961.

into the metals of which the systems were constructed."

The Commissioner found that the mark did not conflict with any other that was registered, and that the petitioner was entitled to the exclusive use of it excepting the words "Moistair Heating System." It was ordered that the mark might be registered if the excepted words, objectionable because descriptive, were "erased" or "removed" from it, but that the filing of a disclaimer would not suffice to secure registration.

Not satisfied with this result, the petitioner appealed to the court of appeals for the District of Columbia, and its judgment affirming the decision of the Commissioner of Patents is before us for review.

The ground of both decisions is that the words "Moistair Heating System" are merely descriptive of a claimed merit of the petitioner's system,—that, in the process of heating, moisture is added to the air,—and that one person may not lawfully monopolize the use of words in general use which might be used with equal truthfulness to describe another system of heating. For this reason it was held that the case falls within the proviso of the Registration Act of 1905, declaring that no mark consisting merely in words or devices which are descriptive of the goods with which they are used or of the character or quality of such goods shall be registered under the terms of the act. Act of February 20, 1905, § 5, 33 Stat. at L. 725, chap. 592, amended January 8, 1913, 37 Stat. at L. 649, chap. 7, Comp. Stat. § 9490, 9 Fed. Stat. Anno. 2d ed. p. 753.

No question of patent right or of unfair competition, or that the design of the trademark is so simple as to be a mere device or contrivance to evade the law and secure the registration of nonregistrable words, is involved. Nairn Linoleum Co. v. Ringwalt Linoleum Works, 46 App. D. C. 64, 69.

[541] This statement makes it apparent that the question presented for decision is: Whether the applicant may lawfully register the words "Moistair Heating System," when combined with the words "Round Oak," as a part of its purely fanciful and arbitrary trademark design, as shown in the drawing filed, and when claim to exclusive use of the words apart from the mark shown in the drawing is disclaimed on the record?

An account of the process of decision, in the Patent Office and in the court of appeals, by which the result in this case was arrived at, as it appears in the brief of the Commissioner of Patents, is suggestive and useful. From this we learn that when a mark has been presented for registration consisting merely (only) of descriptive words or devices, registration has been uniformly refused. When "composite" marks—such as contain both registrable and nonregistrable matter—have been presented for registry with features in them which conflicted with earlier marks, registered by other than the applicant, the complete rejection, "eradication," of the conflicting portions, has been uniformly required before registry was allowed. But where there was no such conflict, and the only objection was that descriptive words were used, the practice of the Patent Office prior to the decision, in 1909, of Johnson v. Brandau, 32 App. D. C. 348, was to permit the registration of marks containing such words, where they were associated with registrable words, or were a part of an arbitrary or fanciful design or device, it being considered not necessary to delete the descriptive matter, even when it was an essential part of the composite trademark as it had been used by the applicant, provided it was clearly not susceptible of exclusive appropriation under the general rules of law. After the decision of Johnson v. Brandau, supra, a practice grew up in the Patent Office, not provided for in the statute, of allowing an applicant to disclaim objectionable descriptive [542] words in cases where to require their actual removal would result in so changing the mark that it would not readily be recognized as that shown in the drawing or specimen filed with the application. The customary form of such disclaimer was a statement filed that no claim was made to the designated words, as, for example, "Moistair Heating System," apart from the mark shown in the drawing. This was interpreted as meaning that only when taken in connection with the remaining features of the mark did the applicant make claim to their exclusive use. Ex parte Illinois Seed Co. 219 Off. Gaz. 931.

Such disclaimer became a part of the applicant's statement in the record, and necessarily formed a part of the certificate of registration as it would appear in the copies of it furnished to the applicant and the public, pursuant to § 11 of the act.

Then came the decisions in Fishbeck Soap Co. v. Kleeno Mfg. Co. 44 App. D. C. 6, and Nairn Linoleum Co. v. Ringwalt Linoleum Works, 46 App. D. C. 64, which, says the Commissioner of Patents, were understood as disapproving the prac-

tice of disclaimer, and since they were rendered, registration of merely descriptive matter has not been allowed in any form, but its actual deletion from the trademark drawing has been required,—with, however, an apparent exception in the case of Rinsburger, 8 T. M. Repts. 567, 128 MS. Dec. 141. The judgment we are considering, requiring, as it does, the "elimination" of the descriptive words, shows that the Commissioner correctly interpreted these two decisions of the court of appeals.

It is apparent from this rehearsal that the Commissioner of Patents has promptly and cordially accepted for his guidance the decisions of the court of appeals, and, although he avoids a controversial attitude in his brief, and gives a colorless history of the practice of his office, [543] still it is manifest that, in this case and in others, the court has very radically changed that practice with respect to permitting registry of composite trademarks, and that its decisions have turned upon the construction of the second proviso, referred to, in the fifth section of the Registration Act, which is made the basis of the judgment we are reviewing.

The Registration Act of 1905 (33 Stat. at L. 724, chap. 592), amended May 4, 1906 (34 Stat. at L. 168, chap. 2081), and February 18, 1909 (35 Stat. at L. 627, chap. 144, Comp. Stat. § 9485, 9 Fed. Stat. Anno. 2d ed. pp. 747, 751), and January 8, 1913 (37 Stat. at L. 649, chap. 7, Comp. Stat. § 9490, 9 Fed. Stat. Anno. 2d ed. p. 753), without changing the substantive law of trademarks, provided, in the manner prescribed, for the registration of marks (subject to special exceptions) which, without the statute, would be entitled to legal and equitable protection, and the case before us calls chiefly for the construction of the provisions of § 5 of that act, which, so far as here involved, are as follows:

"*No mark* by which the goods of the owner of the mark may be distinguished from other goods of the same class *shall be refused registration* as a trademark on account of the nature of such mark unless, etc. . . .

"Provided, that *no mark which consists* . . . merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods . . . *shall be registered* under the terms of this act."

It was settled long prior to the Trademark Registration Act that the law would not secure to any person the exclusive use of a trademark consisting merely of words descriptive of the qualities, ingredients, or characteristics of an article of trade. This for the reason that the function of a trademark is to point distinctively, either by its own meaning or by association, to the origin or ownership of the wares to which it is applied, and words merely descriptive of qualities, ingredients, or characteristics, when used alone, do not do this. Other like goods, equal to them in all respects, may be manufactured or [544] dealt in by others, who, with equal truth, may use, and must be left free to use, the same language of description in placing their goods before the public. Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 322-324, 20 L. ed. 581, 583, 584; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 54, 25 L. ed. 993, 994; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 222, 27 L. ed. 706, 707, 2 Sup. Ct. Rep. 436; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear India Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 547, 34 L. ed. 997, 1003, 11 Sup. Ct. Rep. 396; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 446, 55 L. ed. 536, 31 Sup. Ct. Rep. 456.

Thus the proviso quoted, being simply an expression in statutory form of the prior general rule of law that words merely descriptive are not a proper subject for exclusive trademark appropriation, if the application in this case had been to register only the words "Moistair Heating System," plainly it would have fallen within the terms of the prohibition, for they are merely descriptive of a claimed property or quality of the petitioner's heating system,—that by it moisture is imparted to the air in the process of heating. But the application was not to register these descriptive words "merely," alone and apart from the mark shown in the drawing, but in a described manner of association with other words, "Round Oak," which are not descriptive of any quality of applicant's heating system, and as a definitely positioned part of an entirely fanciful and arbitrary design or seal, to which the Commissioner found the applicant had the exclusive right.

Since the proviso prohibits the registration not of merely descriptive words, but of a "trademark which consists . . . merely" (only) of such words,—the distinction is substantial and plain,—we think it sufficiently clear that such a com-

posite mark as we have here does not fall within its terms. In this connection it must be noted that the requirement of the statute that [545] no trademark shall be refused registration, except in designated cases, is just as imperative as the prohibition of the proviso against registration in cases specified.

While there is no specific provision for disclaimers in the trademark statute, the practice of using them is commended to our judgment by the statement of the Commissioner of Patents that, so far as known, no harm came to the public from the practice of distinguishing, without deleting, nonregisterable matter in the drawing of the mark as registered, when a statement, forming a part of the record, was required, that the applicant was not making claim to an exclusive appropriation of such matter except in the precise relation and association in which it appeared in the drawing and description.

It seems obvious that no one could be deceived as to the scope of such a mark, and that the registrant would be precluded by his disclaimer from setting up in the future any exclusive right to the disclaimed part of it. It seems obvious also that to require the deletion of descriptive words must result often in so changing the trademark sought to be registered from the form in which it had been used in actual trade that it would not be recognized as the same mark as that shown in the drawing, which the statute requires to be filed with the application, or in the specimens produced as actually used, and therefore registration would lose much, if not all, of its value. The required omission might so change the mark that in an infringement suit it could be successfully urged that the registered mark had not been used,—and user is the foundation of registry (§ 2). Of this last the case before us furnishes an excellent example. To strike out "Moistair Heating System" from the applicant's trademark would so change its appearance that its value must be largely lost as designating to prior purchasers or users the origin of the heating system to which it was applied.

The commercial impression of a trademark is derived [546] from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety (Johnson v. Brandau, 32 App. D. C. 348), and to strike out any considerable part of it, certainly any conspicuous part of it, would be to greatly affect its value. Of course, refusal to register a mark does not prevent a former user from continuing its use, but it deprives him of the benefits of the statute, and this should not be done if it can be avoided by fair, even liberal, construction of the act, designed, as it is, to promote the domestic and foreign trade of our country.

Thus the case comes to this: That the Commissioner found that the trademark presented for registration did not conflict with any theretofore registered, and there is no suggestion of unfair practice in the past or contemplated in the future; that it had been used for eighteen months in the form proposed for registry; that the words ordered to be stricken out from the drawing are descriptive, but the mark does not consist "merely" in such words, but is a composite of them with others, and with an arbitrary design which, without these words, both the Commissioner and the court found to be registrable; that the language of the statute that no mark not within its prohibitions or provisos shall be denied registration is just as imperative as the prohibitory words of the proviso; and, very certainly, that a disclaimer on the part of applicant that no claim is made to the use of the words "Moistair Heating System," apart from the mark as shown in the drawing and as described, would preserve to all others the right to use these words in the future to truthfully describe a like property or result of another system, provided only that they be not used as a trademark which so nearly resembles that of the petitioner "as to be likely to cause confusion in the mind of the public or to deceive purchasers" when applied "to merchandise of the same descriptive properties" (§ 5).

[547] Such being the ultimate facts of this controversy, we cannot doubt that the court of appeals fell into error in ruling that the words "Moistair Heating System" must be "eliminated" from the trademark of the applicant as it had been theretofore used, and that the requirement of the act of Congress for the registration of trademarks would be fully complied with if registration of it were permitted with an appropriate declaration on the part of the applicant that no claim is made to the right to the exclusive use of the descriptive words except in the setting and relation in which they appear in the drawing, description, and samples of the trademark filed with the application.

It results that the judgment of the Court of Appeals must be reversed.

Mr. Justice McReynolds dissents.

JOHN W. SIMPSON [1] et al., as Executors of the Estate of John G. Moore, Deceased, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 547–553.)

Evidence — judicial notice — interest rates.

1. The Federal Supreme Court takes judicial notice that in 1901 4 per cent was very generally assumed to be the fair value or earning power of money safely invested.

[For other cases, see Evidence, I. e, in Digest Sup. Ct. 1908.]

Internal revenue — Federal succession tax — mortuary tables — interest rate.

2. It is much too late to assail successfully the use of mortuary tables by the Internal Revenue Department in computing the present worth of life interests in personal property for the purpose of the succession tax imposed under the Spanish War Revenue Act of June 13, 1898, or the assumption that 4 per cent was then the fair value or earning power of money.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

Internal revenue — Federal succession tax — vested or contingent interest — trust fund legacies — refunding.

3. Trust fund legacies which it was the legal duty of the executors to pay over to the trustee before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment within the meaning of the provision of the Act of June 27, 1902, for the refund of succession taxes collected on contingent beneficial interests not vested prior to July 1, 1902.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

[No. 213.]

Argued March 17 and 18, 1920. Decided April 19, 1920.

APPEAL from the Court of Claims to review a judgment dismissing a petition for the refund of succession taxes. Affirmed.

The facts are stated in the opinion.

Mr. **Thomas M. Day** argued the cause, and, with Mr. H. T. Newcomb, filed a brief for appellants:

There is no presumption of law that future payments can be discounted at any particular rate of interest, or that the future duration of a life in being will coincide with average "expectancies."

Louisville & N. R. Co. v. Holloway, 246 U. S. 525, 62 L. ed. 867, 38 Sup. Ct. Rep. 379, 17 N. C. C. A. 578.

Moreover, local conditions are not to be disregarded.

Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 490, 60 L. ed. 1117, 1122, L.R.A.1917F, 367, 36 Sup. Ct. Rep. 630, 13 N. C. C. A. 673; Hartley v. Eagle Ins. Co. 222 N. Y. 186, 3 A.L.R. 1379, 118 N. E. 622.

The arbitrary general rule of assessment prescribed and followed by the Commissioner of Internal Revenue was an unlawful attempt to exercise exclusively legislative power, and for that reason (and because it was arbitrary and general) no assessment depending upon it could be lawful. Of course, the Treasury Department was without power to increase the scope of its own authority by calling its action in enforcing the general rule the exercise of the power to assess.

Waite v. Macy, 246 U. S. 606, 608, 609, 62 L. ed. 892, 894, 895, 38 Sup. Ct. Rep. 395.

All powers of Federal legislation are vested in the Congress of the United States; and, although other departments may be authorized to do many things which the Congress might do, and the line separating legislative from administrative discretion is not easily drawn, those powers which are exclusively legislative in their character can never be exercised by any other agency.

Wayman v. Southard, 10 Wheat. 1, 41, 6 L. ed. 253, 262; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 287, 52 L. ed. 1061, 1064, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

[1] Death of Thomas Thacher suggested, and that cause proceed in the name of John W. Simpson, as surviving executor, etc., ordered March 17, 1920, on motion of counsel for the appellants.

Note.—On judicial notice, generally—see note to Olive v. State, 4 L.R.A. 33.

As to taxes on succession and collateral inheritances—see notes to Re Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; Rodman v. Com. 33 L.R.A.(N.S.) 592; State ex rel. Ise v. Cline, 50 L.R.A.(N.S.) 991; and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

As to basis and method of computing value of life estate or annuity for purposes of succession tax—see note to Re White, 46 L.R.A.(N.S.) 714.

The power to tax is, in the strictest sense, an exclusively legislative power.

Heine v. Levee Comrs. 19 Wall. 655, 659, 22 L. ed. 223, 226; Meriwether v. Garrett, 102 U. S. 472, 513, 519, 26 L. ed. 197, 205, 207; Thompson v. Allen County, 115 U. S. 550, 554, 557, 29 L. ed. 472, 474, 475, 6 Sup. Ct. Rep. 140; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Cooley, Taxn. 3d ed. 99, 100.

No assessing authority is ever permitted to adopt an arbitrary rule, or any general rule as to values, and apply such rule in lieu of making inquiry concerning the particular facts of each case.

McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335; Glidden v. Harrington, 189 U. S. 255, 259, 47 L. ed. 798, 801, 23 Sup. Ct. Rep. 574; New York ex rel. Brooklyn City R. Co. v. New York State Tax. Comrs. 199 U. S. 48, 52, 50 L. ed. 79, 85, 25 Sup. Ct. Rep. 713; Keeney v. New York, 222 U. S. 525, 535, 56 L. ed. 299, 305, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105.

The Commissioner of Internal Revenue cannot alone, or in connection with the Secretary of the Treasury, alter or amend the Internal Revenue Law. All he can do is to carry into effect that which Congress has enacted. His regulations in aid of the execution of the law must be reasonable, and made with a view to the due assessment and collection of the revenue.

Thacher v. United States, 15 Blatchf. 15, Fed. Cas. No. 13,851, affirmed in 103 U. S. 679, 26 L. ed. 535; United States v. 200 Barrels of Whiskey, 95 U. S. 571, 576, 24 L. ed. 491, 492.

The interests, both of the daughters and of the annuitants, which were taxed by the Commissioner, were, in their very nature and essence, inalienable, and the beneficiaries were incapable of disposing of or anticipating such interests.

Stringer v. Young, 191 N. Y. 157, 83 N. E. 690; Lent v. Howard, 89 N. Y. 169; Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; Fowler, Personal Prop. Law (N. Y.) 52, 86; Central Trust Co. v. Gaffney, 157 App. Div. 501, 142 N. Y. Supp. 902, affirmed in 215 N. Y. 740, 109 N. E. 1069; Garrett v. Duclos, 128 App. Div. 508, 112 N. Y. Supp. 811; Slater v. Slater, 114 App. Div. 160, 99 N. Y. Supp. 564, affirmed in 188 N. Y. 633, 81 N. E. 1176; Seeley v. Fletcher, 63 Misc. 448, 117 N. Y. Supp. 86; Re Bishop, 89 Misc. 362, 151 N. Y. Supp. 768; Re Ungrich, 201 N. Y. 419, 94 N. E. 999; Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971; Greer v. Chester, 62 Hun, 329, 17 N. Y. Supp. 238, affirmed in 131 N. Y. 629, 30 N. E. 863; Douglas v. Cruger, 80 N. Y. 15; Lent v. Howard, 89 N. Y. 169; Cuthbert v. Chauvet, 136 N. Y. 326, 18 L.R.A. 745, 32 N. E. 1088.

"Present worths," amounting, as they do, to "somewhat speculative valuations" (Manufacturers R. Co. v. United States, 246 U. S. 457, 494, 62 L. ed. 831, 849, 38 Sup. Ct. Rep. 383), ought not to be considered proper bases for taxation, especially when the law says "clear" and "actual" values are to be the bases (Lynch v. Union Trust Co. 90 C. C. A. 147, 164 Fed. 161).

See also Billings v. People, 189 Ill. 487, 59 L.R.A. 807, 59 N. E. 798, affirmed in 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; Vanderbilt v. Eidman, 196 U. S. 480, 496, 49 L. ed. 563, 568, 25 Sup. Ct. Rep. 331.

The law sanctioned no tax that could not be deducted from something immediately payable.

Vanderbilt v. Eidman, 196 U. S. 480, 494, 49 L. ed. 563, 567, 25 Sup. Ct. Rep. 331; Knowlton v. Moore, 178 U. S. 41, 66, 67, 44 L. ed. 969, 979, 980, 20 Sup. Ct. Rep. 747.

The interests presented by the case at bar are not contingent within the terms of the Act of June 27, 1902. On the contrary, they are present entities in the enjoyment of the life tenant.

United States v. Fidelity Trust Co. 222 U. S. 158, 160, 56 L. ed. 137, 141, 32 Sup. Ct. Rep. 59.

Recognition of this principle is, however, in no way inconsistent with confidence that Congress never intended to tax such interests, save as taxable sums from time to time accrued to the use or benefit of the life tenants. To conclude otherwise would be to conclude that Congress expressly commanded that to be done which it was impossible should be done; namely, the deduction of the amount of the tax from a sum smaller than the tax. Such a possibility has heretofore been assigned as a reason for a different construction.

Knowlton v. Moore, 178 U. S. 41, 69, 44 L. ed. 969, 981, 20 Sup. Ct. Rep. 747.

If it was the intention of the Act of 1898 to tax future interests (which we deny), it is clear that no machinery or standards were provided for the purpose, and that a tax on such interests could not lawfully be assessed or collected.

Re Stewart, 131 N. Y. 284, 14 L.R.A. 836, 30 N. E. 184.

The ascertainment of the value of life interests by mortuary tables was improper.

Herold v. Shanley, 76 C. C. A. 478, 146 Fed. 20; Disston v. McClain, 77 C. C. A. 340, 147 Fed. 117; Herold v. Kahn, 86 C. C. A. 598, 159 Fed. 613; Lynch v. Union Trust Co. 90 C. C. A. 147, 164 Fed. 167.

The court below erred in dismissing the appellants' petition as to the taxes assessed upon the life interests of the two daughters in the residuary estate, in excess of the taxes payable upon their life interests in the amount of the trust funds turned over to the Atlantic Trust Company prior to July 1, 1902, which said excess taxes, amounting to $12,035.51, were assessed on interests in the residuary estate which were unadministered and still subject to the payment of debts and expenses, and hence were contingent beneficial interests which had not become absolutely vested in possession or enjoyment prior to the last-named date.

United States v. Jones, 236 U. S. 106, 59 L. ed. 488, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316; McCoach v. Pratt, 236 U. S. 562, 59 L. ed. 720, 35 Sup. Ct. Rep. 421; Greene v. Day, 1 Dem. 51; Baggott v. Boulger, 2 Duer, 169; Erwin v. Loper, 43 N. Y. 521; Cotter v. Quinlan, 2 Dem. 33; Jessup & Redf. Surrogate's Practice, 1916 ed. 971; Uterhart v. United States, 240 U. S. 598, 60 L. ed. 819, 36 Sup. Ct. Rep. 417; Henry v. United States, 251 U. S. 393, ante, 322, 40 Sup. Ct. Rep. 185.

Solicitor General **King** argued the cause, and, with Mr. A. F. Myers, filed a brief for appellee:

The method of assessment employed was authorized by the War Revenue Act of 1898.

United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; Rand v. United States, 249 U. S. 503, 506, 63 L. ed. 731, 733, 39 Sup. Ct. Rep. 359; Henry v. United States, 251 U. S. 393, ante, 322, 40 Sup. Ct. Rep. 185; Dunbar v. Dunbar, 190 U. S. 340, 345, 47 L. ed. 1084, 1090, 23 Sup. Ct. Rep. 757.

A succession tax accrues as of the moment of the benefactor's death.

Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001, 30 Sup. Ct. Rep. 621.

The method employed is well recognized, is the only one practicable, and is neither unreasonable nor unjust.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; People v. Northern Trust Co. 266 Ill. 139, 107 N. E. 190; Howe v. Howe, 179 Mass. 546, 55 L.R.A. 626, 61 N. E. 225; State ex rel. Smith v. Probate Ct. 136 Minn. 392, 162 N. W. 459; Re Tracy, 179 N. Y. 501, 72 N. E. 519; Re White, 208 N. Y. 64, 46 L.R.A.(N.S.) 714, 101 N. E. 793, Ann. Cas. 1914D, 75; Crenshaw v. Knight, 127 Tenn. 708, 156 S. W. 468; Re Cornwallis, 11 Exch. 580, 156 Eng. Reprint, 962, 25 L. J. Exch. N. S. 149, 4 Week. Rep. 711.

Fixing a given rate of interest as the earning power of money for purposes of tax assessment is not an unlawful attempt to exercise legislative power.

United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; United States v. Antikamnia Chemical Co. 231 U. S. 654, 58 L. ed. 419, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49; Buttfield v. Stranahan, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349.

The funds were as fully vested in the hands of the executors, in trust for the legatee, as they would have been in the hands of the Trust Company.

Read v. Patterson, 134 N. Y. 128, 31 N. E. 445; New York v. United States Trust Co. 78 App. Div. 366, 79 N. Y. Supp. 1010, 178 N. Y. 551, 70 N. E. 1097; Ward v. Ward, 105 N. Y. 68, 11 N. E. 373.

The test is not whether a legacy was actually in the possession of the beneficiary on July 1, 1902, but whether the beneficiary on said date had a present right of possession.

Vanderbilt v. Eidman, 196 U. S. 480, 495, 49 L. ed. 563, 568, 25 Sup. Ct. Rep. 331; Re Hoffman, 143 N. Y. 327, 38 N. E. 311; Hertz v. Woodman, 218 U. S. 205, 219, 54 L. ed. 1001, 1007, 30 Sup. Ct. Rep. 621; United States v. Fidelity Trust Co. 222 U. S. 158, 160, 56 L. ed. 137, 141, 32 Sup. Ct. Rep. 59; United States v. Jones, 236 U. S. 106, 109, 59 L. ed. 488, 489, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316.

Mr. Justice **Clarke** delivered the opinion of the court:

This is a suit to recover the whole, or, failing in that, a large part of a succession tax assessed under the Spanish War Revenue Act of June 13, 1898 (30 Stat. at L. 448, chap. 448, Comp. Stat. § 6144, 4 Fed. Stat. Anno. 2d ed. p. 135), and paid by the appellants as executors of the will of John G. Moore, deceased, a citizen of New York, who died in June, 1899.

[**549**] The assessment was made against the appellants as persons having

in charge or trust, as executors, legacies arising from personal property, and the contention is that right to recovery may be derived, either from the Act of Congress, approved July 27, 1912 (37 Stat. at L. 240, chap. 256, 4 Fed. Stat. Anno. 2d. ed. p. 236), directing the Secretary of the Treasury to refund the amount of any claims which should be satisfactorily shown to have been "erroneously or illegally" assessed under warrant of § 29 of the War Revenue Act or from the act approved June 27, 1902 (32 Stat. at L. 406, chap. 1160), which directs the Secretary of the Treasury to refund to executors so much of any tax as may have been collected under warrant of that act "on contingent beneficial interests which shall not have been vested prior to July 1, 1902."

The decedent in his will directed his executors to convert a large residuary estate into money, to divide the same into three equal shares, and to transfer two of such shares to a trustee, to be selected by them, in trust to invest and reinvest, and to pay to each of his two daughters the whole of the net income of one share so long as she should live.

Pursuant to authority derived from § 31 of the War Revenue Act, and Rev. Stat. §§ 321 and 3182 (Comp. Stat. §§ 492, 5904, 3 Fed. Stat. Anno. 2d ed. pp. 976, 1010), the Commissioner of Internal Revenue, in order to provide for the determination of the amount of taxes to be assessed on legacies such as are here involved, on December 16, 1898, issued instructions to collectors of internal revenue throughout the country, which contained tables showing the present worth of life interests in personal property, with directions for computing the tax upon the same. These tables were based on "Actuaries'" or "Combined Experience Tables," and were used in arriving at the amounts paid in this case.

On June 30, 1899, letters testamentary were issued to appellants as executors, and on April 1, 1901, the United States Commissioner of Internal Revenue, pursuant to the provisions of § 29 of the Spanish War Revenue Act, assessed [550] a tax of about $12,000 on the share of each daughter, which was paid on April 15, 1901.

On October 29, 1907, appellants presented to the government their claim, which was rejected, for the refund of $21,640.55 of the taxes so paid, "or such greater amount thereof as the Commissioner might find refundable under the Refunding Act of June 27, 1902, or other remedial statutes."

The judgment of the court of claims, dismissing the amended petition as to the claims for refund of the tax paid on the legacies of the two daughters, and on three small legacies which will follow the disposition of these, and need no further notice, is before us for review.

Of the two claims of error argued, the first is, that the court of claims erred in refusing to hold that it was illegal to use mortuary tables, and to assume 4 per cent as the value of money in computing the tax that was paid, and that, therefore, the whole amount of it should be refunded.

The objection is not to the particular table that was used, but to the use of any such table at all,—to the method. Such tables, indeed, the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1899 by courts, legislatures, and insurance companies for the purpose of determining the present value of future contingent interests in property, and we take judicial notice of the fact that at the time this tax was collected 4 per cent was very generally assumed to be the fair value or earning power of money safely invested. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act in Knowlton v. Moore, 178 U. S. 41, 44, 44 L. ed. 969, 971, 20 Sup. Ct. Rep. 747; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; Rand v. United States, 249 U. S. 503, 506, 63 L. ed. 731, 733, 39 Sup. Ct. Rep. 359; and in Henry v. United States, decided at this term [251 U. S. 393, ante, 322, 40 Sup. Ct. Rep. 185]. It is much too late to successfully assail a method so generally applied, [551] and as to this claim of error the judgment of the court of claims is affirmed.

The facts following are essential to the disposition of the remaining question. The appellant executors appointed a trust company trustee for the two daughters of decedent, and prior to July 1, 1902, they paid to it, in trust for each of them, the sum of $426,086.08. After making these payments the executors had in their custody in cash and securities in excess of $1,797,000, from which, prior to March 16, 1906, they made further payments, amounting approximately to $500,000, to the trust fund for each of the daughters, thereby making each of them exceed $926,000. The assessment of each was $665,000 in April, 1901.

The contention is that the excess of the assessment above the amount which had been actually paid to the trustee prior to July 1, 1902, had not become vested prior to that date, within the meaning of the Act of June 27, 1902 (32 Stat. at L. 406, § 3, 4 Fed. Stat. Anno. 2d ed. p. 232), and that it should therefore be refunded.

The law of New York in force when the estate was in process of administration provided (N. Y. Code Civ. Proc. 1899, § 2721) that "after the expiration of one year [from the time of granting letters testamentary] the executors . . . must discharge the specific legacies bequeathed by the will, and pay the general legacies, if there be assets," and § 2722 gave to legatees the right to petition in an appropriate court to compel payment of their legacies after the expiration of such year.

Letters testamentary were granted to the appellants on June 30, 1899, and we have seen that assets abundantly sufficient to have increased the trust fund legacies of the daughters much beyond the amount at which they were assessed for taxation were in the custody of the executors prior to July 1, 1902, and therefore under this law of New York it was their duty to have made such payments prior to that date unless cause was shown for not so doing.

[552] The state law also authorized (§ 2718) the executors to publish a notice once in each week for six months, requiring all creditors to present their claims against the estate, and provided that in suits brought on any claim not presented within six months from the first publication of such notice, the executors should not be chargeable for any assets which they may have paid out in satisfaction of legacies.

The appellants first published the notice to creditors on April 25, 1900, and therefore they might safely have made payment on the daughters' legacies after the 1st of November, 1900, one year and eight months prior to July 1, 1902, unless cause to the contrary was shown.

The only excuse given in the record for not complying with this state law is that in March, 1902, a stockholders' suit was commenced against the partnership of Moore & Schley, of which the deceased was a member, in which an accounting was sought for a large amount of promotion profits in connection with the organization of the American Malt Company. As to this, the court of claims finds that the evidence does not show the pleadings, issues, or the character of the suit, or the amount or merit of the claim, or the result of the litigation. Obviously, such a showing of such a suit cannot be considered to have been a genuine obstacle to settlement of the estate, and the other claims against it were negligible in comparison with the available assets.

It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon these two legacies, in an amount larger than was necessary to make them equal to, and greater than, that for which they were assessed for taxation; that for many months before that date it was the legal duty of the executors to make such payment; and that for a like time the legatees had a statutory right to institute suit to compel payment.

It is obvious that legacies which it was thus the legal [553] duty of the executors to pay before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment, within the meaning of the Act of June 27, 1902, as it was interpreted in United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; McCoach v. Pratt, 236 U. S. 562, 567, 59 L. ed. 720, 721, 35 Sup. Ct. Rep. 421; and in Henry v. United States, decided February 2, 1920 [251 U. S. 393, ante, 322, 40 Sup. Ct. Rep. 185]. The case would be one for an increased assessment, rather than for a refund, if the War Revenue Act had not been repealed.

Affirmed.

Mr. Justice McReynolds did not participate in the discussion or decision of this case.

CANADIAN NORTHERN RAILWAY COMPANY, Petitioner,
v.
GUS EGGEN.

(See S. C. Reporter's ed. 553-563.)

Constitutional law — privileges and immunities — discrimination against nonresidents — limitation of actions.

Constitutional privileges and immunities of a nonresident citizen are not denied

---

Note.—As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

by the exemption accorded to resident citizens by the provisions of Minn. Gen. Stat. 1913, § 7709, that "when a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued," where the foreign limitation, though shorter than that of Minnesota, is not unduly short.

[For other cases, see Constitutional Law, 213–236, in Digest Sup. Ct. 1908.]

[No. 281.]

Argued March 1, 1920. Decided April 19, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the District Court for the District of Minnesota, Second Division, in favor of defendant in a personal-injury action. Reversed and judgment of District Court affirmed.

See same case below, 167 C. C. A. 229, 255 Fed. 937.

The facts are stated in the opinion.

Mr. **William D. Mitchell** argued the cause, and, with Mr. Pierce Butler, filed a brief for petitioner:

The distinction made in the statute in favor of citizens of Minnesota is not arbitrary, but based on practical differences in the conditions surrounding the prosecution of claims, which form a reasonable basis for classification.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 294, 296, 42 L. ed. 1037, 1043, 1044, 18 Sup. Ct. Rep. 594; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 331, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 833; District of Columbia v. Brooke, 214 U. S. 138, 150, 53 L. ed. 941, 945, 29 Sup. Ct. Rep. 560; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 148, 149, 52 L. ed. 143, 146, 147, 28 Sup. Ct. Rep. 34; Cairnes v. Cairnes, 29 Colo. 260, 93 Am. St. Rep. 55, 68 Pac. 233; Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 536; Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123; Risewick v. Davis, 19 Md. 93; Judd v. Lawrence, 1 Cush. 531; Bacon v. State Tax Comrs. 126 Mich. 22, 60 L.R.A. 321, 86 Am. St. Rep. 524, 85 N. W. 307; Cobbs v. Coleman, 14 Tex. 597; State ex rel. Owens v. Trustees of Section 29, 11 Ohio, 28; Baughman v. National Waterworks Co. 46 Fed. 7; Harding v. Standard Oil Co. 182 Fed. 423; Devanney v. Hanson, 60 W. Va. 3, 53 S. E. 603; Sedgwick v. Sedgwick, 50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C, 653; Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784.

If the validity of this statute be in doubt, legislative and judicial acquiescence in the validity of such statutes for a long period of time should operate to resolve that doubt in favor of the statute.

Fletcher v. Spaulding, 9 Minn. 64, Gil. 54; Hoyt v. McNeil, 13 Minn. 390, Gil. 362; Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162; Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056; Drake v. Bigelow, 93 Minn. 112, 100 N. W. 664; Penfield v. Chesapeake, O. & S. W. R. Co. 134 U. S. 351, 33 L. ed. 940, 10 Sup. Ct. Rep. 566; Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. ed. 806; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 375, 48 L. ed. 225, 227, 24 Sup. Ct. Rep. 92; Aultman & T. Co. v. Syme, 24 C. C. A. 539, 51 U. S. App. 48, 79 Fed. 238; Robinson v. Oceanic Steam Nav. Co. 112 N. Y. 315, 2 L.R.A. 636, 19 N. E. 625; Klotz v. Angle, 220 N. Y. 358, 116 N. E. 24; Stuart v. Laird, 1 Cranch, 299, 2 L. ed. 115; Marshall Field & Co. v. Clark, 143 U. S. 649, 691, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495.

Mr. **Ernest A. Michel** argued the cause, and, with Mr. Tom Davis, filed a brief for respondent:

A right of action to recover damages for an injury is property, and the legislature has no power to destroy such property.

Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240.

The word "privileges," as used in the Constitution, is confined to those privileges which are fundamental.

Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3,230.

The courts have always guarded the privileges intended to be granted or preserved by the constitutional provisions.

Paul v. Virginia, 8 Wall. 169, 180, 19 L. ed. 357, 360; Ward v. Maryland, 12 Wall. 418, 430, 20 L. ed. 449, 452; Cole v. Cunningham, 133 U. S. 107, 114, 33 L. ed. 538, 542, 10 Sup. Ct. Rep. 271; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

The Minnesota statute abridges the right of citizens of South Dakota when they seek redress in the Minnesota courts.

Cole v. Cunningham, 133 U. S. 107, 114, 33 L. ed. 538, 542, 10 Sup. Ct. Rep. 271;

Blake v. McClung, 172 U. S. 239, 266, 43 L. ed. 432, 442, 19 Sup. Ct. Rep. 172; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; Chalker v. Birmingham & N. W. R. Co. 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. Rep. 366; Maxwell v. Bugbee, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; Cooley, Const. Lim. 7th ed. 569.

The argument of petitioner, that to hold the Minnesota law unconstitutional would nullify statutes in existence for many years, is not of great weight in determining whether the Minnesota law is unconstitutional.

Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

Mr. Justice **Clarke** delivered the opinion of the court:

The only question presented for decision in this case is as to the validity of § 7709 of the Statutes of Minnesota (Minn. Gen. Stat. 1913), which reads:

"When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

The circuit court of appeals, reversing the district [**559**] court, held this statute invalid for the reason that the exemption in favor of citizens of Minnesota rendered it repugnant to article 4, § 2, of the Constitution of the United States, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The action was commenced in the district court of the United States for the district of Minnesota, second division, by the respondent, a citizen of North Dakota, against the petitioner, a corporation organized under the laws of the Dominion of Canada, to recover damages for personal injuries sustained by him on November 29, 1913, when employed by the petitioner as a switchman in its yards at Humboldt, in the province of Saskatchewan. The respondent, a citizen and resident of North Dakota, went to Canada and entered the employ of the petitioner as a switchman a short time prior to the accident complained of. He remained in Canada for six months after the accident and then returned to live in North Dakota. He commenced this action on October 15, 1915, almost two years after the date of the accident. By the laws of Canada, where the cause of action arose, an action of this kind must be commenced within one year from the time injury was sustained. If the statute of Minnesota, above quoted, is valid, it is applicable to the action, which, being barred in Canada, cannot be maintained in Minnesota by a nonresident plaintiff. If, however, the statute is invalid, the general Statute of Limitations of Minnesota, allowing a period of six years within which to commence action, would be applicable. The record properly presents the claim of the petitioner that the circuit court of appeals erred in holding the statute involved unconstitutional and void.

It is plain that the act assailed was not enacted for the purpose of creating an arbitrary or vexatious discrimination against nonresidents of Minnesota.

[**560**] It has been in force ever since the state was admitted into the Union in 1858; it is in terms precisely the same as those of several other states, and in substance it does not differ from those of many more. It gives a nonresident the same rights in the Minnesota courts as a resident citizen has, for a time equal to that of the Statute of Limitations where his cause of action arose. If a resident citizen acquires such a cause of action after it has accrued, his rights are limited precisely as those of the nonresident are, by the laws of the place where it arose. If the limitation of the foreign state is equal to or longer than that of the Minnesota statute, the nonresident's position is as favorable as that of the citizen.

It is only when the foreign limitation is shorter than that of Minnesota, and when the nonresident who owns the cause of action from the time when it arose has slept on his rights until it is barred in the foreign state (which happens to be the respondent's case), that inequality results, and for this we are asked to declare a statute unconstitutional which has been in force for sixty years.

This court has never attempted to formulate a comprehensive list of the rights included within the "privileges and immunities" clause of the Constitution (art. 4, § 2), but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1825, in Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230 (the first Federal case in which this clause was considered), saying: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental." Slaughter-House Cases, 16 Wall.

36, 75, 21 L. ed. 394, 408; Blake v. McClung, 172 U. S. 239, 248, 43 L. ed. 432, 435, 19 Sup. Ct. Rep. 165; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 155, 52 L. ed. 143, 149, 28 Sup. Ct. Rep. 34. In this Corfield Case the court included in a partial list of such fundamental privileges, "the right of a citizen of one state, . . . to institute and maintain actions of any kind in the courts of another."

[561] The state of Minnesota, in the statute we are considering, recognized this right of citizens of other states to institute and maintain suits in its courts as a fundamental right, protected by the Constitution, and for one year from the time his cause of action accrued the respondent was given all of the rights which citizens of Minnesota had under it. The discrimination of which he complains could arise only from his own neglect.

This is not disputed, nor can it be fairly claimed that the limitation of one year is unduly short, having regard to the likelihood of the dispersing of witnesses to accidents such as that in which the respondent was injured, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence so often turn. Thus, the holding of the circuit court of appeals comes to this: that the privilege and immunity clause of the Constitution guarantees to a nonresident precisely the same rights in the courts of a state as resident citizens have, and that any statute which gives him a less, even though it be an adequate, remedy, is unconstitutional and void.

Such a literal interpretation of the clause cannot be accepted.

From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states, as a condition of resorting to their courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many states may be attached under conditions which would not justify the attaching of a resident citizen's property. This court has said of such requirements:

"Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. . . . [562] It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to the citizens of the several states." Blake v. McClung, 172 U. S. 239, 256, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165.

The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before the new bar took effect. Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; Terry v. Anderson, 95 U. S. 628, 632, 24 L. ed. 365, 366; Tennessee v. Sneed, 96 U. S. 69, 74, 24 L. ed. 610, 612; Antoni v. Greenhow, 107 U. S. 769, 774, 27 L. ed. 468, 471, 2 Sup. Ct. Rep. 91.

A like result to that which we are announcing was reached with respect to similar statutes, in Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. ed. 806; by the circuit court of appeals, second circuit, in Aultman & T. Co. v. Syme, 24 C. C. A. 539, 51 U. S. App. 48, 79 Fed. 238; in Klotz v. Angle, 220 N. Y. 347, 116 N. E. 24; and in Robinson v. Oceanic Steam Nav. Co. 112 N. Y. 315, 325, 2 L.R.A. 636, 19 N. E. 625. In this last case the court of appeals of New York pertinently says:

[563] "A construction of the constitutional limitation (the one we are considering) which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and nonresidents in legal proceedings and other matters."

The laws of Minnesota gave to the nonresident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year,

—as long a time as was given him for that purpose by the laws under which he chose to live and work,—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate, and the statute is a valid law.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

Reversed.

COMMONWEALTH OF PENNSYLVANIA, Complainant,
v.
STATE OF WEST VIRGINIA. (No. 23, Original.)

STATE OF OHIO, Complainant,
v.
STATE OF WEST VIRGINIA. (No. 24, Original.)

(See S. C. Reporter's ed. 563-565.)

Supreme Court of the United States — controversies between states — consolidation — appointment of commissioner to take testimony.

Controversies between states consolidated and a commissioner appointed, with the power of a master in chancery, to take and return the testimony.

[For other cases, see Supreme Court of the United States, III. in Digest Sup. Ct. 1908.]

[Nos. 23 and 24, Original.]

April 19, 1920.

ORIGINAL SUITS by the Commonwealth of Pennsylvania and the State of Ohio against the State of West Virginia. Causes consolidated and a commissioner appointed to take and return the testimony.

Order announced by Mr. Chief Justice White:

[564] On consideration of the respective motions of the complainants for the appointment of a special master, and of the defendant for the appointment of a commissioner to take the testimony and report the same to the court, and of the motions to consolidate the cases for the purpose of taking such testimony,

It is now here ordered that the motions to consolidate the cases for the purpose of taking the proofs be, and the same are hereby, granted.

It is further ordered that Mr. Levi Cooke, of the District of Columbia, be, and he is hereby, appointed a commissioner to take and return the testimony in these causes, with the powers of a master in chancery, as provided in the rules of this court; but said commissioner shall not make any findings of fact or state any conclusions of law.

It is further ordered that the complainants shall take their evidence, at such place or places as they may indicate, between the first day of May, 1920, and the first day of October, 1920, upon giving ten days' notice of the time and place of taking such evidence to the counsel for the defendant; that the defendant may take evidence, at such place or places as it may indicate, between the first day of October, 1920, and the first day of March, 1921, upon giving ten days' notice of the time and place of taking such evidence to the counsel for the complainants; that the complainants shall take their evidence in rebuttal between the first day of March, 1921, and the first day of April, 1921, at such place or places as they may indicate, upon giving ten days' notice to counsel for defendant, and the defendant shall then conclude the taking of its evidence in surrebuttal on or before the first day of May, 1921, upon giving ten days' notice of the time and place of taking such evidence to the counsel for complainants. Provided, however, that if complainants shall conclude the taking of their evidence in chief before [565] the first day of October, 1920, and shall give notice thereof, the time for the taking of evidence in chief on the part of defendant shall begin to run fifteen days after the giving of said notice by the complainants; and if the defendant shall conclude the taking of its evidence before the first day of March, 1921, and shall give notice thereof, the thirty-one days' time for the taking of evidence in rebuttal on behalf of the complainants shall begin to run fifteen days after the giving of said notice by the defendant; and the thirty days' time for the taking of evidence on behalf of defendant in surrebuttal shall begin to run from the termination of said thirty days allowed for the taking of the evidence in rebuttal by the complainants; but nothing in this proviso

contained shall operate or be construed to postpone the ultimate dates for the commencement of the time for the taking of the defendant's evidence in chief, the complainants' evidence in rebuttal, and the defendant's evidence in surrebuttal, respectively, first above specified.

It is further ordered that the said complainants and the defendant, respectively, shall make such deposits with the clerk of this court for fees, costs, and expenses of the said clerk and of the said commissioner as they may, from time to time, be requested by said clerk.

MEMORANDA.

OF

CASES DISPOSED OF WITHOUT OPINIONS.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff in Error, v. ROBERT T. CHEEK. [No. 418.]

Error to state court—final judgment.

In error to the Supreme Court of the State of Missouri to review a judgment transferring to the St. Louis Court of Appeals a case in which the Supreme Court had reviewed the judgment of the Circuit Court of the City of St. Louis, sustaining demurrers to the petition.

See same case below, — Mo. —, 209 S. W. 928.

Messrs. Samuel W. Fordyce, Jr., and Thomas W. White for plaintiff in error.

Mr. Frederick H. Bacon for defendant in error.

March 8, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 Sup. Ct. Rep. 654; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 101, 57 L. ed. 138, 140, 33 Sup. Ct. Rep. 78; Grays Harbor Logging Co. v. Coats-Fordney Logging Co. (Washington ex rel. Grays Harbor Logging Co. v. Superior Ct.) 243 U. S. 251, 255, 61 L. ed. 702, 705, 37 Sup. Ct. Rep. 295; Bruce v. Tobin, 245 U. S. 18, 19, 62 L. ed. 123, 124, 38 Sup. Ct. Rep. 7.

GULF & SHIP ISLAND RAILROAD COMPANY et al., Plaintiffs in Error, v. CARL BOONE et al., etc. [No. 669.]

Error to state court—Federal question—how presented.

In Error to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Covington County, in that state, in favor of plaintiffs in an action for death.

See same case below, 120 Miss. 632, 82 So. 335.

Messrs. B. E. Eaton and T. J. Wills for plaintiffs in error.

Mr. George Anderson for defendants in error.

March 8, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510; St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 241, 60 L. ed. 624, 36 Sup. Ct. Rep. 274; Bilby v. Stewart, 246 U. S. 255, 257, 62 L. ed. 701, 702, 38 Sup. Ct. Rep. 264.

CHEATHAM ELECTRIC SWITCHING DEVICE COMPANY, Appellant, v. TRANSIT DEVELOPMENT COMPANY et al. [No. 692.]

Appeal—from district court—Federal question.

[568] Appeal from the District Court of the United States for the Eastern District of New York to review a decree entered pursuant to the mandate of the Circuit Court of Appeals for the Second Circuit, which, modifying a decree of the District Court, directed the entry of a decree for nominal damages in a patent infringement suit.

See same case below, in circuit court of appeals, 126 C. C. A. 297, 209 Fed. 229.

Mr. Albert M. Austin for appellant.

Mr. Thomas J. Johnston for appellees.

March 8, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37, 37 L. ed. 986, 988, 14 Sup. Ct. Rep. 4; Brown v. Alton Water Co. 222 U. S. 325, 332-334, 56 L. ed. 221, 224, 225, 32 Sup. Ct. Rep. 156; Metropolitan Water Co. v. Kaw Valley Drainage Dist. 223 U. S. 519, 522.

56 L. ed. 533, 534, 32 Sup. Ct. Rep. 246; Shapiro v. United States, 235 U. S. 412, 416, 59 L. ed. 291, 293, 35 Sup. Ct. Rep. 122; and see Red Jacket Jr., Coal Co. v. United Thacker Coal Co. 248 U. S. 531, 63 L. ed. 405, 39 Sup. Ct. Rep. 5.

Union Trust Company v. Woodward & Lothrop. [No. — Original.]

Petition for an allowance of an appeal herein.

Mr. William G. Johnson for the petition.

March 8, 1920. Denied.

Ex parte: In the Matter of James F. Bishop, Administrator of the Estate of Herman A. Ristow, Deceased, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Prohibition herein.

Mr. Harry W. Standidge for petitioner.

No appearance for respondent.

March 8, 1920. Denied.

John M. Tananevicz, Plaintiff in Error, v. People of the State of Illinois. [No. 312.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Appellate Court of that state, affirming a conviction of a banker, had in the Criminal Court of Cook County, for receiving a deposit while knowing himself to be insolvent.

See same case below, 285 Ill. 376, 120 N. E. 766.

Mr. Emory J. Smith for plaintiff in error.

Messrs. Edward J. Brundage, Edward C. Fitch, and A. D. Rodenberg for defendant in error.

March 15, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510; St. Louis & S. F. R. Co. v. Shepherd, 240 [569] U. S. 240, 241, 60 L. ed. 622, 624, 36 Sup. Ct. Rep. 274; Bilby v. Stewart, 246 U. S. 255, 257, 62 L. ed. 701, 702, 38 Sup. Ct. Rep. 264.

(2) Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; United Surety Co. v. American Fruit Product Co. 238 U. S. 140, 142, 59 L. ed. 1238, 1239, 35 Sup. Ct. Rep. 828; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

(3) § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

Virginia & West Virginia Coal Company, Plaintiff in Error, v. Green Charles. [No. 262.]

Error to circuit court of appeals—Federal question.

In Error to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Virginia, in favor of defendant in an action in ejectment.

See same case below, 165 C. C. A. 599, 254 Fed. 379.

Messrs. S. B. Avis and A. M. Belcher for plaintiff in error.

Mr. William H. Werth for defendant in error.

March 15, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) § 128 of the Judicial Code [36 Stat. at L. 1133, chap. 231, Comp. Stat. § 1120, 5 Fed. Stat. Anno. 2d ed. p. 607]; Shulthis v. McDougal, 225 U. S. 561, 568, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704; Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892; St. Anthony's Church v. Pennsylvania R. Co. 237 U. S. 575, 577, 59 L. ed. 1119, 1122, 35 Sup. Ct. Rep. 729; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 444, 59 L. ed. 1397, 1400, 35 Sup. Ct. Rep. 902.

(2) Spencer v. Duplan Silk Co. 191 U. S. 526, 530, 48 L. ed. 287, 290, 24 Sup. Ct. Rep. 174; Devine v. Los Angeles, 202 U. S. 313, 333, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

C. C. Taft Company, Plaintiff in Error, v. State of Iowa. [No. 230.]

Error to state court—Federal question.

In Error to the Supreme Court of the

State of Iowa to review a judgment which affirmed a judgment of the District Court of Polk County, in that state, for the condemnation and seizure of cigarettes.

See same case below, 183 Iowa, 548, 9 A.L.R. 390, 167 N. W. 467.

Messrs. Fred P. Carr and R. M. Haines for plaintiff in error.

Messrs. [570] H. M. Havner and Freeman C. Davidson for defendant in error.

March 15, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of the Act of September 6, 1916 (39 Stat. at L. 726, 727, chap. 448, Comp. Stat. §§ 1207, 1228a, Fed. Stat. Anno. Supp. 1918, pp. 411, 420), § 6.

JAMES P. PARSONS, Plaintiff in Error, v. WILLIAM H. MOOR et al.[1] [No. 236.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of Ohio to review a judgment which reversed a judgment of the Court of Common Pleas for Lucas County in a mortgage foreclosure action.

See same case below, 98 Ohio St. 233, 120 N. E. 305.

Mr. Charles F. Carusi for plaintiff in error.

Mr. Herbert P. Whitney for defendants in error.

March 15, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

STATE OF NEW JERSEY, Complainant, v. A MITCHELL PALMER, Attorney General, et al. [No. —, Original.]

On motion for leave to file original bill.

March 15, 1920. Order. Application for leave to file bill granted and process ordered; but should the Attorney General be advised to move to dismiss, a motion to advance the hearing on the motion to dismiss to the earliest practicable day will be entertained, in order that the issues arising from such motion may be considered in connection with the controversies now under advisement resulting from the original bill filed by the state of Rhode Island, and other causes involving kindred questions which are now also under submission.

UNION PACIFIC COAL COMPANY, Petitioner, v. MARK A. SKINNER, Collector of Internal Revenue. [No. 111.]

Internal revenue—income tax—dividends—accumulated surplus.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which, reversing a judgment of the District Court for the District of Colorado, ordered the dismissal of the complaint in a suit to recover back an income tax paid under protest.

See same case below, 161 C. C. A. 204, 249 Fed. 152.

Mr. Henry W. Clark for petitioner.

Solicitor General King and Mr. A. F. Myers for respondent.

March 22, 1920. [571] Per Curiam: Affirmed with costs upon the authority of Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149, 38 Sup. Ct. Rep. 543, and cause remanded to the District Court of the United States for the District of Colorado.

McCAY ENGINEERING COMPANY, Appellant, v. UNITED STATES. [No. 227.]

United States—contracts—construction—extra costs—delays.

Appeal from the Court of Claims to review the dismissal of a claim against the United States growing out of a contract for a public work.

See same case below, 53 Ct. Cl. 642.

Messrs. George A. King and George R. Shields for appellant.

Assistant Attorney General Davis and Mr. Harvey D. Jacob for appellee.

March 22, 1920. Per Curiam: Affirmed by an equally divided court.

Mr. Justice McReynolds took no part in the decision of this case.

KANSAS CITY BOLT & NUT COMPANY, Plaintiff in Error, v. KANSAS CITY LIGHT & POWER COMPANY. [No. 241.]

Constitutional law—impairing contract obligations—due process of law.

In Error to the Supreme Court of the State of Missouri to review a decree which affirmed a decree of the Circuit Court of Jackson County, in that state, refusing to enjoin a public service corporation

[1] Death of Fred O. Peak, one of the defendants in error herein, suggested, and appearance of Bell S. Peak, individually and as executrix under the last will and testament of Fred O. Peak, deceased, as a party defendant in error herein, filed and entered March 12, 1920, on motion of counsel for the defendants in error.

from charging increased rates as fixed by the state Public Service Commission.

See same case below, 275 Mo. 529, 204 S. W. 1074.

Mr. Rees Turpin for plaintiff in error.

Mr. John H. Lucas for defendant in error.

March 22, 1920. Per Curiam: Affirmed upon the authority of Union Dry Goods Co. v. Georgia Pub. Service Corp. 248 U. S. 372, 63 L. ed. 309, 9 A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117.

NEW ORLEANS LAND COMPANY, Plaintiff in Error, v. WILLIS J. ROUSSELL, Administrator, etc., et al. [No. 257.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court of the Parish of Orleans, in that state, in favor of plaintiffs in a petitory action.

See same case below, 143 La. 1058, 79 So. 860.

Mr. Charles Louque for plaintiff in error.

Mr. William Winans Wall for defendants in error.

March 22, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of [572] September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

EDWARD C. MASON, as He Is Trustee in Bankruptcy, etc., Plaintiff in Error, v. THOMAS J. SHANNON et al. [No. 261.]

Error to state court—Federal question—error or certiorari.

In Error to the Superior Court of the State of Massachusetts to review a judgment affirmed by the Supreme Judicial Court of that state, allowing the account of a receiver, and denying the petition of a trustee in bankruptcy to require the receiver to turn over the assets and account for the same.

See same case below, in supreme judicial court, 230 Mass. 224, 119 N. E. 768.

Mr. Harold Williams, Jr., for plaintiff in error.

Mr. John T. Hughes for defendants in error.

March 22, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

UNITED STATES OF AMERICA et al., Appellants, v. ALASKA STEAMSHIP COMPANY et al. [No. 541.]

March 22, 1920. Counsel requested to file briefs concerning the effect upon the issues here involved resulting from the act of Congress terminating the Federal control of railroads, and amending the Act to Regulate Commerce in certain particulars, approved February 28, 1920 (— Stat. at L. —, chap. —).

QUEENS LAND & TITLE COMPANY et al., Appellants, v. KINGS COUNTY TRUST COMPANY et al. [No. 297.]

Appeal—from district court—frivolous Federal question.

Appeal from the District Court of the United States for the Eastern District [573] of New York to review a decree dismissing the bill in a suit to set aside a foreclosure decree made by a state court.

See same case below, 255 Fed. 222.

Mr. William G. Cooke for appellants.

Mr. George E. Brower for appellees.

April 19, 1920. Per Curiam: Affirmed with costs upon the authority of Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191; and see Blumenstock Bros. Advertising Agency v. Curtis Pub. Co. this day decided, 252 U. S. 436, ante, 649, 40 Sup. Ct. Rep. 385.

MARY WILLEM, a Creditor, etc., Appellant, v. DAWSON E. BRADLEY, Trustee, etc. [No. 266.]

Appeal—from district court—frivolous Federal question.

Appeal from the District Court of the United States for the Southern District of Ohio to review a decree allowing a claim against a bankrupt merely as a general claim.

Mr. William W. Symmes for appellant.

Mr. Paul V. Connolly for appellee.

April 19, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 232, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY et al., Plaintiffs in Error, v. MACLAY HOYNE, State's Attorney, etc., et al. [No. 282]; and METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY et al., Plaintiffs in Error, v. SANITARY DISTRICT OF CHICAGO et al. [No. 283.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of Illinois to review a decree which reversed a decree of the Circuit Court of Cook County, in that state, dismissing a suit to compel the removal or alteration of a railway bridge as an unreasonable obstruction to navigation.

See same case below, in No. 282, 285 Ill. 246, 120 N. E. 748; in No. 283, 285 Ill. 342, 120 N. E. 756.

Messrs. Frank J. Loesch and T. J. Scofield for plaintiffs in error.

Messrs. Edmund D. Adcock and C. Arch Williams for defendants in error.

April 19, 1920. Per Curiam: Dismissed for want of jurisdiction upon the [574] authority of § 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, 5 Fed. Stat. Anno. 2d ed. p. 723), as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

E. W. BLANCETT, Plaintiff in Error, v. STATE OF NEW MEXICO. [No. 295.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of New Mexico to review a judgment which affirmed a conviction of murder had in the District Court of Santa Fe County, in that state.

See same case below, 24 N. M. 433, 174 Pac. 207.

Mr. A. B. Renehan for plaintiff in error.

Mr. Harry S. Bowman for defendant in error.

April 19, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, 5 Fed. Stat. Anno. 2d ed. p. 723), as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plaintiff in Error, v. HERMAN VAN DE ZANDE. [No. 423.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Municipal Court of Brown County, in that state, in favor of plaintiff in a personal-injury action.

See same case below, 168 Wis. 628, 170 N. W. 259.

Mr. R. N. Van Doren for plaintiff in error.

Mr. Robert A. Kaftan for defendant in error.

April 19, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, 5 Fed. Stat. Anno. 2d ed. p. 723), as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

UNITED STATES, Appellant, v. WAYNE COUNTY, KENTUCKY. [No. 233.]

Eminent domain—taking—compensation.

Appeal from the Court of Claims to review an award of compensation for the taking by the United States of a public road.

See same case below, 53 Ct. Cl. 417.

Assistant Attorney General Davis for appellant.

Mr. Jackson H. Ralston for appellee.

[575] April 19, 1920. Per Curiam: Affirmed upon the authority of

(1) United States v. Cress, 243 U. S. 316, 329, 61 L. ed. 746, 753, 37 Sup. Ct. Rep. 380; United States v. Welch, 217 U. S. 333, 339, 54 L. ed. 787, 789, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Griz-

zard, 219 U. S. 180, 185, 55 L. ed. 165, 166, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162.

(2) St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 101, 37 L. ed. 380, 384, 13 Sup. Ct. Rep. 485; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 169, 56 L. ed. 710, 715, 32 Sup. Ct. Rep. 449; and see Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 9.

(3) Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

B. T. BACKUS, Plaintiff in Error, v. NORFOLK SOUTHERN RAILROAD COMPANY. [No. 263.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Circuit Court of the City of Norfolk, in that state, for the recovery of damages from a carrier for failing to divert a shipment.

Mr. J. Edward Cole for plaintiff in error.

Mr. James G. Martin for defendant in error.

April 19, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, 5 Fed. Stat. Anno. 2d ed. p. 723), as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

F. R. GLASCOCK et al., Plaintiffs in Error, v. ELLIS MCDANIEL et al., Minors, by J. O. Cravens, Guardian. [No. 287.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the Superior Court of Muskogee County, in that state, in favor of plaintiffs in a suit to quiet title.

See same case below, — Okla. —, 175 Pac. 737.

Messrs. William B. Moore and George S. Ramsey for plaintiffs in error.

Messrs. Grant Foreman and James D. Simms for defendants in error.

April 19, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, 5 Fed. Stat. Anno. 2d ed. p. 723), as amended by the Act of [576] September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

JOHN P. GALBRAITH, Petitioner, v. JOHN VALLELY, Trustee, etc. [No. 697.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 261 Fed. 670.

Mr. Fred B. Dodge for petitioner.

No appearance for respondent.

March 8, 1920. Granted.

WESTERN UNION TELEGRAPH COMPANY, Petitioner, v. ADDIE SPEIGHT. [No. 712.]

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina.

See same case below, 178 N. C. 146, 100 S. E. 351.

Messrs. Francis Raymond Stark, Charles W. Tillett, and Thomas C. Guthrie for petitioner.

Mr. Murray Allen for respondent.

March 8, 1920. Granted.

HENRY KRICHMAN, Petitioner, v. UNITED STATES OF AMERICA. [No. 746.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 263 Fed. 538.

Mr. Harrison P. Lindabury for petitioner.

No appearance for respondent.

March 8, 1920. Granted.

---

[577] UNITED STATES, Petitioner, v. NATIONAL SURETY COMPANY. [Nos. 779 and 780.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 262 Fed. 62.

Solicitor General King and Assistant Attorney General Spellacy for petitioner.

Messrs. S. W. Fordyce and Thomas W. White for respondent.

April 19, 1920. Granted.

H. SNOWDEN MARSHALL, as Receiver, etc., Petitioner, v. PEOPLE OF THE STATE OF NEW YORK. [No. 836.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. A. S. Gilbert and William J. Hughes for petitioner.

Mr. Cortlandt A. Johnson for respondent.

April 19, 1920. Granted.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Petitioner, v. O. C. SWAIM. [No. 678.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Iowa.

See same case below, — Iowa, —, 170 N. W. 296; on rehearing, — Iowa, —, 174 N. W. 384.

Messrs. Joseph G. Gamble, Thomas P. Littlepage, and Sidney F. Taliaferro for petitioner.

Harriet B. Evans for respondent.

March 8, 1920. Denied.

J. B. POLLARD, Petitioner, v. UNITED STATES OF AMERICA. [No. 682.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 336.

Mr. William H. Atwell for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

March 8, 1920. Denied.

ADA GRIFFITH, Petitioner, v. UNITED STATES OF AMERICA. [No. 686.]

Petition for a Writ of Certiorari to the United States Circuit Court [578] of Appeals for the Seventh Circuit.

See same case below, 261 Fed. 159.

Mr. Benjamin C. Bachrach for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

March 8, 1920. Denied.

FREDERICK M. KILMER, Trustee for Alice F. Kilmer, Petitioner, v. CHARLES H. KEITH, Trustee, etc. [No. 701.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 9 A.L.R. 1287, 261 Fed. 733.

Mr. Elbridge R. Anderson for petitioner.

Mr. Lee M. Friedman for respondent.

March 8, 1920. Denied.

ROME LANE, on Behalf of Himself and Others, Petitioner, v. EQUITABLE TRUST COMPANY OF NEW YORK. [No. 703.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 262 Fed. 918.

Messrs. Wells H. Blodgett and Clifford B. Allen for petitioner.

Messrs. G. W. Murray and Laurence Greer for respondent.

March 8, 1920. Denied.

MARIA ELOISA ROCHA, Petitioner, v. EMILIA TUASON Y PATINO et al. [No. 704.]

Petition for a Writ of Certiorari to the Supreme Court of the Philippine Islands.

Messrs. W. A. Kincaid, Alexander Britton, and Evans Browne for petitioner.

No appearance for respondents.

March 8, 1920. Denied.

HUDSON NAVIGATION COMPANY, Petitioner, v. J. ARON & COMPANY (Inc.), et al. [No. 711.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 262 Fed. 1021.

Mr. Stuart G. [579] Gibboney for petitioner.

Mr. Charles R. Hickox for respondents.

March 8, 1920. Denied.

CAMP BIRD, Limited, Petitioner, v. FRANK W. HOWBERT, as Collector of Internal Revenue, etc. [No. 718.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 262 Fed. 114.

Mr. William V. Hodges for petitioner.

Solicitor General King and Mr. William C. Herron for respondent.

March 8, 1920. Denied.

PHILLIPS COMPANY, Petitioner, v. BYRON F. EVERITT, Trustee, etc. [No. 721.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 262 Fed. 341.

Mr. William L. Carpenter for petitioner.

Mr. Clarence A. Lightner for respondent.

March 8, 1920. Denied.

ALFRED R. SWANN, Petitioner, v. W. W. AUSTELL, Executor, etc., et al. [No. 722.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 262 Fed. 465.

Messrs. Daniel W. Rountree and Clifford L. Anderson for petitioner.

Messrs. Jack J. Spalding and Charles T. Hoskins for respondents.

March 8, 1920. Denied.

WILLIAM F. HANRAHAN, Petitioner, v. PACIFIC TRANSPORT COMPANY (Ltd.). [No. 732.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 262 Fed. 951.

Mr. Silas B. Axtell for petitioner.

Messrs. Robert S. Erskine and L. De Grove Potter for respondent.

March 8, 1920. Denied.

---

[580] E. B. CAPPS, Administrator, etc., Petitioner, v. ATLANTIC COAST LINE RAILROAD COMPANY. [No. 748.]

Petition for a Writ of Certiorari to the Supreme Court of the State of North Carolina.

See same case below, 178 N. C. 558, 101 S. E. 216.

Mr. James S. Manning for petitioner.

Messrs. F. D. McKenney, J. Spalding Flannery, and P. A. Willcox for respondent.

March 8, 1920. Denied.

J. W. ATKINS, Petitioner, v. L. G. GARRETT. [No. 749.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 587.

Messrs. W. B. Spencer, Charles Payne Fenner, and Walter S. Penfield for petitioner.

No appearance for respondent.

March 8, 1920. Denied.

MARYANNE SHIPPING COMPANY, Claimant of Steamship Maryanne, Petitioner, v. RAMBERG IRON WORKS. [No. 750.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 262 Fed. 129.

Messrs. Horace L. Cheyney and Ralph J. M. Bullowa for petitioner.

Mr. Francis Martin for respondent.

March 8, 1920. Denied.

CRICKET STEAMSHIP COMPANY, Petitioner, v. JOHN P. PARRY. [No. 754.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 263 Fed. 523.

Mr. Cletus Keating for petitioner.

Mr. Silas B. Axtell for respondent.

March 8, 1920. Denied.

WALTER F. BRITTON, Trustee, etc., Petitioner, v. UNION INVESTMENT COMPANY. [No. 709.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for [581] the Eighth Circuit.

See same case below, 262 Fed. 111.

Mr. Harrison L. Schmitt for petitioner.

Messrs. William A. Lancaster and David F. Simpson for respondent.

March 15, 1920. Denied.

WALTER M. REEDER et al., Petitioners, v. UNITED STATES OF AMERICA. [No. 725.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 262 Fed. 36.

Mr. John W. Scothorn for petitioners.

Assistant Attorney General Stewart and Mr. William C. Herron for respondent.

March 15, 1920. Denied.

ATCHAFALAYA LAND COMPANY, Petitioner, v. PAUL CAPDEVIELLE, Auditor, et al. [No. 739.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana.

See same case below, 146 La. 109, 83 So. 426.

Mr. George Janvier for petitioner.

No appearance for respondents.

March 15, 1920. Denied.

E. J. FRAZIER, Petitioner, v. STATE OF OREGON. [No. 716.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon.

See same case below, 94 Or. 90, 180 Pac. 520, 184 Pac. 848.

Mr. Enos S. Stockbridge for petitioner.

Mr. George M. Brown for respondent.

March 22, 1920. Denied.

ALFRED J. KEPPELMANN et al., Executors and Trustees, etc., Petitioners, v. A. MITCHELL PALMER, as Alien Property Custodian. [No. 723.]

Petition for a Writ of Certiorari to the Court of Chancery of the State of New Jersey.

See same case below, in court of errors and appeals, — N. J. —, 108 Atl. 432.

Mr. Edward M. Colie for petitioners.

Assistant Attorney General Spellacy for respondent.

March 22, 1920. Denied.

---

[582] CARL GOEPEL et al., Partners, etc., Petitioners, v. A. MITCHELL PALMER, as Alien Property Custodian. [No. 724.]

Petition for a Writ of Certiorari to the Court of Chancery of the State of New Jersey.

See same case below, in court of errors and appeals, — N. J. —, 108 Atl. 432.

Mr. Ruby R. Vale for petitioners.

Assistant Attorney General Spellacy for respondent.

March 22, 1920. Denied.

AMERICAN ORE RECLAMATION COMPANY, Petitioner, v. DWIGHT & LLOYD SINTERING COMPANY, Inc. [No. 747.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 263 Fed. 315.

Mr. Henry B. Gayley for petitioner.

Mr. Otto C. Wierum for respondent.

March 22, 1920. Denied.

LOUIS DE F. MUNGER, Petitioner, v. FIRESTONE TIRE & RUBBER COMPANY [No. 735]; and LOUIS DE F. MUNGER, Petitioner, v. B. F. GOODRICH COMPANY [No. 736].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 261 Fed. 921.

Mr. William A. Redding for petitioner.

Messrs. Charles Neave, William G. McKnight, and Edward Rector for respondents.

March 22, 1920. Denied.

EMPIRE FUEL COMPANY, Petitioner, v. J. E. LYONS. [No. 757.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 262 Fed. 465.

Messrs. Arthur S. Dayton, Melvin G. Sperry, and Frank E. Wood for petitioner.

Mr. Murray Seasongood for respondent.

March 22, 1920. Denied.

CARL H. RICHARDSON, as Trustee, etc., Petitioner, v. GERMANIA BANK OF THE CITY OF NEW YORK. [No. 770.]

[583] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 263 Fed. 320.

Mr. Carroll G. Walter for petitioner.

Mr. Bernard Hershkopf for respondent.

March 22, 1920. Denied.

S. J. LINDSAY, Petitioner, v. UNITED STATES OF AMERICA. [No. 783.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 94.

Mr. A. Johnston Ackiss for petitioner.

Assistant Attorney General Frierson for respondent.

March 22, 1920. Denied.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Petitioner, v. INDUSTRIAL COMMISSION OF THE STATE OF ILLINOIS (Maria Kiley, Administratrix, etc.). [No. 784.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

See same case below, 290 Ill. 590, 125 N. E. 380.

Mr. Gardiner Lathrop for petitioner.

Mr. Leo L. Donohoe for respondent.

March 22, 1920. Denied.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, Petitioner, v. CITY OF ENNIS et al. [No. 479.]

Petition for a Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

See same case below, — Tex. Civ. App. —, 201 S. W. 256.

Messrs. H. M. Garwood, J. L. Gammon, and Jesse Andrews, for petitioner.

No brief was filed for respondents.

March 29, 1920. Denied.

ANTONIO CISNEROS CHAPA, Petitioner, v. UNITED STATES OF AMERICA. [No. 745.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 775.

Mr. C. M. Chambers for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

March 29, 1920. Denied.

---

[584] CENTRAL ELEVATOR COMPANY OF BALTIMORE CITY, Petitioner, v. NAAM LOOZE VENNOOT SCHAP, etc. [No. 760.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 102.

Messrs. Frederic D. McKenney and Shirley Carter for petitioner.

Messrs. Charles R. Hickox and John M. Woolsey for respondent.

March 29, 1920. Denied.

PENNSYLVANIA RAILROAD COMPANY, Petitioner, v. NAAM LOOZE VENNOOT SCHAP, etc. [No. 761.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 102.

Messrs. Frederic D. McKenney and Shirley Carter for petitioner.

Messrs. Charles R. Hickox and John M. Woolsey for respondent.

March 29, 1920. Denied.

CENTRAL ELEVATOR COMPANY OF BALTIMORE CITY, Petitioner, v. EDWIN DYASON, Master of the Steamship Welbeck Hall, etc. [No. 762.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 102.

Messrs. Frederic D. McKenney and Shirley Carter for petitioner.

Mr. James K. Symmers for respondent.

March 29, 1920. Denied.

PENNSYLVANIA RAILROAD COMPANY, Petitioner, v. EDWIN DYASON, Master of the Steamship Welbeck Hall, etc. [No. 763.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 102.

Messrs. Frederic D. McKenney and Shirley Carter for petitioner.

Mr. James K. Symmers for respondent.

March 29, 1920. Denied.

V. F. MILLER, Petitioner, v. UNITED STATES OF AMERICA. [No. 766.]

Petition for a Writ of Certiorari to the United States Circuit Court [585] of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 914.

Mr. A. M. Chambers for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

March 29, 1920. Denied.

FRANCE & CANADA STEAMSHIP CORPORATION, Petitioner, v. KONRAD STORGARD. [No. 773.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 263 Fed. 545.

Mr. Bertrand L. Pettigrew for petitioner.

Mr. Silas B. Axtell for respondent.

March 29, 1920. Denied.

SOUTHWESTERN GAS & ELECTRIC COMPANY, Petitioner, v. CITY OF SHREVEPORT. [No. 774.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 771.

Mr. Max Pam for petitioner.

No appearance for respondent.

March 29, 1920. Denied.

ALEC ERICKSON, Petitioner, v. JOHN A. ROEBLING'S SONS COMPANY OF NEW YORK. [No. 778.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 261 Fed. 986.

Mr. Silas B. Axtell for petitioner.

No brief was filed for respondent.

March 29, 1920. Denied.

KARL SANDGREN et al., Petitioners, v. ULSTER STEAMSHIP COMPANY (Limited) Owner and Claimant, etc. [No. 787.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 262 Fed. 751.

Mr. William J. Waguespack for petitioners.

No appearance for respondent.

March 29, 1920. Denied.

---

[586] BENJAMIN HOROWITZ et al., Plaintiffs in Error, v. UNITED STATES OF AMERICA. [No. 693.]

Petition for a Writ of Certiorari herein.

See same case below, 262 Fed. 48.

Messrs. John J. Fitzgerald and Elijah N. Zoline for plaintiffs in error.

Assistant Attorney General Stewart for defendant in error.

April 19, 1920. Denied.

BARBER & COMPANY, Inc., Petitioner, v. STEAMSHIP KNUTSFORD, Limited. [No. 737.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 261 Fed. 866.

Mr. D. Roger Englar for petitioner.

Messrs. Charles R. Hickox and L. De Grove Potter for respondent.

April 19, 1920. Denied.

ARTHUR BAIN, Petitioner, v. UNITED STATES OF AMERICA. [No. 753.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 262 Fed. 664.

Mr. Abram M. Tillman for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

April 19, 1920. Denied.

CHARLES L. BAENDER, Petitioner, v. UNITED STATES OF AMERICA. [No. 758.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 558, 260 Fed. 832.

Mr. George D. Collins for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

April 19, 1920. Denied.

WEBB JAY et al., Petitioners, v. FREDERICK WEINBERG et al. [No. 759.]

Petition for a Writ of Certiorari to [587] the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 262 Fed. 973.

Messrs. Charles S. Burton and George L. Wilkinson for petitioners.

Messrs. R. A. Parker and Elliott J. Stoddard for respondents.

April 19, 1920. Denied.

JESSE C. WASHBURN et al., Petitioners, v. E. N. GILLESPIE. [No. 769.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 171 C. C. A. 637, 261 Fed. 41.

Messrs. Horace Speed, Henry S. Johnston, and L. T. Michener for petitioners.

No appearance for respondent.

April 19, 1920. Denied.

MURLE L. ROWE, as Trustee, etc., Petitioner, v. JAMES L. DROHEN et al. [No. 772.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 262 Fed. 15.

Mr. Herman J. Westwood for petitioner.

Messrs. Grafton L. McGill and Francis S. Maguire for respondents.

April 19, 1920. Denied.

SHELLEY B. HUTCHINSON, Petitioner, v. WILLIAM M. SPERRY et al. [No. 785.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 261 Fed. 133.

Mr. William Mayo Atkinson for petitioner.

Messrs. W. Benton Crisp and Frederick Geller for respondents.

April 19, 1920. Denied.

CHRISTIAN TJOSEVIG et al., Petitioners, v. T. J. DONOHOE et al. [No. 799.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 262 Fed. 911.

Mr. John Rustgard for petitioners.

Messrs. Edmund Smith, J. A. Hellenthal, and Ira D. Orton for respondents.

April 19, 1920. Denied.

---

[588] NEW YORK CENTRAL RAILROAD COMPANY, Claimant, etc., Petitioner, v. JOHN S. HOWELL et al. [No. 804.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 262 Fed. 119.

Mr. Oscar R. Houston for petitioner.

No appearance for respondents.

April 19, 1920. Denied.

ELIZABETH DENNY GREGG, Petitioner, v. FRANCIS P. GARVAN, Alien Property Custodian [No. 834]; and A. J. KELLEY, JR., et al., Trustees, etc., Petitioners, v. FRANCIS P. GARVAN, Alien Property Custodian [No. 835].

Petition for Writs of Certiorari to the Supreme Court of the State of Pennsylvania.

See same case below, 266 Pa. 189, 109 Atl. 777.

Mr. F[illegible] [illegible]uer.

Assi[illegible]y for re[illegible]

Apr[illegible]

D. H. GILL et al., Plaintiffs in Error, v. CITY OF DALLAS et al. [No. 225.]

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

See same case below, — Tex. Civ. App. —, 209 S. W. 209.

Mr. William H. Clark for plaintiffs in error.

No appearance for defendants in error.

March 5, 1920. Dismissed with costs, pursuant to the Tenth Rule.

GLOBE WORKS, Appellant, v. UNITED STATES. [No. 237.]

Appeal from the Court of Claims.

See same case below, 53 Ct. Cl. 532.

Mr. John S. Blair for appellant.

Solicitor General King and Assistant Attorney General Davis for appellee.

March 11, 1920. Dismissed pursuant to the Sixteenth Rule, on motion of [589] Assistant Attorney General Davis for the appellee.

UNITED STATES OF AMERICA, Plaintiff in Error, v. H. L. SPRINKLE. [No. 293.]

In Error to the District Court of the United States for the Southern District of Florida.

The Attorney General for plaintiff in error.

No appearance for defendant in error.

March 15, 1920. Dismissed on motion of counsel for the plaintiff in error.

E. B. HOWARD, State Auditor of the State of Oklahoma, Appellant, v. H. V. FOSTER et al., etc. [No. 267.]

Appeal from the District Court of the United States for the Western District of Oklahoma.

Messrs. S. P. Freeling and John B. Harrison for appellant.

No appearance for appellees.

March 19, 1920. Dismissed with costs, on motion of counsel for the appellant.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. H. T. TRUE, JR. [No. 284.]

In Error to the Supreme Court of the State of Oklahoma.

See same case below, — Okla. —, 176 Pac. 758.

Messrs. Edward J. White and Thomas B. Pryor for plaintiff in error.

Mr. F. E. Riddle for defendant in error.

March [illegible] Dismissed with costs, on m[illegible] for the plaintiff in error.

UNION PACIFIC RAILROAD COMPANY et al., Plaintiffs in Error, v. W. H. JENKINS et al. [No. 298.]

In Error to the Supreme Court of the State of Nebraska.

Messrs. Charles H. Sloan [590] and William E. Flynn for plaintiffs in error.

No appearance for defendants in error.

March 24, 1920. Dismissed with costs, pursuant to the Tenth Rule.[1]

NATIONAL SURETY COMPANY, Appellant, v. UNITED STATES OF AMERICA FOR THE USE OF AMERICAN SHEET METAL WORKS et al. [No. 347.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 167 C. C. A. 319, 256 Fed. 77.

Mr. William B. Grant for appellant.

No appearance for appellees.

March 29, 1920. Dismissed with costs, and mandate granted, on motion of counsel for the appellant.

LOUIS C. TIFFANY, Sole Surviving Executor, etc., Appellant, v. UNITED STATES. [No. 209.]

Appeal from the Court of Claims.

See same case below, 53 Ct. Cl. 640.

Messrs. Simon Lyon and R. B. H. Lyon for appellant.

The Attorney General for appellee.

April 19, 1920. Reversed, upon confession of error, and cause remanded for further proceedings in conformity with law, and mandate granted, on motion of counsel for the appellee.

SOUTHERN COTTON OIL COMPANY et al., Appellants, v. ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY. [No. 502.]

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Messrs. W. E. Hemingway, G. B. Rose, and J. F. Loughborough for appellants.

No appearance for appellee.

April 19, 1920. Dismissed with costs, per stipulation.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY et al. v. MARIE L. THOMPSON. [No. 698.]

On a Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Mr. J. Hayden Oliver for petitioners.

Messrs. Simon Lyon and R. B. H. Lyon for respondent.

[591] April 19, 1920. Dismissed, per stipulation.

NEW YORK EVENING POST COMPANY, Petitioner, v. JOHN ARMSTRONG CHALONER. [No. 796.]

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 265 Fed. 204.

Mr. William M. Wherry, Jr., for petitioner.

No appearance for respondent.

April 19, 1920. Dismissed on motion of counsel for the petitioner.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. ROAD IMPROVEMENT DISTRICT NO. 1 OF PRAIRIE COUNTY, ARKANSAS. [No. 366.]

In Error to the Supreme Court of the State of Arkansas.

See same case below, 137 Ark. 587, 209 S. W. 725.

Messrs. Thomas S. Buzbee, Thomas P. Littlepage, Sidney F. Taliaferro, George B. Pugh, and W. F. Dickinson for plaintiff in error.

Mr. Charles A. Walls for defendant in error.

April 19, 1920. Dismissed with costs, on motion of counsel for the plaintiff in error.

MISSOURI PACIFIC RAILROAD COMPANY et al., Plaintiffs in Error, v. MONROE COUNTY ROAD IMPROVEMENT DISTRICT et al. [No. 367.]

In Error to the Supreme Court of the State of Arkansas.

See same case below, 137 Ark. 568, 209 S. W. 728.

Messrs. Tray Pace, Thomas S. Buzbee, Thomas P. Littlepage, Sidney F. Taliaferro, George B. Pugh, and W. F. Dickinson for plaintiffs in error.

Messrs. W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough for defendants in error.

April 19, 1920. Dismissed with costs, on motion of counsel for the plaintiffs in error.

[1] Motion to vacate judgment of dismissal and restore cause to docket denied June 7, 1920.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1919,

AND REPORTED HEREIN,

VOLUME 253,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 253 U. S.	Title.	Here in
1-2	United States v. Atlantic Dredging Co.	735
2-4	" "	736
4	" "	737
9-10	" "	737
10-12	" "	738
12	Maguire v. Trefry	739
13	" "	749
13-15	" "	750
15-17	" "	751
17	Ward v. Love County	751
18-19	" "	756
19-21	" "	757
21-23	" "	758
23-25	" "	759
25	Broadwell v. Carter County	759
25-26	" "	760
26	United States v. Reading Co.	760
40-42	" "	772
42-44	" "	773
44-47	" "	774
47-49	" "	775
49-52	" "	776
52-54	" "	777
54-57	" "	778
57-59	" "	779
59-62	" "	780
62-64	" "	781
64-65	" "	782
66	Wallace v. Hines	782
67-68	" "	785
68-70	" "	786
70	" "	787
71	Great Northern R. Co. v. Cahill	787
71-74	" "	788
74-76	" "	789
76-77	" "	790
77	Erie R. Co. v. Collins	790
80-82	" "	792
82-84	" "	793
84-86	" "	794
86	Erie R. Co. v. Szary	794
88-89	" "	796
89-90	" "	797
90-91	White v. Chin Fong	797
91-93	" "	798

Off. Rep. 253 U. S.	Title.	Here in
94	Leary v. United States	798
95-96	" "	800
96-97	" "	801
97	Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co.	801
98	" "	802
98-100	" "	803
101	Western U. Teleg. Co. v. Brown	803
103-104	" "	804
104-106	" "	805
106-109	" "	806
109-111	" "	807
111-113	" "	808
113	United States v. Alaska S. S. Co.	808
114-116	" "	809
116-117	" "	810
117	Spiller v. Atchison, T. & S. F. R. Co.	810
120-122	" "	815
122-124	" "	816
124-126	" "	817
126-129	" "	818
129-131	" "	819
131-133	" "	820
133-136	" "	821
136	" "	822
136	Meccano v. Wanamaker	822
137-140	" "	825
140-142	" "	826
142	" "	827
142	O'Connell v. United States	827
144-145	" "	832
145-147	" "	833
147-148	" "	834
149	Knickerbocker Ice Co. v. Stewart	834
155-156	" "	837
157-159	" "	838
159-162	" "	839
162-164	" "	840
164-166	" "	841
166-169	" "	842
169-170	" "	843
170	Calhoun v. Massie	843

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1919,

AND REPORTED HEREIN,

VOLUME 253,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1919,

AND REPORTED HEREIN,

VOLUME 253,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 253 U. S.	Title.	Here in
1-2	United States v. Atlantic Dredging Co.	735
2-4	" "	736
4	" "	737
9-10	" "	737
10-12	" "	738
12	Maguire v. Tretry	739
13	" "	749
13-15	" "	750
15-17	" "	751
17	Ward v. Love County	751
18-19	" "	756
19-21	" "	757
21-23	" "	758
23-25	" "	759
25	Broadwell v. Carter County	759
25-26	" "	760
26	United States v. Reading Co.	760
40-42	" "	772
42-44	" "	773
44-47	" "	774
47-49	" "	775
49-52	" "	776
52-54	" "	777
54-57	" "	778
57-59	" "	779
59-62	" "	780
62-64	" "	781
64-65	" "	782
66	Wallace v. Hines	782
67-68	" "	785
68-70	" "	786
70	" "	787
71	Great Northern R. Co. v. Cahill	787
71-74	" "	788
74-76	" "	789
76-77	" "	790
77	Erie R. Co. v. Collins	790
80-82	" "	792
82-84	" "	793
84-86	" "	794
86	Erie R. Co. v. Szary	794
88-89	" "	796
89-90	" "	797
90-91	White v. Chin Fong	797
91-93	" "	798

Off. Rep. 253 U. S.	Title.	Here in
94	Leary v. United States	798
95-96	" "	800
96-97	" "	801
97	Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co.	801
98	" "	802
98-100	" "	803
101	Western U. Teleg. Co. v. Brown	803
103-104	" "	804
104-106	" "	805
106-109	" "	806
109-111	" "	807
111-113	" "	808
113	United States v. Alaska S. S. Co.	808
114-116	" "	809
116-117	" "	810
117	Spiller v. Atchison, T. & S. F. R. Co.	810
120-122	" "	815
122-124	" "	816
124-126	" "	817
126-129	" "	818
129-131	" "	819
131-133	" "	820
133-136	" "	821
136	" "	822
136	Meccano v. Wanamaker	822
137-140	" "	825
140-142	" "	826
142	" "	827
142	O'Connell v. United States	827
144-145	" "	832
145-147	" "	833
147-148	" "	834
149	Knickerbocker Ice Co. v. Stewart	834
155-156	" "	837
157-159	" "	838
159-162	" "	839
162-164	" "	840
164-166	" "	841
166-169	" "	842
169-170	" "	843
170	Calhoun v. Massie	843

64 L. ed.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1919.

Vol. 253.

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1919.

UNITED STATES, Appt.,
v.
ATLANTIC DREDGING COMPANY, W. B. Brooks, Agent.

(See S. C. Reporter's ed. 1-12.)

United States — contracts — misrepresentation of conditions.

1. The declaration in the government specifications for a dredging contract that no guaranty as to accuracy of description is intended, and the admonition to bidders that they must decide as to the character of the materials to be dredged, and make their bids accordingly, do not prevent the contractor from relying upon the representation in the government's specifications and maps as to the character of the materials to be encountered, asserted to be founded upon test borings, when in fact the existence of material much more difficult to dredge was disclosed by some of the borings, and such disclosures were concealed from bidders, the government not merely expressing in the specification its belief that its representation was true, but further asserting such belief through its approval of the contractor's plant, which was only efficient for dredging material named, and was inefficient for dredging the material actually found to exist.

[For other cases, see United States, VI. d, in Digest Sup. Ct. 1908.]

United States — contracts — misrepresentation of conditions — loss.

2. The election of a government contractor to continue the work after it discovered that the materials to be dredged were not of the character which the government represented that it believed would be encountered does not preclude such contractor, upon thereafter discovering that the belief expressed by the government was not justified and was in fact a deception, from stopping the work and suing to recover its losses under the contract.

[For other cases, see United States, VI. d; VI. f, in Digest Sup. Ct. 1908.]

Claims — against United States — jurisdiction — tort.

3. A suit to recover from the United States the losses incurred by a public contractor because of the misrepresentations by the government as to the character of the materials to be encountered cannot be said to be one sounding in tort, and hence not tenable against the United States, where there is no intimation of bad faith against the officers of the government, and the court of claims regarded the representation as in the nature of a warranty, and there was nothing punitive in its judgment, it being simply compensatory of the cost of the work of which the government received the benefit.

[For other cases, see Claims, 128-131, in Digest Sup. Ct. 1908.]

[No. 214.]

Argued March 16, 1920. Decided April 26, 1920.

APPEAL from the Court of Claims to review a judgment awarding a public contractor compensation for loss incurred because of misrepresentation by the government as to existing conditions. Affirmed.

See same case below, 53 Ct. Cl. 490.

Statement by Mr. Justice **McKenna**:

Action in the court of claims to recover the sum of $545,121.72 from the United States on account of expenditures and loss caused, it is alleged, in the execution

of a contract which it was induced to enter into by false and misleading statements of the officers of the United States in charge of excavations in the Delaware river.

In pursuance of advertisement by the United States through Colonel Kuhn, the dredging company entered into a contract to do a certain part of the work for the sum of 12.99 cents per cubic yard, scow measurement.

Sealed proposals were required by the advertisement, and it was stated that information could be had on application, and bidders were invited to base their bids upon the specifications which had been prepared by, and were submitted by, the government.

The specifications stated that the depth of the channel to be dredged was 35 feet, and under the heading, "Quality or Character of the Material," contained the following: "The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand, except from station 54 to station 55 + 144, at the lower end of West Horseshoe range (the latter is not included in the contract), where the material is firm mud, sand, and gravel or cobbles." It was stated that "bidders were expected to examine the work, however, and decide for themselves as to its character, and to make their bids accordingly, as the United States does not guarantee the accuracy of this description."

[3] The further statement was that "a number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) No guaranty is given as to correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy."

To ascertain the character of the material to be dredged the government officers had subjected the bottom of the river to certain borings, called, according to their manner of being made, "test borings and wash borings," and the results thereof were correctly reported and recorded on the log or field notes at the time; that is, that the probe had penetrated or had not penetrated, but there was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were made. It was hence shown that the material to be encountered was "mainly mud or mud with an admixture of sand." In other words, the map did not contain a true description of the character of the material which was to be encountered, and was encountered by the dredging company in the prosecution of the work. The material dredged, at certain places, differed from that shown on the map exhibited to bidders. The company made no independent examination, though it had time to do so, and in making its proposal it stated that it did so with full knowledge of the character and quality of the work required.

The proposals required the character and capacity of the plant proposed to be employed by the contractor to be stated, and that it should be kept in condition for efficient work, and be subject to the inspection and approval of the "contracting officer." In compliance with the requirement the plant was submitted to such officer and by him inspected and approved. It was efficient for dredging [4] the character of material mentioned in the specifications and described on the map to which bidders were referred for information; it was not efficient for dredging the material actually found to exist, and the company secured the services of another concern to do the dredging for it, and that concern did all of the work that was done.

After the company and the concern it had employed had been at work for some time, it complained of the character of material which was being encountered, and a supplementary contract was entered into by it and the "contracting officer."

This contract recited that "heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, had been encountered," and provided that such material might be deposited in the Delaware river instead of on shore, as provided in the original contract.

At the time of making the supplemental contract the company was not aware of the manner in which the "test borings" over the area embraced in its contract had been made. Upon learning of this in December, 1915, it discontinued work and declined to do further work. The company then had not been informed of the fact that impenetrable material had been reached by the probe. At the time of the cessation of work there remained approximately 350,000 cubic yards of material to be dredged in the area of the contract. The American Dredging Company completed the dredging at 16.2 cents per cubic yard.

The amount expended by the company

was $354,009.19, upon which it had received $142,959.10, making its loss on the contract $211,050.09. For such sum judgment was rendered, and the United States prosecuted this appeal.

Assistant Attorney General **Davis** argued the cause and filed a brief for appellant:

There was no misrepresentation.

Southern Development Co. v. Silva, 125 U. S. 247, 250, 31 L. ed. 678, 680, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212.

Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered.

Day v. United States, 245 U. S. 159, 62 L. ed. 219, 38 Sup. Ct. Rep. 57; Phœnix Bridge Co. v. United States, 211 U. S. 188, 53 L. ed. 141, 29 Sup. Ct. Rep. 81; Dermott v. Jones, 2 Wall. 1, 17 L. ed. 762; Spearin v. United States, 248 U. S. 136, 63 L. ed. 169, 39 Sup. Ct. Rep. 59.

Even had there been misrepresentation, claimant, by electing to proceed with the contract, ratified it and is estopped.

2 Pom. Eq. Jur. 4th ed. §§ 916, 917, p. 1915; Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259; Wilson v. New United States Cattle-Ranch Co. 20 C. C. A. 244, 36 U. S. App. 634, 73 Fed. 994; Kingman & Co. v. Stoddard, 29 C. C. A. 413, 57 U. S. App. 379, 85 Fed. 740; Richardson v. Lowe, 79 C. C. A. 317, 149 Fed. 628; Ripley v. Jackson Zinc & Lead Co. 136 C. C. A. 619, 221 Fed. 209; Gregg v. Megargel, 254 Fed. 733; Simon v. Goodyear Metallic Rubber Shoe Co. 52 L.R.A. 745, 44 C. C. A. 612, 105 Fed. 579; United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 309, 39 L. ed. 160, 164, 15 Sup. Ct. Rep. 97; Oregonian R. Co. v. Oregon R. & Nav. Co. 10 Sawy. 464, 22 Fed. 245.

By the finding of facts and the act defining its jurisdiction, the court of claims, if it had jurisdiction at all, is precluded from applying the measure of damages it applied in this case.

Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; Morgan v. United States, 14 Wall. 531, 20 L. ed. 738; Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; Juragua Iron Co. v. United States, 212 U. S. 297, 53 L. ed. 520, 29 Sup. Ct. Rep. 385, 15 Ann. Cas. 536; Basso v. United States, 239 U. S. 602, 60 L. ed. 462, 36 Sup. Ct. Rep. 226; Ball Engineering Co. v. J. G. White & Co. 250 U. S. 46, 63 L. ed. 835, 39 Sup. Ct. Rep. 393; Smith v. Bolles, 132 U. S. 125, 129, 33 L. ed. 279, 281, 10 Sup. Ct. Rep. 39, 16 Mor. Min. Rep. 159; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81.

Mr. **William L. Marbury** argued the cause, and, with Mr. W. L. Rawls, filed a brief for appellee:

Pleadings of technical formality were not requisite or customary in the court of claims.

United States v. Behan, 110 U. S. 347, 28 L. ed. 171, 4 Sup. Ct. Rep. 81.

A state of facts is thus exhibited which clearly entitled the appellee to recover, as for a breach of warranty or condition.

United States v. Spearin, 248 U. S. 132, 63 L. ed. 166, 39 Sup. Ct. Rep. 59; Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876, 18 Mor. Min. Rep. 98; United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 50 L. ed. 251, 26 Sup. Ct. Rep. 69; Hollerbach v. United States, 233 U. S. 165, 58 L. ed. 898, 34 Sup. Ct. Rep. 553; Christie v. United States, 237 U. S. 234, 59 L. ed. 933, 35 Sup. Ct. Rep. 565.

After stating the case as above, Mr. Justice **McKenna** delivered the opinion of the court:

The case turns upon the statement of the government of its belief of the character of the material to be encountered, [10] and, as misrepresentation, the omission from the map exhibited to bidders of the actual borings made and their disclosures.

The government asserts that there was no misrepresentation, basing the assertion upon the declaration of the specifications that no guaranty was intended, and the admonition to bidders that they must decide as to the character of the materials to be dredged, and to "make their bids accordingly."

The assertion puts out of view, we think, other and determining circumstances. There was not only a clear declaration of the belief of the government that its representation was true, but the

foundation of it was asserted to be the test of actual borings, and the reference to maps as evidence of what the borings had disclosed. The finding is that the maps contained a record of twenty-six borings as covering specified sections that were to be dredged, and of these ten were in the section of the river, which, by its contract afterwards made, the plaintiff agreed to dredge.

There was a further assertion of belief, through its "contracting officer," by the approval of the company's plant. As we have seen, the government's care of its interests extended to the inspection of the instrumentalities of the contractor, and required the character and capacity of the plant which was to be used, to be submitted for inspection and approval. In fulfilment of the requirement the company submitted its plant. It was only efficient for dredging material of the character mentioned in the specifications and described on the map, and it was so approved. The significance of the submission and approval is manifest. The character and capacity of the plant conveyed to the officer the fact that the company was accepting as true the representation of the specifications and the map of the materials to be dredged; and reciprocally the approval of the plant by the officer was an [11] assurance to the company of the truth of the representation, and a justification of reliance upon it.

The case is, therefore, within the ruling of United States v. Spearin, 248 U. S. 132, 136, 63 L. ed. 166, 169, 39 Sup. Ct. Rep. 59, where it is stated that the direction to contractors to visit the site and inform themselves of the actual conditions of a proposed undertaking will not relieve from defects in the plans and specifications, citing Christie v. United States, 237 U. S. 234, 59 L. ed. 933, 35 Sup. Ct. Rep. 565; Hollerbach v. United States, 233 U. S. 165, 58 L. ed. 898, 34 Sup. Ct. Rep. 553, and United States v. Utah, N. & C. Stage Co. 199 U. S. 424, 50 L. ed. 255, 26 Sup. Ct. Rep. 69. It is held in those cases "that the contractor ought to be relieved, if he was misled by erroneous statements in the specifications." The present case is certainly within the principle expressed. In the cited cases there was no qualification of the requirement; in this case it was accompanied by the expression of belief, and conduct which was, in effect, a repetition and confirmation of the belief, and gave assurance that it had a reliable foundation. The company, therefore, was justified in acting upon it.

The government, however, contends that, at best, the alternative was presented to the company, when it discovered the character of the materials, to either quit work and sue for damages, or continue the work; and that, having elected the latter, it cannot now resort to the other. In fortification of this contention it is said that "even if the government made a misrepresentation as to the borings, that misrepresentation would necessarily have been as to the character of the materials to be dredged, and claimant knew all there was to know about this from the 'very beginning.'"

This assumption and the extent of it and the conclusion from it are not justified. It is true the company discovered that the material it encountered was different in character from that represented, but the company did not know of the concealment of the actual test of the borings, and the fact that it, the company, attempted to [12] struggle on against the difficult conditions with its inefficient plant, should not be charged against it. In other words, it should not now be held to have been put to the suggested election. It did not know at that time of the manner in which the "test borings" had been made. Upon learning that they had been made by the probe method, it then elected to go no further with the work; that is, upon discovering that the belief expressed was not justified and was in fact a deception. And it was not the less so because its impulse was not sinister or fraudulent.

The government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We cannot assent. There is no intimation of bad faith against the officers of the government, and the Court of Claims regarded the representation of the character of the material as in the nature of a warranty; besides, its judgment is in no way punitive. It is simply compensatory of the cost of the work, of which the government got the benefit.

Affirmed.

The Chief Justice and Mr. Justice Clarke dissent.

EMILY M. MAGUIRE, Plff. in Err.,
v.
WILLIAM D. T. TREFRY, Tax Commissioner of the Commonwealth of Massachusetts.

(See S. C. Reporter's ed. 12–17.)

Constitutional law — due process of law — state income tax — income received from nonresident trustee.

A state may, without denying due process of law, tax the income received by a resident from securities held for her benefit by the trustee in a trust created and administered by the law of another state, and not directly taxable to the trustee.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

[No. 280.]

Argued March 24, 1920. Decided April 26, 1920.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment ordered by the Supreme Judicial Court of that state for the abatement of a part only of a tax upon income received from a nonresident trustee. Affirmed.

See same case below in supreme judicial court, 230 Mass. 503, 120 N. E. 162.

The facts are stated in the opinion.

Mr. Richard W. Hale argued the cause, and, with Mr. John M. Maguire, filed a brief for plaintiff in error:

No state may, directly or indirectly, tax property which is not in its jurisdiction.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 47 L. ed. 513, 518, 23 Sup. Ct. Rep. 463.

The subjects of taxation are three: persons, property, and business.

State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186.

Note.—As to personal property having a situs for taxation elsewhere, as subject of taxation in the state of the owner's domicil—see notes to Com. v. West India Oil Ref. Co. 36 L.R.A.(N.S.) 295; New England Mut. L. Ins. Co. v. Board of Assessors, 26 L.R.A.(N.S.) 1120; Johnson County v. Hewitt, 14 L.R.A.(N.S.) 493; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 2 L.R.A.(N.S.) 637; and Fidelity & C. Trust Co. v. Louisville, L.R.A.1918C, 124.

As to situs, as between different states or countries, of personal property for purposes of personal-property taxation —see note to Liverpool & L. & G. Ins. Co. v. Board of Assessors, L.R.A.1915C, 903.

As to constitutionality of income tax —see notes to State ex rel. Bolens v. Frear, L.R.A.1915B, 569; and Alderman v. Wells, 27 L.R.A.(N.S.) 864.

Validity and construction of statutes taxing the income of a resident derived from foreign trade or investments.

I. Validity, 739.
II. Construction, 739.

I. Validity.

The power of a state under the Federal Constitution to tax its residents upon income derived from sources in other states is quite broad. A tax upon income derived from securities held by a trustee in a trust created and administered by the law of another state, and not directly taxable to the trustee, is sustained in MAGUIRE v. TREFRY, affirming 230 Mass. 503, 120 N. E. 162. It has been held that a state, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Federal Constitution, where there is no discrimination against interstate commerce, either in the admeasurement of the tax, or in the means adopted for enforcing it. United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748.

But a state cannot, consistently with the guaranty of the equal protection of the laws, contained in the 14th Amendment to the Federal Constitution, impose a tax in the case of a domestic corporation doing business both within and without the state, upon the corporate income derived from the business done without the state, as well as upon that done within, and at the same time exempt from the tax a domestic corporation doing its entire business without the state. F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, post, 989, 40 Sup. Ct. Rep. 560.

II. Construction.

Many questions as to the construction of statutes taxing residents on income derived from sources in other states have arisen. For example, questions

This income tax might be a levy on the person, measured by income; or an excise imposed on the business (or privilege) of receiving income; or a property tax either upon the income itself or upon the principal of the trust. The Federal general income tax is an excise so far as it applies to citizens or residents.

Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713.

But it is plainly and necessarily a property tax so far as it applies to the income accruing to nonresident aliens from their bonds and other securities in this country.

De Ganay v. Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524.

That portion of the Massachusetts income tax here drawn in question has been adjudged a property tax, and not a personal tax or a tax on business.

Tax Comr. v. Putnam (Trefry v. Putnam) 227 Mass. 522, L.R.A.1917F, 806, 116 N. E. 904.

---

have arisen as to the extent to which the statute intends to tax such income.

The Massachusetts Income Tax Law under consideration in Maguire v. Trefry, by construction in Maguire v. Tax Comr. 230 Mass. 503, 120 N. E. 162, was held not to levy a tax upon the income which a resident beneficiary of a trust estate administered in another state received from securities taxed to the trustee in the latter state. Although the Massachusetts act was quite broad, it referred to the general taxing law, and provided that the act should not be construed to impose a tax on any person in respect to income derived from property exempt from taxation. The general law provided that if the executor or administrator or trustee was not an inhabitant of the commonwealth, the tax should be assessed to the person to whom the income is payable, where he resides, if it was not legally taxable to the executor, administrator, or trustee under a testamentary trust in the other state.

A statute levying a tax "upon all income . . . received by every person residing within the state, and by every nonresident of the state upon such income as is derived from sources within the state or within its jurisdiction," and which, in the following sentence, levied a tax upon "so much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities, or evidences of indebtedness . . . whether such income is derived from sources within or without the state," was construed in State ex rel. Arpin v. Eberhardt, 158 Wis. 20, 147 N. W. 1016, to impose a tax, by the general provision first above quoted, only upon so much of the income of a resident as was derived from sources within the state; and, by virtue of the second provision, only upon income from the sources mentioned, whether within or without the state; consequently the income derived by a resident from a dredging business in another state, carried on within that state by a partnership composed of a resident of the state of Wisconsin and two other partners, all the property and machinery belonging to the business being located in the other state, and there taxed, was held not taxable to the resident of Wisconsin. Upon the authority of this case, it was held that, assuming, without deciding, that an inheritance of real estate, located in another state, is income within the meaning of the statute, it is not assessable, being within the class of incomes derived from sources wholly without the state, and not mentioned in the statute. State ex rel. Brenk v. Widule, 161 Wis. 396, 154 N. W. 696.

Business income "derived from business transacted and property located within the state" includes all of a corporation's business income derived from the manufacture, sale, and delivery of such of its products as are manufactured, sold, and delivered from its factory in Wisconsin to customers in Wisconsin and other states, and also the net business income of its products which were manufactured at its factory and shipped from there to its branch houses out of the state, and delivered from there to customers residing outside of the state, on sales being made either from the home office or at the branch houses. A statute attempting to levy an income tax upon the business income as thus defined was sustained in United States Glue Co. v. Oak Creek, 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421. This conclusion of the state court was sustained by the United States Supreme Court, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748.

English cases.

By 16 & 17 Vict. chap. 34, § 2, Schedule D, an income tax is imposed: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether

Considered as a property tax, this income tax is imposed on principal rather than on the income as received.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 579, et seq. 39 L. ed. 759, 818, 15 Sup. Ct. Rep. 673; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 618, 628, 39 L. ed. 1108, 1119, 1122, 15 Sup. Ct. Rep. 912; Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 344, 345, 30 L. ed. 1200, 1204, 1205, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Opinion of Justices, 220 Mass. 623, 108 N. E. 570; Hunt v. Perry, 165 Mass. 287, 43 N. E. 103; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

Irrespective of its technical nature, this tax must be deemed one in substance imposed on the trust principal.

Brushaber v. Union P. R. Co. 240 U. S. 1, 12, 60 L. ed. 493, 499, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Thomas v. United States, 192 U. S. 363, 370, 48 L. ed. 481, 483,

situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every 20 shillings of the annual amount of such profits and gains. And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every 20 shillings of the annual amount of such profits and gains. And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this act, and to be charged for every 20 shillings of the annual amount thereof."

The language of this section of the statute is sweeping in its inclusions, but its effect has been controlled by subsequent sections. It is provided that the duties imposed by the section are to be charged according to certain rules, styled "cases." The first and fifth of these cases, as found in 5 & 6 Vict. chap. 35, § 100, are the ones that have most frequently been involved in the question under annotation, and are as follows: "Schedule D. . . . Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned. First case: Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedules of this act. . . . Rules. —1st: The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending, etc. . . . Fifth case: The duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of her Majesty's dominions out of Great Britain, and foreign possessions. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain, and arising from property which shall not have been imported into Great Britain, or from money or value so received on credit or on account in respect of such remittances, property, money, or value brought, or to be brought, into Great Britain, computing the same on an average of the three preceding years, as directed in the first case, without other deduction or abatement than is hereinbefore allowed in such case."

These cases vary in prescribing the methods for ascertaining the amount of income of foreign trades or investments. In brief, in case 1, the duty is charged on the full amount of the profits or gains of such trade, while in case 5 the duty is charged on only so much of the profits of the trade, etc., as is received in the United Kingdom. The contest in many of the English cases has been to bring the case within case 5, thus subjecting to the tax only so much of the profits as have been received in the United Kingdom.

In the first case decided by the House of Lords, a merchant residing in England, and carrying on a business there, who was also a partner with a large capital invested in an independent business carried on entirely at Melbourne, Australia, was held to be taxable under the fifth case of Schedule D, and there-

24 Sup. Ct. Rep. 305; Hittinger v. Westford, 135 Mass. 260; Boston Loan Co. v. Boston, 137 Mass. 335; International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617; Flint v. Stone Tracy Co. 220 U. S. 107, 150, 55 L. ed. 389, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Dyer v. Melrose, 197 Mass. 99, 34 L.R.A.(N.S.) 1215, 125 Am. St. Rep. 330, 83 N. E. 6, 215 U. S. 594, 54 L. ed. 341, 30 Sup. Ct. Rep. 410; State v. Brim, 57 N. C. (4 Jones, Eq.) 300; Hood's Estate, 21 Pa. 115; Hay v. Fairlie, 1 Russ. Ch. 128, 38 Eng. Reprint, 49.

If a life tenant residing in Massachusetts exercised a testamentary power of appointment over either the corpus or the income of the fund, Massachusetts could not reach the transfer, even with the long arm of an inheritance or estate tax.

Walker v. Treasurer, 221 Mass. 600, 109 N. E. 647.

The taxation of trusts historically involves assessment of the legal estate.

---

fore to be liable to the income tax in respect only of so much of the profits of his Australian business as were brought to England either in kind or in money, and not to be liable in respect to all the profits of that trade. Colquhoun v. Brooks, L. R. 14 App. Cas. 493, 59 L. J. Q. B. N. S. 53, 61 L. T. N. S. 518, 38 Week. Rep. 289, 54 J. P. 277.

In the subsequent case of San Paulo (Brazilian) R. Co. v. Carter [1896] A. C. 31, 65 L. J. Q. B. N. S. 161, 73 L. T. N. S. 538, 44 Week. Rep. 336, 60 J. P. 84, 452, Lord Watson attributes the decision in Colquhoun v. Brooks to the principle that the Income Tax Acts contained no machinery for assessing under the first case, profits accruing from any trade which is not wholly or in part carried on within the United Kingdom, whereas the acts do provide machinery for assessing under the fifth case, profits arising from trade exclusively carried on outside the United Kingdom. And Lord Watson adds that, in his opinion, Colquhoun v. Brooks establishes the rule that the answer to the question whether the tax falls within the first or the fifth case depends upon where the trade is carried on. If no part of the trade is carried on within the United Kingdom, the tax is leviable under the fifth case; but if all or any part of the trade is carried on within the United Kingdom, the tax is leviable under the first case. This principle is affirmed in Mitchell v. Egyptian Hotels, [1915] A. C. 1022, 84 L. J. K. B. N. S. 1772, [1915] W. N. 281, 31 Times L. R. 546, 59 Sol. Jo. 649. In this view the question, therefore, under this statute, resolves itself into the very practical one of where a trade is carried on.

Where a trade is carried on is recognized by the English cases to be a question of difficulty; ordinarily it is a question of fact in the individual case. [See also note to Shaffer v. Carter, ante, 445, on this point.] Many of the cases have involved English companies, and the control which the British company has exercised is emphasized in the determination of where the trade is carried on.

An English company incorporated with limited liability under British statutes, and having its registered office in London organized for the purpose of constructing and operating a railway in Brazil, the business of which is vested in a board of directors in London, which has the direction and supreme control of the business, was held in San Paulo (Brazilian) R. Co. v. Carter, supra, to be carrying on a trade at least in part in England, and therefore to be subject to a tax leviable under the first case. The facts that the directors were authorized by the articles of association to manage and work the railway and its connections through a superintendent in Brazil, appointed by them, and a staff of servants in Brazil, who were under the superintendent's immediate supervision, and that the receipts of the company from which profits made by it were derived were earned and paid in Brazil, were held not to change the rule. The court states that, notwithstanding these facts, the substantial fact remains that the directors, subject to any resolutions which may be passed for their guidance by the members of the company, were vested with the sole right to manage and control every department of its affairs.

It was found as a fact that a company incorporated in New Jersey, which engaged in spinning cotton thread and selling it mainly in the United States, to a small extent in Australia and Canada, but not in the United Kingdom, owning mills and real estate in Massachusetts, Connecticut, and Rhode Island, the whole of the common stock of the company being held by, or by trustees for, an English company, the English Sewing Cotton Co. Ltd., was controlled and managed by directors of the company resident in England, in extraor-

The clumsy-fingered tax gatherer of the older days could not grasp so elusive a thing as an equity. He sought out the property and the legal owner, and there levied his charge.

Trinity College v. Browne, 1 Vern. 441, 23 Eng. Reprint, 573; Hall v. Bromley, L. R. 35 Ch. Div. 655, 56 L. J. Ch. N. S. 722, 56 L. T. N. S. 683, 35 Week. Rep. 659; Latrobe v. Baltimore, 19 Md. 13; Watson v. Boston, 209 Mass. 18, 95 N. E. 302.

It is a misconception to think that the situs of the trust property can be held to be in a place because a life tenant of the trust property is domiciled there.

New York ex rel. Hatch v. Reardon, 204 U. S. 152, 161, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432; Crocker v. Malley, 249 U. S. 223, 63 L. ed. 573, 2 A.L.R. 1601, 39 Sup. Ct. Rep. 270; Kraay v. Gibson, 15 Ohio Dec. 323, s. c. 17 Ohio Dec. 218; Southern P. Co. v. Kentucky, 222 U. S.

---

dinary sessions; and it being held to be a resident of England, it was held assessable for an income tax on the whole of its annual profits and gains arising or accruing from its trade, whether carried on in England or elsewhere. American Thread Co. v. Joyce, 108 L. T. N. S. 353, 29 Times L. R. 266, 57 Sol. Jo. 321, 50 Scot. L. R. 665.

A foreign company which had its head office in the United Kingdom, and did its business there through its board of directors, was held to be assessable upon the entire profits made by the company. Goerz v. Bell [1904] 2 K. B. 136, 73 L. J. K. B. N. S. 448, 53 Week. Rep. 64, 90 L. T. N. S. 675, 20 Times L. R. 348.

On the contrary, an English company resident in London, with registered offices there, which owned hotels in Egypt, which were controlled by a local board in Egypt, intrusted with the exclusive management and control of the business, the London board controlling no part of the carrying on of the hotel trade, was held not to be carrying on a trade in England within the meaning of the Income Tax Law, although it was provided in the by-laws of the company that the London directors were to cause two accounts to be kept, and were to recommend what the dividends should be, and also to have control over an increase in capital. Egyptian Hotels v. Mitchell [1914] 3 K. B. 118, 83 L. J. K. B. N. S. 1510, 111 L. T. N. S. 189, 30 Times L. R. 457, 58 Sol. Jo. 494. Upon appeal to the House of Lords, the Lords present being equally divided, the decision of the court of appeal was affirmed. [1915] A. C. 1022 [1915] W. N. 281, 84 L. J. K. B. N. S. 1772, 31 Times L. R. 546, 59 Sol. Jo. 649. Lord Parker, of Waddington, and Lord Sumner agreed with the court of appeal, while Earl Loreburn and Lord Parmoor were of the opinion that a trade was being carried on in England. The last-named judges emphasized the financial control which the London board of directors exercised, and held that there was evidence to support the finding of the commissioners that the head and seat and controlling power of the company remained in England, with the board of directors of the company; hence, that a trade was carried on in England, within the meaning of the Income Tax Law.

The question of control has been held determinative even where the English company exercises such control through the ownership of all or a majority of the stock of a foreign company, which actually carries on the business.

An English corporation organized under the English Companies Act, and registered in England, which acquired all but fourteen of the fifty thousand, eight hundred and eighty-six shares of an American brewing company, and which exercised control over the American company, was held to be carrying on the trade of the American company, and to be assessable upon the entire profits. St. Louis Breweries v. Apthorpe, 79 L. T. N. S. 551, 47 Week. Rep. 334, 15 Times L. R. 112, 63 J. P. 135.

A similar decision upon similar facts appears in Apthorpe v. Peter Schoenhofen Brewing Co. 80 L. T. N. S. 395, 15 Times L. R. 245, where an English company was organized for the purpose of acquiring and operating a brewery in the state of Illinois, and, in order to avoid any difficulty in connection with the Illinois state laws, which prevented alien corporations and persons from holding real property in the state, maintained the American corporate organization to operate the brewery, and acquired all but three of the shares of stock in the American corporation. The English company was held to be carrying on the brewery trade in England, within the meaning of the Income Tax Laws, where the control of the American business rested with the English corporation.

63, 76, 56 L. ed. 96, 101, 32 Sup. Ct. Rep. 13; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; Green v. Van Buskirk, 7 Wall. 139, 150, 19 L. ed. 109, 113; Story, Confl. L. § 550; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 399, 51 L. ed. 853, 855, 27 Sup. Ct. Rep. 499; New York ex rel. Burke v. Wells, 208 U. S. 14, 52 L. ed. 370, 28 Sup. Ct. Rep. 193; De Ganay v. Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524; People ex rel. Hoyt v. Tax & A. Comrs. 23 N. Y. 240; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A.(N.S.) 295, 129 S. W. 301; Leavell v. Blades, 237 Mo. 695, 141 S. W. 893; Robinson v. Dover, 59 N. H. 521; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C. 124, 38 Sup. Ct. Rep. 40; Kingman County v. Leonard, 57 Kan. 535, 34 L.R.A. 810, 57 Am. St. Rep. 347, 46 Pac. 960; Putnam v. Middleborough, 209 Mass. 456, 95 N. E. 749; Newcomb

Frank Jones Brewing Co. v. Apthorpe, 15 Times L. R. 113, is decided upon the authority of Apthorpe v. Peter Schoenhofen Brewing Co. supra.

But stock control by an English corporation of a foreign corporation which transacts business abroad does not, of itself, make the business that of the English company. This is true even if the English corporation owns the entire stock in the foreign company. Gramophone & Typewriters v. Stanley [1908] 2 K. B. 89, 77 L. J. K. B. N. S. 834, 99 L. T. N. S. 39, 24 Times L. R. 480, 15 Manson, 251. The question has been stated to be, "Whose is the business that is being carried on?" Kodak v. Clark [1902] 2 K. B. 450, 71 L. J. K. B. N. S. 791, 67 J. P. 26, 51 Week. Rep. 75, 18 Times L. R. 686, affirmed in [1903] 1 K. B. 505, 72 L. J. K. B. N. S. 369, 67 J. P. 213, 51 Week. Rep. 459, 88 L. T. N. S. 155, 19 Times L. R. 243.

In the case last above cited, an English company which was organized to and did purchase 98 per cent of the shares of stock of an American company which carried on its business entirely in America was held not chargeable with an income tax upon the profits made by the American company, although there was control exercised by the English company. It is stated by Phillimore, J.: "I do not think it can possibly be said that Kodak, Limited, though controlling and managing the Eastman Kodak Company, is, when the Eastman Kodak Company carry on business under its control, thereby itself carrying on the business. The Eastman Kodak Company carries on business for its 100 per cent of shareholders; 98 per cent of those are the English company, and it has to carry on its business, so far as it lawfully can, under the control of and in obedience to the English company and its nominees; but it does not carry on the business for the English company, but for the English company plus the 2 per cent in America; and when one comes to consider what the relations between the two companies are, one sees that it is very important to keep that provision in view." Phillimore, J., very clearly states the questions arising in these cases as follows: "In this case there seems to be a mixing up of two very different questions. First of all, Whose business is it that is being carried on abroad? That is one question. A company may be formed in England, and there may be a sham company in America purporting to be carrying on business, and yet it may be the business of the English company, carried on abroad. That is one question. Then the other question is, If the business is really carried on abroad, but the directorate—the company that carries it on—is in England, where is the control, for the purpose of settling the question of taxation? One question is, Whose business is it? The other is, Who controls the one business? Now the San Paulo (Brazilian) R. Co. Case [1896] A. C. 31, 65 L. J. Q. B. N. S. 161, 73 L. T. N. S. 538, 44 Week. Rep. 336, 60 J. P. 48, 452, supra, and the Frank Jones Brewing Co. Case, supra (and some others), deal with the question of where is the control. There is one business carried on in America—one business carried on abroad; where is the control? If it is in England, then the business is partially carried on in England, and is taxable here. The other class of cases do not deal with that. They deal with the question of whose is the business carried on abroad, —is it the business of the English company, or is it the business of someone else? If it is the business of someone else, it matters not that the English company control it, supervise it, administer it; it is the business of the foreign company, and the foreign company own it." Accordingly, the English company was held not assessable upon the full profits made by the American company.

T[illegible] which the English

v. Paige, 224 Mass. 516, 113 N. E. 458; Com. v. B. F. Avery & Sons, 163 Ky. 828, 174 S. W. 518; Kinehart v. Howard, 90 Md. 1, 44 Atl. 1040; Lewis v. Chester County, 60 Pa. 325; Gardiner v. Treasurer, 225 Mass. 355, 114 N. E. 617.

The cestui que trust has an estate, not a bare right of action.

Brown v. Fletcher, 235 U. S. 589, 599, 59 L. ed. 374, 378, 35 Sup. Ct. Rep. 154; Currier v. Studley, 159 Mass. 22, 33 N. E. 709; Sawyer v. Cook, 188 Mass. 163, 74 N. E. 356; Freeman v. Baldwin, 13 Ala. 252; Dana v. Treasurer, 227 Mass. 562, 116 N. E. 941; Kinney v. Treasurer (Kinney v. Stevens) 207 Mass. 368, 35 L.R.A.(N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902.

Even were the cestui que trust remitted to a personal right only, the decision should be in her favor.

Jenkins v. Lester, 131 Mass. 357; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, 204, 50 L. ed. 150, 152, 153, 26 Sup. Ct. Rep. 36, 4

---

courts make, and which, in some cases, is very shadowy, is between exercising a controlling influence as stockholder, the business remaining that of the foreign corporation, and actually making the business of the foreign corporation that of the English, or, in other words, using the foreign corporation as a mere agent of the English.

In some cases involving companies, the question of residence has been emphasized; but this term seems to be used in a sense synonomous with control; for in De Beers Consol. Mines v. Howe [1906] A. C. 455, 95 L. T. N. S. 221, 22 Times L. R. 756, 75 L. J. K. B. N. S. 858, 13 Manson, 394, where Lord Loreburn, Ld. Ch., states the question on appeal to be whether the company "ought to be assessed to income tax on the footing that it is a company resident in the United Kingdom;" he further says that a company resides where its real business is carried on, and its real business is carried on where the central management and control actually abide. The company involved in the De Beers Consol. Mines Case was registered in South Africa, with its head office formally at Kimberley. The general meetings have always been held at that place. The profits of the company were made out of diamonds mined in South Africa, and sold under annual contracts to a syndicate for delivery in South Africa upon terms of division of profits realized on resale between the company and the syndicate. Some of the directors and life governors lived in South Africa, and there were directors' meetings at Kimberley as well as in London, but the majority of directors and life governors lived in England, and the directors' meetings in London were the meetings where the real control was always exercised in practically all the important business of the company except the mining operations. London had always controlled the negotiation of the contracts with the diamond syndicate, had determined the policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors. London had also always controlled matters that required to be determined by the majority of all the directors, which included all questions of expenditure except wages, materials, and such like at the mines, and a limited sum which might be spent by the directors at Kimberley. The commissioners arrived at the conclusion: "(1) That the trade or business of the appellant company constituted one trade or business, and was carried on and exercised by the appellant company within the United Kingdom at their London office. (2) That the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were in fact controlled, managed, and directed." And the court concludes that the company was resident within the United Kingdom for purposes of income tax, and must be assessed on that footing.

A company incorporated and registered in New Zealand, but which was managed and controlled in reality in London, was held resident of the United Kingdom, and assessable there, in New Zealand Shipping Co. v. Stephens, 96 L. T. N. S. 50, 23 Times L. R. 213, affirmed by court of appeal in 24 Times L. R. 172.

In an early case the residence of the corporation was treated as determinative of the question whether it was assessable upon its entire income or only on so much as was remitted to England. The court, having reached the conclusion that the company was resident in England, held it taxable on its entire profits, and not merely on so much as was remitted to England. Cesena Sulphur Co. v. Nicholson, L. R. 1 Exch. Div.

Ann. Cas. 493; Selliger v. Kentucky, 213 U. S. 200, 205, 206, 53 L. ed. 761, 764, 29 Sup. Ct. Rep. 449.

Mr. **William Harold Hitchcock** argued the cause, and, with Mr. J. Weston Allen, Attorney General of Massachusetts, filed a brief for defendant in error:

The sovereign of the domicil of the owner of personal property has jurisdiction to tax that property, whatever its character, or wherever it or the documents evidencing it are situated.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Bullen v. Wisconsin, 240 U. S. 625, 631, 60 L. ed. 830, 835, 36 Sup. Ct. Rep. 473; Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40; Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13; New Orleans v. Stempel, 175 U. S. 309, 322, 44 L. ed. 174, 181, 20 Sup. Ct. Rep. 110; Selliger v. Kentucky, 213 U. S. 200, 204, 53 L. ed.

428, 45 L. J. Exch. N. S. 821, 35 L. T. N. S. 275, 25 Week. Rep. 71. Two companies were involved in this decision, the one organized for the purpose of carrying on the trade or business of sulphur miners, manufacturers, or merchants, and the other for purchasing and operating certain jute mills in India. The sulphur company was organized under the English Joint Stock Companies Act, and was located in England, having an office there. It was formed for the purpose of developing and working mines of sulphur in Italy. The general meetings of the company were held in England, where the directors exercised general supervision over the company. The manufacturing part of the business was done in Italy. Subsequent to its organization in England the company was registered in Italy for all purposes, all the company's profits were earned in Italy, and only so much of the profits as was required to pay dividends to the English shareholders was sent to the United Kingdom. The jute mill company was organized under the Company's Act of England, and was not registered elsewhere than in England. It was organized for the purpose of taking over the business, good will, and plant of certain jute mills in India. The meetings of the directors were held at the office of one of the directors in England. The board of directors exercised a general control over the business. The profits were all made in India, and the only part that was sent to England was the amount transmitted to pay English expenses and dividends to English shareholders. Under these circumstances, both companies were held to reside in England, and, this being true, were assessed upon the full amount of the profits, without regard to where the trade was carried on, as is the case in the subsequent English cases.

Upon the authority of the Cesena Case, a company incorporated under the English Joint Stock Companies Act, and registered in England, which conducted gas works in foreign countries, was held taxable on its entire income, and not merely on so much as was remitted to England. Imperial Continental Gas Asso. v. Nicholson, 37 L. T. N. S. 717. See American Thread Co. v. Joyce, 108 L. T. N. S. 353, 29 Times L. R. 266, 57 Sol. Jo. 321, 50 Scot. L. R. 665, supra.

In two cases not much stress has been laid upon the control exercised by the English company, but the place where the business is carried on is held determinative. Bartholomay Brewing Co. v. Wyatt and Nobel Dynamite Trust Co. v. Wyatt [1893] 2 Q. B. 499, 62 L. J. Q. B. N. S. 525, 5 Reports, 564, 69 L. T. N. S. 561, 42 Week. Rep. 173, 58 J. P. 133. The authority of these cases has been doubted in subsequent cases. Kodak v. Clark [1902] 2 K. B. 450, 71 L. J. K. B. N. S. 791, 67 J. P. 26, 51 Week. Rep. 75, 18 Times L. R. 686; St. Louis Breweries v. Apthorpe, 79 L. T. N. S. 551, 47 Week. Rep. 334, 15 Times L. R. 112, 63 J. P. 135. In Bartholomay Brewing Co. v. Wyatt, supra, a British company formed to acquire and work breweries in the United States, which, being unable, because of the American law, to hold the property in the United States, organized an American company to be the owner of the property, all of the shares of the American company except those necessary to qualify the American directors or trustees being held by the English company, the shares in which were held partly in England and partly in America,—was held taxable only on so much of the profits of the business, which was carried on wholly in America, as was received in England. The supreme management and direction of the company rested with the English directors, who were periodically informed of the estimated results of the business in America, and of the amount estimated to be available

761, 763, 29 Sup. Ct. Rep. 449; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Wheeler v. Sohmer, 233 U. S. 434, 58 L. ed. 1030, 34 Sup. Ct. Rep. 607; Bonaparte v. Appeal Tax Ct. 104 U. S. 592, 26 L. ed. 845; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 354, 55 L. ed. 762, 767, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Blackstone v. Miller, 188 U. S. 189, 205, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277; Bliss v. Bliss, 221 Mass. 201, L.R.A.1916A, 889, 109 N. E. 148; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Kinney v. Treasurer (Kinney v. Stevens) 207 Mass. 368, 35 L.R.A. (N.S.) 784, 93 N. E. 586, Ann. Cas. 1912A, 902; Hawkridge v. Treasurer, 223 Mass. 134, 111 N. E. 707.

The right of the beneficiary of a trust is purely a right in personam,—a right that an individual trustee act in his ownership of property in a specified way.

---

for dividends. They prepared balance sheets, adding the English to the local expenses, and declared such dividends as they saw fit. The amount of the dividends for English shareholders in the English company was remitted to England; the amount required for American shareholders in the English company was retained and distributed in America. The court holds that this case falls within the rule announced in Colquhoun v. Brooks, L. R. 14 App. Cas. 493, 59 L. J. Q. B. N. S. 53, 61 L. T. N. S. 518, 38 Week. Rep. 289, 54 J. P. 277, supra, but Wright, J., states that there is another way in which the same conclusion may be reached on different grounds: "I think that, in point of law, whatever control is exercised by the English company is exercised by it as the holder of practically all the shares in the American company; and if that is so, the English company cannot be properly said to carry on the business of the American company at all."

Decided at the same time was the case of Nobel Dynamite Trust Co. v. Wyatt, supra, in which it was held that an English company organized to acquire and operate certain companies dealing in explosives, and which did so acquire several foreign companies, was taxable only on so much of the profits of the foreign companies as was received in England. By direction of the board of directors of the English company, the dividends due from the foreign companies to the foreign shareholders of the English company were paid directly, instead of being remitted to England. It was admitted, however, that the directors of the English company could have directed the amount of the dividends to be remitted to England, instead of being retained in the foreign countries.

— what constitutes a receipt of money.

As shown in the "cases" above set out, the result is dependent in some instances upon the "amount received" in the United Kingdom. When an amount has been "received" there has given rise to some dispute.

The interest on securities possessed by an English life insurance company outside of the United Kingdom, and never remitted to England, is not received in England, within the meaning of case 4 of the Income Tax Law, although such interest is taken into account by the English company in its balance sheet, in order to ascertain the profits of the year. Gresham Life Assur. Soc. v. Bishop [1902] A. C. 287, 86 L. T. N. S. 693, 50 Week. Rep. 593, 71 L. J. K. B. N. S. 618, 66 J. P. 755, 18 Times L. R. 626.

It had previously been held in another case in the Queen's bench division that interest on investments in India, received by an English insurance company at a branch in India, and entered upon the accounts of the company, and treated as if it had been received in England, was assessable for income tax. Universal Life Assur. Soc. v. Bishop, 81 L. T. N. S. 422, 68 L. J. Q. B. N. S. 962, 64 J. P. 5.

A company which sends funds out of the United Kingdom for investment cannot arbitrarily treat funds subsequently sent back as repayment of capital.

In Scottish Provident Inst. v. Allan [1903] A. C. 129, 88 L. T. N. S. 478, 67 J. P. 341, 72 L. J. P. C. N. S. 70, 19 Times L. R. 432, a mutual life assurance society sent for investment purposes, to Australia, the sum of one and one-half million dollars in round numbers, and at the end of the period in question had over two and a half million there. From time to time the Australian agents remitted sums to the home office in Scotland, designating them in each instance as the remittances or repayments of principal. The court of session arrived at the conclusion that the remittances were in fact remittances

2 Story, Eq. Jur. § 964; Langdell, Eq. Jur. p. 5; 2 Holmes, Select Essays in Anglo-American Legal History, 716; Kildare v. Eustace, 1 Vern. 419, 23 Eng. Reprint, 559; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Penn v. Baltimore, 1 Ves. Sr. 444, 27 Eng. Reprint, 1132; Brown v. Desmond, 100 Mass. 269; Hart v. Sansom, 110 U. S. 151, 154, 155, 28 L. ed. 101–103, 3 Sup. Ct. Rep. 586.

This right of the beneficiary is taxable at his domicil,

Peabody v. Treasurer, 215 Mass. 131, 102 N. E. 435; Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Bullen v. Wisconsin, 240 U. S. 625, 631, 60 L. ed. 830, 835, 36 Sup. Ct. Rep. 473; Bellows Falls Power Co. v. Com. 222 Mass. 51, 109 N. E. 891, Ann. Cas. 1916C, 834, 245 U. S. 630, 62 L. ed. 520, 38 Sup. Ct. Rep. 63; Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Greves v. Shaw, 173 Mass. 205, 53 N. E. 372; Re

of profits, and therefore subject to the income tax, and this conclusion was sustained by the House of Lords. The Earl of Halsbury, Ld. Ch., states that the case gives rise to a question of fact; that if the sum remitted was profits, it was subject to the income tax, but if it was a repayment of the principal, it was not so subject. He further states that if the parties would be able to show that some part of the remittances ought to be appropriated to capital, and could make it apparent that the money which was received was not all profit, but simply a payment of capital, it was for them to make the showing; that "prima facie, this remittance is a large amount of profit (looking at the figures) made by this trading company."

—what constitutes profits.

The question as to what constitutes profits of a business has also arisen.

Investments made by a life insurance company abroad, whether by reason of an obligation to comply with local laws or as a matter of business, to add to the stability of the company, its profit-earning or its attractiveness to foreign and colonial insurers, are in every sense of the term business investments, and the income derivable therefrom is taxable under case 1, relating to the profits of trade, and not necessarily taxable as interest arising from securities abroad. Liverpool & L. & G. Ins. Co. v. Bennett [1913] A. C. 610, 109 L. T. N. S. 483, 6 Tax Cas. 327, 82 L. J. K. B. N. S. 1221, 29 Times L. R. 757, 57 Sol. Jo. 739. Lord Shaw, of Dunfermline, states that it is not necessary to decide whether case 4, which relates to the duty to be charged in respect of interest arising from securities abroad, applies or not; that it is well settled that if a sufficient warrant be found in the statute for taxation under alternative heads, the alternative lies with the taxing authority. In this case they selected case 1,—a conclusion which the House of Lords sustains. The investments involved in this case fell within three classes; class A consists of investments made in various states of the United States and in Canada as deposits required by the local law as a condition of carrying on fire insurance business in the state in question or in the Dominion, as the case might be; and so long as the company carried on business therein, it was unable to recover possession of any part of the sum so deposited, the same being held as a fund out of which, in case of nonpayment of claims by the company, the policyholders in the said states and Dominion could be paid. Class B consists of investments made in the state of New York and in Canada as deposits required by the local law, not as a condition of carrying on business, but in order to enable the company to accept and retain risks beyond a certain limit. Class C consists of investments made in the United States, Canada, and Australia, not by reason of any legal obligation, but for the purpose of deriving income or profits from moneys of the company. The income from all three classes was held to be profit from the business, as above stated. Compare with Norwich Union F. Ins. Co. v. Magee, infra.

—branch offices.

In the case of an English company having foreign branch offices, a question as to the status of the profits of the branch office has arisen.

A bank with head office in London and branches in Mexico and Lima was held, in London Bank v. Apthorpe [1891] 2 Q. B. 378, 65 L. T. N. S. 601, 60 L. J. Q. B. N. S. 653, 39 Week. Rep. 564, 56 J. P. 86, to be a single business, which was carried on in the United Kingdom, and therefore the entire profits were taxable, and not merely so much as was remitted to the United Kingdom.

An insurance company with head of-

Bronson, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707; Hunt v. Perry, 165 Mass. 287, 43 N. E. 103.

Citizens of Massachusetts in many instances must go to the courts of other states to enforce their rights in foreign corporations in which they are shareholders. Yet, in all cases, shares of stock in such corporations, held by inhabitants of Massachusetts, are there taxable.

Smith v. Mutual L. Ins. Co. 14 Allen, 342; Williston v. Michigan S. & N. I. R. Co. 13 Allen, 400; Kimball v. St. Louis & S. F. R. Co. 157 Mass. 7, 34 Am. St. Rep. 250, 31 N. E. 697; Richards v. Security Mut. L. Ins. Co. 230 Mass. 320, 119 N. E. 744; Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842.

Mr. Justice **Day** delivered the opinion of the court:

Massachusetts has a statute providing for a tax upon incomes (Mass. Gen. Stat. 1916, chap. 269, § 9). In the act imposing the tax it is provided: "If an in-

---

fices in London and branch offices in America and in New Zealand is taxable upon profits made in the branches, and not remitted to the United Kingdom, but maintained in those countries for the purpose of increasing its reserves there, and thus meeting the requirements of the law. Norwich Union F. Ins. Co. v. Magee, 73 L. T. N. S. 733, 44 Week. Rep. 384. Compare with Liverpool & L. & G. Ins. Co. v. Bennett, supra.

— deduction for expenses.

Some cases have related to the deduction of expenses incurred in transacting the foreign business.

An English water company operating in Alexandria cannot deduct from the amount of its profits interest paid on certain debentures given for money borrowed by the company, since the fourth rule of § 100 of 5 & 6 Vict. chap. 35, expressly declares that, in estimating profits, "no deduction shall be made on account of any annual interest payable out of such profits or gains." Alexandria Water Co. v. Musgrave, L. R. 11 Q. B. Div. 174, 52 L. J. Q. B. N. S. 349, 49 L. T. N. S. 287, 32 Week. Rep. 146.

In Stevens v. Boustead [1916] 2 K. B. 560, 85 L. J. K. B. N. S. 1731, 115 L. T. N. S. 381, 32 Times L. R. 661, 61 Sol. Jo. 10, affirmed by court of appeal in [1917] W. N. 382, 34 Times L. R. 143, 144 L. T. Jo. 125, the annual value of premises in which business was carried on by a London firm in Singapore and Penang was held to be a proper deduction in arriving at the profits or gains assessable.

— foreign investments.

The majority of the English cases have related to profits of trade or business carried on abroad. Some cases, however, have related to foreign investments.

Payments made to the guardian of infants in England by the American trustees under an American will, who exercise their discretionary power as to such payments, were held to be income within the meaning of the Income Tax Law, in Drummond v. Collins [1914] 2 K. B. 643, 83 L. J. K. B. N. S. 729, 110 L. T. N. S. 653, 30 Times L. R. 353. Under the will in question the infants were not given any share in the estate except as the uncontrolled discretion of the trustees might determine, until they attained the age of twenty-five years, from which time the trustees were directed to pay over one half of the net income of the respective shares to the respective infants, and accumulate the balance until they should attain the age of thirty-five years, after which the entire income was to be paid to them. The court holds the trust fund to be a possession in America even before the children attain the age of twenty-five years, and any sums remitted by the trustees under their discretion to be income, as above stated.

The income from shares in a foreign company, held by trustees domiciled and resident in the United Kingdom, which is paid direct to a foreign beneficiary, not being remitted to the United Kingdom, is not income accruing to a person residing in the United Kingdom, the mere fact that the trustees are domiciled and resident in the United Kingdom not being sufficient to charge this income with the tax. Williams v. Singer [1919] 2 K. B. 108, 88 L. J. K. B. N. S. 757, 121 L. T. N. S. 108, 35 Times L. R. 455, 63 Sol. Jo. 496, affirmed by the House of Lords in 36 Times L. R. 661.

Under the fourth case of Schedule D of § 100 of the Income Tax Act 1842, income from foreign securities is to be computed on the full amount of the sums received or to be received in Great Britain during the current year; while, under the fifth case, income from foreign possessions is to be computed

habitant of this commonwealth receives income from one or more executors, administrators or trustees, none of whom is an inhabitant of this commonwealth or has derived his appointment from a court of this commonwealth, such income shall be subject to the taxes assessed by this act, according to the nature of the income received by the executors, administrators or trustees."

The plaintiff in error is a resident of the state of Massachusetts, and was taxed upon income from a trust created by the will of one Matilda P. MacArthur, formerly of Philadelphia. The plaintiff in error, under the will of the decedent, was the beneficiary of a trust thereby created. The securities were held in trust by the Girard Trust Company of Philadelphia. Those which were directly taxable to the trustee were held exempt from taxation in Massachuestts under the terms of the statute of that [14] state. The securities the income from which was held taxable in Massachusetts consisted of the bonds of three corporations and certain certificates of the Southern Railway Equipment Trust. These securities were held in the possession of the trustee in Philadelphia. The trust was being administered under the laws of Pennsylvania. The supreme judicial court of Massachusetts held the tax to be valid. 230 Mass. 503, 120 N. E. 162.

Of the nature of the tax the chief justice of Massachusetts, speaking for the supreme judicial court, said: "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom, and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government, measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in Bates v. Boston, 5 Cush. 93, at page 99: 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary."

We see no reason to doubt the correctness of this view of the nature and effect of the Massachusetts statute, and shall accept it for the purpose of considering the Federal [15] question before us, which arises from the contention of the plaintiff in error that the imposition of the tax was a denial of due process of law within the protection of the 14th Amendment to the Federal Constitution, because, it is alleged, the effect of the statute is to subject property to taxation which is beyond the limits and outside the jurisdiction of the state. To support this contention the plaintiff in error relies primarily upon the decision of this court in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493. In that case we held that tangible, personal property, permanently located in another state than that of the owner, where it had acquired a situs, and was taxed irrespective of the domicil of the

---

on an average of the sums annually received for three years preceding the assessment.

Shares of stock held by a resident of the United Kingdom in an American company are foreign possessions, and the computation of the tax thereon should be based upon the average income therefrom for the three preceding years, and not on the income in the year of assessment. Singer v. Williams [1919] 2 K. B. 94, 88 L. J. K. B. N. S. 766, 121 L. T. N. S. 684, 35 Times L. R. 364, affirmed by the House of Lords in 36 Times L. R. 659.

See Gresham Life Assur. Soc. v. Bishop [1902] A. C. 287, 86 L. T. N. S. 693, 50 Week. Rep. 593, 71 L. J. K. B. N. S. 618, 66 J. P. 755, 18 Times L. R. 626; Universal Life Assur. Soc. v. Bishop, 81 L. T. N. S. 422, 68 L. J. Q. B. N. S. 962, 64 J. P. 5; Scottish Provident Inst. v. Allan [1903] A. C. 129, 88 L. T. N. S. 478, 67 J. P. 341, 72 L. J. P. C. N. S. 70, 19 Times L. R. 432; Liverpool & L. & G. Ins. Co. v. Bennett [1913] A. C. 610, 109 L. T. N. S. 483, 82 L. J. K. B. N. S. 1221, 6 Tax Cas. 327, 29 Times L. R. 757, 57 Sol. Jo. 739; and Norwich Union F. Ins. Co. v. Magee, 73 L. T. N. S. 733, 44 Week. Rep. 384, supra.

owner, was beyond the taxing power of the state, and that an attempt to tax such property at the owner's domicil was a denial of due process of law under the 14th Amendment. This ruling was made with reference to cars of the Transit Company permanently employed outside the state of the owner's residence. In that case this court, in the opinion of Mr. Justice Brown, speaking for it, expressly said that the taxation of intangible personal property was not involved. 199 U. S. 211.

It is true that in some instances we have held that bonds and bills and notes, although evidences of debt, have come to be regarded as property which may acquire a taxable situs at the place where they are kept, which may be elsewhere than at the domicil of the owner. These cases rest upon the principle that such instruments are more than mere evidences of debt, and may be taxed in the jurisdiction where located, and where they receive the protection of local law and authority. Blackstone v. Miller, 188 U. S. 189, 206, 47 L. ed. 439, 445, 23 Sup. Ct. Rep. 277; People ex rel. Jefferson v. Smith, 88 N. Y. 576, 585. At the last term we held in De Ganay v. Lederer, 250 U. S. 376, 63 L. ed. 1042, 39 Sup. Ct. Rep. 524, that stocks and bonds issued by domestic corporations, and mortgages secured [16] on domestic real estate, although owned by an alien nonresident, but in the hands of an agent in this country with authority to deal with them, were subject to the Income Tax Law of October 3, 1913 (38 Stat. at L. 166, chap. 16, 4 Fed. Stat. Anno. 2d ed. p. 236).

In the present case we are not dealing with the right to tax securities which have acquired a local situs, but are concerned with the right of the state to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws of another state.

In Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40, we held that a bank deposit of a resident of Kentucky in the bank of another state, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case Union Refrigerator Transit Co. v. Kentucky, supra, was distinguished, and the principle was affirmed that the state of the owner's domicil might tax the credits of a resident, although evidenced by debts due from residents of another state. This is the general rule recognized in the maxim "mobilia sequuntur personam," and justifying, except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicil of the owner. We have pointed out in other decisions that the principle of that maxim is not of universal application, and may yield to the exigencies of particular situations. But we think it is applicable here.

It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership. "The legal owner holds the direct and absolute dominion over the property, in view of the law; but the income, profits, or benefits thereof in his hands belong wholly, or in part, to others." 2 Story, Eq. 11th ed. § 964. It is this property right belonging [17] to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts.

The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the 14th Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the state, which are held taxable at the domicil of the owner. Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

We find no error in the judgment and the same is affirmed.

Dissenting, Mr. Justice McReynolds.

COLEMAN J. WARD et al., Petitioners,
v.
BOARD OF COUNTY COMMISSIONERS OF LOVE COUNTY, OKLAHOMA.

(See S. C. Reporter's ed. 17-25.)

Certiorari to state court — Federal question — decision on non-Federal ground.

1. Non-Federal grounds put forward by the highest state court as the basis for its decision, but which are plainly untenable, cannot serve to bring the case within the rule that the Federal Supreme Court will not review the judgment of a state court where the latter has decided the case upon an independent ground not within the Federal objections taken, and that ground is sufficient to sustain the judgment.

Taxes — payment under protest — recovery back.

2. Indian allottees who, through pending suits and otherwise, were objecting and protesting that the collection of certain sums from them by a county as taxes on their allotments was forbidden by a law of Congress, cannot be said to have paid such taxes voluntarily so as to defeat their right to compel restitution, where, notwithstanding such protest, the county demanded payment of the taxes, and by threatening to sell the lands and by actually selling other lands similarly situated made it appear to such allottees that they must choose between paying the taxes and losing their land, with the result that, to prevent a sale and to avoid the imposition of a penalty of 18 per cent, they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal.

[For other cases, see Taxes, III. g, 2, in Digest Sup. Ct. 1908.]

Taxes — recovery back — compulsory payment.

3. No statutory authority is essential to enable or require a county to refund unlawful taxes collected by it by coercive means, although a portion of such taxes may have been paid over after collection to the state or to other municipal bodies.

[For other cases, see Taxes, III. g, 2, in Digest Sup. Ct. 1908.]

[No. 224.]

Submitted March 11, 1920. Decided April 26, 1920.

ON WRIT of Certiorari to the Supreme Court of the State of Oklahoma to review a judgment which reversed a judgment of the District Court of Love County, in that state, in favor of claimants in a suit to recover back taxes paid on Indian allotments. Reversed.

See same case below, — Okla. —, 173 Pac. 1050.

The facts are stated in the opinion.

Messrs. **John Emerson Bennett** and **George P. Glaze** submitted the cause for petitioners. Mrs. Estelle Balfour Bennett was on the brief:

The right of recovery herein rests upon a violation of vested rights which denies a right, title, privilege, and immunity claimed under the laws of the United States. The decision of the supreme court of Oklahoma operates to impair and deny the treaty contract of exemption within the contract clause of the Federal Constitution.

Choate v. Trapp, 224 U. S. 665, 679, 56 L. ed. 941, 947, 32 Sup. Ct. Rep. 565; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; White v. Hart, 13 Wall. 646, 654, 20 L. ed. 685, 688; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Von Hoffman v. Quincy, 4 Wall. 552, 18 L. ed. 409; Ogden v. Saunders, 12 Wheat. 231, 6 L. ed. 611; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Beers v. Haughton, 9 Pet. 359, 9 L. ed. 157; McCracken v. Hayward, 2 How. 612, 11 L. ed. 399; Planters' Bank v. Sharp, 6 How. 327, 12 L. ed. 458.

When the courts of Oklahoma excuse the retention of the money taken in this case by invoking a state rule of public policy, namely, the theory of voluntary payment, and the theory that a decision based upon the state construction constitutes a state question, this operates by law to take property without due process of law, and to deny the equal protection of the law, guaranteed by the Federal Constitution.

Raymond v. Chicago Union Traction Co. 207 U. S. 36, 52 L. ed. 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Ex parte Virginia, 100 U. S. 339, 370, 25 L. ed. 676, 687, 3 Am. Crim. Rep. 547; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143.

The voluntary-payment theory upon which the respondent would defeat and destroy the vested right of petitioners is not the law, and, upon such theory, counsel for respondent cannot successfully maintain in this court the right of Love county to retain money in its hands wrongfully received by it, which, in equity and good conscience, it is not entitled to retain.

Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Union P. R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131, P.U.R.1919B, 315, 39 Sup. Ct. Rep. 24.

It was early laid down as a rule, by this court, that counties could not retain money which had been received contrary to law.

Note.—On certiorari to state courts—see notes to Andrews v. Virginian R. Co. 63 L. ed. U. S. 236, and Bruce v. Tobin, 62 L. ed. U. S. 123.

As to necessity and sufficiency of statement of grounds in notice of protest required as condition of recovering back payment of an unlawful tax—see note to Whitford v. Clarke, 36 L.R.A. (N.S.) 476.

As to when taxes illegally assessed may be recovered back—see notes to Phelps v. New York, 2 L.R.A. 626; State ex rel. McCarty v. Nelson, 4 L.R.A. 300; and Erskine v. Van Arsdale, 21 L. ed. U. S. 63.

Louisiana v. Wood, 102 U. S. 294, 299, 26 L. ed. 153, 155; Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62.

A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if a Federal right or immunity which, if recognized and enforced, would require a different judgment, is specially set up or claimed.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; Sage v. Hampe, 235 U. S. 99, 59 L. ed. 147, 35 Sup. Ct. Rep. 94; Joy v. St. Louis, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478; Talbot v. First Nat. Bank, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; Curran v. Arkansas, 15 How. 304, 14 L. ed. 705.

Moneys paid under such circumstances as in this cause are, without a doubt, paid under coercion and duress, and are not voluntary.

Atchison, T. & S. F. R. Co. v. O'Connor, supra; Union P. R. Co. v. Public Service Commission, supra; Patton v. Brady, 184 U. S. 608, 614, 46 L. ed. 713, 717, 22 Sup. Ct. Rep. 493; Robertson v. Frank Bros. Co. 132 U. S. 17, 27, 33 L. ed. 236, 239, 10 Sup. Ct. Rep. 5; Swift Co. v. United States, 111 U. S. 22, 28, 28 L. ed. 341, 343, 4 Sup. Ct. Rep. 244; Maxwell v. Griswold, 10 How. 242, 256, 13 L. ed. 405, 411; State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 220, 20 L. ed. 370, 375; Herold v. Kahn, 86 C. C. A. 598, 159 Fed. 614.

There were pending at the time of collection of the sums paid by petitioners to Love county, suits to enjoin the collection of the purported tax, which suits were sufficient notice to the county of the taxpayers' claim to the money; and it is therefore error for the supreme court of Oklahoma to hold that the refund here demanded cannot be had because the county has distributed the tax money to the various municipal subdivisions of the county.

Du Bois v. Lake County, 10 Ind. App. 347, 37 N. E. 1057; Greenabaum v. King, 4 Kan. 332, 96 Am. Dec. 172; Shoemaker v. Grant County, 36 Ind. 175; United States Exp. Co. v. Allen, 39 Fed. 714; Hill, Trustees, 144; Chapman v. Douglas County, 107 U. S. 348, 361, 27 L. ed. 378, 383, 2 Sup. Ct. Rep. 62; Marsh v. Fulton County, 10 Wall. 676, 684, 19 L. ed. 1040, 1042; Louisiana v. Wood, 102 U. S. 294, 299, 26 L. ed. 153, 155; Miltenberger v. Cooke, 18 Wall. 421, 21 L. ed. 864; McCracken v. San Francisco, 16 Cal. 591; Clark v. Saline County, 9 Neb. 516, 4 N. W. 246; Pimental v. San Francisco, 21 Cal. 362; Argenti v. San Francisco, 16 Cal. 282.

The court erred in holding that the money paid respondent county as taxes upon allotted lands which were nontaxable under treaty with the United States and Act of Congress of June 28, 1898, was paid voluntarily, and that, in the absence of a state statute so authorizing, it cannot be recovered back.

Choate v. Trapp, 224 U. S. 665, 676, 56 L. ed. 941, 946, 32 Sup. Ct. Rep. 565; United States v. Chehalis County, 217 Fed. 285; State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 220, 20 L. ed. 370, 375; Herold v. Kahn, 86 C. C. A. 598, 159 Fed. 614; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 287, 56 L. ed. 436, 438, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Union P. R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131, P.U.R.1919B, 315, 39 Sup. Ct. Rep. 24; Patton v. Brady, 184 U. S. 608, 614, 46 L. ed. 713, 717, 22 Sup. Ct. Rep. 493; Robertson v. Frank Bros. Co. 132 U. S. 17, 27, 33 L. ed. 236, 239, 10 Sup. Ct. Rep. 5; Swift Co. v. United States, 111 U. S. 22, 28, 28 L. ed. 341, 343, 4 Sup. Ct. Rep. 244; Joannin v. Ogilvie, 49 Minn. 564, 16 L.R.A. 376, 32 Am. St. Rep. 581, 52 N. W. 217; Maxwell v. Griswold, 10 How. 242–256, 13 L. ed. 405–411; Ottawa University v. Stratton, 85 Kan. 246, 116 Pac. 892; United States v. Huckabee, 16 Wall. 414, 21 L. ed. 457.

In the administration of the affairs of Indians the courts of the United States have, from the beginning, declined to apply ordinary rules of forfeiture against them, but, on the contrary, have exercised a liberal construction at all times in determining their rights, based upon the fact that the Indians belong to a class of people who are not well informed of their rights, and therefore the necessity of liberal construction in determining all questions touching their persons and property. The Indian citizen is not on an equal footing with the county and its officers,

and such inequality must be made good by superior justice.

Choctaw Nation v. United States, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578.

The contractual character of the tax exemption to the Indian citizens is established in this case beyond controversy.

Choate v. Trapp, 224 U. S. 665, 679, 56 L. ed. 941, 947, 32 Sup. Ct. Rep. 565; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303.

To deny a remedy is, in effect, a denial of the right.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; White v. Hart, 13 Wall. 646, 654, 20 L. ed. 685, 688; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; VonHoffman v. Quincy, 4 Wall. 552, 18 L. ed. 409; Ogden v. Saunders, 12 Wheat. 231, 6 L. ed. 611; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Beers v. Haughton, 9 Pet. 359, 9 L. ed. 157; McCracken v. Hayward, 2 How. 612, 11 L. ed. 399; Planters' Bank v. Sharp, 6 How. 327, 12 L. ed. 458.

The judgment of the Oklahoma supreme court is error for the reason that it denies relief for the violation and destruction of a vested property right, and leaves petitioners without any remedy whatsoever therefor. The right which is thus destroyed, existing by virtue of a treaty with the United States and an act of Congress, such judgment of the state court not only overrides the due-process clause, but also denies operation of the equal-protection clause of the Federal Constitution.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Raymond v. Chicago Union Traction Co. 207 U. S. 20–41, 52 L. ed. 78–89, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Ex parte Virginia, 100 U. S. 339, 370, 25 L. ed. 676, 687, 3 Am. Crim. Rep. 547; Scott v. McNeal, 154 U. S. 34, 51, 38 L. ed. 896, 903, 14 Sup. Ct. Rep. 1108; Choate v. Trapp, supra.

Messrs. T. B. Wilkins, Russell Brown, George B. Rittenhouse, P. T. McVay, Clinton A. Galbraith, and George Trice filed a brief for respondent:

Love county was not liable for the taxes collected for and paid to the state and townships, towns, and school districts.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; 4 Dill. Mun. Corp. 5th ed. §§ 1616, 1617; Union Bank v. New York, 51 Barb. 183; Burlington & M. River R. Co. v. Buffalo County, 14 Neb. 54, 14 N. W. 539; Shoemaker v. Grant County, 36 Ind. 175; Stone v. Woodbury County, 51 Iowa, 522, 1 N. W. 745; Price v. Lancaster County, 18 Neb. 199, 24 N. W. 705; Meacham v. Newport, 70 Vt. 264, 40 Atl. 729; Com. use of Devoe v. Boske, 124 Ky. 468, 11 L.R.A.(N.S.) 1104, 99 S. W. 316; Wilson v. Allen County, 99 Kan. 586, 710, 162 Pac. 1158; Pawnee County v. Atchison, T. & S. F. R. Co. 21 Kan. 748.

The supreme court of Oklahoma was warranted in disregarding the allegations of mere conclusions in the petition, that Love county assessed, levied, collected, and retained all the taxes sought to be recovered, and same were not admitted by demurrer.

Williams v. Stewart, 115 Ga. 864, 42 S. E. 256; Prichard v. Morganton, 126 N. C. 908, 78 Am. St. Rep. 679, 36 S. E. 353; People v. Oakland Water Front Co. 118 Cal. 234, 50 Pac. 305; Henderson v. McMaster, 104 S. C. 268, 88 S. E. 645; Brown v. Avery, 63 Fla. 355, 58 So. 34, Ann. Cas. 1914A, 90; Heiskell v. Knox County, 132 Tenn. 180, 177 S. W. 483, Ann. Cas. 1916E, 1281; Fey v. Rossi Improv. Co. 23 Cal. App. 766, 139 Pac. 908; French v. Senate, 146 Cal. 604, 69 L.R.A. 556, 80 Pac. 1031, 2 Ann. Cas. 756; McLane v. Paschal, 8 Tex. Civ. App. 398, 28 S. W. 711; 31 Cyc. 337.

The supreme court of Oklahoma found that the petition did not separate the taxes so as to show what portion was paid to the state and to the various municipalities. Hence, it did not show what portion was paid to the county for which it might be liable, and, not being so itemized, the board of county commissioners did not err in disallowing the claims.

Allen v. Pittsburg County, 28 Okla. 773, 116 Pac. 175; Osterhoudt v. Rigney, 98 N. Y. 232; Smith v. Oklahoma County, 56 Okla. 677, 156 Pac. 186; Re Pinney, 17 Misc. 24, 40 N. Y. Supp. 717; Clyne v. Bingham County, 7 Idaho, 75, 60 Pac. 76; Miller v. Crawford County, 106 Wis. 210, 82 N. W. 175; Atchison County v. Tomlinson, 9 Kan. 167.

The supreme court of Oklahoma did not err in upholding the board of county commissioners in rejecting petitioner's claims for the reason they were not filed in time.

M'Clung v. Silliman, 6 Wheat. 598, 603, 5 L. ed. 340, 341; Pennsylvania R. Co. v. Wabash, St. L. & P. R. Co. 157 U. S. 225, 228, 39 L. ed. 682, 683, 15 Sup. Ct. Rep. 576; St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223, 60 L. ed. 966, 36 Sup. Ct. Rep. 602; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; Stillwater Advance Printing & Pub. Co. v. Payne County, 29 Okla. 862, 119 Pac. 1002; Herdman v. Woodson County, 6 Kan. App. 513, 50 Pac. 946; Elbert County v. Swift, 2 Ga. App. 47, 58 S. E. 396; Carroll v. Siebenthaler, 37 Cal. 193; Welch v. Santa Cruz County, 30 Cal. App. 123, 156 Pac. 1003; Royster v. Granville County, 98 N. C. 148, 3 S. E. 739; Perrin v. Honeycutt, 144 Cal. 87, 77 Pac. 776; Cochise County v. Wilcox, 14 Ariz. 234, 127 Pac. 758.

The proceeding selected to recover being under a state statute, and the petitioner having failed to recover because he failed to follow the statute, and because he did not file his claims in the time allowed by the statute, the question could, under such a procedure, be none other than a state question; and even where a tribe of Indians invoke a state procedure in seeking redress for their grievances, they are bound by the requirements of such procedure, the same as any private individual invoking it, and can bring it only in the same manner and within the same time as other persons.

Seneca Nation v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

The burden is on the assignee to show the competency of his assignor.

Schinotti v. Cuddy, 25 Misc. 556, 55 N. Y. Supp. 219.

If the Indian was incompetent to make a voluntary payment of the tax in the first instance, what made him competent to assign his claim for all taxes paid to Greenless, and to voluntarily give Greenless one half of what he collected, and run the risk of Greenless giving the other half, after Greenless had received it, to the Indian?

William Cameron & Co. v. Yarby, — Okla. —, 175 Pac. 206.

Taxes paid under mistake of law cannot be recovered back.

Johnson v. Grady County, 50 Okla. 188, 150 Pac. 497; Louisiana Realty Co. v. McAlester, 25 Okla. 726, 108 Pac. 391; Hutchison v. Brown, — Okla. —, 167 Pac. 624; Davenport v. Doyle, 57 Okla. 341, 157 Pac. 110; Spalding v. Hill, 47 Okla. 621, 149 Pac. 1133; Clark v. Holmes, 31 Okla. 164, 120 Pac. 642, Ann. Cas. 1913D, 385; Lewis v. Clements, 21 Okla. 167, 95 Pac. 769; Phillips v. Jefferson County, 5 Kan. 412; Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; Union P. R. Co. v. Dodge County, 98 U. S. 541, 25 L. ed. 196; Chesebrough v. United States, 192 U. S. 253, 259, 48 L. ed. 432, 434, 24 Sup. Ct. Rep. 262; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327; United States v. Edmondston, 181 U. S. 500, 45 L. ed. 971, 21 Sup. Ct. Rep. 718; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Wills v. Austin, 53 Cal. 152; San Francisco & N. P. R. Co. v. Dinwiddie, 8 Sawy. 312, 13 Fed. 789; Brunson v. Crawford County Levee Dist. 107 Ark. 24, 44 L.R.A. (N.S.) 293, 153 S. W. 828, Ann. Cas. 1915A, 493; Davie v. Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145; Cincinnati, N. O. & T. P. R. Co. v. Hamilton County, 120 Tenn. 1, 113 S. W. 261; Walser v. Board of Education, 160 Ill. 272, 31 L.R.A. 329, 43 N. E. 346; Otis v. People, 196 Ill. 542, 63 N. E. 1054; Robinson v. Kittitas County, 101 Wash. 422, 172 Pac. 554; Gaar, S. & Co. v. Shannon, 52 Tex. Civ. App. 634, 115 S. W. 361; Koewing v. West Orange, 89 N. J. L. 539, 99 Atl. 203; Re Meyer, 106 Fed. 831, 3 N. B. N. Rep. 436; Houston v. Feeser, 76 Tex. 365, 13 S. W. 266; Bristol v. Morganton, 125 N. C. 365, 34 S. E. 512; Couch v. Kansas City, 127 Mo. 436, 30 S. W. 117; Cincinnati, R. & Ft. W. R. Co. v. Wayne Twp. 55 Ind. App. 533, 102 N. E. 865; Slimmer v. Chickasaw County, 140 Iowa, 448, 118 N. W. 779, 17 Ann. Cas. 1028; Com. v. Ferries Co. 120 Va. 827, 92 S. E. 804; Barrow v. Prince Edward County, 121 Va. 1, 92 N. E. 910; Howell v. Ada County, 6 Idaho, 154, 53 Pac. 542; Jenks v. Lima Twp. 17 Ind. 326; Durham v. Montgomery County, 95 Ind. 182; Cincinnati, R. & Ft. W. R. Co. v. Wayne Twp. 55 Ind. App. 533, 102 N. E. 865; Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512; Powell v. St. Croix County, 46 Wis. 210, 50 N. W. 1013; Shane v. St. Paul, 26 Minn. 543, 6 N. W. 349; Lester v. Baltimore, 29 Md. 415, 96 Am. Dec. 542; Espy v. Ft. Madison, 14 Iowa, 226; Sheldon v. South School Dist. 24 Conn. 91; Forrest v. New York, 13 Abb. Pr. 352; Fleetwood v. New York, 2 Sandf. 475; New York & H. R. Co. v. Marsh, 12 N. Y. 308; Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220; Hoke v. Atlanta, 107 Ga. 416.

33 S. E. 412; Peebles v. Pittsburgh, 101 Pa. 304, 47 Am. Rep. 714; Wabaunsee County v. Walker, 8 Kan. 431; Dixson County v. Beardshear, 38 Neb. 389, 56 N. W. 990; Galveston City Co. v. Galveston, 56 Tex. 486; Williams v. Stewart, 115 Ga. 864, 42 S. E. 256; Kraft v. Keokuk, 14 Iowa, 86.

Messrs. T. B. Wilkins, Clinton A. Galbraith, George Trice, George B. Rittenhouse, and P. T. McVay also filed a brief for respondent:

There is no Federal question decided in the case.

Allen v. Pittsburg County, 28 Okla. 773, 116 Pac. 175; Bostick v. Noble County, 19 Okla. 92, 91 Pac. 1125; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Bush v. Person, 18 How. 82, 83, 15 L. ed. 273, 274; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Osterhoudt v. Rigney, 98 N. Y. 232; Parker v. Tillman County, 41 Okla. 723, 139 Pac. 981; Rust Land & Lumber Co. v. Jackson, 250 U. S. 71, 63 L. ed. 850, 39 Sup. Ct. Rep. 424; Seneca Nation v. Christy, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828; Smith v. Oklahoma County, 56 Okla. 672, 156 Pac. 186; Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; Washington v. Miller, 235 U. S. 422, 429, 59 L. ed. 295, 299, 35 Sup. Ct. Rep. 119.

The state court decided the case against the petitioner on a matter of general law, broad enough to sustain the judgment, and did not determine a Federal question adversely to him.

Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Chesebrough v. United States, 192 U. S. 253, 259, 48 L. ed. 432, 434, 24 Sup. Ct. Rep. 262; Christopher v. Mungen, 242 U. S. 611, 61 L. ed. 526, 37 Sup. Ct. Rep. 18; Clark v. Holmes, 31 Okla. 164, 120 Pac. 642, Ann. Cas. 1913D, 385; Davenport v. Doyle, 57 Okla. 341, 157 Pac. 110; Eustis v. Bolles, 150 U. S. 361, 366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; Fowler v. Lamson, 164 U. S. 252, 255, 41 L. ed. 424, 425, 17 Sup. Ct. Rep. 112; Garr, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Broadwell v. Carter County, — Okla. —, 175 Pac. 828; Hutchison v. Brown, — Okla. —, 167 Pac. 624; Johnson v. Grady County, 50 Okla. 188, 150 Pac. 497; Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926; Lewis v. Clements, 21 Okla. 167, 95 Pac. 769; Lieber v. Rogers, 37 Okla. 614, 133 Pac. 30; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Louisiana Realty Co. v. McAlester, 25 Okla. 726, 108 Pac. 391; Marcy v. Seminole County, 45 Okla. 1, 144 Pac. 611; McGeisey v. Seminole County, 45 Okla. 10, 144 Pac. 614; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 162, 10 L. ed. 105, 107; Phillips v. Jefferson County, 5 Kan. 412; Spalding v. Hill, 47 Okla. 621, 149 Pac 1133; Union P. R. Co. v. Dodge County. 98 U. S. 541, 25 L. ed. 196; Union P. R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131, P.U.R.1919B, 315. 39 Sup. Ct. Rep. 24; United States v Edmondston, 181 U. S. 500, 45 L. ed. 971, 21 Sup. Ct. Rep. 718; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327; Wabaunsee County v. Walker, 8 Kan. 431; Weilep v. Audrain, 36 Okla. 288, 128 Pac. 254; Whitmire v. Trapp, 33 Okla. 429, 126 Pac. 578; Wood v. Gleason, 43 Okla. 9, 140 Pac. 418; Zavaglia v. Notarbartolo, 243 U. S. 628, 61 L. ed. 936, 37 Sup. Ct. Rep. 403.

Even if the state court had decided a Federal question against petitioner, nevertheless it decided against him also upon independent grounds, not involving any Federal question, and broad enough to support the judgment, and for this reason the Federal question will not be considered.

Farson, Son & Co. v. Bird, 248 U. S. 268, 63 L. ed. 233, 39 Sup. Ct. Rep. 111; Garr, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Petrie v. Nampa & M. Irrig. Dist. 248 U. S. 154, 63 L. ed. 178, 39 Sup. Ct. Rep. 25.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a proceeding by and on behalf of Coleman J. Ward and sixty-six other Indians to recover moneys alleged to have been coercively collected from them by Love county, Oklahoma, as taxes on their allotments, which, under the laws and Constitution of the United States, were nontaxable. The county commissioners disallowed the claim, and the claimants appealed to the district court of the county. There the claimants' petition was challenged by a demurrer, which was overruled, [19] and the county elected not to plead further. A judgment for the claimants followed, and this was reversed by the supreme court. [— Okla —, 173 Pac. 1050.] The case is here on writ of certiorari.

The claimants, who were members of

the Choctaw Tribe and wards of the United States, received their allotments out of the tribal domain under a congressional enactment of June 28, 1898, which subjected the right of alienation to certain restrictions, and provided that "the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent." Chap. 517, 30 Stat. at L. 507. In the Act of June 16, 1906, enabling Oklahoma to become a state, Congress made it plain that no impairment of the rights of property pertaining to the Indians was intended (chap. 3335, § 1, 34 Stat. at L. 267); and the state included in its Constitution a provision exempting from taxation "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws." Art. 10, § 6. Afterwards Congress, by an act of May 27, 1908, removed the restrictions on alienation as to certain classes of allottees, including the present claimants, and declared that all land from which the restrictions were removed "shall be subject to taxation . . . ; as though it were the property of other persons than allottees." Chap. 199, §§ 1, 4, 35 Stat. at L. 312, 3 Fed. Stat. Anno. 2d ed. pp. 881, 887.

Following the last enactment the officers of Love and other counties began to tax the allotted lands from which restrictions on alienation were removed, and this met with pronounced opposition on the part of the Indian allottees, who insisted, as they had been advised, that the tax exemption was a vested property right which could not be abrogated or destroyed consistently with the Constitution of the United States. Suits were begun in the state courts to maintain the exemption and enjoin the [20] threatened taxation, one of the suits being prosecuted by some 8,000 allottees against the officers of Love and other counties. The suits were resisted, and the state courts, being of opinion that the exemption had been repealed by Congress, sustained the power to tax. English v. Richardson, 28 Okla. 408, 114 Pac. 710; Gleason v. Wood, 28 Okla. 502, 114 Pac. 703; Choate v. Trapp, 28 Okla. 517, 114 Pac. 709. The cases were then brought here, and this court held that the exemption was a vested property right which Congress could not repeal consistently with the 5th Amendment, that it was binding on the taxing authorities in Oklahoma, and that the state courts had erred in refusing to enjoin them from taxing the lands. Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; Gleason v. Wood, 224 U. S. 679, 56 L. ed. 947, 32 Sup. Ct. Rep. 571; English v. Richardson, 224 U. S. 680, 56 L. ed. 949, 32 Sup. Ct. Rep. 571.

While those suits were pending, the officers of Love county, with full knowledge of the suits, and being defendants in one, proceeded with the taxation of the allotments, demanded of these claimants that the taxes on their lands be paid to the county, threatened to advertise and sell the lands unless the taxes were paid, did advertise and sell other lands similarly situated, and caused these claimants to believe that their lands would be sold if the taxes were not paid. So, to prevent such a sale, and to avoid the imposition of a penalty of 18 per cent, for which the local statute provided, these claimants paid the taxes. They protested and objected at the time that the taxes were invalid, and the county officers knew that all the allottees were pressing the objection in the pending suits.

As a conclusion from these facts the claimants asserted that the taxes were collected by Love county by coercive means, that their collection was in violation of a right arising out of a law of Congress and protected by the Constitution of the United States, and that the county was accordingly bound to repay the moneys thus collected. The total amount claimed is $7,833.35, aside from interest.

[21] Such, in substance, was the case presented by the petition, which also described each tract that was taxed, named the allottee from whom the taxes were collected, and stated the amount and date of each payment.

In reversing the judgment which the district court had given for the claimants, the supreme court held, first, that the taxes were not collected by coercive means, but were paid voluntarily, and could not be recovered back, as there was no statutory authority therefor; and, secondly, that there was no statute making the county liable for taxes collected and then paid over to the state and municipal bodies other than the county,—which it was assumed was true of a portion of these taxes,—and that the petition did not show how much of the taxes was retained by the county, or how much paid over to the state and other municipal bodies, and therefore it could not be the basis of any judgment against the county.

The county challenges our jurisdiction by a motion to dismiss the writ of certiorari, and by way of supporting the motion insists that the supreme court put its judgment entirely on independent non-Federal grounds which were broad enough to sustain the judgment.

As these claimants had not disposed of their allotments, and twenty-one years had not elapsed since the date of the patents, it is certain that the lands were nontaxable. This was settled in Choate v. Trapp, supra, and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the state and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love county, no matter what was said in local statutes. The county did not respect it, but, on the contrary, assessed the lands allotted to these claimants, placed them on the county tax roll, and there charged them with taxes like [22] other property. If a portion of the taxes was to go to the state and other municipal bodies after collection,—which we assume was the case,—it still was the county that charged the taxes *against these lands* and proceeded to collect them. Payment of all the taxes was demanded by the county, and all were paid to it in the circumstances already narrated.

We accept so much of the supreme court's decision as held that, if the payment was voluntary, the moneys could not be recovered back in the absence of a permissive statute, and that there was no such statute. But we are unable to accept its decision in other respects.

The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support. Union P. R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131, P.U.R.1919B, 315, 39 Sup. Ct. Rep. 24; Leathe v. Thomas, 207 U. S. 93, 99, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. 243 U. S. 157, 164, 61 L. ed. 644, 37 Sup. Ct. Rep. 318. And see Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. ed. 173, 177; Huntington v. Attrill, 146 U. S. 657, 683, 684, 36 L. ed. 1123, 1133, 1134, 13 Sup. Ct. Rep. 224; Boyd v. Nebraska, 143 U. S. 135, 180, 36 L. ed. 103, 116, 12 Sup. Ct. Rep. 375; Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687. Of course, if non-Federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767. With this qualification, it is true that a judgment of a state court, which is put on [23] independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof.

The facts set forth in the petition, all of which were admitted by the demurrer whereon the county elected to stand, make it plain, as we think, that the finding or decision that the taxes were paid voluntarily was without any fair or substantial support. The claimants were Indians, just emerging from a state of dependency and wardship. Through the pending suits and otherwise they were objecting and protesting that the taxation of their lands was forbidden by a law of Congress. But, notwithstanding this, the county demanded that the taxes be paid, and by threatening to sell the lands of these claimants, and actually selling other lands similarly situated, made it appear to the claimants that they must choose between paying the taxes and losing their lands. To prevent a sale and to avoid the imposition of a penalty of 18 per cent, they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal. The moneys thus collected were obtained by coercive means,—by compulsion. The county and its officers reasonably could not have regarded it otherwise; much less the Indian claimants. Atchison, T. & S. F. R. Co. v. O'Connor,

223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Gaar, S. & Co. v. Shannon, 223 U. S. 471, 56 L. ed. 512, 32 Sup. Ct. Rep. 236; Union P. R. Co. v. Public Service Commission, supra; Swift & C. B. Co. v. United States, 111 U. S. 22, 29, 28 L. ed. 341, 343, 4 Sup. Ct. Rep. 244; Robertson v. Frank Bros. Co. 132 U. S. 17, 23, 33 L. ed. 236, 238, 10 Sup. Ct. Rep. 5; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 329, 53 L. ed. 1013, 1018, 29 Sup. Ct. Rep. 671. The county places some reliance on Lamborn v. Dickinson County, 97 U. S. 181, 24 L. ed. 926, and Union P. R. Co. v. Dodge County, 98 U. S. 541, 25 L. ed. 196; but those cases are quite distinguishable in their facts, and some of the [24] general observations therein to which the county invites attention must be taken as modified by the later cases just cited.

As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well-settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." Marsh v. Fulton County, 10 Wall. 676, 684, 19 L. ed. 1040, 1042; Louisiana v. Wood, 102 U. S. 294, 298, 299, 26 L. ed. 153, 155; Chapman v. Douglas County, 107 U. S. 348, 355, 27 L. ed. 378, 381, 2 Sup. Ct. Rep. 62. To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the 14th Amendment, which binds the county as an agency of the state.

If it be true, as the supreme court assumed, that a portion of the taxes was paid over, after collection, to the state and other municipal bodies, we regard it as certain that this did not alter the county's liability to the claimants. The county had no right to collect the money, and it took the same with notice that the rights of all who were to share in the taxes were disputed by these claimants, and were being contested in the pending suits. In these circumstances it could not lessen its liability by paying over a portion of the money to others whose rights it knew were disputed and were no better than its own. Atchison, T. & S. F. R. Co. v. O'Connor, supra, p. 287. In legal contemplation it received the money for the use and benefit of the claimants, and should respond to them accordingly.

[25] The county calls attention to the fact that in the demurrer to the petition the Statute of Limitation (probably meaning § 1570, Rev. Laws 1910) was relied on. This point was not discussed by the supreme court, and we are not concerned with it beyond observing that when the case is remanded, it will be open to that court to deal with the point as to the whole claim or any item in it as any valid local law in force when the claim was filed may require.

Motion to dismiss denied.

Judgment reversed.

GEORGE R. BROADWELL, Petitioner,
v.
BOARD OF COUNTY COMMISSIONERS OF CARTER COUNTY, OKLAHOMA.

(See S. C. Reporter's ed. 25, 26.)

This case is governed by the decision in Ward v. Love County, ante, 751.

[No. 289.]

Submitted March 25, 1920. Decided April 26, 1920.

ON WRIT of Certiorari to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Carter County, in that state, sustaining a demurrer to a petition for the recovery back of taxes paid on Indian allotments. Reversed.

Note.—On certiorari to state courts—see notes to Andrews v. Virginian R. Co. 63 L. ed. U. S. 236, and Bruce v. Tobin, 62 L. ed. U. S. 123.

As to necessity and sufficiency of statement of grounds in notice of protest required as condition of recovering back payment of an unlawful tax—see note to Whitford v. Clarke, 36 L.R.A. (N.S.) 476.

As to when taxes illegally assessed may be recovered back—see notes to Phelps v. New York, 2 L.R.A. 626; State ex rel. McCarty v. Nelson, 4 L.R.A. 300; and Erskine v. VanArsdale, 21 L. ed. U. S. 63.

See same case below, — Okla. —, 175 Pac. 828.

The facts are stated in the opinion.

Mr. **George P. Glaze** submitted the cause for petitioner.

Messrs. **George B. Rittenhouse, Clinton A. Galbraith, P. T. McVay,** and **J. A. Bass** submitted the cause for respondent. Messrs. Russell Brown and George Trice were on the brief.

For contentions of counsel, see their briefs as reported in Ward v. Love County ante, 751.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a proceeding to recover moneys charged to have been paid under compulsion by a number of Choctaw and [26] Chickasaw Indians to Carter county, Oklahoma, as taxes on allotted lands which were nontaxable. The county commissioners disallowed the claim; the district court of the county to which the claimants appealed sustained a demurrer to their petition and rendered judgment against them, and the supreme court affirmed the judgment. — Okla. —, 175 Pac. 828. The total amount claimed is $22,455.99, aside from interest.

The case as presented here is in all material respects like Ward v. Love County, just decided [253 U. S. 17, ante, 751, 40 Sup. Ct. Rep. 419], and its decision properly may be rested on the opinion in that case.

Motion to dismiss denied.

Judgment reversed.

UNITED STATES OF AMERICA, Appt.,
v.
READING COMPANY, Philadelphia & Reading Railway Company, et al. (No. 3.)

READING COMPANY, Philadelphia & Reading Railway Company, et al., Appts.,
v.
UNITED STATES OF AMERICA. (No. 4.)

(See S. C. Reporter's ed. 26–65.)

Monopoly — unlawful combination — lease of railroad — lessor's covenant as to shipments.

1. A covenant in a lease by a coal company of a railway owned by it to another railway company, which may be construed to require the coal company to ship to market over the leased line three fourths of all the coal it produces, cannot be said to impose an undue restriction upon the coal company in selecting its markets and in shipping its coal, in violation of the Sherman Anti-trust Act, where the lines of the two railway companies are in no sense competitive, the leased line serving as a natural extension of the lessee railway company's lines to the great tonnage-producing coal districts, and where the rental to be paid is one third of the gross earnings of the railway.

[For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.]

Injunction — against enforcement of monopolistic contract — covenant in lease of coal lands.

2. Attempts to enforce a covenant in leases for the operation of coal-producing lands that the lessee shall ship all coal mined by rail routes which are named, or which are to be designated, are properly enjoined where such covenant was resorted to as part of a scheme in contravention of the Sherman Anti-trust Act to control the mining and transportation of coal.

[For other cases, see Injunction, I. c, in Digest Sup. Ct. 1908.]

Appeal — judgment — dismissal without prejudice.

3. Where a majority of the individual defendants in a suit to dissolve a combination found to contravene the Sherman Anti-trust Act have died since the suit was instituted, and their successors in office have not been made parties, and the conclusion to be announced can be given full effect by an appropriate decree against the corporate defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

Monopoly — unlawful combination — carriers and coal companies — dissolution.

4. An undue and unreasonable restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and a monopolization of such trade and commerce, forbidden by the Sherman Anti-trust Act, and calling for dissolution of the combination, results from a scheme whereby a holding company was created and placed by stock control in a position to dominate, not only two great competing interstate railway carriers, but also two great com-

---

Note.—As to monopolies—see notes to Fowle v. Park, 33 L. ed. U. S. 67, and United States v. Trans-Missouri Freight Asso. 41 L. ed. U. S. 1008.

As to illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

As to what relation a contract or combination must bear to interstate commerce in order to bring it within the scope of the Federal Anti-trust Act—see notes to Loewe v. Lawlor, 52 L. ed. U. S. 488, and Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 10 L.R.A.(N.S.) 268.

peting coal companies engaged extensively in mining and selling anthracite coal which must be transported to interstate markets over the controlled interstate railway lines, which power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully, until the Federal Supreme Court condemned certain percentage coal contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation, the holding company continuing, up to the time the present dissolution suit was begun, in active dominating control of the carriers and coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings.

[For other cases, see Monopoly, II. in Digest Sup. Ct. 1908.]

Carriers — association with commodity carried — stock ownership.

5. The combination in a single corporation of the ownership of all of the stock of a carrier and of all of the stock of a coal company violates the commodities clause of the Act of June 29, 1906, making it unlawful for any railway company to transport in interstate commerce any article mined or produced by it or under its authority, or which it may own, or in which it may have any interest, direct or indirect, where all three companies have the same officers and directors, and it is under their authority that the coal mines are worked and the railway operated, and they exercise that authority in the one case in precisely the same character as in the other; viz., as officials of the holding company, the manner in which the stock of the three is held resulting, as intended, in the abdication of all independent corporate action by both the railway company and the coal company, involving, as it does, the surrender to the holding company of the entire conduct of their affairs.

[For other cases, see Carriers, III. in Digest Sup. Ct. 1908.]

Carriers — association with commodity carried — stock ownership.

6. While the ownership by a railway company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful, under the commodities clause of the Act of June 29, 1906, for the railway company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require.

[For other cases, see Carriers, III. in Digest Sup. Ct. 1908.]

Judgment — dissolution — monopoly — extent of relief.

7. A combination of competing interstate railway carriers and competing coal companies, found to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, free from stock or other control.

[For other cases, see Judgment, II. in Digest Sup. Ct. 1908.]

[Nos. 3 and 4.]

Argued October 10 and 11, 1916. Restored to docket for reargument May 21, 1917. Reargued November 20 and 21, 1917. Restored to docket for reargument June 10, 1918. Reargued October 7, 1919. Decided April 26, 1920.

CROSS APPEALS from the District Court of the United States for the Eastern District of Pennsylvania to review a decree granting a part of the relief sought by the United States in a suit to dissolve a combination asserted to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906. Affirmed in part and reversed in part, and remanded with directions to enter a decree of dissolution of the intercorporate relations existing between corporate defendants so as to give each company its entire independence.

See same case below, 226 Fed. 229.

The facts are stated in the opinion.

Solicitor General **Davis** and Assistant to the Attorney General **Todd** argued the cause on the first and second arguments, and, with Attorney General Gregory and Mr. Thurlow M. Gordon, Special Assistant to the Attorney General, filed a brief for the United States:

The Reading Holding Company's control of the production, transportation, and sale of anthracite coal from lands in the Schuylkill region tributary to the lines of the Reading Railway Company was acquired and is maintained by other than normal methods of industrial development, and by means wrongful and unlawful in themselves.

Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; United States v. American Tobacco Co. 221 U. S. 106, 176, 184, 187, 55 L. ed. 663, 692, 695, 696, 31 Sup. Ct. Rep. 632; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; United States v. Pacific & A. R. & Nav.

Co. 228 U. S. 87, 104, 57 L. ed. 742, 748, 33 Sup. Ct. Rep. 443; United States v. Reading Co. 226 U. S. 324, 352, 353, 57 L. ed. 243, 252, 253, 33 Sup. Ct. Rep. 90; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; United States Teleph. Co. v. Central U. Teleph. Co. 122 C. C. A. 86, 202 Fed. 72; Swift & Co. v. United States, 196 U. S. 375, 402, 49 L. ed. 518, 527, 25 Sup. Ct. Rep. 276; Re Rates for Transportation of Anthracite Coal, 35 Inters. Com. Rep. 239; Coxe Bros. v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 460, 4 I. C. C. Rep. 535; Meeker v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129; Vandalia R. Co. v. United States, 141 C. C. A. 469, 226 Fed. 713; Fourche River Lumber Co. v. Bryant Lumber Co. 230 U. S. 316, 323, 57 L. ed. 1498, 1501, 33 Sup. Ct. Rep. 887; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 57 L. ed. 226, 33 Sup. Ct. Rep. 83; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247, 145 Fed. 1007; United States v. Hocking Valley R. Co. 194 Fed. 234, 127 C. C. A. 285, 210 Fed. 740.

The court was not asked in this case to apply any remedy under the Act to Regulate Commerce. The advantages granted to the Reading Coal Company in the cost of transportation were alleged and proved as the cost of transportation was alleged and proved as one of the wrongful means employed in building up and maintaining the monopoly complained of, just as similar advantages in the cost of transportation were shown in Standard Oil Co. v. United States, 221 U. S. 1, 42, 76, 55 L. ed. 619, 638, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

It is not essential, for the purposes of this proceeding under the Anti-trust Act, that the court decide specifically that the transactions in question do constitute violations of the Act to Regulate Commerce. It is enough that it be satisfied they are not normal means of industrial development.

Swift & Co. v. United States, 196 U. S. 375, 402, 49 L. ed. 518, 527, 25 Sup. Ct. Rep. 276; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 105, 57 L. ed. 742, 748, 33 Sup. Ct. Rep. 443; Meeker v. Lehigh Valley R. Co. 106 C. C. A. 94, 183 Fed. 548.

Where, as here, the transactions amount to a departure from the carrier's published rates, or involve discriminations on their face, no prior administrative ruling by the Interstate Commerce Commission is necessary as a condition precedent to an attack upon them in the courts.

Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 196, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 255, 260, 261, 57 L. ed. 1472, 1475, 1477, 1478, 33 Sup. Ct. Rep. 916; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 308, 57 L. ed. 226, 234, 33 Sup. Ct. Rep. 83; American Sugar Ref. Co. v. Delaware, L. & W. R. Co. 125 C. C. A. 251, 207 Fed. 742; Hocking Valley R. Co. v. United States, 127 C. C. A. 285, 210 Fed. 735, 234 U. S. 757, 58 L. ed. 1579, 34 Sup. Ct. Rep. 675; Vandalia R. Co. v. United States, 141 C. C. A. 469, 226 Fed. 713, 239 U. S. 642, 60 L. ed. 482, 36 Sup. Ct. Rep. 163; Central R. Co. v. United States, 143 C. C. A. 569, 229 Fed. 501, 241 U. S. 658, 60 L. ed. 1225, 36 Sup. Ct. Rep. 446.

The fact is, however, that the Interstate Commerce Commission had already expressly held that precisely similar transactions constitute undue preferences and rebates, in violation of the Act to Regulate Commerce, first in Coxe Bros. v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 460, 4 I. C. C. Rep. 535, decided in 1891, and again in Meeker v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129, decided in 1911; and has since held the same as to the very transactions here in question (Re Rates for Transportation of Anthracite Coal, 35 Inters. Com. Rep. 220).

Even if the preferences granted to the Reading Coal Company by the old Reading Railroad Company, in the form of remitted interest charges, etc., were authorized by the laws of Pennsylvania, those laws would have ceased to be of any effect, so far as interstate commerce is concerned, after the passage of the Act to Regulate Commerce, which has been authoritatively construed as prohibiting such preferences.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 468, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 416, 53 L. ed. 836, 851, 29 Sup. Ct. Rep. 527; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 613, 56 L. ed. 911, 916, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

Agreements by shippers to give to a particular common carrier their exclu-

sive patronage exclude other carriers from the privilege of competing therefor, and thus tend directly to restrain trade and promote monopoly.

United States v. Great Lakes Towing Co. 208 Fed. 733; United States Teleph. Co. v. Central U. Teleph. Co. 122 C. C. A. 86, 202 Fed. 72; Gwynn v. Citizens' Teleph. Co. 69 S. C. 442, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460; United States v. Reading Co. 226 U. S. 324, 367, 57 L. ed. 243, 257, 33 Sup. Ct. Rep. 90.

Systems of contracts for exclusive dealing, even between those not subject to public service law, have the same tendency. They are specifically forbidden by the recent Clayton Act, and have been repeatedly enjoined in decrees under the Anti-trust Act.

United States v. Keystone Watch Case Co. 218 Fed. 502; United States v. Eastman Kodak Co. 226 Fed. 62; United States v. Motion Picture Patents Co. 225 Fed. 800; United States v. Corn Products Ref. Co. 234 Fed. 964; Merchants Legal Stamp Co. v. Murphy, 220 Mass. 281, L.R.A.1915C, 520, 107 N. E. 968; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 46, 47, 57 L. ed. 107, 116, 117, 33 Sup. Ct. Rep. 9; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Ellis v. Inman, P. & Co. 65 C. C. A. 488, 131 Fed. 182.

Furthermore, for a railroad company to buy up coal lands and lease them to shippers under exclusive routing contracts clearly violates the provisions of the Acts to Regulate Commerce, which prohibit preferences and rebates, since the granting of such a lease constitutes a consideration given to the lessee for shipping his output over the lines of the railroad company.

United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 308, 57 L. ed. 226, 234, 33 Sup. Ct. Rep. 83; Cleveland, C. C. & St. L. R. Co. v. Hirsch, 123 C. C. A. 145, 204 Fed. 849; Fourche River Lumber Co. v. Bryant Lumber Co. 230 U. S. 316, 322, 323, 57 L. ed. 1498, 1501, 33 Sup. Ct. Rep. 887.

The control acquired and maintained by the Reading Holding Company over the production, transportation, and sale of anthracite coal from lands in the Schuylkill region tributary to the lines of the Reading Railway Company constitutes a restraint and monopolization of trade.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 392, 393, 50 L. ed. 515, 521, 522, 26 Sup. Ct. Rep. 272; Atty. Gen. v. Great Northern R. Co. 29 L. J. Ch. N. S. 794, 6 Jur. N. S. 1006, 8 Week. Rep. 556; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; United States v. Lake Shore & M. S. R. Co. 203 Fed. 315; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 519, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 Ann. Cas. 667; Northern Securities Co. v. United States, 193 U. S. 197, 363, 48 L. ed. 679, 711, 24 Sup. Ct. Rep. 436; United States v. Union P. R. Co. 226 U. S. 61, 83, 57 L. ed. 124, 132, 33 Sup. Ct. Rep. 53; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 104, 57 L. ed. 742, 748, 33 Sup. Ct. Rep. 443; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249.

The business of producing, purchasing, shipping, and selling coal produced along the line of a given railroad is itself a branch of trade, and when the railroad, by other than normal methods of business development, and especially by unconscionable and oppressive use of its position as a common carrier, and by means unlawful in themselves, excludes others from that branch of trade, thereby grasping the greater part of it for itself, it restrains and monopolizes trade, in violation of the Anti-trust Act.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Atty. Gen. v. Great Northern R. Co. 29 L. J. Ch. N. S. 794, 6 Jur. N. S. 1006, 8 Week. Rep. 556; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A. (N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 Ann. Cas. 667; United States

v. Lake Shore & M. S. R. Co. 203 Fed. 315.

If the Reading Companies have that kind of monopoly, it is immaterial whether or not they have some other kind of monopoly also.

United States v. E. C. Knight Co. 156 U. S. 1, 16, 39 L. ed. 325, 330, 15 Sup. Ct. Rep. 249; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 610; Atty. Gen. v. Great Northern R. Co. 29 L. J. Ch. N. S. 794, 6 Jur. N. S. 1006, 8 Week. Rep. 556; Stockton v. Central R. Co. 50 N. J. Eq. 81, 17 L.R.A. 97, 24 Atl. 964.

The Anti-trust Act makes no exception in favor of contracts, combinations, or conspiracies entered into prior to its passage. No such exception was intended, and none should be added by construction.

21 Cong. Rec. 2459, 2726, 4098; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 319, 342, 41 L. ed. 1007, 1020, 1028, 17 Sup. Ct. Rep. 540; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; United States v. American Tobacco Co. 164 Fed. 700, 221 U. S. 106, 176, 184, 55 L. ed. 663, 692, 695, 31 Sup. Ct. Rep. 632; United States v. E. I. duPont de Nemours & Co. 188 Fed. 127; Boyd v. New York & H. R. Co. 220 Fed. 180; Elliott Mach. Co. v. Center, 227 Fed. 124; United States v. United Shoe Machinery Co. 227 Fed. 507; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 399, 50 L. ed. 515, 524, 26 Sup. Ct. Rep. 272; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 416, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 478, 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 613, 56 L. ed. 911, 916, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

As to the power of Congress to remove restraints of trade initiated by transactions entered into prior to the passage of the Anti-trust Act, of course there can be no question.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 342, 41 L. ed. 1007, 1028, 17 Sup. Ct. Rep. 540; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 399, 50 L. ed. 515, 524, 26 Sup. Ct. Rep. 272; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 416, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

There can be no vested right to continue a condition of monopoly or of undue restriction of competition, any more than there can be a vested right to continue any other obstruction to the free flow of interstate commerce.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; Noble State Bank v. Haskell, 219 U. S. 104, 111, 113, 55 L. ed. 112, 116, 117, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Legal Tender Cases, 12 Wall. 457, 551, 20 L. ed. 287, 312.

Again, construing that act as applicable to restraints of trade and monopolies first brought into being prior to its enactment does not give it any retroactive operation. Contracts, combinations, and conspiracies in restraint of trade are continuing offenses, and as such may be enjoined whenever and wherever they operate, irrespective of when or where they were initiated.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; United States v. Kissel, 218 U. S. 601, 607, 54 L. ed. 1168, 1178, 31 Sup. Ct. Rep. 124; Hyde v. United States, 225 U. S. 347, 363, 56 L. ed. 1114, 1124, 32 Sup. Ct. Rep. 793; Brown v. Elliott, 225 U. S. 392, 402, 56 L. ed. 1136, 1140, 32 Sup. Ct. Rep. 817; United States v. American Tobacco Co. 221 U. S. 106, 171, 184, 185, 55 L. ed. 663, 690, 695, 696, 31 Sup. Ct. Rep. 632.

Such a combination, as said by this court in the Standard Oil Co. Case, is a continually operating force restraining trade within the meaning of the 1st section of the act (221 U. S. 78, 55 L. ed. 652, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734), and a perennial violation of the 2d section, prohibiting monopoly (221 U. S. 74).

Furthermore, the ownership and control of coal lands is not attacked as

such, but merely as a means of monopolizing.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

No state legislation whatever could sanction the monopolization or restraint of interstate commerce.

Ibid.; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90.

It is a common thing for a corporation to be given power to acquire the capital stock of other corporations. Such a power, however, must always be exercised in subordination to the public policy against restraints of trade and monopolies.

United States Teleph. Co. v. Central Union Teleph. Co. 122 C. C. A. 86, 202 Fed. 72; Distilling & Cattle Feeding Co. v. People, 156 Ill. 488, 47 Am. St. Rep. 200, 41 N. E. 188.

The common law prevails in Pennsylvania, and the rule of the common law against restraint and monopolization of trade, like the rule of the Sherman Law, is a limitation of rights—rights which may be pushed to evil consequences, and therefore should be restrained.

Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9.

Even freedom of speech and of the press, though guaranteed by the Constitution itself, may yet be used illegally, in furtherance of combinations in restraint of trade.

Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 608, 58 L. ed. 1490, 1497, L.R.A. 1915A, 788, 34 Sup. Ct. Rep. 951; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492.

For like reason the right to acquire property is limited by the prohibition against restraint of trade.

Shawnee Compress Co. v. Anderson, 209 U. S. 423, 434, 52 L. ed. 865, 875, 28 Sup. Ct. Rep. 572; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; Standard Oil Co. v. United States, 221 U. S. 1, 59, 60, 55 L. ed. 619, 644, 645, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 178, 184, 187, 55 L. ed. 663, 693, 695, 696, 31 Sup. Ct. Rep. 632; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 352, 353, 57 L. ed. 243, 252, 253, 33 Sup. Ct. Rep. 90; United States v. Patten, 226 U. S. 525, 539, 57 L. ed. 333, 340, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 104, 57 L. ed. 742, 748, 33 Sup. Ct. Rep. 443; United States v. E. I. du Pont de Nemours & Co. 188 Fed. 151; Darius Cole Transp. Co. v. White Star Line, 108 C. C. A. 165, 186 Fed. 63; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, 291; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 247; Central R. Co. v. Collins, 40 Ga. 582; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Dunbar v. American Teleph. & Teleg. Co. 224 Ill. 9, 115 Am. St. Rep. 132, 79 N. E. 423, 8 Ann. Cas. 57; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; State v. Nebraska Distilling Co. 29 Neb. 700, 46 N. W. 155; People v. North River Sugar Ref. Co. 54 Hun, 354, 5 L.R.A. 386, 7 N. Y. Supp. 406; Atty. Gen. v. Great Northern R. Co. 29 L. J. Ch. N. S. 794, 6 Jur. N. S. 1006, 8 Week. Rep. 556.

As to corporations formed prior to 1874, the Pennsylvania Constitution, while not retroactive, revoked all pre-existing authority to acquire coal lands or the stocks of mining companies, in so far as that authority remained unexecuted.

Commodity Clause Case (United States v. Delaware & H. Co.) 164 Fed. 253; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714.

It is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter, as for condition broken, or for a breach of trust.

Com. v. Commercial Bank, 28 Pa. 389.

And liability to forfeiture once in-

curred continues until waived—as had not been done in this instance—by the only authority ordinarily competent to do so,—the legislature.

People v. Phœnix Bank, 24 Wend. 433, 35 Am. Dec. 634; 2 Morawetz, Priv. Corp. § 1029.

Even if railroads were, for a short time, given power to aid coal companies by the purchase of their stocks, it does not follow that they were authorized to become so completely identified with those coal-mining companies as virtually to make them departments of the railroad—as these defendants have done—any more than a municipality which has been authorized by law to aid in the construction of a railroad by investing in its securities would have authority to become in effect the proprietor and operator of the railroad itself.

United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 529, 59 L. ed. 1438, 1443, 35 Sup. Ct. Rep. 873; United States v. Lehigh Valley R. Co. 220 U. S. 257, 273, 55 L. ed. 458, 463, 31 Sup. Ct. Rep. 387.

A purchaser at a judicial sale cannot acquire any right or interest in property which he would be forbidden to acquire at a private sale.

Louisville & N. R. Co. v. Kentucky, supra.

Railroads engaged, as are the defendants Reading Railway Company and Central Railroad Company, in transporting coal of the same kind from a sole and restricted area of production to the principal markets, are competitive, whether their tracks reach the same individual mines or not.

Re Rates for Transportation of Anthracite Coal, 35 Inters. Com. Rep. 287; United States v. Reading Co. 183 Fed. 489, 226 U. S. 324, 342, 351, 352, 57 L. ed. 243, 248, 251, 252, 33 Sup. Ct. Rep. 90; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964, 50 N. J. Eq. 491, 25 Atl. 942; United States v. Lake Shore & M. S. R. Co. 203 Fed. 295; Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 40 L. ed. 940, 944, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 173, 42 L. ed. 414, 426, 18 Sup. Ct. Rep. 45.

Though the Reading Railway and the Central Railroad Company interchange some traffic, they are none the less competitive in their fundamental relation.

United States v. Reading Co. 183 Fed. 489; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53, 188 Fed. 126.

A combination which renders impossible competition between two such carriers as the Reading Railway Company and the Central Railroad Company, and between two such owners, producers, shippers, and sellers of a staple article of commerce as the Reading Coal Company and the Wilkes-Barre Coal Company, restrains and monopolizes trade.

United States v. Joint Traffic Asso. 171 U. S. 505, 571, 43 L. ed. 259, 288, 19 Sup. Ct. Rep. 25; Northern Securities Co. v. United States, 193 U. S. 197, 337, 48 L. ed. 679, 700, 24 Sup. Ct. Rep. 436; National Cotton Oil Co. v. Texas, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 Sup. Ct. Rep. 379; United States v. Union P. R. Co. 226 U. S. 61, 87, 57 L. ed. 124, 133, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 353, 57 L. ed. 243, 252, 33 Sup. Ct. Rep. 90; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; 21 Cong. Rec. 1768, 2457, 2460, 2570, 2598, 2726, 3147, 4092, 4093, 6309; Standard Oil Co. v. United States, 221 U. S. 1, 50, 83, 84, 55 L. ed. 619, 641, 654, 655, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 319, 324, 41 L. ed. 1007, 1020, 1021, 17 Sup. Ct. Rep. 540; Pearsall v. Great Northern R. Co. 161 U. S. 646, 676, 40 L. ed. 838, 848, 16 Sup. Ct. Rep. 705; United States v. International Harvester Co. 214 Fed. 1001; United States v. Motion Picture Patents Co. 225 Fed. 802; United States v. American Can Co. 230 Fed. 901; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 186, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; Central R. Co. v. Collins, 40 Ga. 629; Richardson v. Buhl, 77 Mich. 658, 6 L.R.A. 457, 43 N. W. 1102; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 434, 52 L. ed. 865, 875, 28

Sup. Ct. Rep. 572; United States v. American Tobacco Co. 221 U. S. 106, 176, 177, 55 L. ed. 663, 692, 693, 31 Sup. Ct. Rep. 632.

If only the two competitive railroads had been combined through the Reading Holding Company, the Anti-trust Act would have been violated.

United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; United States v. Joint Traffic Asso. 171 U. S. 505, 577, 43 L. ed. 259, 290, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

In prohibiting every contract or combination which would destroy the competitive relation between substantially competitive interstate railroads, so far from having done anything new or revolutionary, Congress has but followed the common law.

Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 698, 40 L. ed. 849, 858, 16 Sup. Ct. Rep. 714; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 334, 41 L. ed. 1007, 1025, 17 Sup. Ct. Rep. 540; Central R. Co. v. Collins, 40 Ga. 582; People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L.R.A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; Milbank v. New York, L. E. & W. R. Co. 64 How. Pr. 20; Pearson v. Concord R. Corp. 62 N. H. 537, 13 Am. St. Rep. 590; Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 L.R.A. 605, 16 Am. St. Rep. 81, 7 So. 108; Noyes, Intercorporate Relations, § 292; Cook, Stock & Stockholders, § 315; Morawetz, 22 Harvard L. Rev. 492, 495; Re Consolidations & Combinations of Carriers, 12 Inters. Com. Rep. 277.

But, leaving the railroads out of consideration, there would still be here a combination of competitive owners, producers, shippers, and sellers of anthracite coal, violative of the Anti-trust Act.

Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Arnot v. Pittston & E. Coal Co. 68 N. Y. 566, 23 Am. Rep. 190; United States v. Reading Co. 226 U. S. 324, 353, 57 L. ed. 243, 252, 33 Sup. Ct. Rep. 90, 183 Fed. 470; Northern Securities Co. v. United States, 193 U. S. 197, 327, 48 L. ed. 679, 696, 24 Sup. Ct. Rep. 436.

The present combination of the Reading Railway Company and the Central Railroad Company, and of the Reading Coal Company and the Wilkes-Barre Coal Company, through a holding company, is but a renewal, in slightly different form, of the attempted combination in 1892 of the same railroads and coal companies by a lease from the Central to a subsidiary company of the Reading, declared unlawful by the courts of New Jersey.

Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964, 50 N. J. Eq. 490, 25 Atl. 942; McCarter v. Fireman's Ins. Co. 74 N. J. Eq. 372, 29 L.R.A.(N.S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048; Stockton v. American Tobacco Co. 55 N. J. Eq. 367, 36 Atl. 971, 56 N. J. Eq. 847, 42 Atl. 1117.

This combination of able competitors, by reason of its power, the methods by which that power was attained and is held, its conduct toward others, and the intent which colors all its acts, not only threatens, but has actually produced, a serious abridgment of competition. It is not necessary to show more.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Stockton v. Central R. Co. 50 N. J. Eq. 84, 17 L.R.A. 97, 24 Atl. 964; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 533, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 623; Atty. Gen. v. Great Northern R. Co. 29 L. J. Ch. N. S. 799, 6 Jur. N. S. 1006, 8 Week. Rep. 556; United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964.

A transaction which the law prohibits does not become lawful because the conscious purpose of the ultimate motive is innocent.

Holmes, Common Law, 52, 54, 75; Bishop, New Crim. Law, § 343; New York, N. H. & H. R. Co. v. Interstate

Commerce Commission, 200 U. S. 361, 398, 50 L. ed. 515, 524, 26 Sup. Ct. Rep. 272; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 534, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873; Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 58 L. ed. 1490, L.R.A.1915A, 788, 34 Sup. Ct. Rep. 951; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Nash v. United States, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; United States v. Patten, 226 U. S. 525, 543, 57 L. ed. 333, 341, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; United States v. Reading Co. 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90; United States v. Union P. R. Co. 226 U. S. 61, 92, 93, 57 L. ed. 124, 135, 136, 33 Sup. Ct. Rep. 53; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 57 L. ed. 107, 117, 33 Sup. Ct. Rep. 9; Standard Oil Co. v. United States, 221 U. S. 65, 55 L. ed. 647, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; American Tobacco Co. v. United States, 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 441, 54 L. ed. 826, 830, 30 Sup. Ct. Rep. 535; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; Northern Securities Co. v. United States, 193 U. S. 197, 328, 337, 48 L. ed. 679, 696, 700, 24 Sup. Ct. Rep. 436; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; United States v. Joint Traffic Asso. 171 U. S. 505, 561, 43 L. ed. 259, 284, 19 Sup. Ct. Rep. 25; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 341, 41 L. ed. 1007, 1027, 17 Sup. Ct. Rep. 540; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 622; Lawlor v. Loewe, 109 C. C. A. 288, 187 Fed. 524; United States v. Motion Picture Patents Co. 225 Fed. 808.

The fact that the rates or prices charged by a combination are reasonable is no defense under the Anti-trust Act.

United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 324, 41 L. ed. 1007, 1021, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 565, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; Pearsall v. Great Northern R. Co. 161 U. S. 646, 676, 677, 40 L. ed. 838, 848, 849, 16 Sup. Ct. Rep. 705; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 238, 44 L. ed. 136, 146, 20 Sup. Ct. Rep. 96; Northern Securities Co. v. United States, 193 U. S. 197, 327, 48 L. ed. 679, 696, 24 Sup. Ct. Rep. 436; Harriman v. Northern Securities Co. 197 U. S. 244, 291, 49 L. ed. 739, 761, 25 Sup. Ct. Rep. 493; International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859, 237 Mo. 394, 141 S. W. 672; State ex rel. Watson v. Standard Oil Co. 49 Ohio St. 186, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; Harding v. American Glucose Co. 182 Ill. 619, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; Distilling & Cattle Feeding Co. v. People, 156 Ill. 489, 47 Am. St. Rep. 200, 41 N. E. 188; People v. North River Sugar Ref. Co. 54 Hun, 379, 5 L.R.A. 386, 7 N. Y. Supp. 406; Stockton v. Central R. Co. 50 N. J. Eq. 84, 17 L.R.A. 97, 24 Atl. 964; Richardson v. Buhl, 77 Mich. 660, 6 L.R.A. 457, 43 N. W. 1102; State v. Eastern Coal Co. 29 R. I. 254, 132 Am. St. Rep. 817, 70 Atl. 5, 17 Ann. Cas. 96; San Antonio Gas Co. v. State, 22 Tex. Civ. App. 122, 54 S. W. 289; Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 525, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 Ann. Cas. 667.

Since the argument below, it has been authoritatively determined by the Interstate Commerce Commission, after exhaustive investigation, that the freight rates charged by both the Reading and the Central were excessive; and, what is worse, that they were made excessive for the express purpose of excluding independent producers from the trade.

Re Rates for Transportation of Anthracite Coal, 35 Inters. Com. Rep. 220.

This finding, which is in accord with earlier decisions involving rates of the same amount via other anthracite railroads (Coxe Bros. v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 460, 4 I. C. C. Rep. 535; Meeker v. Lehigh Valley R. Co. 21 Inters. Com. Rep. 129, 236 U. S. 412, 59 L. ed. 644, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691; Lehigh Valley R. Co. v. United States, 204 Fed. 986; Anti-Trust Case (Meeker v. Lehigh Valley R. Co.) 106 C. C. A. 94, 183 Fed. 548; Marian Coal Co. v. Delaware, L. & W. R. Co. 24 Inters. Com. Rep. 140, 25 Inters. Com. Rep. 14), and has been affirmed by later ones (Red Ash Coal Co. v. Central R. Co. 37 Inters. Com. Rep. 460; Weston, Dodson & Co. v. Central R. Co. 38

Inters. Com. Rep. 206; Plymouth Coal Co. v. Lehigh Valley R. Co. 36 Inters. Com. Rep. 143; G. B. Markle Co. v. Lehigh Valley R. Co. 37 Inters. Com. Rep. 441; Plymouth Coal Co. v. Pennsylvania R. Co. 37 Inters. Com. Rep. 457), concludes the question and renders further discussion unnecessary.

The agreements of 1871, 1883, 1887, and 1892 unduly restrict the freedom of the Lehigh Coal & Navigation Company and the Wilkes-Barre Coal Company in selecting markets and otherwise carrying on their business.

United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 533, 59 L. ed. 1438, 1445, 35 Sup. Ct. Rep. 873; Standard Oil Co. v. United States, 221 U. S. 1, 58, 55 L. ed. 619, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 179, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632; United States v. Reading Co. 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90; Nash v. United States, 229 U. S. 373, 376, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; United States v. Lake Shore & M. S. R. Co. 203 Fed. 311.

The agreements exclude other carriers from the privilege of competing with the Central Railroad Company for the transportation of large tonnage of anthracite.

Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 408, 55 L. ed. 502, 518, 31 Sup. Ct. Rep. 376; Henry v. A. B. Dick Co. 224 U. S. 1, 49, 54, 56 L. ed. 645, 664, 666, 32 Sup. Ct. Rep. 364, Ann. Cas. 1913D, 880; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; United States v. Great Lakes Towing Co. 208 Fed. 745; United States Teleph. Co. v. Central U. Teleph. Co. 122 C. C. A. 86, 202 Fed. 66; Gwynn v. Citizens' Teleph. Co. 69 S. C. 443, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460; United States v. Keystone Watch Case Co. 218 Fed. 510; United States v. Eastman Kodak Co. 226 Fed. 76; United States v. Motion Picture Patents Co. 225 Fed. 809; United States v. Corn Products Ref. Co. 234 Fed. 964; Merchants Legal Stamp Co. v. Murphy, 220 Mass. 281, L.R.A. 1915C, 520, 107 N. E. 968; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 46, 47, 57 L. ed. 107, 116, 117, 33 Sup. Ct. Rep. 9; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; Ellis v. Inman, P. & Co. 65 C. C. A. 488, 131 Fed. 182; United States v. Union P. R. Co. 226 U. S. 61, 83, 57 L. ed. 124, 132, 33 Sup. Ct. Rep. 53; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 308, 57 L. ed. 226, 234, 33 Sup. Ct. Rep. 83; Cleveland, C. C. & St. L. R. Co. v. Hirsch, 123 C. C. A. 145, 204 Fed. 849.

The agreements bring under the combined control of the Navigation Company and the Central Railroad Company two carriers of anthracite, namely, the Lehigh & Hudson River Railway Company and the Lehigh & New England Railroad Company, which are natural competitors of each other and of the Central Railroad Company.

United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53.

By requiring rates between points common to the canal operated by the Navigation Company and the railroad operated by the Central Railroad Company to be arranged by mutual agreement, the agreements suppress competition between the canal and the railroad in the transportation of anthracite and other freight.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; United States v. Union P. R. Co. 226 U. S. 61, 85, 88, 57 L. ed. 124, 132, 134, 33 Sup. Ct. Rep. 53.

It makes no difference that the canal itself is intrastate. It is an avenue of interstate traffic, and ratemaking in respect of such traffic is subject to Federal law.

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641, 13 Inters. Com. Rep. 329; Denver & R. G. R. Co. v. Interstate Commerce Commission, 195 Fed. 968; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229.

The fact that the agreements were made prior to the enactment of the Anti-trust Act does not remove them from the operation of the act.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 342, 41 L. ed. 1007, 1028, 17 Sup. Ct. Rep. 540; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 416, 53 L. ed. 836, 852, 29 Sup. Ct. Rep. 527; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 478, 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Philadelphia, B. & W. R. Co. v.

Schubert, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

The transportation by the Reading Railway Company and the Central Railroad Company of anthracite coal mined or purchased, and, at the time of transportation, owned respectively by the Reading Coal Company and the Wilkes-Barre Coal Company, violates the commodity clause of the Act to Regulate Commerce.

United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Central R. Co. 220 U. S. 275, 55 L. ed. 464, 31 Sup. Ct. Rep. 392; Delaware, L. & W. R. Co. v. United States, 231 U. S. 363, 370, 58 L. ed. 269, 272, 34 Sup. Ct. Rep. 65; Tap Line Cases (United States v. Louisiana & P. R. Co.) 234 U. S. 1, 27, 58 L. ed. 1185, 1195, 34 Sup. Ct. Rep. 741; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; Interstate Commerce Commission v. Baird, 194 U. S. 25, 42, 43, 48 L. ed. 860, 868, 869, 24 Sup. Ct. Rep. 563; Re Rates for Transportation of Anthracite Coal, 35 Inters. Com. Rep. 220; Lehigh Valley R. Co. v. Rainey, 112 Fed. 487; Stockton v. Central R. Co. 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 430, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 306, 57 L. ed. 226, 234, 33 Sup. Ct. Rep. 83; Fourche River Lumber Co. v. Bryant Lumber Co. 230 U. S. 316, 323, 57 L. ed. 1498, 1501, 33 Sup. Ct. Rep. 887; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247; Buie v. Chicago, R. I. & P. R. Co. 95 Tex. 51, 55 L.R.A. 861, 65 S. W. 27; Chicago Union Traction Co. v. Chicago, 199 Ill. 626, 65 N. E. 470; Columbus, H. V. & T. R. Co. v. Burke, 20 Ohio L. J. 287.

The Wilkes-Barre Coal Company was created by the Central Railroad Company through the consolidation of several smaller coal companies for the express purpose of holding and mining coal lands along its line. The date of its incorporation, January 20, 1874, was after the Pennsylvania Constitution of 1874 became operative, and therefore the contention that the relation between them is sanctioned by Pennsylvania law—irrelevant in any event (United States v. Union P. R. Co. 226 U. S. 61, 86, 57 L. ed. 124, 133, 33 Sup. Ct. Rep. 53; Harriman v. Northern Securities Co. 197 U. S. 244, 249, 49 L. ed. 739, 741, 25 Sup. Ct. Rep. 493; Standard Oil Co. v. United States, 221 U. S. 1, 68, 55 L. ed. 619 648, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 183, 55 L. ed. 663, 695, 31 Sup. Ct. Rep. 632)—is without basis.

The Central's acquisition of the shares of the consolidated company after the adoption of the new Constitution of Pennsylvania was not a mere continuance of its prior ownership of the shares of the constituent companies. The Wilkes-Barre Coal Company was an entirely new corporation,—not less so because formed by a consolidation of pre-existing corporations. Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; St. Louis, I. M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 308, 310, 38 L. ed. 450, 454, 455, 14 Sup. Ct. Rep. 592; Mercantile Bank v. Tennessee, 161 U. S. 161, 171, 40 L. ed. 656, 659, 16 Sup. Ct. Rep. 461; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 18, 21, 45 L. ed. 395, 405, 406, 21 Sup. Ct. Rep. 240; Yazoo & M. Valley R. Co. v. Vicksburg, 209 U. S. 358, 362, 52 L. ed. 833, 834, 28 Sup. Ct. Rep. 510. The Central's acquisition after January 1, 1874, of the shares of Wilkes-Barre Coal Company, was therefore a new and independent acquisition, and, as such, controlled by the laws then in force.

Again, even if it be assumed that the Act of 1869 wrote into the charters of the Wilkes-Barre Coal & Iron Company and the Honeybrook Coal Company the right to have railroads purchase their shares, they could not transfer such right to their successor corporation, the Wilkes-Barre Coal Company, since, in the meantime, the prohibition in the Pennsylvania Constitution of 1874 had gone into effect.

Rochester R. Co. v. Rochester, 205 U. S. 236, 254, 51 L. ed. 784, 791, 27 Sup. Ct. Rep. 469; Yazoo & M. Valley R. Co. v. Vicksburg, 209 U. S. 358, 52 L. ed. 833, 28 Sup. Ct. Rep. 510; Great Northern R. Co. v. Minnesota, 216 U. S. 206, 54 L. ed. 446, 30 Sup. Ct. Rep. 344.

The defendants contend that the question whether transportation by the Central Railroad Company of coal owned by the Wilkes-Barre Coal Company violates the commodity clause is res judicata under the decision of this court in United States v. Central R. Co. 213 U. S. 415, 53 L. ed. 851, 29 Sup. Ct. Rep. 527;

United States v. Central R. Co. 220 U. S. 275, 55 L. ed. 464, 31 Sup. Ct. Rep. 392. An examination of that case and of the companion case of United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387, will demonstrate that this contention is unsound.

The district court should require that, within a stated period, the defendants submit a plan of dissolution for its approval, and should hear both the government and the defendants in regard thereto; and if defendants shall fail to submit a plan within the period stated, or if the plan submitted shall be rejected, the district court should give effect to the requirements of the statute through the appointment of a receiver, or by enjoining the movement of the products of the combination in interstate commerce.

United States v. Union P. R. Co. 226 U. S. 61, 97, 98, 57 L. ed. 124, 137, 138, 33 Sup. Ct. Rep. 53; United States v. American Tobacco Co. 221 U. S. 106, 187, 188, 55 L. ed. 663, 696, 697, 31 Sup. Ct. Rep. 632; United States v. International Harvester Co. 214 Fed. 987.

The separations required should be by such means as will most thoroughly effectuate that purpose.

United States v. Union P. R. Co. 226 U. S. 476, 57 L. ed. 308, 33 Sup. Ct. Rep. 162.

Solicitor General **King** argued the cause, and, with Attorney General Palmer and Mr. A. F. Myers, filed a brief for the United States on the third argument.

Messrs. **Jackson E. Reynolds** and **John G. Johnson** argued the cause on original argument, and, with Mr. Charles Heebner, filed a brief for the Reading Company et al.:

The Reading Company has not monopolized, and is not monopolizing, in violation of the Anti-trust Act, the production, transportation, and sale of anthracite coal from mines in the Schuylkill region tributary to the lines of the Philadelphia & Reading Railway Company.

United States v. Reading Co. 183 Fed. 457, 226 Fed. 229; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 402, 403, 53 L. ed. 836, 843, 844, 29 Sup. Ct. Rep. 527; Com. v. New York, L. E. & W. R. Co. 132 Pa. 606, 7 L.R.A. 634, 19 Atl. 291; Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co. 21 L.R.A.(N.S.) 982, 94 C. C. A. 217, 168 Fed. 161, 16 Ann. Cas. 613; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; Little Rock & M. R. Co. v. St. Louis & S. W. R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 184, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208; Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239; Oregon R. & Nav. Co. v. Dumas, 104 C. C. A. 641, 181 Fed. 781; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co. 112 C. C. A. 153, 191 Fed. 543; United States v. Winslow, 227 U. S. 202, 218, 57 L. ed. 481, 485, 33 Sup. Ct. Rep. 253.

The acquisition by the Reading Company of a majority of the shares of the Central Railroad Company of New Jersey has not resulted in a combination in restraint of trade, and a monopolization thereof, in violation of the Anti-trust Act.

United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466, 475, 60 L. ed. 387, 391, 36 Sup. Ct. Rep. 212; Cong. Rec. 51st Cong. 1st Sess. p. 3151; 2 Hoar, Autobiography of Seventy Years, p. 364; United States v. E. I. du Pont de Nemours & Co. 188 Fed. 150; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 179, 180, 55 L. ed. 663, 693, 694, 31 Sup. Ct. Rep. 632; United States v. Terminal R. Asso. 224 U. S. 383, 394, 56 L. ed. 810, 813, 32 Sup. Ct. Rep. 507; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; Taft, Anti-trust Act, pp. 112, 126, 127; United States v. Union P. R. Co. 226 U. S. 61, 93, 57 L. ed. 124, 135, 33 Sup. Ct. Rep. 53; United States v. Reading Co. 226 U. S. 324, 370, 57 L. ed. 243, 259, 33 Sup. Ct. Rep. 90, 183 Fed. 479; Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 553, 554, 50 L. ed. 585, 593, 26 Sup. Ct. Rep. 330; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 440, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; United States v. United

States Steel Corp. 223 Fed. 55; United States v. Keystone Watch Case Co. 218 Fed. 513; United States v. International Harvester Co. 214 Fed. 987; Dady v. Georgia & A. R. Co. 112 Fed. 838; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; United States v. Lake Shore & M. S. R. Co. 203 Fed. 323.

The transportation by the Philadelphia & Reading Railway Company in interstate commerce of anthracite coal mined or purchased, and, at the time of transportation, owned by the Philadelphia & Reading Coal & Iron Company, does not violate the commodity clause of the Act to Regulate Commerce.

Delaware, L. & W. R. Co. v. United States, 231 U. S. 363, 58 L. ed. 269, 34 Sup. Ct. Rep. 65; United States ex rel. Atty. Gen. v. Delaware & H. Co. 164 Fed. 215, 213 U. S. 366, 402, 413, 414, 53 L. ed. 836, 843, 851, 29 Sup. Ct. Rep. 527; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 526, 59 L. ed. 1438, 1442, 35 Sup. Ct. Rep. 873; United States v. Lehigh Valley R. Co. 220 U. S. 257, 274, 55 L. ed. 458, 464, 31 Sup. Ct. Rep. 387.

Mr. **Jackson E. Reynolds** argued the cause for the Reading Company on the second and third arguments.

Mr. **Robert W. De Forest** argued the cause, and, with Mr. Charles E. Miller, filed a brief for the Central Railroad Company of New Jersey et al.

Messrs. Henry S. Drinker, Jr., and Abraham M. Beitler filed a brief for the Lehigh Coal & Navigation Company.

Mr. John J. Beattie filed a brief for the Lehigh & Hudson River Railway Company.

Mr. William Jay Turner filed a brief for the Lehigh & New England Railroad Company.

Mr. Justice **Clarke** delivered the opinion of the court:

These are appeals from a decree entered in a suit instituted by the government to dissolve the intercorporate relations existing between the corporation defendants, for the alleged reason that through such relations they [41] constitute a combination in restraint of interstate commerce in anthracite coal, and an attempt to monopolize or a monopolization of such trade and commerce, in violation of the first and second sections of the Anti-trust Act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820. 9 Fed. Stat. Anno. 2d ed. p. 644); and also for the alleged reason that the defendants Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey are violating the commodities clause of the Act of Congress of June 29, 1906 (34 Stat. at L. 585, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 359), by transporting over their lines of railroad, in interstate commerce, coal mined or purchased by coal companies with which they are associated by stock ownership.

It will contribute to brevity and clearness to designate the defendant corporations as follows: Reading Company, as the Holding Company; Philadelphia & Reading Railway Company, as Reading Railway Company; Philadelphia & Reading Coal & Iron Company, as Reading Coal Company; Central Railroad Company of New Jersey, as Central Railroad Company; Lehigh & Wilkes-Barre Coal Company as Wilkes-Barre Company; Lehigh Coal & Navigation Company as Navigation Company.

Practically all of the anthracite coal in this country is found in northeastern Pennsylvania, in three limited and substantially parallel deposits, located in valleys which are separated by mountainous country. For trade purposes these coal areas are designated: the most northerly, as the Wyoming field, estimated to contain about 176 square miles of coal; the next southerly, as the Middle or Lehigh field, estimated to contain about 45 square miles; and the most southerly, as the Schuylkill field, estimated to contain about 263 square miles of coal.

The annual production of the mines in these three fields in 1896 was about 43,640,000 tons, and in 1913 it slightly exceeded 71,000,000 tons. The chief marketing centers for this great tonnage of coal are New York, distant by rail from the fields about 140 miles, and Philadelphia, distant [42] about 90 miles. From these cities it is widely distributed by rail and water throughout New York and New England, and, to some extent, through the South.

Such a large tonnage was naturally attractive to railroad carriers, with the result that the Wyoming field has six outlets by rail to New York harbor, viz.: the Central Railroad of New Jersey and five others, known as initial anthracite carriers. The Lehigh field has three such rail outlets, but the largest, the Schuylkill field, has only two direct rail connections with Philadelphia and New York, viz.: the Reading and the Pennsylvania

Railroads. Outlets by canal to Philadelphia and tidewater, at one time important, may here be neglected.

This description of the subject-matter and of its relation to the interstate transportation system of the country will suffice for the purposes of this opinion. It may be found in much greater detail in the cases cited in the margin.[1]

The essential claims of the government in the case have become narrowed to these, viz.:

First: That the ownership by the Holding Company of controlling interests in the shares of the capital stock of the Reading *Railway* Company, of the Reading Coal Company, and of the Central Railroad Company, constitutes a combination in restraint of interstate trade and commerce, and an attempt to monopolize and a monopolization of a part of the same, in violation of the Anti-trust Act of July 2, 1890.

Second: That the Holding Company in itself constitutes a like violation of the act.

Third: That certain covenants and agreements between the Central Railroad Company and the Navigation Company, [43] contained in a lease, by the latter to the former, of the Lehigh & Susquehanna Railroad, constitute a like violation of the act.

Fourth: That the transportation in interstate commerce by the Reading Railway Company and by the Central Railroad Company, of coal mined or purchased by the coal companies affiliated with each of them, constitutes a violation of the commodities clause of the Act to Regulate Commerce.

Pursuant to the provisions of the Act of June 25, 1910 (36 Stat. at L. 854, chap. 428, Comp. Stat. § 8824, 6 Fed. Stat. Anno. 2d ed. p. 137), the case was heard by three circuit judges of the third circuit, who, while holding against the contention of the government on many of the prayers for relief in the bill, some generally and some without prejudice, also held that the Reading Coal Company and the Wilkes-Barre Coal Company were naturally competitive producers and sellers of anthracite coal, and that their union through the Holding Company and the Central Company constituted a combination in restraint of trade within the Anti-trust Act, and for this reason the Central Company was ordered to dispose of all the stock, bonds, and other securities of the Wilkes-Barre Coal Company owned by it, and was enjoined from requiring the Coal Company to ship its coal over the lines of the Central Company.

The court also held that clauses in mining leases by the Reading Coal Company and by the Wilkes-Barre Coal Company, and their subsidiaries, requiring the lessees to ship all coal produced, over roads named or to be designated, were unlawful and void.

The case has been appealed by both parties, and is before us for review on all of the issues as we have thus stated them.

Reference to the history of the properties now controlled by the Holding Company will be of value for the assistance it will be in determining the intent and purpose [44] with which the combinations here assailed were formed. Standard Oil Co. v. United States, 221 U. S. 1, 46, 76, 55 L. ed. 619, 639, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734.

The Philadelphia & Reading *Railroad* Company was chartered by special act of the Pennsylvania general assembly in 1833, and it conducted the business of a railroad carrier prosperously for about thirty years, when, as its annual reports show, it embarked upon the policy of attempting to control the anthracite tonnage of the Schuylkill field by acquiring extensive ownership of coal lands. Thus, the report of the company for 1870 contains the following:

"Up to this time about 70,000 acres of the best anthracite coal lands in Pennsylvania have been acquired and will be held by an auxiliary company known as the Philadelphia & Reading Coal & Iron Company, of which the Philadelphia & Reading Railroad Company *is the only stockholder*. The result of this action has been to secure—and *attach to the company's railroad*—a body of coal land capable of *supplying all the coal tonnage that can possibly be transported over the road for centuries.*"

And this is from the report for 1880:

"The transportation of coal has always been a source of great profit to the railroad company, and the only doubt in the past as to the permanency of the earning power of the company as a transporter was due to the *fear that rival companies*

[1] United States v. Reading Co. 183 Fed. 427; United States v. Reading Co. 226 Fed. 229; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; United States v. Lehigh Valley R. Co. 220 U. S. 257, 55 L. ed. 458, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873; United States v. Reading Co. 226 U. S. 324, 57 L. ed. 243, 33 Sup. Ct. Rep. 90.

would tap the Schuylkill region and divert the coal tonnage to their own lines. *This danger was happily averted by the purchase of the coal lands.*"

And this from the report of 1881:

"The coal estates of the Philadelphia & Reading Company . . . consist of 91,149 acres (142 square miles) of coal lands, *which is 60 per cent of all the anthracite lands in the Schuylkill district, and 30 per cent of all in Pennsylvania.*"

This area of coal lands had increased by 1891 to 102,573 acres, of which the report said:

"[**45**] The coal lands comprise in extent about 33 per cent of the entire anthracite coal fields of the state, and taking into account the aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estates in the other regions, which has been going on for many years, it must be conceded that we have *at least 50 per cent of the entire deposit remaining unmined.*"

As if in further pursuit of this now settled purpose, in the following year, 1892, the Reading Railroad Company leased the Lehigh Valley Railroad and the Central Railroad of New Jersey for 999 years. These were both anthracite carriers competing with the Reading, and each had an important coal mining subsidiary company. But the lease by the Central Railroad Company was assailed in the New Jersey courts, and all operations under it were enjoined, with the result that both leases were abandoned.

It is obvious that these reports show an avowed and consistently pursued purpose (not then prohibited by statute) to secure by purchase a dominating control over the coal of the Schuylkill field and over the transportation of it to market.

In the large financial operations incident to the expansion policy thus described, bonds were issued, secured by a mortgage on all of the property of the Reading Railroad Company and of the Reading Coal Company. In 1893 there was default in the payment of interest on these bonds, and receivers were appointed who operated both properties until 1896, when they were sold to representatives of the creditors and stockholders of the two companies, and under a scheme of reorganization, the validity of which is assailed in this suit, both properties were transferred to three corporations in the manner now to be described:

1st. To the Reading *Railway* Company, a corporation newly organized under the laws of Pennsylvania, were allotted about 1,000 miles of the railroad (but none of [**46**] the equipment) which had been owned or leased by the former Reading *Railroad* Company. The capital stock of this company was fixed at $20,000,000, and it issued $20,000,000 of bonds, all of which were given to the Holding Company. The property thus transferred was valued, in the representations made at the time to the New York Stock Exchange, at $90,000,000. In 1896 this railroad carried in excess of 9,000,000 tons of anthracite,—more than one fifth of the then total production of the country. But by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars, and ships owned by the former railroad company, and its tidewater terminals at Philadelphia and on New York harbor, were allotted to the Holding Company.

2d. By the decree of sale the Reading Coal & Iron Company was released from its former obligations and to it, thus freed, the principal part of the property (coal and other), owned by it before the sale, was allotted and retransferred upon condition that it would deliver all of its capital stock to the Holding Company, would become co-obligor with that company on bonds to be issued, and would join with it in executing a mortgage for $135,000,000 on all of its property to secure such bonds. This company thus came into possession of 102,573 acres of anthracite lands, owned and leased,—almost two thirds of the entire acreage of the Schuylkill coal field,—stocks and bonds in other coal companies, coal in storage, and other property, all of the estimated value of $95,000,000.

3d. To serve the purposes of the intended Holding Company, a charter granted in 1871 by special act of the general assembly of Pennsylvania, but unused for twenty years, was utilized. This charter was of the class denominated "omnibus" by the supreme court of Pennsylvania, [**47**] and in terms it authorized the company to engage in, or control, almost any business other than that of a bank of issue,—this broad charter was the occasion for making use of the company in this enterprise. The corporate name was changed to "Reading Company," its capital stock was increased from $100,000 to $140,000,000, and the purchasers at the receivers' sale allotted and transferred to it railroad equipment, real estate, colliers and barges, formerly owned by the Reading *Railroad* Company, together with stocks which gave

it control of more than thirty short-line railroads, aggregating 275 miles of track, and other property of large value, in addition to all of the bonds and stock of the new Reading *Railway* Company, and all of the stock of the Reading Coal Company.

The result of this intercorporate transfer of the property, owned before the reorganization by the Reading *Railroad* Company and the Reading Coal & Iron Company, was that the Holding Company, without any outlay,—solely because the creditors and stockholders of the former Reading Railroad Company and of the Reading Coal Company desired to establish the proposed scheme for control of the properties formerly owned by the two companies,—became the owner of the title to railway equipment, real estate, colliers and barges of an estimated value of $34,400,000; plus all of the capital stock and bonds of the new Railway Company,—$40,000,000; plus all of the capital stock of the Coal Company,—$8,000,000,—and a contract by that company to mortgage, for the use of the Holding Company, its entire property; plus other stocks, bonds, and mortgages owned by the former Railroad Company of the estimated value of over $38,000,000,—making a total value, as represented at the time to the New York Stock Exchange, of $193,613,000.

Thus, this scheme of reorganization, adopted and executed [48] six years after the enactment of the Anti-trust Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost 1,000 miles of railway over which its coal must find its access to interstate markets. This board of directors, obviously, thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act. United States v. Union P. R. Co. 226 U. S. 61, 57 L. ed. 124, 33 Sup. Ct. Rep. 53.

Obviously, also, it made the Coal Company and the Railway Company mere agents or instrumentalities of the Holding Company—the mining and transportation departments of its business—for producing, purchasing, and selling coal and for transporting it to market. The Reading *Railway* Company and the Reading Coal Company each had thereafter but one stockholder,—the Holding Company,—and their earnings were to be distributed not in proportion to the shares of their capital stocks, aggregating $28,000,000, but were to go to the creditors and shareholders of the Holding Company, with its mortgage debt of $135,000,000 and its capital stock of $140,000,000. The Holding Company thus served to pool the property, the activities, and the profits of the three companies. Northern Securities Co. v. United States, 193 U. S. 197, 327, 362, 48 L. ed. 679, 696, 710, 24 Sup. Ct. Rep. 436.

It will be profitable to consider next what use was made of the great power thus gathered into the one Holding Company.

[49] In 1898 this Holding Company entered into a combination with five other anthracite-carrying railroad companies to prevent the then contemplated construction of an additional line of railway from the Wyoming field to tidewater, which independent miners and shippers of coal were promoting for the purpose of securing better rates on their coal to the seaboard. In a mere holding company, the Temple Iron Company, all six carriers combined, as stockholders, for the purpose of providing $5,000,000, with which the properties of the chief independent operators, Simpson and Watkins, were purchased, and thereby the new railroad project was defeated. The president of the Holding Company was active in the enterprise, and that company, although only one of six, became responsible for 30 per cent of the required financing. In United States v. Reading Co. 226 U. S. 324, 351, 57 L. ed. 243, 251, 33 Sup. Ct. Rep. 90, this court characterized what was done by this combination, under the leadership of the Holding Company, in these terms:

"The New York, Wyoming, & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained."

And, again, at p. 355:

"We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the states, in plain violation of the Act of Congress of July 2, 1890."

About the year 1900 the Holding Company and many other initial anthracite

carriers and their controlled coal companies, pursuant to an agreement with each other, made separate agreements with nearly all of the independent producers of coal along their lines, to purchase at the mines "all the anthracite coal thereafter mined from any of their mines now opened or operated, or which might thereafter be opened and operated," and to pay therefor 65 per cent [50] of the average price of coal prevailing at tidewater points at or near New York, computed from month to month. In the case above cited, this court discussed these contracts and declared: that they were made for the purpose of eliminating the competition of independent operators from the markets, and thus removing "a menace to the monopoly of transportation to tidewater which the defendants collectively possessed;" that before these contracts, there existed not only the power to compete, but actual competition, between the coal of the independents and that produced by the buying defendants; but that, after the contracts were made, "such competition was impracticable;" that the case fell well within not only the Standard Oil Co. Case, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, and American Tobacco Co. Case, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; but was of such an unreasonable character as to be "within the authority of a long line of cases decided by this court;" and finally, that the defendants had combined, by and through the instrumentality of the 65 per cent contracts, with the purpose and design of unlawfully controlling the sale of the independent output of coal at tidewater.

Thus, this court held that once within two years, and again within four years after it was organized, this Holding Company used the great power which we have seen was centered in its board of directors, by adroit division of property and corporate agency, for the purpose of violating, in a flagrant manner, the Anti-trust Act of 1890.

Almost immediately after the two attempts to monopolize the trade in anthracite thus condemned by this court, the Holding Company, in January, 1901, purchased a controlling interest in the capital stock of the Central Railroad Company. When this suit was commenced, that company was operating 675 miles of track, over which it carried in 1913, 10,783,000 tons of anthracite,—almost one half of its total freight traffic. Its capital stock was then $27,436,000, and its funded debt was $46,881,000.

This Central Company owned, at the time, in excess of [51] eleven twelfths of the capital stock of the Wilkes-Barre Coal Company, with a capital stock of over $9,000,000, and a funded debt of about $17,000,000. And that company owned or had leased in excess of 14,000 acres of coal-bearing lands,—13,000 acres in the Wyoming field,—and in the year ending June 30, 1913, it shipped from its lands thus owned or controlled, 6,243,000 tons of coal, which was sold for over $20,000,000.

Immediately after this purchase, the president of the Holding Company, Mr. Baer, was made president of the Central Railroad Company and of the Wilkes-Barre Coal Company, and remained such until his death, after the commencement of this suit, and from one third to one half of the directors of each company were thereafter chosen from the board of the Holding Company. Thus from the time of this purchase both companies have been actively dominated by the Holding Company management.

It is argued that the Central Railroad, thus acquired, and the Reading system, were not competitors, but this question is put beyond discussion by the testimony of Mr. Baer, the president of the Reading Company, and his immediate predecessor in office, Mr. Harris. The former testified:

Q. You are president of the defendants, the Reading Company, Philadelphia & Reading Railway Company, Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and the Temple Iron Company?

A. I am. . . .

Q. What do you regard as the competitors of the Philadelphia & Reading now in New York harbor, as to anthracite coal?

A. All the companies that ship to New York. They would be the Pennsylvania Railroad, the Lehigh Valley, the Delaware & Lackawanna, the Delaware & Hudson, [52] the Erie, Ontario, & Western. I guess those are all the roads leading to New York directly or indirectly. (He did not name the Central Company because it was a part of the Reading system when he testified.)

Q. Those roads are all carrying anthracite coal to New York harbor?

A. Yes, sir.

Q. And you regard them as competi-

tors who must be considered in fixing rates?

A. Yes, sir; unquestionably.

Mr. Harris testified:

Q. During the time that you were president of the Philadelphia & Reading Railroad Company, from 1893 to 1901, what were the competitive roads in the coal trade with which you came in competition?

A. We came in competition with all the roads that were carrying coal from Pennsylvania.

Q. Name the principal ones in reference to carrying coal from the coal mines to New York harbor.

A. The Reading, the Lehigh Valley, *the Central Railroad of New Jersey*, the Delaware, Lackawanna, & Western, the Erie, and the Pennsylvania Railroad.

That the Reading Coal Company and the Wilkes-Barre Coal Company were competitors before the latter passed under the control of the Holding Company is obvious, but Mr. Baer put this also beyond dispute by testifying:

Q. Prior to 1901, were the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Company competitors as sellers of coal in New York harbor?

A. Yes; and they are to-day.

Q. And generally throughout the eastern territory, they were competitors at that time?

A. Yes, sir; through that northern territory. Not in this territory nor in the southern.

Thus, by this purchase, the Reading Holding Company [53] acquired complete control, not only of one of the largest competitive anthracite carriers, but also of one of the largest competitive coal producing and selling companies in the country. The anthracite tonnage of the Central & Reading Railway Companies, thus combined, exceeded, at the time, 18,000,000 tons, —over one third of the then total production of the country,—and the revenue derived from it was more than one third of the total earnings of the two railroad companies.

In 1915 the Interstate Commerce Commission concluded an investigation of the "rates, practices, rules, and regulations governing the transportation of anthracite coal," which had been in progress for three years. The eleven initial anthracite carriers which have lines penetrating the coal-producing region were required to furnish special reports as to their anthracite coal transportation operations, and they appeared and participated in the hearing. The result of this exhaustive investigation was that the Commission found: that since about 1901, with variations and exceptions which are negligible here, the carriers have had the same fixed and flat rates to tidewater, regardless of the distance and character of the haul; that these rates were the result of co-operation or combination among the carriers; and that they were excessive to such an extent that material reductions by all of the carriers were ordered, including, of course, those of the Central and Reading companies. The Commission also found, and this appears in the record of this case, that the Reading Coal Company had never paid any dividends on its stock, and that, while the books of the Holding Company showed the Coal Company to have been indebted to it in a sum exceeding $68,000,000 for advances of capital made by the Reading *Railroad* Company before the reorganization in 1896, it has paid interest thereon only occasionally and in such small amounts that up to 1913 it fell short by more than $30,000,000 of equaling 4 per cent per [54] annum on the indebtedness. In the meantime advances of large sums had been made by the Holding Company to the Coal Company, and unusual credits had been allowed the latter in the payment of its freight bills. This dealing of the Holding Company with the Reading Coal Company, and similar dealing of the Central Company with the Wilkes-Barre Coal Company and the Navigation Company, are denounced by the Commission as unlawful discrimination against other shippers of coal over the rails of these two companies, and, obviously, such favoritism tends to discourage competition and to unduly restrain interstate commerce.

Upon this history of the transactions involved, not controverted, save as to some findings of the Interstate Commerce Commission, we must proceed to judgment; and very certainly it makes a case calling for the application of repeated decisions of this court, which clearly rule it.

It will be convenient to first dispose of several minor contentions.

In 1871 the Navigation Company leased the Lehigh & Susquehanna Railroad, which it owned, to the Central Railroad Company, by an instrument containing a covenant which the government

claims requires the Navigation Company to ship to market over the leased line three fourths of all the coal which it should produce in the future. This covenant has been amended and supplemented by several agreements, but not so as to essentially modify it with respect to the contention we are to consider.

It is argued that this covenant necessarily imposed an undue restriction upon the Navigation Company in selecting its markets and in shipping its coal, in violation of the Anti-trust Act.

It is not entirely clear that the covenant will bear the restrictive interpretation as to shipments which the [55] government puts upon it, but, assuming that it may be so interpreted, nevertheless, the conditions and circumstances of the case considered, the result contended for cannot be allowed.

When the lease was made, in 1871, the Central Railroad extended from Jersey City to its western terminus at Phillipsburg, New Jersey, and it was without access to the coal fields. The Lehigh & Susquehanna Railroad was about 100 miles in length, and extended from Phillipsburg into the Wyoming field, where the Navigation Company owned extensive coal-producing properties and mines. The lines of the two companies were in no sense competitive, but, on the contrary, the Lehigh & Susquehanna line served as a natural extension of the Central Company's lines to the great tonnage-producing coal districts. The rental to be paid was one third of the gross earnings of the railroad, and it was natural and "normal" that the lessor should desire that the traffic should continue to be as large as possible. Plainly this covenant was not written with the purpose of suppressing interstate commerce, and the history of its operation shows that, instead of suppressing it, it has greatly promoted it. The claim is quite too insubstantial to be entertained, and the decree of the district court with respect to it will be affirmed and the bill, as to it, dismissed.

In many leases for the operation of coal-producing lands the Reading Coal Company and the Wilkes-Barre Coal Company incorporated a covenant that the lessee should ship all coal mined by rail routes, which were named or which were to be designated. Since this covenant was resorted to as a part of the scheme to control the mining and transportation of coal, which is condemned as unlawful in this opinion, the decree of the district court, enjoining the lessors and the other defendants herein from attempting to enforce such covenants, will be affirmed.

The other charges against the Lehigh Coal & Navigation [56] Company and the case stated in the bill with respect to the Wilmington & Northern Railroad Company, the Lehigh & Hudson River Railway Company, and the Lehigh & New England Railroad Company, are substantially abandoned in the government's brief, and, having regard to the results arrived at with respect to the principal defendants, the ends of justice will be best served by dismissing the bill as to all of these defendants, without prejudice, as was done by the district court as to all but the Wilmington & Northern Railroad Company, as to which the dismissal was unqualified. A majority of the individual defendants have died since the suit was instituted, and their successors in office have not been made parties, and, since the conclusion to be announced can be given full effect by an appropriate decree against the corporation defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice.

We are thus brought to the consideration of what the decree shall be with respect to the really important defendants in the case, the three Reading companies, the Central Railroad Company of New Jersey, and the Wilkes-Barre Coal Company.

Before the reorganization of 1896, the gathering of more than two thirds of the acreage of the Schuylkill field into the control of the two Reading Companies was, as their reports show, for the frankly avowed purpose, then not forbidden by statute, of monopolizing the production, transportation, and sale of the anthracite coal of the largest of the three sources of supply.

When, in 1896, the problem was presented of reorganizing the financial affairs of the two companies, it was not solved, as it might have been, by creating separate coal and railroad companies to conduct independently interstate commerce in the two departments to which their railroad and coal properties were adapted, but, on the [57] contrary, and very obviously for the purpose of evading the provision of the Constitution of Pennsylvania prohibiting any incorporated common carrier from, directly or indirectly, engaging in mining "articles" for transportation over its lines (Pa. Const. 1874, art. 17, § 5), and also of evad-

ing the provisions of the Federal Anti-trust Act against restraining and monopolizing interstate commerce, resort was had to the holding company device, by which one company was given unrestricted control over the other two, with the power, inherent in that form of organization, of continuing and carrying forward the restraint and monopoly which had previously been acquired over that large volume of interstate commerce which was to be conducted by the coal and railroad companies.

Again, when, in 1901, a rivalry, imaginary or real, arose for the control of the Central Railroad Company, the Holding Company, regardless of the law, did not hesitate to purchase control of that great competing anthracite coal-carrying system, with its extensive coal-owning and mining subsidiary. This acquisition placed the Holding Company in a position of dominating control not only over two great competing interstate railroad carriers, but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate lines of railway.

Again, and obviously, this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.

That such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce, within the meaning of the Anti-trust Act, has been frequently held by this court.

[58] Thus, in Northern Securities Co. v. United States, 193 U. S. 197, 327, 48 L. ed. 679, 696, 24 Sup. Ct. Rep. 436, when dealing with a holding company, such as we have here, this court, in 1903, held:

"No scheme or device could more certainly come within the words of the act —'combination in the form of a trust or otherwise . . . in restraint of commerce among the several states or with foreign nations,'—or could more effectively and certainly suppress free competition between the constituent companies . . . *The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect,* and which the public is entitled to have protected."

And again, in United States v. Union P. R. Co. 226 U. S. 61, 88, 57 L. ed. 124, 134, 33 Sup. Ct. Rep. 53, decided nine years later, in 1912, this court held:

"The consolidation of two great competing systems of railroad engaged in interstate commerce by transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates . . . Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. *It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.*"

It will suffice to add that this doctrine was referred to as the settled conclusion of this court, in 1914, when, discussing a similar state Anti-trust Act in International Harvester Co. v. Missouri, 234 U. S. 199, 209, 58 L. ed. 1276, 1281, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859, it was said:

"The specification under this head is that the supreme court [of Missouri] found, it is contended, benefit—not [59] injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion, the answer is immediate. *It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and had some good effect* . . . The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it."

Thus, this record clearly shows a group of men selecting the Holding Company with an "omnibus" charter, and not only investing it by stock control with such complete dominion over two great competing interstate carriers and over two great competing coal companies extensively engaged in interstate commerce in anthracite coal as to bring it, without more, within the condemnation of the Anti-trust Act, but it also shows that this power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully until this court condemned the 65 per cent contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation. To this it must be added that up to the time when this suit was com-

menced, this Holding Company had continued in active, dominating control of the Reading Railway Company and of the competing Central Railroad system, and also of the two coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings. It is difficult to imagine a clearer case, and in all essential particulars it rests on undisputed conduct and upon perfectly established law. It is ruled by many decisions of this court, but specifically and clearly by United States v. Union P. R. Co. supra.

For flagrant violation of the first and second sections of the Anti-trust Act, the relations between the Reading [60] Company, the Reading Railway Company, and the Reading Coal Company, and between these companies and the Central Railroad Company of New Jersey, must be so dissolved as to give each of them a position in all respects independent and free from stock or other control of either of the other corporations.

With respect to the contention that the commodities clause of the Act of June 29, 1906 (34 Stat. at L. 584, 585, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. pp. 337, 359), is being violated by the Reading Railway Company and the Central Railroad Company.

The circuit judges, centering their attention upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company; that the two companies had separate forces of operatives and separate accounting systems; and upon the importance of maintaining "the theory of separate corporate entity" as a legal doctrine, concluded, upon the authority of United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 413, 53 L. ed. 836, 851, 29 Sup. Ct. Rep. 527, that the evidence did not justify holding that, in transporting the products of the Reading Coal Company's mines to market, the Reading Railway Company was carrying a commodity "mined or produced by it or under its authority," or which it owned "in whole or in part," or in which it had "any interest, direct or indirect."

But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act.

The purpose of the commodity clause was to put an [61] end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper. Plainly, in such a case as we have here, this evil would be present as fully as if the title to both the coal lands and the railroads were in the Holding Company, for all of the profits realized from the operations of the two must find their way ultimately into its treasury,—any discriminating practice which would harm the general shipper would profit the Holding Company. Being thus clearly within the evil to be remedied, there remains the question whether such a controlling stock ownership in a corporation is fairly within the scope of the language of the statute.

In terms the act declares that it shall be unlawful for any railroad company to transport in interstate commerce "any article or commodity . . . mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same "authority" that transported it over the railroad. All three of the Reading companies had the same officers and directors, and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other,—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving, as it did, the surrender to the Holding Company of the entire [62] conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same "authority" that operated the Reading Railway lines.

The case falls clearly within the scope of the act, and for the violation of this commodity clause, as well as for its violation of the Anti-trust Act, the combination between the Reading Railway Company and the Reading Coal Company must be dissolved.

The relation between the Central Railroad Company and the Wilkes-Barre Coal Company presents a different question, for here the Railroad Company owns over eleven twelfths of the stock of the Coal Company, and therefore the holding in 213 U. S. 366, supra, is especially pressed in argument,—that the ownership of stock by a railroad company in a coal company does not cause the former to have such an interest in a legal or equitable sense in the product of the latter as to bring it within the prohibition of the act. But this holding was considered in United States v. Lehigh Valley R. Co. 220 U. S. 257, 272, 55 L. ed. 458, 463, 31 Sup. Ct. Rep. 387, and it was there held not applicable where a railroad company used its stock ownership for the purpose of securing a complete control over the affairs of a coal company, and of treating it as a mere agency or department of the owning company. This rule was repeated and applied in United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 529, 59 L. ed. 1438, 1443, 35 Sup. Ct. Rep. 873. It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two, such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for [63] the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require. United States v. Lehigh Valley R. Co. 220 U. S. 257, 272, 273, 55 L. ed. 458, 463, 464, 31 Sup. Ct. Rep. 387; United States v. Delaware, L. & W. R. Co. supra; Chicago, M. & St. P. R. Co. v. Minneapolis Civic & C. Asso. 247 U. S. 490, 501, 62 L. ed. 1229, 1237, 38 Sup. Ct. Rep. 553.

Applying this rule of law to the relation between the Central Railroad Company and the Wilkes-Barre Coal Company, with the former owning over eleven twelfths of the capital stock of the latter, and using it as the coal mining department of its organization, we cannot doubt that it falls within the condemnation of the commodities clause, and that this relation must also, for this reason, be dissolved.

It results that the decree of the District Court will be affirmed, as to the Lehigh Coal & Navigation Company, the Lehigh & New England Railroad Company, the Lehigh & Hudson River Railway Company, as to the restrictive covenants in the mining leases with respect to the shipping of coal, as to the dissolution of the combination between the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Coal Company, maintained through the Reading Company and the Central Railroad Company of New Jersey. As to the Wilmington & Northern Railroad Company and as to the individual defendants, the bill will be dismissed without prejudice. As to the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, and the [64] Central Railroad Company of New Jersey, the decree of the District Court will be reversed and the cause remanded with directions to enter a decree in conformity with this opinion, dissolving the combination of the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, existing and maintained through the Reading Company, with such provision for the disposition of the shares of stock and bonds and other property of the various companies, held by the Reading Company, as may be necessary to establish the entire independence from that company and from each other, of the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad Company of New Jersey, and the Lehigh & Wilkes-Barre Coal Company, and also that such disposition shall be made by the decree of the stocks and bonds of the Lehigh & Wilkes-Barre Coal Company, held by the Central Railroad Company of New Jersey, as may be necessary to establish entire independence between these two companies, to the end that the affairs of all of these now combined companies may be conducted in harmony with the law.

Affirmed in part; reversed in part, and remanded, with direction to enter a decree in conformity with this opinion.

Mr. Chief Justice **White**, Mr. Justice **Holmes**, and Mr. Justice **Van Devanter**, dissenting:

Except in so far as the decree below commanded a separation of interest between the Central Railroad of New Jersey and the Lehigh & Wilkes-Barre Coal Company, the court below dismissed, for want of equity, the bill of the United States, brought to sever the existing relations [65] between the Reading Company, the Philadelphia & Reading Railway Company, the Philadelphia & Reading Coal & Iron Company, the Central Railroad of New Jersey, the Lehigh & Wilkes-Barre Coal Company, and other corporations, on the ground that the relations between those companies resulted in a monopoly or combination in restraint of trade, in violation of the Sherman Act, and gave rise to a disregard of the commodities clause of the act of Congress.

By the opinion now announced, this action of the court below, in so far as it directed a dismissal, is reversed, and virtually the full relief prayed by the government is therefore granted. We are unable to concur in this conclusion, because, in our opinion, neither the contentions as to the Sherman Act, nor the reliance upon the commodities clause, except to the extent that in the particulars stated they were sustained by the court below, have any foundation to rest upon. We do not state at any length the reasons which lead us to this view, because the court below, composed of three circuit judges, in a comprehensive and clear opinion announced by McPherson, Judge, sustains the correctness of the action which it took, and also demonstrates the error involved in the decree of this court, reversing its action. United States v. Reading Co. 226 Fed. 229. To that opinion we therefore refer as stating the reasons for our dissent.

---

[66] GEORGE WALLACE, Obert A. Olsen, Carl R. Kositzky, et al., Appts.,
v.
WALKER D. HINES, Director General of Railroads; Northern Pacific Railway Company, et al.

(See S. C. Reporter's ed. 66-70.)

Injunction — against illegal tax — remedy at law.

1. Equity has jurisdiction, there being no adequate remedy at law, of a suit to enjoin state officials from enforcing an alleged unlawful tax upon foreign railway companies where such tax is made a first lien upon all the property of the railways in the state, thus putting a cloud upon their titles, and where delay in payment is visited with considerable penalties.

[For other cases, see Equity, I. c; Injunction, I. k, in Digest Sup. Ct. 1908.]

Injunction — against illegal tax — remedy at law.

2. Equitable relief by way of injunction against the enforcement of state taxes alleged to be unlawfully assessed will not be denied on the ground that an adequate remedy at law exists under a local statutory provision that an action respecting the title to property, or arising upon contract, may be brought in the state courts against the state the same as against a private person.

[For other cases, see Equity, I. c; Injunction, I. k, in Digest Sup. Ct. 1908.]

Taxes — foreign railway company — considering property outside state.

3. A state, when taxing a foreign interstate railway company, cannot take into account the property of such railway company situated outside the state unless it can be seen in some plain and fairly intelligible way that such property adds to the value

---

Note.—On the jurisdiction of equity where remedy at law exists—see notes to Meldrum v. Meldrum, 11 L.R.A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. 6 L.R.A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

On injunction to restrain the collection of illegal taxes—see notes to Odlin v. Woodruff, 22 L.R.A. 699; Ogden City v. Armstrong, 42 L. ed. U. S. 445; and Dows v. Chicago, 20 L. ed. U. S. 65.

On constitutional restriction on power of taxation—see note to Birmingham v. Klein, 8 L.R.A. 369.

On the power of a state to tax—see note to Dobbins v. Erie County, 10 L. ed. U. S. 1022.

As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburgh & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

of the railway and the rights exercised in the state.

[For other cases, see Commerce, III. a; Taxes, III. b, 2, a; Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — commerce — state taxation of foreign railway company — proportioning local value to entire system.

4. A state may not, consistently with the commerce and due process of law clauses of the Federal Constitution, fix the value of the property of foreign interstate railway companies for the purpose of levying a special excise tax upon the doing of business in the state by taking the total value of the stock and bonds of each railway company and assessing the proportion of this value that the main track mileage bears to the main track of the whole line, where, by reason of topographical conditions, the cost of the lines in that state was much less than in other states, and the great and very valuable terminals of the railways are in other states, and where the valuations as made include such items as bonds secured by mortgage of lands in other states, a land grant in another state, and other property that adds to the riches of the corporation, but does not affect that part of the railway in the state.

[For other cases, see Commerce, III. a; Taxes, III. b, 2, a; Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

[No. 683.]

Argued April 21, 1920. Decided May 3, 1920.

APPEAL from the District Court of the United States for the District of North Dakota to review a decree enjoining the enforcement of a state tax on foreign interstate railway companies. Affirmed.

The facts are stated in the opinion.

Mr. **F. E. Packard** argued the cause, and, with Mr. William Langer, Attorney General of North Dakota, filed a brief for appellants:

Appellants have a plain, adequate, and complete remedy at law.

New York Guaranty & Indemnity Co. v. Memphis Water Co. 107 U. S. 205, 27 L. ed. 484, 2 Sup. Ct. Rep. 279; Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. ed. 651, 23 Sup. Ct. Rep. 452; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636, 27 Sup. Ct. Rep. 326; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941; 2 Cooley, Taxn. 3d ed. p. 1485; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260; Chicago, M. & St. P. R. Co. v. Cass County, 8 N. D. 18, 76 N. W. 239; Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, L.R.A.1916A, 965, 153 N. W. 454; State v. Mutual L. Ins. Co. 175 Ind. 59, 42 L.R.A.(N.S.) 256, 93 N. E. 213.

If a statute will bear two constructions, one within and the other beyond the constitutional power of a lawmaking body, the courts must adopt that which is consistent with its constitutionality, as the presumption prevails that the legislature intended to act within the scope of its authority.

St. Louis South Western R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 Sup. Ct. Rep. 99.

The law in question is not invalid, since it levies a tax on the basis of mileage proportion of a unit value of stocks and bonds. It imposes a tax upon property within the state, although the major portion of it may be devoted to interstate commerce.

Ibid.; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, 34 Sup. Ct. Rep. 15; Looney v. Crane Co. 245 U. S. 178, 62 L. ed. 230, 38 Sup. Ct. Rep. 85.

Distribution of unit value upon a single-track mileage basis, with certain qualifications, has been uniformly recognized by Federal courts as eminently fair.

Louisville & N. R. Co. v. Bosworth, 209 Fed. 422; Louisville & N. R. Co. v. Greene, 244 U. S. 522, 61 L. ed. 1291, 37 Sup. Ct. Rep. 683, Ann. Cas. 1917E, 97; State R. Tax Cases, 92 U. S. 608, 23 L. ed. 671; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88; Illinois C. R. Co. v. Greene, 244 U. S. 555, 61 L. ed. 1309, 37 Sup. Ct. Rep. 697.

The measure of the tax is the total assets of the corporation.

Bailey v. Clark, 21 Wall. 284, 22 L. ed. 651; People ex rel. Commercial Cable Co. v. Morgan, 178 N. Y. 433, 67 L.R.A. 960, 70 N. E. 967; Leather Mfrs.' Nat. Bank v. Treat, 62 C. C. A. 644, 128 Fed. 262.

Mr. **E. Marvin Underwood** argued the cause, and, with Solicitor General King and Messrs. D. F. Lyons, M. L. Countryman, H. H. Field, H. B. Dike, and Alexander Koplin, filed a brief for appellee Walker D. Hines, Director General of Railroads:

This is a proper case for the exercise of equity jurisdiction.

Ohio River & W. R. Co. v. Dittey, 232

U. S. 576, 587, 58 L. ed. 737, 743, 34 Sup. Ct. Rep. 372; Shaffer v. Carter, 252 U. S. 37, ante, 445, 40 Sup. Ct. Rep. 221; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 471, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236.

The statute in question is invalid, since it taxes property outside of the state of North Dakota, and constitutes an undue burden on interstate commerce.

Meyer v. Wells, F. & Co. 223 U. S. 298, 301, 56 L. ed. 445, 447, 32 Sup. Ct. Rep. 218; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617; Locomobile Co. v. Massachusetts, 246 U. S. 146, 62 L. ed. 631, 38 Sup. Ct. Rep. 298; Looney v. Crane Co. 245 U. S. 178, 62 L. ed. 230, 38 Sup. Ct. Rep. 85; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Union Tank Line Co. v. Wright, 249 U. S. 275, 283, 63 L. ed. 602, 607, 39 Sup. Ct. Rep. 276.

Since the company is not free to renounce the privilege of doing intrastate business, the tax in question is invalid because it would be in effect a privilege tax upon interstate business.

Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Allen v. Pullman's Palace Car Co. 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39.

Mr. **Charles W. Bunn** argued the cause, and, with Messrs. Burton Hanson, E. C. Lindley, and A. H. Bright, filed a brief for the Railway Companies:

The tax is made by the act a first lien on all property within the state of each assessed railway corporation, taking precedence over all other demands and judgments, including, apparently, priority over mortgage and other similar liens. This is a ground of equity jurisdiction.

Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 737, 34 Sup. Ct. Rep. 372; Shaffer v. Carter, 252 U. S. 37, ante, 445, 40 Sup. Ct. Rep. 221.

Ten per cent penalty immediately accrues about December 3, and thereafter 1 per cent for each month while the tax remains unpaid. The act directs proceedings to be taken by the attorney general to collect the tax and penalties, by sale of the corporate properties or otherwise. This brings the case within those in which payment of the tax would not be voluntary, and would be held made under duress.

Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 471, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236.

The act requires that all moneys collected under its provisions shall be paid into the state treasury, to be used for defraying the general expenses of the state government. It is thought there is no statute of North Dakota giving the right to sue the state to recover taxes illegally exacted; and a taxpayer's remedy against the receiving officer personally is certainly inadequate, for he is faced with the uncertainty of making collection. This was held to give equity jurisdiction in Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

It is shown by Union P. R. Co. v. Weld County, 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510, and by Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941, cited and approved in Greene v. Louisville & Interurban R. Co. 244 U. S. 519, 61 L. ed. 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88, that, in order for payment under duress and suit to recover back to be adequate, there must be a clear right under the state law to recover from the governmental authority imposing and receiving the tax.

See also Louisville & N. R. Co. v. Greene, 244 U. S. 531, 61 L. ed. 1299, 37 Sup. Ct. Rep. 683, Ann. Cas. 1917E, 97; Johnson v. Wells, F. & Co. 239 U. S. 234, 60 L. ed. 243, 36 Sup. Ct. Rep. 62.

The secretary of state, after ninety days' delinquency, is required to cancel registration of the corporations, thus suspending their privileges under the laws of North Dakota to do business, until the tax is paid, with penalties. This feature gives equity jurisdiction.

Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280.

The Federal courts entertain jurisdiction of suits to recover taxes illegally exacted, because they are founded upon an act of Congress, and not because of any implied contract.

United States v. Emery, B. J. Realty Co. 237 U. S. 28, 32, 59 L. ed. 825, 827, 35 Sup. Ct. Rep. 499.

Indeed, the decisions show that there is no implied contract, where the government either takes property under a claim of title, or exacts payment of taxes, asserting them to be legal.

Ibid.; Basso v. United States, 239 U. S. 602, 60 L. ed. 462, 36 Sup. Ct. Rep. 226; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.

A bare action to recover taxes paid under protest is not one based on contract, express or implied; a fortiori it does not fall under the North Dakota statute, which says nothing about implied contracts.

United States v. Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; United States v. Kaufman, 96 U. S. 567, 24 L. ed. 792.

The equity jurisdiction was sustained in Johnson v. Wells, F. & Co. supra, and by the circuit court of appeals in the same case (L.R.A.1916C, 522, 130 C. C. A. 528, 214 Fed. 180), notwithstanding a statute of South Dakota, which gave a much better remedy than the statute in question.

The jurisdiction being properly invoked on constitutional grounds, the court will determine all questions involved, though purely of state law.

Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 508, 61 L. ed. 1280, 1285, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88.

The tax in question cannot be sustained as a property tax.

Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218.

A tax which professes to be on a privilege may be, by reason of the mode of its assessment, in substance a tax on property without the state, and therefore a trespass on fields which the state constitutionally may not enter; a tax which calls itself a tax on the privilege of doing business within the state must be regarded as a tax on property outside the state if its amount is fixed by the value of such property.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Ludwig v. Western U. Teleg. Co. supra; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050; Looney v. Crane Co. 245 U. S. 178, 62 L. ed. 230, 38 Sup. Ct. Rep. 85; International Paper Co. v. Massachusetts, 246 U. S. 135, 62 L. ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617; Locomobile Co. v. Massachusetts, 246 U. S. 146, 62 L. ed. 631, 38 Sup. Ct. Rep. 298.

Under the special facts shown in the bill, the taxing of a track mileage proportion of the total value of all the carrier's property of every kind whatsoever and wherever situate demonstrates that the tax is laid on property beyond the jurisdiction of the taxing state.

Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Meyer v. Wells, F. & Co. supra; Union Tank Line Co. v. Wright, 249 U. S. 275, 286, 63 L. ed. 602, 608, 39 Sup. Ct. Rep. 276.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal from an order of three judges restraining the defendants, the appellants, from taking steps to enforce taxes imposed by an act of North Dakota, approved March 7, 1919 (chap. 222), until the further order of the court. The plaintiff railroads are corporations of other states, with lines extending into North Dakota. The defendants are the state tax commissioner, the state treasurer, the state auditor, the attorney general, and the secretary of state for North Dakota. As the tax is made a first lien upon all the property of the plaintiff railroads in the state, and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the state to which the tax is to be paid. Shaffer v. Carter, March 1, 1920 [252 U. S. 37, ante, 445, 40 Sup. Ct. Rep. 221]; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 472, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236. The only ground for supposing that there is such a remedy is a provision that "an action respecting the title to property, or arising upon contract, may be brought in the district court against the [68] state the same as against a private person." N. D. Comp. Laws 1913, § 8175. This case

does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiffs to a speculation upon what the state court might say if an action at law were brought. Union P. R. Co. v. Weld County, 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510.

We quote the tax law in full.[1] It will be seen that it [**69**] purports to be a special excise tax upon doing business in the state. As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds, and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But, on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a state of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries, and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the [**70**] possession of bonds secured by mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax,—whatever it may be,—whether a tax on property, or, as here, an excise upon doing business in the state. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 364, 59 L. ed. 265, 272, 35 Sup. Ct. Rep. 99. In this case, it is alleged. the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with

[1] (2) Every corporation, joint-stock company or association, now or hereafter organized under the law of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing business in the state by such corporation, joint-stock company or association, equivalent to 50 cents for each $1,000 of the capital actually invested in the transaction of business in the state: provided, that in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state, business within the state shall be held to mean such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business both within and without the state: provided, that in the case of a railroad, telephone, telegraph, car or freight-line, express company or other common carrier, or a gas, light, power of heating company, having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding calendar year; provided, that for the purpose of this tax an exemption of $10,000 from the amount of capital invested in the state shall be allowed; provided, further, that this exemption shall be allowed only if such corporation, joint-stock company or association furnish to the tax commissioner all the information necessary to its computation.

interstate commerce and a taking of property without due process of law. Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Union Tank Line Co. v. Wright, 249 U. S. 275, 282, 63 L. ed. 602, 607, 39 Sup. Ct. Rep. 276.

The attorney general of the state, in his very candid argument, suggested that if the mode adopted by the tax commissioner were open to objections, the statute might be construed to give him an election as to the method of distribution, and that he should take gross earnings, or, if more easily ascertainable, the property or mileage basis of distribution. As we are dealing only with a preliminary injunction, we confine our consideration to a general view of the mode actually followed, and upon that we are of opinion that the decree should be affirmed.

Decree affirmed.

---

[71] GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,
v.
J. C. CAHILL and George Redman, Copartners as Redman & Cahill, and the Board of Railroad Commissioners of the State of South Dakota.

(See S. C. Reporter's ed. 71-77.)

Constitutional law — due process of law — requiring railway company to install scales.

Railway companies may not, consistently with due process of law, be compelled by a state administrative order to install cattle-weighing scales at stations from which cattle are shipped.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 124.]

Argued January 13, 1920. Decided May 17, 1920.

IN ERROR to the Supreme Court of the State of South Dakota to review a judgment which reversed a judgment of the Circuit Court of Minnehaha County, in that state, reversing an order of the State Board of Railroad Commissioners which directed a railway company to install a cattle-weighing scale at a specified station. Reversed and remanded for further proceedings.

See same case below, 40 S. D. 55, P.U.R.1918C, 184, 166 N. W. 306.

The facts are stated in the opinion.

Mr. **E. C. Lindley** argued the cause, and, with Messrs. M. L. Countryman, F. R. Aikens, and H. E. Judge, filed a brief for plaintiff in error.

Mr. **Oliver E. Sweet** argued the cause, and, with Mr. Clarence C. Caldwell, Attorney General of the state of South Dakota, and P. W. Dougherty, filed a brief for defendants in error.

Mr. Chief Justice **White** delivered the opinion of the court:

In Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753, the question was whether an order of the

---

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Duty of railway company to install stock scales at station.

The existence of any duty on the part of a carrier to install stock-weighing scales at stations from which stock is shipped is negatived in the decision in GREAT NORTHERN R. Co. v. CAHILL, and in that in Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753. These decisions are in accord with that in New Mexico Wool Growers' Asso. v. Atchison, T. & S. F. R. Co. 20 N. M. 33, 145 Pac. 1077, and with a ruling of the Indiana Public Service Commission in McDonald v. Pittsburgh, C. C. & St. L. R. Co. P.U.R.1916E, 801.

The point is made in these cases that such scales are not reasonably necessary for any purpose involved in the business of the railway company in the transportation of live stock, but are a convenience to dealers and stock raisers for their information in computing the amount of sales. The point urged in favor of the duty of the carrier to install such scales, that the shipper would thereby be enabled to load more economically, is negatived also by the fact which was shown in each of the cases that the rates for the shipment of live stock were based upon weight determined upon track scales in transit or at point of destination, and that hoof stock scales were never used for determining the weight upon which the tariff was based. It was further shown in at least some of the cases that, in loading stock into the cars, the shipper loaded the same not according to

Railroad & Warehouse Commission of Minnesota, directing the railway to install at a named station a cattle-weighing scale, was rightly sustained by the supreme court of the state. It [72] was found by that court (a) that out of 259 stations on the railway line in Minnesota where stockyards for handling cattle existed there were but 54 supplied with cattle-weighing scales, all of which the railway had voluntarily installed; (b) that although such scales had no direct part in transportation, they were convenient in stock dealings, and a station possessing one had an advantage over a place where none existed; in fact, that at the 54 stations where they had been voluntarily installed it had come to pass that they were used, not by shippers for the purposes of their transportation business, but by those who bought and sold cattle.

Coming to consider the contention of the railway that the order to put in the scales was repugnant to the 14th Amendment, as a taking of its property without due process, since, as a carrier, no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet. Holding that, as the duty of the railway was confined to furnishing appliances for its business of transportation, and that cattle scales were not of such a character, it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle, however much the public might be benefited thereby, the defense of the railway was maintained, and the order of the Commission was held to be wanting in due process and void. The result, it was pointed out, could not be avoided by the suggestion that the order was intended to correct a discrimination which existed in favor of certain stations which had scales, since in substance to say that would be to correct one discrimination by creating another.

Shortly before the argument in this court of the Minnesota Case just referred to, the firm of Cahill & Redman [73] petitioned the Board of Railroad Commissioners of South Dakota for an order requiring the Great Northern Railway Company to install and maintain a cattle scale adjacent to its cattle yards at Albee station. It was alleged in the petition that no means otherwise of weighing cattle existed at Albee; that the public necessities of the cattle trade required the scale, and that the number of cattle shipped from the place justified the outlay by the railway.

The railway answered, denying any duty on its part to install the scale, and asserted that to compel it to put the scale in would deprive it of its property without due process, and would, besides, deny it the equal protection of the laws, both in violation of the 14th Amendment.

At the hearing which followed there was no showing that any cattle had been shipped over the railway into Albee. It was indisputably established, however, (a) that not only the defendant railway, but the other roads operating in the state of South Dakota, had, at some of their stations, installed stockyard scales which presumably, in the absence of all proof to the contrary, had been voluntarily installed; (b) that all shipments of cattle from Albee during the preceding three years amounted only to 56 carloads, all of which were moved in interstate commerce, that is, to St. Paul, Minnesota, and that with regard to less than carload lots two cattle shipped in intrastate commerce constituted the sole movement; (c) that the universal rule on all railroads throughout the United States is to determine the weight of cattle shipped in carload lots, for the purposes of ascertaining the freight charges, not by weight taken on scales at the point of shipment, but by a track scales at or adjacent to the point of delivery; (d) that the business of dealing in cattle at Albee would be facilitated and probably increased by the existence there of a cattle scale where cattle dealt in could be weighed, and that the public want in this respect had come to be increasingly felt since the removal by its owner of a [74] private scale which the public had used at a time previous to the demand made upon the railway to install the cattle scale here in question.

The Commission, in its findings, while pointing out that the complainants had testified that, besides the benefit to the public, there would be an advantage to

---

weight, but placed in a given car only so much stock as would ride safely to the point of destination.

On the contrary, the power of a state corporation commission to require a railroad company to install track scales for weighing lumber was sustained in North Carolina Corporation Commission v. Atlantic Coast Line R. Co. 139 N. C. 126, 51 S. E. 793.

shippers by the establishment of the scale, as it would enable the shippers to load their cattle so as to avoid any loss resulting from a failure to bring the loaded car up to the minimum weight required for carload shipments, added the following: "The testimony of the other witnesses, including those appearing for the railway company, is to the effect that the only use to which a stock scale is put is for the accommodation and convenience of stock buyers and persons making sales of live stock to the buyers at stockyards in arriving at the weights as to the basis for the purchase and sale."

In the meanwhile the Minnesota Case had been decided, and therefore, when the Commission came to apply the law to the facts by it found in this case, it was called upon to determine how far the ruling in that case deprived it of power to grant the relief prayed in this. Discharging that duty, it held that the Minnesota Case was inapplicable, because in South Dakota there was a common knowledge that railroad cattle scales when established were for the benefit of both the public and shippers, enabling all who took cattle into the railroad yards, whether for shipment or otherwise, to ascertain their weight. After referring to the relation in certain aspects which cattle scales when installed bore to carload and less than carload shipments, and that a law of the state provided for the inspection of cattle scales when installed by railways at their cattle yards, it was pointed out that, in accordance with many adjudged cases establishing that it was a part of the duty of a carrier to install stockyards in which to hold cattle intended for shipment, and to receive inbound cattle when unloaded, it had, by further legislation, been made the duty of carriers [75] to establish stockyards at their stations. Declaring that no difference in principle existed between the duty to furnish stockyards and the duty to install stock scales, the conclusion of the Commission was thus summed up:

"After a very careful examination of the evidence in this record, this Commission is of the opinion and finds that live-stock scales are a necessary facility at stockyards for the weighing of live stock received for the purposes of shipment, not only for the convenience of the public at large, live-stock buyers and individual shippers, but in the necessary weighing preliminary to properly loading and subsequent to the unloading of live stock at such stockyards, and that there is an actual public necessity for the installation of a stockyards scale at the stockyards of the defendant at its station at Albee, in Grant county, in this state."

Conforming to these conclusions, the order awarded directed the installation of a stock scale of a certain capacity "in such a manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station, as well as the weighing of stock received into the stockyards at Albee."

An intermediary court to which the case was removed held that as the furnishing of a stock scale was no part of the duty of a common carrier, the railway could not be compelled to furnish it without taking its property without due process of law, and that this result would be all the more flagrantly brought about by compelling the railway to furnish the scale upon the theory that, if furnished, it would afford a facility for the trading in cattle at the place where it was installed.

The complainant and the Board of Railroad & Warehouse Commissioners, as appellants, in invoking the reversal of the judgment of the intermediary court and the affirmance of the order of the Board, as stated by the supreme court of the state, in that court relied solely upon [76] two grounds: "First, that local buyers and sellers of live stock have the right to demand the installation of stockyard scales for their own convenience in buying live stock, and second, that it is the duty of the carrier to furnish the shipper such facilities as will enable him to avoid underloading cars where the rate is fixed upon minimum loads, and to ascertain the cost of shipping stock in a car in excess of the minimum carload weight." [40 S. D. 58, P.U.R.1918C, 184, 166 N. W. 306.]

Disposing of the first of these contentions the court said: "The fallacy of the first proposition is so clear that discussion would be idle. The carrier owes no duty to the local buyer or seller of live stock until the stock is tendered at the stockyards for shipment."

In passing upon the second proposition the court quoted a passage from a textbook (10 C. J. 59) in which, after stating the general duty of a common carrier to furnish appliances necessary or appropriate for discharging its duties as a common carrier, it was declared: "The duty of a carrier of live stock, it is said, cannot be efficiently discharged without the aid of pens or yards in which the live stock offered for shipment can be received and handled with safety and without inconvenience to the public, be-

fore being loaded in the cars in which they are to be transported, and such duty is strictly analogous to the duty of the carrier to construct and maintain a secure depot for inanimate freight."

Applying such doctrine the court, without citation of authority or reference to any legislative enactment or administrative practice supporting the view, and without referring to the South Dakota statutes relied upon by the Board, making it obligatory upon the carrier to put in cattle pens at all stations, without imposing any such duty to put in cattle scales, but, on the contrary, giving power only to inspect such scales when put in, held, wholly as a matter of first impression, that the identity between the two (cattle yards and cattle scales) was so complete that [77] the obligation which existed to erect cattle yards at every station also established the duty to install a cattle scales at every station. The judgment of the intermediary court was therefore reversed and the order of the Board affirmed.

Eliminating, as this conclusion did, all the questions pressed before the Board obviously with the purpose of taking the case out of the reach of the Minnesota decision, based upon a supposed duty to put in scales because of the advantage which would result to dealers in cattle, it clearly follows that this case is decisively controlled by the ruling in the Minnesota Case, and therefore leaves us only the duty to apply that ruling. Coming to do so, the judgment below is therefore reversed and the cause remanded, with directions for further proceedings not inconsistent with this opinion.

It is so ordered.

ERIE RAILROAD COMPANY, Petitioner,
v.
WILLIAM M. COLLINS.

(See S. C. Reporter's ed. 77–86.)

Master and servant — employer's liability — when servant is engaged in interstate commerce.

1. An employee of an interstate railway company assigned to duty in a signaling tower and pumping station was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act while starting a gasolene engine at the pumping station, which was used to pump water into a tank from which water was to be supplied daily to locomotives in whatever commerce, interstate or intrastate, engaged.

[For other cases, see Master and Servant, II. a, 2, b, in Digest Sup. Ct. 1918 Supp.]

Damages — shame and humiliation.

2. Shame and humiliation because of disfigurement may be an element in the recovery of damages for the injury.

[For other cases, see Damages, VI. q, in Digest Sup. Ct. 1908.]

[No. 348.]

Argued January 8, 1920. Decided May 17, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of New York in favor of plaintiff in a personal-injury action brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 170 C. C. A. 240, 259 Fed. 172.

The facts are stated in the opinion.

Mr. **John W. Ryan** argued the cause, and, with Mr. Adelbert Moot, filed a brief for petitioner:

At the time of his injury Collins was not employed in interstate commerce within the meaning of that term as used in the Federal Employers' Liability Act.

Southern R. Co. v. Puckett, 244 U. S. 571, 574, 61 L. ed. 1321, 1325, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 478, 58 L. ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153; Erie R. Co. v. Welsh, 242 U. S. 303, 306, 61 L. ed. 319, 324, 37 Sup. Ct. Rep. 116; New York C. R. Co. v. Winfield, 244 U. S. 147, 163, 61 L. ed. 1045, 1053, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Lehigh Valley R. Co. v. Barlow, 244 U. S. 183,

---

Note.—On the constitutionality, application, and effect of the Federal Employers' Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

As to mental suffering arising from contemplation of disfigurement or mutilation as element of damages for personal injuries—see notes to Patterson v. Blatti, L.R.A.1916E, 898; and Diamond Rubber Co. v. Harryman, 15 L.R.A. (N.S.) 775.

61 L. ed. 1070, 37 Sup. Ct. Rep. 515; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188; Kelly v. Pennsylvania R. Co. 151 C. C. A. 171, 238 Fed. 95; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918D, 54, 13 N. C. C. A. 1127; Gallagher v. New York C. R. Co. 180 App. Div. 88, 167 N. Y. Supp. 480, 222 N. Y. 649, 119 N. E. 1044, 248 U. S. 559, 63 L. ed. 421, 39 Sup. Ct. Rep. 6; Vollmers v. New York C. R. Co. 223 N. Y. 571, 119 N. E. 1084.

The erroneous instruction of the court that plaintiff was entitled to recover for shame and humiliation felt by him resulted in an outrageously excessive verdict.

Southern P. Co. v. Hetzer, 1 L.R.A. (N.S.) 288, 68 C. C. A. 26, 135 Fed. 272; Kennon v. Gilmer, 131 U. S. 22, 26, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 696; McDermott v. Severe, 202 U. S. 600, 611, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709.

Mr. **Hamilton Ward** argued the cause, and, with Mr. Irving W. Cole, filed a brief for respondent:

At the time of the injury, respondent was engaged in interstate employment, or in an act of his employment so closely related to or connected with or incidental to interstate commerce as to come within the Federal act.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Erie R. Co. v. Welsh, 242 U. S. 303, 61 L. ed. 319, 37 Sup. Ct. Rep. 116; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188; Kinzell v. Chicago, M. & St. P. R. Co. 250 U. S. 130, 63 L. ed. 893, 39 Sup. Ct. Rep. 412; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918D, 54, 13 N. C. C. A. 1127; Eng v. Southern P. Co. 210 Fed. 92; Southern R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69; Roush v. Baltimore & O. R. Co. 243 Fed. 712; Thomas v. Boston & M. R. Co. 134 C. C. A. 554, 219 Fed. 180, 8 N. C. C. A. 981; Pittsburgh, C. C. & St. L. R. Co. v. Glinn, 135 C. C. A. 46, 219 Fed. 148; Coal & Coke R. Co. v. Deal, 145 C. C. A. 490, 231 Fed. 604; Philadelphia, B. & W. R. Co. v. McConnell, 142 C. C. A. 555, 228 Fed. 263; Guy v. Cincinnati Northern R. Co. 198 Mich. 140, 166 N. W. 667, 246 U. S. 668, 62 L. ed. 930, 38 Sup. Ct. Rep. 336; Sells v. Grand Trunk Western R. Co. 206 Ill. App. 45; Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 63 L. ed. 869, 39 Sup. Ct. Rep. 396; Guida v. Pennsylvania R. Co. 183 App. Div. 822, 171 N. Y. Supp. 285, 224 N. Y. 712, 121 N. E. 871; Hargrove v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 202 S. W. 188; Eskelsen v. Union P. R. Co. 102 Neb. 423, 167 N. W. 408, 168 N. W. 366; Denver & R. G. R. Co. v. Da Vella, 63 Colo. 71, 165 Pac. 254; Denver & R. G. R. Co. v. Wilson, 62 Colo. 492, 163 Pac. 857; Re Maroney, — Ind. App. —, 118 N. E. 134; Morata v. Oregon-Washington R. & Nav. Co. 87 Or. 219, 170 Pac. 291; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Lindstrom v. New York C. R. Co. 186 App. Div. 429, 174 N. Y. Supp. 224; New York C. R. Co. v. Porter, 249 U. S. 168, 63 L. ed. 536, 39 Sup. Ct. Rep. 188; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8, 130 Pac. 897; Kelly v. Erie R. Co. 188 App. Div. 863, 177 N. Y. Supp. 278.

There was no reversible error in the charge of the court on the question of damages.

Seaboard Air Line R. Co. v. Renn, 241 U. S. 290, 60 L. ed. 1006, 36 Sup. Ct. Rep. 567, 17 N. C. C. A. 1; New York C. R. Co. v. Bianc, 250 U. S. 596, 63 L. ed. 1161, 40 Sup. Ct. Rep. 44; McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162, 26 Sup. Ct. Rep. 709; United States Exp. Co. v. Wahl, 94 C. C. A. 260, 168 Fed. 851; Middlesex & B. Street R. Co. v. Egan, 131 C. C. A. 53, 214 Fed. 747; Prescott v. Robinson, 74 N. H. 460, 17 L.R.A.(N.S.) 594, 124 Am. St. Rep. 987, 69 Atl. 522; Morris v. International R. Co. 174 App. Div. 61, 159 N. Y. Supp. 993; Diamond Rubber Co. v. Harryman, 41 Colo. 415, 15 L.R.A.(N.S.) 775, 92 Pac. 922; Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695, Ann. Cas. 1912D, 1238; Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238; Rockwell v. Eldred, 7 Pa. Super. Ct. 95; Gray v. Washington Water Power Co. 30 Wash. 665, 71 Pac. 206; Heddles v. Chicago & N. W. R. Co. 77 Wis. 228, 20 Am. St. Rep. 106, 46 N. W. 115; Central R. & Bkg. Co. v. Lanier, 83 Ga. 587, 10 S. E. 279; Ken-

non v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696.

[80] Mr. Justice McKenna delivered the opinion of the court:

Action for damages under the Federal Employers' Liability Act, brought in the district court for the western district of New York.

The following are the allegations of the complaint, stated narratively:

December 25, 1915, and prior thereto, defendant was an operator of a steam railroad and engaged in interstate commerce. On and prior to that date plaintiff, as an employee of defendant, operated a signaling tower and water tank in the town of Burns, New York, the tower being used for the operation of trains in interstate and intrastate commerce. The tank was used for supplying the locomotives of the trains with water, which was pumped from a close-by well into the tank by a gasolene engine which plaintiff ran.

In the nighttime of December 25, 1915, while plaintiff was engaged in starting the engine, the gasolene suddenly exploded, burning him and seriously and painfully and permanently injuring him, causing him immediate and permanent suffering and the expenditure of large sums of money, by all of which he was damaged in the sum of $25,000.

The engine was defective, which was the cause of the explosion, plaintiff being guilty of no negligence.

Judgment was prayed in the sum of $25,000.

Defendant by demurrer attacked the sufficiency of the complaint and the jurisdiction of the court.

The court (Judge Hazel) overruled the demurrer, but, in doing so, expressed the conflicting considerations which swayed for and against its strength, but finally held the complaint sufficient, "and that plaintiff was engaged in interstate commerce, or that his work was so closely connected therewith as to be a part of it." To this conclusion. [81] the court seemed to have been determined by Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.

Defendant answered, putting at issue the allegations of the complaint, and set up as separate defenses assumption of risk and contributory negligence.

A trial was had to a jury, during the course of which it was stipulated that, at the time of plaintiff's injury and prior thereto, "trains carrying interstate commerce ran daily," and at such times "water from the water tank was supplied daily in part to defendant's engines engaged in interstate commerce and in part to engines hauling intrastate freight."

Motions for nonsuit and for a directed verdict were successively made and overruled.

The jury returned a verdict for plaintiff in the sum of $15,000, upon which judgment was entered against motion for arrest and new trial.

Error was then prosecuted to the court of appeals, which court affirmed the judgment, and to review its action this certiorari was granted.

The evidence presents very few matters of controversy. It establishes the employment of plaintiff by defendant, and its character, and presents the question whether it was in interstate commerce or intrastate commerce, in both of which, it is stipulated, defendant was engaged. And on this question the courts below decided the employment was in interstate commerce, though exhibiting some struggle with opposing considerations.

They seemed to have been constrained to that conclusion by the same cases; and a review of them, therefore, is immediately indicated to see whether, in their discord or harmony, whichever exists, a solution can be found for the present controversy.

They all dealt with considerations dependent upon the [82] distinctions of fact and law between interstate and intrastate commerce. A distinction, it may at once be said, is plain enough so far as the essential characteristics of the commerces are concerned, but how far instruments or personal actions are connected with either, and can be assigned to either, becomes in cases a matter of difficulty, and ground, it may be, of divergent judgments. With this in mind we review the cases.

But first as to the facts in this: Defendant is an interstate railroad, and upon its line running from other states to New York it operated in New York a signal tower and switches, to attend which plaintiff was employed. It also had near the tower a pumping station, consisting of water tank and a gasolene engine for pumping purposes, through which instrumentalities water was supplied to its engines in whichever commerce engaged. While in attendance at the pumping station plaintiff was injured. And such is the case, that is, while in attendance at the pumping station, it being

his duty to so attend, was he injured in interstate commerce?

It can hardly be contended that while plaintiff was engaged in the signal tower he was not engaged in interstate commerce, though he may have, on occasion, signaled the approach or departure of intrastate trains. But it is contended that when he descended from the tower and went to the pumping station he put off an interstate character and took on one of intrastate quality; or, it may be, was devested of both and sank into undesignated employment. A rather abrupt transition, it would seem at first blush, and, if of determining influence, would subject the Employers' Liability Act to rapid changes of application, plaintiff being within it at one point of time and without it at another,—within it when on the signal tower, but without it when in the pump house, though in both places being concerned with trains engaged in interstate commerce.

[83] But let us go from speculation to the cases. Pedersen v. Delaware, L. & W. R. Co. supra, Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902, Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992, Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188, and Roush v. Baltimore & O. R. Co. 243 Fed. 712, were considered by the court of appeals. Some state cases were also referred to.

In Pedersen v. Delaware, L. & W. R. Co. it was held that one carrying bolts to be used in repairing an interstate railroad, and who was injured by an interstate train, was entitled to invoke the Employers' Liability Act. In other words, that one employed upon an instrumentality of interstate commerce was employed in interstate commerce. And it was said, citing cases: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

In the Yurkonis Case the injury complained of happened to Yurkonis on a mine or colliery of the railroad by the explosion of gases when Yurkonis was engaged in and about the performance of his duties. It was held that an injury so received, though the coal was destined for use in interstate commerce, was not one occurring in such commerce.

In Roush v. Baltimore & O. R. Co. 243 Fed. 712, the decision was that one employed in operating a pumping station which furnished water to interstate and intrastate roads was engaged in work incidental to interstate commerce. The court deducing that conclusion from cases from which it liberally quoted.

Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992, the court of appeals considered as substantially the same in incident and principle with the Yurkonis Case, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902. The case concerned an injury [84] while handling coal. It was a step or steps nearer the instrumentality of use. It was being removed, when the injury complained of occurred, from storage tracks to chutes. The employment was considered too distant from interstate commerce to be a part of it, or to have "close or direct relation to interstate transportation." The Yurkonis Case was cited and applied.

Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436. L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188, was considered of like character. The employment asserted to have been in interstate commerce was the taking down and putting up fixtures in a machine shop for repairing interstate locomotives.

Before summarizing these cases we may add Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918B, 54, 13 N. C. C. A. 1127, and Southern R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69. In the Winters Case the work was repairing an engine. The engine, it was said, had no definite destination. "It simply had finished some interstate business and had not as yet begun on any other." As to such instrumentalities the determining principle was said to be that their character depends upon their "employment at the time, not upon remote probabilities or accidental later events."

In the Puckett Case an employee (car inspector) going to the relief of another employee stumbled over some large clinkers in his path while carrying a jack for raising a derailed car. It was decided that he was engaged in interstate commerce, the purpose being to open the way for interstate transportation.

These, then, being the cases, what do they afford in the solution of the case at bar? As we have said regarding the essential character of the two commerces, the difference between them is easily recognized and expressed; but, as we have also said, whether at a given time particular instrumentalities or employ-

ment may be assigned to one or the other may not be easy, and of this the cases are illustrative. What is their determining principle?

[85] In the Pedersen Case it was said that the questions which naturally arise: "Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?" Or, as said in Shanks v. Delaware, L. & W. R. Co. supra, was the "work so closely related to it [interstate commerce] as to be practically a part of it?" The answer must be in the affirmative. Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerces that separated the duty, and it comes, therefore, within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both commerces as were demanded, and the test of the cases satisfied.

There is only one other assertion of error that demands notice. The others (regarding assumption of risk and contributory negligence) counsel neither argue nor submit; their abandonment, therefore, may be assumed.

It is asserted against the verdict that it is "outrageously excessive," caused by the instruction of the court that plaintiff could recover "for shame and humiliation." Counsel's argument is not easy to represent or estimate. They say that "mental pain" of the designated character, "the suffering from feelings, is intangible, incapable of test or trial," might vary in individuals, "rests entirely in the belief of the sufferer, and is not susceptible of contradiction or rebuttal." If all that be granted, it was for the consideration of the jury. It certainly cannot be pronounced a proposition of law that personal mutilation or disfiguration may be a matter of indifference to anybody, [86] or that sensitiveness to it may vary with "temperaments" and be incapable of measurement. We see no error in the instruction.

Judgment affirmed.

Mr. Justice **Van Devanter** and Mr. Justice **Pitney** dissent.

ERIE RAILROAD COMPANY, Petitioner,
v.
ANTONI SZARY.

(See S. C. Reporter's ed. 86-90.)

Master and servant — employer's liability — when servant is engaged in interstate commerce.

A railway employee charged with the duty of sanding the locomotives of a railway company engaged both in intrastate and interstate commerce is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act when, having sanded the last locomotive and carried the ashes from the drying stove in the sand house to the ash pit across the tracks, he was struck by a passing locomotive on his way to get the ash pail, which he had left at the pit while he went for a drink of water, and it is immaterial in what kind of commerce the last locomotive sanded was engaged.

[For other cases, see Master and Servant, II. a, 2, b, in Digest Sup. Ct. 1918 Supp.]

[No. 355.]

Argued January 8, 1920. Decided May 17, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of New York in favor of plaintiff in a personal-injury action brought under the Federal Employers' Liability Act. Affirmed.

See same case below, 170 C. C. A. 246, 259 Fed. 178.

The facts are stated in the opinion.

Mr. **Theodore Kiendl, Jr.**, argued the cause, and Messrs. William C. Cannon and Coulter D. Young filed a brief for petitioner:

The action was brought under the act of Congress known as the Federal Employers' Liability Act. The pleadings raised the issue as to the plaintiff's employment in interstate commerce at the time he sustained his injury, and the burden was upon the plaintiff to establish that he was engaged in such commerce, in order to come within the purview of the Federal statute.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup.

Note.—On the constitutionality, application, and effect of the Federal Employers' Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Southern R. Co. v. Lloyd, 239 U. S. 496, 501, 60 L. ed. 402, 406, 36 Sup. Ct. Rep. 210; McAuliffe v. New York C. & H. R. R. Co. 164 App. Div. 846, 150 N. Y. Supp. 512.

This court has consistently held that the test as to whether or not the employee was engaged in interstate commerce depends upon the work in which he was engaged at the time of the injury.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153; Erie R. Co. v. Welsh, 242 U. S. 303, 61 L. ed. 319, 37 Sup. Ct. Rep. 116; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Southern R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69.

The cases hold that a man may be employed in a position of a dual nature, —that is, in interstate and intrastate commerce; and when so employed the courts will differentiate and determine what was the nature of the work he was engaged in at the particular moment the accident happened.

New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1.

It seems clear from the decisions of this court that the preparation of the sand for, or placing it in, storage, would not constitute interstate commerce.

Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 61 L. ed. 1070, 37 Sup. Ct. Rep. 515; Hudson & M. R. Co. v. Iorio, 152 C. C. A. 641, 239 Fed. 855; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918B, 54, 13 N. C. C. A. 1127.

The other phase of the plaintiff's employment, namely, the cleaning of the stove that dried the sand, and the removal of the ashes from the stove, is the most favorable view of the evidence for the plaintiff. On the night of the accident the plaintiff had cleaned the stove, removed the ashes, taken them over and dumped them into the ash pit. After dumping the ashes in the ash pit, he set the pail down and recrossed the track to the engine house, where he got a drink of water. When on the way back to the ash pit to get the pail, he was run over and injured. So that, at the time of his injury, he was not even engaged in removing the ashes from the stove. But, assuming that his act was a part of his cleaning the stove, it did not have to do with any interstate operation.

Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Illinois C. R. Co. v. Cousins, 241 U. S. 641, 60 L. ed. 1216, 36 Sup. Ct. Rep. 446; Baltimore & O. R. Co. v. Branson, 242 U. S. 623, 61 L. ed. 534, 37 Sup. Ct. Rep. 244; Southern R. Co. v. Pitchford, 165 C. C. A. 330, 253 Fed. 736; Giovio v. New York C. R. Co. 176 App. Div. 230, 162 N. Y. Supp. 1026; O'Dell v. Southern R. Co. 248 Fed. 345, 164 C. C. A. 456, 252 Fed. 540; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918B, 54, 13 N. C. C. A. 1127.

The opinions of the circuit court of appeals in this case and in the Collins Case are opposed to the reasoning and the principles enunciated by this court.

Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 103, 63 L. ed. 869, 872, 39 Sup. Ct. Rep. 396; Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 61 L. ed. 1070, 37 Sup. Ct. Rep. 515; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918B, 54, 13 N. C. C. A. 1127.

Mr. **John C. Robinson** argued the cause and filed a brief for respondent:

In cases where the employee has been injured while working in connection with such instrumentalities of interstate commerce, this court has always held that the employee came within the purview and fair intendment of the Federal Employers' Liability Act, even though the particular instrumentality was used for intrastate as well as for interstate commerce.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Pennsylvania Co. v. Donat, 239 U. S. 50, 60 L. ed. 139, 36 Sup. Ct. Rep. 4; Louisville & N. R. Co. v. Parker, 242

U. S. 13, 61 L. ed. 119, 37 Sup. Ct. Rep. 4; Southern R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69; New York C. R. Co. v. Porter, 249 U. S. 168, 63 L. ed. 536, 39 Sup. Ct. Rep. 188; Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 63 L. ed. 869, 39 Sup. Ct. Rep. 396.

Szary, at the time of his injury, was engaged in interstate commerce.

Philadelphia, B. & W. R. Co. v. Smith, supra; Roush v. Baltimore & O. R. Co. 243 Fed. 713; Guida v. Pennsylvania R. Co. 183 App. Div. 822, 171 N. Y. Supp. 285; Sells v. Grand Trunk Western R. Co. 206 Ill. App. 45.

All of the cases in this court, cited by the petitioner, are clearly distinguishable from the one at bar. They may be grouped under two headings: (a) Those where the injury was sustained while plaintiff was in the act of taking some commodity, which might be used in interstate commerce, from storage, or putting it into storage.

Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Lehigh Valley R. Co. v. Barlow, 224 U. S. 183, 61 L. ed. 1070, 37 Sup. Ct. Rep. 515.

(b) Those where the injury was sustained while repairing or working upon some object such as an engine, car, etc., which was not permanently devoted to interstate commerce, or so closely connected with it as to be a part of it.

Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188; Illinois C. R. Co. v. Cousins, 241 U. S. 641, 60 L. ed. 1216, 36 Sup. Ct. Rep. 446; Baltimore & O. R. Co. v. Branson, 242 U. S. 623, 61 L. ed. 534, 37 Sup. Ct. Rep. 244; Hudson & M. R. Co. v. Iorio, 152 C. C. A. 641, 239 Fed. 855.

It is not necessary, in order for him to obtain the benefit of the Federal Employers' Liability Act, that Szary should have been engaged in interstate commerce at the very instant of his injury.

Knowles v. New York, N. H. & H. R. Co. 223 N. Y. 513, 119 N. E. 1023; Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057, 37 Sup. Ct. Rep. 556, Ann. Cas. 1915B, 662, 14 N. C. C. A. 957.

Mr. Justice **McKenna** delivered the opinion of the court:

Action for damages under the Employers' Liability Act, for the loss of a leg in the railroad company's service. The verdict and judgment were for $20,000. The contest in the case is whether the injury was received in interstate or intrastate service.

The judges below concurred in the judgment, but disagreed upon the grounds of it. Judges Hand and Hough concurred on the authority of the Collins Case (170 C. C. A. 240, 259 Fed. 172), though Judge Hand did not sit in it, and Judge Hough dissented from its judgment.

As we have just affirmed that case, if it is not distinguishable from the case at bar, the latter must also be affirmed. A distinction is not asserted, but both cases are attacked. In our opinion in the Collins Case we have reviewed most of the cases upon which the company relies in this, and whether their principle applies depends upon the facts. We collect them from the testimony, and represent them as the jury had a right to consider them, omitting conflicts.

[89] Sand is necessary to an engine and must be used dry. Szary and two others were employed in its preparation, which was done in what is called the "sand house," a small structure standing in the yards of the company, alongside of the tracks. The drying was done in four large stoves which it was the duty of Szary and his associates to attend. Soft coal was the heating means, and the resulting ashes were dumped in an ash pit, to do which a track had to be crossed.

On the night of the accident, January 5, 1917, Szary began his duties at 6 o'clock, and sanded about seven engines whose destinations were other states. He sanded the last engine at 9 o'clock, and, after doing so, he removed the ashes from the stove and carried them to the ash pit in a pail, according to his custom; in doing which he was compelled to cross one of the tracks. He emptied the pail and left it on the ground while he went to the engine room to get a drink of water, and when returning for the pail and crossing the track he was hit by an engine. He had looked and saw no engine and heard no signal. He described the night as "very dark and very foggy and rainy and misty," and testified that he could not see anything, the steam and smoke from the engines in all parts of the yard being so thick that he could see nothing.

The engine that hit him was running backwards and without a light. He was picked up and carried to a hospital and his left leg was amputated the same night from 2 to 3 inches below the knee.

We think these facts bring the case within the Collins Case and the test there deduced from prior decisions. There were attempts there, and there are attempts here, to separate the duty and assign it character by intervals of time, and distinctions between the acts of service. Indeed, something is attempted to be made of an omission, or an asserted omission, in the evidence, of the kind of commerce in which the last engine served was engaged. [90] The distinctions are too artificial for acceptance. The acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character.

The conclusion that the service of Szary was rendered in interstate commerce determines the correctness of the ruling of the District Court upon the motion to dismiss, made at the close of plaintiff's evidence, and afterwards for particular instructions and the objections to the charge by the court. All of the rulings were based on the character of the commerce, the court adjudging it to be interstate.

It hence follows that the judgment must be and it is affirmed.

Mr. Justice **Van Devanter** and Mr. Justice **Pitney** dissent.

EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco, Petitioner,

v.

CHIN FONG.

(See S. C. Reporter's ed. 90-93.)

Aliens — deportation — Chinese merchant — re-entry — fraud in original entry.

A Chinese person claiming the right to re-enter the United States under the Act of November 3, 1893, as a returning merchant, may not be deported by executive action on the ground that the original entry was fraudulent, but he must be deemed to be entitled to a judicial inquiry and determination of his rights, in view of the provision of that act that a Chinaman who applies for admission into the United States on the ground that he was formerly engaged therein as a merchant must establish the fact by two credible witnesses other than Chinese that he was such at least one year before his departure from the United States, and had not engaged during such year in any manual labor except such as was necessary in the conduct of his business.

[For other cases, see Aliens, VI. b, in Digest Sup. Ct. 1908.]

[No. 506.]

Argued April 22, 1920. Decided May 17, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which, reversing a judgment of the District Court for the First Division of the Northern District of California, directed the discharge of a Chinese person held by the commissioner of immigration for deportation. Affirmed.

See same case below, 169 C. C. A. 569, 258 Fed. 849.

The facts are stated in the opinion.

Assistant Attorney General **Stewart** argued the cause, and, with Mr. Harry S. Ridgely, filed a brief for petitioner.

Mr. **Jackson H. Ralston** argued the cause, and, with Mr. George W. Hott, filed a brief for respondent.

Mr. Justice **McKenna** delivered the opinion of the court:

Certiorari to review a judgment of the court of appeals discharging respondent from the custody of the commissioner of immigration, he holding respondent for deportation as a Chinese person not entitled to be in the United States. 169 C. C. A. 569, 258 Fed. 849. The judgment of the court of appeals reversed that of the district court, the latter court having remanded respondent to the custody of the commissioner for deportation.

The evidence establishes the fact that respondent entered the United States as a merchant, and was such at a fixed place of business for at least a year before his departure for China, and that his stay in China was intended to be temporary. He hence contends that the commissioner, as representing the executive branch of the government, had no authority to determine that his original entry was unlawful. This contention the district court ruled against and the circuit court of appeals ruled in favor of, and constitutes the question in the case. The circuit court of appeals, by Circuit Judge Morrow, passing upon it, said: "The acting Secretary of Labor, in approving the decision of the commissioner of immigration, did so upon the ground that 'the original entry of this man [respondent] was obtained by fraud;' but this was not the question submitted to the

commissioner of immigration or to the Secretary of Labor for [92] decision. The question was not whether the applicant was legally admitted in 1896–1897 or 1906. The question was whether he had been a merchant in the United States at least one year before his departure from the United States in 1912 (Chin Fong v. Backus, 241 U. S. 1, 5, 60 L. ed. 859, 861, 36 Sup. Ct. Rep. 490)," and upon that question, it was decided that "the evidence was all one way, establishing beyond controversy all of the facts required by the statute and the rule of the Department of Labor."

The conclusion was that the commissioner did not consider this evidence or pass upon it, but, deciding that appellee's original entry was fraudulent, ordered his deportation. In other words, it was held that the commissioner ignored the question presented to him and the evidence pertaining to it, reviewed and reversed the judgment of another time and tribunal, took away the right that had been exercised under it and which gave the assurance that respondent could go to China and return again. The order of deportation was, therefore, declared to be void. For this the court cited the case of Chin Fong v. Backus, supra, and the various statutes applicable to the exclusion of Chinese persons from entry into the United States. Acts of May 6, 1882 (22 Stat. at L. 58, chap. 126, Comp. Stat. § 4290, 2 Fed. Stat. Anno. 2d ed. p. 67); July 5, 1884 (23 Stat. at L. 115, chap. 220, 2 Fed. Stat. Anno. 2d ed. p. 67); September 13, 1888 (25 Stat. at L. 476, chap. 1015); March 3, 1901 (31 Stat. at L. 1093, chap. 845, Comp. Stat. § 4332, 2 Fed. Stat. Anno. 2d ed. p. 108), and the Act of November 3, 1893 (28 Stat. at L. 7, chap. 14, Comp. Stat. § 4320).

In the case of United States v. Woo Jan, 245 U. S. 552, 62 L. ed. 466, 38 Sup. Ct. Rep. 207, we had occasion to consider the difference between the situation of a Chinese person in the United States, and one seeking to enter it; and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision. We think the distinction is applicable here, and that one who has been in the United States, and has departed from it with the intention of returning, is entitled, under existing legislation, to have his right to do so judicially investigated with "its assurances and sanctions," [93] as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action.

And such is the provision of the Act of November 3, 1893 (28 Stat. at L. 7, chap. 14, Comp. Stat. § 4320). It is there provided that a Chinaman who applies for admission into the United States on the ground that he was formerly engaged therein as a merchant must establish the fact by two credible witnesses, other than Chinese, that he was such at least one year before his departure from the United States, and had not engaged during such year in any manual labor except what was necessary in the conduct of his business.

The government appeals against the explicit words of the provision to the purpose of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese, or, if they fraudulently enter, to expel them; and it is insisted that it would be a perfunctory execution of the purpose to let one in who may be immediately put out again. That intention, it is urged, should not be ascribed to the laws, and, in emphasis, it is said: "Such a legislative absurdity is unthinkable." But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this court has declared, and, in the present case, the right that had been adjudged, and had been exercised in reliance upon the adjudication.

Judgment affirmed.

---

[94] DANIEL J. LEARY and George Leary, Administrators of James D. Leary, Deceased, Appts.,

v.

UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 94-97.)

Bail — rights of surety — indemnity fund.

1. Funds held in trust primarily as security against liability on a bail bond may not be charged by the surety with the cost of defending against proceedings brought by the United States to collect a judgment upon such bond as forfeited, merely because the United States impounded the funds available for payment.

[For other cases, see Bail, II. d; Principal and Surety, IV. in Digest Sup. Ct. 1908.]

Clerks — fees — poundage.

2. The clerk of a Federal district court may properly deduct his poundage of 1 per cent, under U. S. Rev. Stat. § 828, from the amount allowed to the surety on a forfeited bail bond out of the impounded funds of the principal in such clerk's hands, which

are finally adjudged to have been held in trust primarily as security against liability on such bond.

[For other cases, see Clerks, I. b, 2, in Digest Sup. Ct. 1908.]

Bail — rights of surety — indemnity fund.

3. The surety on a forfeited bail bond cannot charge a fund held in trust as security against liability on such bond with his expenses in defending the trust and establishing its priority over the claims of the United States, nor with the poundage fees of a clerk of court having possession of such fund.

[For other cases, see Bail, II. d; Principal and Surety, IV. in Digest Sup. Ct. 1908.]

[No. 314.]

Argued April 30, 1920. Decided May 17, 1920.

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the District Court for the Western District of Virginia, allowing a part only of a claim of interveners in a suit brought by the United States to establish a trust. Affirmed.

See same case below, 168 C. C. A. 330, 257 Fed. 246.

The facts are stated in the opinion.

Mr. **Aubrey E. Strode** argued the cause, and, with Mr. J. T. Coleman, Jr., filed a brief for appellants:

In the absence of an expressed intention otherwise, the whole fund placed with the trustee was thereby impressed with the trust, and became applicable to its purposes expressed and implied, and reasonably necessary to its execution.

Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; New Amsterdam Casualty Co. v. Cumberland Teleph. & Teleg. Co. 12 L.R.A.(N.S.) 478, 82 C. C. A. 315, 152 Fed. 963; Perry, Trusts, 6th ed. § 910; 2 Beach, Trusts & Trustees, § 698; Stull v. Harvey, 112 Va. 822, 72 S. E. 701; 39 Cyc. 342, 513.

The understanding and agreement of the parties, as appears from the letters and the things done, was an indemnity agreement, and was intended to save Leary harmless from any and all liabilities that might be incurred by him because of his going upon the bail bonds in evidence.

22 Cyc. 79, 80, 89, 97, 98; 1 Bouvier's Law Dict. Rawle's Rev. p. 1010; 2 Words & Phrases, 2d Series, 1033

Greene warranted his title to the stock. By such notice it became incumbent upon Greene to make good the warranty of his title to the stock that was implied in his pledge of it to Leary; and Greene, having defaulted in this duty, which Leary performed for him, is bound to make good the consequent loss, and the stock, having been pledged as indemnity, may be subjected to that loss because of the indemnity agreement, which carried with it the warranty of title.

35 Cyc. 394; 31 Cyc. 811, 812; 40 Cyc. 492, 493.

Leary dealt with Greene unaffected by notice of any infirmity in Greene's title to the pledged security.

Leary v. United States, 144 C. C. A. 70, 229 Fed. 660, 245 U. S. 1, 62 L. ed. 113, 38 Sup. Ct. Rep. 1.

Under the trust and indemnity agreement, expenditures reasonably and necessarily made under that agreement constitute charges upon the impounded fund, including court costs and reasonable attorneys' fees.

Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1158; United States v. Ringgold, 8 Pet. 150, 8 L. ed. 899; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; 22 Cyc. 89; State v. Connolly, 75 N. J. Eq. 521, 138 Am. St. Rep. 577, 72 Atl. 363.

Mr. **Marion Erwin**, Special Assistant to the Attorney General, argued the cause and filed a brief for appellee:

There was no error in charging the 1 per cent clerk's poundage under U. S. Rev. Stat. § 828, Comp. Stat. § 1383, 4 Fed. Stat. Anno. 2d ed. p. 657, on the total amount allowed intervener out of the general fund.

Kitchen v. Woodfin, 1 Hughes, 340, Fed. Cas. No. 7,855; Blake v. Hawkins, 19 Fed. 204.

The indemnity contract went no further than an agreement to hold Leary harmless to the extent of the judgment for principal, interest, and costs, which was rendered against him in the suit brought in the United States circuit court of New York, which, when entered on January 6, 1908, legally and finally established his liability on the bail bond.

22 Cyc. 79, 84, 85; Luddington v. Pulver, 6 Wend. 404; Nash v. Palmer, 5 Maule & S. 374, 105 Eng. Reprint, 1088, 17 Revised Rep. 364, 22 Cyc. 88; Springs v. Brown, 97 Fed. 405; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 343, 14 L. ed. 157, 172; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552.

In no event can the expenses paid out by interveners, in the collateral contest

arising out of the equitable title set up by the United States, be considered as expenses against which Leary was indemnified on Greene's contract with him.

35 Cyc. 416; Bancroft v. Abbott, 3 Allen, 524; Curtis v. Banker, 136 Mass. 355; Brandt v. Donnelly, 94 Ky. 129, 21 S. W. 534; Richards v. Whittle, 16 N. H. 259.

As between party and party, no costs can be taxed against the government, except where the case belongs to some exceptional class, in which it is specially so provided by statute.

United States v. Barker, 2 Wheat. 395, 4 L. ed. 271; United States v. Hooe, 3 Cranch, 73, 2 L. ed. 370; United States v. Davis, 4 C. C. A. 251, 12 U. S. App. 47, 54 Fed. 147; Re Chase, 50 Fed. 695; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 40 L. ed. 1164, 22 Sup. Ct. Rep. 920.

The cases where a solicitor's fees are taxable against a fund in court, for recovery or preservation of the fund, are only cases in which the beneficiaries of the fund may be considered as the clients of the solicitor, as where suit is brought by one party for himself and others, and subsequently all apply for, or are given the benefit of, the work of the first solicitor; or where a trustee brings action to recover, or defends for his cestui que trust. In all such cases the taxation for the solicitor's fees or expenses is against the fund recovered, as between attorney and client, and not against the general fund out of which the trust fund is carved.

Adams v. Kehlor Mill. Co. 38 Fed. 281; Internal Improv. Fund v. Greenough, 105 U. S. 527, 535, 26 L. ed. 1157, 1161; Ryckman v. Parkins, 5 Paige, 543; 11 Cyc. 97; Ober & Sons Co. v. Macon Const. Co. 100 Ga. 635, 28 S. E. 388.

In a case where there is a contest between claimants of a fund in court, the costs and expenses of such contest are not taxable against the general fund, but are taxable, if at all, only as between party and party.

Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; National Bank v. Whitney, 103 U. S. 99, 104, 26 L. ed. 443, 561, 71 N. Y. 161.

[95] Mr. Justice **Holmes** delivered the opinion of the court:

The United States brought a bill to charge Kellogg with a trust in respect of funds received by him from Greene, and obtained from the plaintiff by Greene through his participation in some well-known frauds. In 224 U. S. 567, 56 L. ed. 889, 32 Sup. Ct. Rep. 599, Ann. Cas. 1913D, 1029, the representative of Leary was allowed to intervene and to assert a paramount claim upon the funds. In 245 U. S. 1, 62 L. ed. 113, 38 Sup. Ct. Rep. 1, it was established that the funds were held by Kellogg primarily as security to Leary against his liability upon a bail bond for Greene. The United States having obtained a judgment on the bail bond, and the same having been paid by the Leary estate, the present appellants filed a petition in the cause, in the district court, to have the funds applied to the reimbursement (1) of expenditures in defending against proceedings in the surrogate court to secure payment of the judgment; (2) of expenditures in establishing and protecting the trust; and (3) of the sum of $40,802, the amount paid on the judgment, with interest from July 26, 1910, the date when the judgment was paid. The district court allowed the last claim, with interest at 6 per cent, less the clerk's poundage of 1 per cent under Rev. Stat. § 828, Comp. Stat. § 1383, 4 Fed. Stat. Anno. 2d ed. p. 657. (The details are immaterial.) It denied the other claims, and its decree was affirmed by the circuit court of appeals. 168 C. C. A. 330, 257 Fed. 246. Leary's administrators appealed.

The only reason suggested for the claim on account of defending against proceedings on the judgment is that the United States in the present suit had impounded the funds available for payment. But the obligation to pay the judgment was absolute, not confined to a payment from these funds, and the claim for the cost of resisting it has no foundation. We also are of opinion that the deduction of poundage by the clerk was proper as in other [96] cases of money kept and paid out by him. But it is said that this item and the expense of defending the trust should be borne by the residue of the funds in the clerk's hands after deducting the amount paid in respect of the judgment. It is argued that the trust informally established by letters of Kellogg stating that he held it for Leary's protection, to be applied in payment of his obligation in case it should be established, if construed with reasonable liberality, must embrace these elements to make the protection complete. Of course, the upholding of Leary's claim against the United States was not contemplated in the terms of the trust, because Leary's ignorance of the interest of the United States was essential to the validity of his position as a

purchaser without notice. But it is thought that indemnity includes defenses of the indemnifying fund against unexpected attacks, that if the trustee fails to make it the cestui que trust may do so, and that, in either event, the fund should be charged. It does not matter that the United States is the opposing party, as its rights in the fund are inferior to those that Leary now has successfully affirmed. Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

To these arguments the government replies in the first place that they come too late; that the decree of the circuit court of appeals that was before this court on the last occasion was treated as a final decree, which therefore fixed the amount that the appellants could recover beyond enlargement, and that, as the prayer of the appellants was only for the transfer of so much of the fund as would pay the judgment on the bail bond with interest, nothing more can be asked now. This objection might raise difficulty if otherwise our opinion were in favor of the appellants; but, as we think that the circuit court of appeals was right with regard to the merits, we will assume, for the purposes of decision, that the previous proceeding did not so precisely determine the appellants' [97] rights as to prevent their demanding the foregoing items as incident to the claim allowed.

To charge the fund with these expenses is to charge the United States, and it begs the question to say that the United States in this respect is subordinate to the Leary claim. It is not subordinate unless Leary's costs ought to come out of the government's pocket, even though limited to particular money there. The government cannot be made to pay or to take subject to the deduction, because Leary, even though a bona fide purchaser, had no contract for it, and because to charge the fund apart from contract is merely a roundabout way of saying that the owner of the fund must pay charges of a kind that the United States never pays (see National Bank v. Whitney, 103 U. S. 103, 104, 26 L. ed. 444, 561; United States v. Barker, 2 Wheat. 395, 4 L. ed. 271), and charges for protecting the fund not for, but against, the United States.

Decree affirmed.

Mr. Justice **McReynolds** took no part in the decision of this case.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Petitioner,
v.
McCAULL-DINSMORE COMPANY.

(See S. C. Reporter's ed. 97–100.)

Carriers — limiting liability — origin or destination value — Cummins Amendment.

The stipulation in the uniform bill of lading that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment, including freight charges, if paid, which is sanctioned by the Interstate Commerce Commission as in no way limiting the carrier's liability to less than the value of the goods, but as merely offering the most convenient way of finding the value, but which does in fact prevent a recovery of the full actual loss, where the shipment would have been worth more at destination than at origin, is inconsistent with and invalidated by the provision of the Cummins Amendment of March 4, 1915, that carriers shall be liable to the holder of the bill of lading for the full actual loss, damage, or injury, notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value.

[For other cases, see Carriers, II. b, 7, in Digest Sup. Ct. 1908.]

[No. 628.]

Argued and submitted April 23, 1920. Decided May 17, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the District Court for the District of Minnesota in favor of the shipper in a suit against

Note.—On validity of agreement to restrict carrier's liability, generally—see notes to Missouri P. R. Co. v. Ivey, 1 L.R.A. 500; Hartwell v. Northern P. Exp. Co. 3 L.R.A. 342; Richmond & D. R. Co. v. Payne, 6 L.R.A. 849; Adams Exp. Co. v. Harris, 7 L.R.A. 214; Duntley v. Boston & M. R. Co. 9 L.R.A. 452; Gulf, C. & S. F. R. Co. v. Gatewood, 10 L.R.A. 419; Pacific Exp. Co. v. Foley, 12 L.R.A. 799; Deming v Merchants' Cotton-Press & Storage Co. 13 L.R.A. 518; Ballou v. Earle, 14 L.R.A. 433; Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527; Everett v. Norfolk & S. R. Co. 1 L.R.A.(N.S.) 985; New Jersey Steam Nav. Co. v. Merchants' Bank, 12 L. ed. U. S. 465; and Chicago, M. & St. P. R. Co. v. Solan, 42 L. ed. U. S. 688.

a carrier to recover damages for the loss of a shipment. Affirmed.

See same case below, 171 C. C. A. 561, 260 Fed. 835.

The facts are stated in the opinion.

Mr. O. W. Dynes argued the cause, and, with Messrs. H. H. Field, F. W. Root, and Burton Hanson, filed a brief for petitioner:

At common law the carrier and shipper were permitted to fix by mutual agreement a bona fide value to govern in computing loss of or damage to a shipment.

Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 596, 28 L. ed. 527, 531, 4 Sup. Ct. Rep. 566; New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 617, 37 L. ed. 292, 304, 13 Sup. Ct. Rep. 444; The Oneida, 63 C. C. A. 239, 128 Fed. 692; Inman v. Seaboard Air Line R. Co. 159 Fed. 974; Springfield Light, Heat & P. Co. v. Norfolk & W. R. Co. 260 Fed. 254; Boston & M. R. Co. v. Piper, 246 U S. 439, 443, 62 L. ed. 820, 822, 38 Sup. Ct. Rep. 354, Ann. Cas. 1918E, 469; 1 Hutchinson, Carr. 3d ed. § 426; Alair v. Northern P. R. Co. 53 Minn. 160, 19 L.R.A. 764, 39 Am. St. Rep. 588, 54 N. W. 1072; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Adams Exp. Co. v. Croninger, 226 U. S. 491, 509, 57 L. ed. 314, 321, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Brown v. Cunard, S. S. Co. 147 Mass. 58, 16 N. E. 717; Jennings v. Smith, 45 C. C. A. 249, 106 Fed. 139; MacFarlane v. Adams Exp. Co. 137 Fed. 982; The Koan Maru, 251 Fed. 384; Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33, 50 Am. Rep. 282; Coupland v. Housatonic R. Co. 61 Conn. 531, 15 L.R.A. 534, 23 Atl. 870; J. J. Douglas Co. v. Minnesota Transfer R. Co. 62 Minn. 288, 30 L.R.A. 860, 64 N. W. 899; Oppenheimer v. United States Exp. Co. 69 Ill. 62, 18 Am. Rep. 596; Adams Exp. Co. v. Carnahan, 29 Ind. App. 606, 94 Am. St. Rep. 279, 63 N. E. 245, 64 N. E. 647; Harvey v. Terre Haute & I. R. Co. 74 Mo. 538; Magnin v. Dinsmore, 56 N. Y. 168; Baltimore & O. R. Co. v. Hubbard, 72 Ohio St. 302, 74 N. E. 214, 18 Am. Neg. Rep. 231; Ullman v. Chicago & N. W. R. Co. 112 Wis. 158, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41.

Under the Carmack Amendment the carrier and shipper were permitted to fix by mutual agreement a bona fide value to govern in computing loss of or damage to the shipment.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155.

To secure uniform treatment of all shippers by carriers was a fundamental purpose of the Act to Regulate Commerce.

Adams Exp. Co. v. Croninger, supra; Re Bills of Lading, 14 Inters. Com. Rep. 349; Shaffer v. Chicago, R. I. & P. R. Co. 21 Inters. Com. Rep. 11; Re Cummins Amendment, 33 Inters. Com. Rep. 693.

The Interstate Commerce Commission acted within its administrative authority, delegated by Congress, in approving the clause of the uniform bill of lading here in controversy.

Loomis v. Lehigh Valley R. Co. 240 U. S. 43, 50, 60 L. ed. 517, 519, 36 Sup. Ct. Rep. 228; Re Cummins Amendment, 33 Inters. Com. Rep. 682.

The courts have not been given jurisdiction to nullify purely administrative action lawfully taken by the Interstate Commerce Commission.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 255, 57 L. ed. 1472, 1475, 33 Sup. Ct. Rep. 916; Texas & P. R. Co. v. American Tie & Timber Co. 234 U. S. 138, 146, 58 L. ed. 1255, 1258, 34 Sup. Ct. Rep. 885; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Decker v. Director General, 55 Inters. Com. Rep. 455; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 419, 57 L. ed. 1511, 1549, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Loomis v. Lehigh Valley R. Co. 240 U. S. 43, 60 L. ed. 517, 36 Sup. Ct. Rep. 228.

The bill of lading clause in controversy is in conformity with the declared policy of the law.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 510, 57 L. ed. 314, 321, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Texas & P. R. Co. v. Leatherwood, 250 U. S. 478, 63 L. ed. 1096, 39 Sup. Ct. Rep. 517.

Mr. J. O. P. Wheelwright submitted the cause for respondent.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for the loss of grain belonging to the plaintiff and delivered

on November 17, 1915, to the defendant, the petitioner, in Montana, for transportation to Omaha, Nebraska. The grain was shipped under the uniform bill of lading, part of the tariffs filed with the Interstate Commerce Commission, by which it was provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." The petitioner has paid $1,200.48, being the amount of the loss so computed, but the value of the grain at the place of destination at the time when it should have been delivered, with interest, less freight charges, was $1,422.11. The plaintiff claimed the difference between the two sums on the ground that the Cummins Amendment to the Interstate Commerce Act made the above stipulation void. The district court gave judgment for the plaintiff (252 Fed. 664), and the judgment was affirmed by the circuit court of appeals (171 C. C. A. 561, 260 Fed. 835).

[99] The Cummins Amendment, Act of March 4, 1915, chap. 176, 38 Stat. at L. 1196, Comp. Stat. § 8604a, 4 Fed. Stat. Anno. 2d ed. p. 506, provides that the carriers affected by the act shall issue a bill of lading and shall be liable to the lawful holder of it "for any loss, damage, or injury to such property . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier . . . from the liability hereby imposed;" and further, that the carrier "shall be liable . . . for the full actual loss, damage, or injury . . . notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void." Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods, but merely offering the most convenient way of finding the value. Shaffer v. Chicago, R. I. & P. R. Co. 21 Inters. Com. Rep. 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid, and not forbidden by the law. 33 Inters. Com. Rep. 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the meaning of a statute, and upon that, of course, the courts must decide for themselves.

We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down, the carrier might have had to pay more under this contract than by the common-law rule. But the [100] question is how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat, but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later Act of August 9, 1916, chap. 301, 39 Stat. at L. 441, Comp. Stat. § 8604a, Fed. Stat. Anno. Supp. 1918, p. 387, can prevail against what we understand to be the meaning of the words. Those words seem not only to indicate a broad general purpose, but to apply specifically to this very case.

Judgment affirmed.

The CHIEF JUSTICE dissents for the reasons stated by the Interstate Commerce Commission.

---

[101] WESTERN UNION TELEGRAPH COMPANY, Petitioner,
v.
GEORGE M. BROWN, Executor of the Last Will and Testament of William Lange, Jr., Deceased, and J. U. Hastings.

(See S. C. Reporter's ed. 101-113.)

Contracts — sale or option — default — forfeiture — seller's election.

A positive undertaking of the owners of mining stock to sell, and of the pur-

Note.—As to rights and liabilities of vendor and purchaser by conditional sale on default of payment—see note to Cole v. Hines, 32 L.R.A. 455.

chasers to buy, upon terms named, is not converted into an option to purchase, terminable at the will of the purchasers upon their failure to make the required payments, merely because the agreement further provides that the stock is to be deposited in a bank in escrow, to be delivered to the purchasers when the final payment agreed upon is made, and stipulates that, in the event of default in payment, the bank is authorized to deliver the stock to the sellers, all prior payments to be forfeited, and the rights of each of the parties to cease and determine, since this forfeiture provision is for the benefit of the sellers, and may be insisted upon or waived, at their election.

[For other cases, see Contracts, I. d, 4; Sale, I. a, in Digest Sup. Ct. 1908.]

[No. 159.]

Argued January 20 and 21, 1920. Decided May 17, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of California in favor of plaintiffs in an action against a telegraph company to recover for failure to deliver a message. Reversed and case remanded to the District Court for further proceedings.

See same case below, 160 C. C. A. 556, 248 Fed. 656.

The facts are stated in the opinion.

Messrs. **Beverly L. Hodghead** and **Rush Taggart** argued the cause, and, with Mr. Francis R. Stark, filed a brief for petitioner:

The Pitt and Campbell agreement was an absolute agreement, and plaintiffs were bound by their covenant to buy the stock, and therefore were not damaged by the delay.

James, Option Contr. § 109; Wilcoxson v. Stitt, 65 Cal. 596, 52 Am. Rep. 310, 4 Pac. 629; Central Oil Co. v. Southern Ref. Co. 154 Cal. 165, 97 Pac. 177; Weaver v. Griffith (210 Pa. 13, 105 Am. St. Rep. 783) 59 Atl. 315; Vickers v. Electrozone Commercial Co. 63 N. J. L. 9, 48 Atl. 606; Hamburger v. Thomas, — Tex. Civ. App. —, 118 S. W. 770; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Jones v. Hert, 192 Ala. 111, 68 So. 259; McMillen v. Strange, 159 Wis. 271, 150 N. W. 434; Meagher v. Hoyle, 173 Mass. 577, 54 N. E. 347; Dana v. St. Paul Invest. Co. 42 Minn. 196, 44 N. W. 55; Shenners v. Pritchard, 104 Wis. 291, 80 N. W. 458; Stewart v. Griffith, 217 U. S. 323, 54 L. ed. 782, 30 Sup. Ct. Rep. 528, 19 Ann. Cas. 639.

Mr. **Samuel Poorman, Jr.**, argued the cause and filed a brief for respondents:

The Pitt and Campbell contract left it to plaintiff's option to withhold the May 1st instalment, and thereby forfeit the previous payment, and terminate all rights of each of the parties thereunder.

Ramsey v. West, 31 Mo. App. 676; Bradford v. Limpus, 10 Iowa, 35; Beckwith-Anderson Land Co. v. Allison, 26 Cal. App. 473, 147 Pac. 482; Verstine v. Yeaney, 210 Pa. 109, 59 Atl. 689; Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey, 76 Kan. 42, 12 L.R.A. (N.S.) 745, 90 Pac. 803; McConathy v. Lanham, 116 Ky. 735, 76 S. W. 535; Williamson v. Hill, 154 Mass. 117, 13 L.R.A. 690, 27 N. E. 1008; Gordon v. Swan, 43 Cal. 564, 3 Mor. Min. Rep. 84; Glock v. Howard & W. Colony Co. 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; 2 Warvelle, Vendors. pp. 818, 821.

Mr. Justice **Day** delivered the opinion of the court:

This is an action by Brown, executor of Lange, and Hastings, to recover damages from the Western Union [104] Telegraph Company for failure to deliver a message sent by Hastings and Lange to the Lyon County Bank, Yerington, Nevada. A judgment was recovered against the Telegraph Company in the district court, which was affirmed in the circuit court of appeals for the ninth circuit. 160 C. C. A. 556, 248 Fed. 656. The case is here upon writ of certiorari.

Upon stipulation the case was tried in the district court without a jury, and the court made findings from which it appears: On March 16, 1907, W. C. Pitt and W. T. Campbell entered into a contract with Hastings and Lange for the sale of 625,000 shares of the capital

---

On conditional sales, generally—see note to Sturm v. Boker, 37 L. ed. U. S. 1093.

As to right of purchaser on conditional sale to recover payments where seller retakes the property—see notes to C. W. Raymond Co. v. Kahn, 51 L.R.A.(N.S.) 251; and Pfeifer v. Norman, 38 L.R.A. (N.S.) 891.

On liability of telegraph company for failure properly to transmit or deliver a message petraining to the negotiations for, or offer of, a contract—see note to Western U. Teleg. Co. v. Sights, 42 L.R.A.(N.S.) 419.

stock of the Kennedy Consolidated Gold Mining Company. In this contract it was stipulated that Pitt and Campbell agreed to sell and deliver to Hastings and Lange, who agreed to buy, take, and receive from them, 625,000 shares of the Kennedy Consolidated Gold Mining Company, upon the following terms and conditions: First. The total price to be paid for the shares of stock to be $75,000 in gold coin of the United States, payable $7,500 on the execution of the agreement; $11,250 on or before the 1st day of May, 1907; and the like sum on or before the 5th of July, 1907, the 5th of September, 1907, the 5th of November, 1907, the 5th of January, 1908, and the 5th of March, 1908. It was agreed that immediately upon payment of the first-named sum, Pitt and Campbell would deposit in escrow in and with the Lyon County Bank, of Yerington, Nevada, certificates of stock indorsed in blank, representing in the aggregate 625,000 shares of the capital stock of the Mining Company, and would thereupon enter into an escrow agreement with Hastings and Lange and the bank, under which agreement the bank should hold the shares of stock to be delivered to Hastings and Lange upon the payment by them of the final sum provided for, and the bank was constituted the agent of Pitt and Campbell for the purpose of receiving the payments [**105**] under the agreement, and it was further agreed that, in event of default by Hastings and Lange, the bank should be authorized, under the terms of such deposit in escrow, to deliver all the shares of stock, so deposited with it, to Pitt and Campbell, and all payments theretofore made by Hastings and Lange should be forfeited to Pitt and Campbell, and that thereupon all rights of each of the parties should forever cease and terminate. Hastings and Lange paid to Pitt and Campbell the initial sum of $7,500, and Pitt and Campbell deposited in escrow with the Lyon County Bank certificates of stock representing 625,000 shares of the stock of the Mining Company, properly indorsed, and the bank received said certificates in escrow and held the same in accordance with the contract. After the execution of the contract Hastings and Lange arranged with the bank to treat drafts that they might send it in partial payment as gold coin, and to pay the amount of such drafts in gold coin to Pitt and Campbell under said contract; that for the purpose of making the payment mentioned in the contract, which became due on or before May 1, 1907, Hastings and Lange on April 27, 1907, sent by mail from Oakland, California, to the Lyon County Bank, at Yerington, Nevada, a draft for the sum of $11,250, United States gold coin, payable to the order of the bank; that the draft was received by the bank at Yerington, Nevada, on April 30, 1907, some time between 8:30 A. M., the time the bank opened for business, and 9 o'clock A. M., of that day; that on April 29, 1907, before the message, hereinafter mentioned, was delivered to the Telegraph Company, Hastings and Lange were informed and believed that the stock of the Mining Company was of little or no value, and, upon obtaining such information, they determined to make no further payments on their contract with Pitt and Campbell, and to abandon their rights in and to said stock, and to withdraw from the transaction with Pitt and Campbell. It is further found [**106**] that, on the evening of April 29, 1907, plaintiffs called at the office of the defendant in Oakland, California, and requested the agent in charge to telegraph the Lyon County Bank at Yerington, Nevada, as follows:

Oakland, April 29, 1907.

Lyon County Bank,
Yerington, Nevada.

Draft mailed you Saturday under mistake. Do not pay any sum to Pitt and Campbell. Return draft. Letter follows.

Hastings and Lange.

Hastings and Lange stated to the agent of the Telegraph Company that it was necessary that the message be delivered to the bank before banking hours on the following morning; that is, before it opened for business on the 30th day of April, 1907; and desired to know of the agent in what manner they could be absolutely assured that the message would be so delivered, stating to the agent that they had a contract for the purchase of certain shares of stock of a mining company, and that payment under the contract was required to be made by them on or before May 1, 1907, to Pitt and Campbell through the bank, and that, in default thereof, the contract to purchase the stock would by its terms be forfeited, and the rights of the parties thereto would cease and terminate; that, for the purpose of making the payment, they had mailed to the bank a certain bank draft in the sum of $11,250; that, in the ordinary course of the mail between the city of Oakland, California, and the town of Yerington, Nevada, the same would be delivered to the bank on the following

morning, that is to say, during the forenoon of April 30, 1907; that, since mailing the draft, they had learned facts touching the value of the stock, which had determined them to make no further payments, and to forfeit the contract and all money by them paid thereunder; that they were seeking [107] by the message to intercept payment by the bank on account of the contract through said Pitt and Campbell, and that, unless such message were transmitted, and delivered immediately to the bank before banking hours on April 30, 1907, it would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event the amount would be wholly lost to them, as they did not intend to continue under their contract, having learned that the stock was of little or no value. It was further found that thereupon the agent represented that the Telegraph Company would insure the immediate delivery of the message to the bank at Yerington if plaintiffs would pay the sum of $1.45, which sum was in excess of the company's regular charge. Plaintiffs accepted the proposal, and paid the sum to the agent; in the presence of the plaintiffs the agent thereupon wrote upon the message, immediately below the date thereof, the words: "Deliver immediately," and accepted the message for immediate transmission to the town of Yerington for immediate delivery to the bank, and agreed to immediately transmit and immediately deliver it to the bank for the plaintiffs, and assured the plaintiffs of such immediate transmission and immediate delivery thereof; that the sum of $1.45 was in excess of the defendant's regular charge and usual toll, the usual charge for an unrepeated message being 98 cents, and for a repeated message the sum of $1.47. The message was written upon a blank form of the Telegraph Company, which is set forth in the findings.

It is further found that neither Hastings nor Lange read the printed matter on the blank, nor was either of them cognizant of the terms and conditions written thereon. The message was not repeated in the manner provided in the stipulations on the blank; that the regular course of communication by telegraph between Oakland, California, and Yerington, Nevada, was by the lines of the Western Union Telegraph Company to Wabuska, Nevada, which [108] was the terminus of the Telegraph Company's lines for Yerington messages, and that, in order to transmit telegrams beyond Wabuska, it was necessary that they be transmitted from that point over the telephone line of the Electric Company to Yerington; that each of the companies received all messages offered it by the other company for further transmission, subject to the stipulations on telegraphic blanks, each company having and charging their separate toll. That the offices of the Electric Company and the Telegraph Company were both maintained in the Southern Pacific Railway Company station at Wabuska, and that the telephone instrument of the Electric Company was within a few feet of the telegraphic instruments of the Telegraph Company; that at the time the Southern Pacific Railroad Company employed an agent at Wabuska to attend to its railway business, and that, by an arrangement between the Railroad Company and the Telegraph Company, said agent was employed to attend to the telegraph business of the Telegraph Company at Wabuska; that, by agreement between the Railroad Company and the Electric Company, the agent of the Railroad Company was at the same time employed by the Electric Company to handle the telephone business of the Electric Company; that there was a regular stage line open between Yerington and Wabuska in April and May, 1907; that the distance between Yerington and Wabuska was approximately 11 miles, and could be traversed in the stage in about one and one-half hours.

It is found that the Telegraph Company did not promptly, upon the receipt of the message on the evening of April 29, 1907, transmit it to the town of Wabuska, Nevada; that the defendant did not promptly deliver the message to the Electric Company for further transmission over its telephone line to Yerington, Nevada, but, on the contrary, defendant wholly failed and neglected [109] to transmit the message to Wabuska until May 2, 1907, and wholly failed and neglected to deliver it to the Electric Company until May 2, 1907; that the delay in the transmission of the message occurred wholly on the lines of the Telegraph Company, and was caused by that company, and did not occur on the lines of the telephone of the Yerington Electric Company.

It is further found that if the Telegraph Company had proceeded with reasonable promptness to transmit and deliver the message to the bank, the same would have reached Yerington before the bank had received the draft mailed to it

as aforesaid, and it would not have placed the amount represented thereby to the credit of Pitt and Campbell, or either of them, or paid any amount thereon; that, by reason of the gross negligence of the Telegraph Company, the message was not delivered to the bank until May 2, 1907, between the hours of 8:30 and 9 A. M.; that the bank had received the draft, and thereafter, on April 30, had paid over the amount thereof in gold coin to Pitt and Campbell, pursuant to the terms of the contract between the plaintiffs and Pitt and Campbell, on account of the payment to be made on or before May 1, 1907, and had given credit to Hastings and Lange for the amount of said payment, all of which was done without any knowledge of said message or the determination of Hastings and Lange to recall said draft; that Hastings and Lange did not make any further payments on the purchase price of said shares of stock, but abandoned the contract with Pitt and Campbell, and forfeited and lost all moneys paid thereon.

It was found that the 625,000 shares of stock of the Kennedy Consolidated Gold Mining Company have been at all times, and since and including April 29, 1907, practically valueless.

The circuit court of appeals held: (1) That the contract was an option, terminable by the buyers' failure to [110] make the payments required; (2) the oral agreement for the transmission of the message was a binding agreement upon the Western Union Telegraph Company; (3) that, under the circumstances, the Telegraph Company was guilty of gross negligence in failing to transmit and deliver the message. The court thereupon affirmed the judgment of the district court for the amount of the payment, adding interest.

In our view of the case it is unnecessary to consider the correctness of the decision of the circuit court of appeals as to the binding obligation of the oral contract made with the agent of the Telegraph Company, or the question of negligence of the company in the transmission and delivery of the message. The right of Hastings and Lange to recover was based upon the theory that the contract was an option, terminable by the act of the buyer in failing to make the payment on the contract, which payment, it is found, would not have been made had the message been promptly delivered. An option is a privilege given by the owner of property to another, to buy the property at his election. It secures the privilege to buy, and is not, of itself, a purchase. The owner does not sell his property; he gives to another the right to buy at his election.

What, then, is the nature of this agreement? It contains the positive undertaking of the owner to sell and the purchaser to buy 625,000 shares of stock upon terms which are named. Upon the first payment being made, the certificates are to be deposited with the bank in escrow, to be delivered when the final payment agreed upon is made, and, in event of default in payment, the bank is authorized to deliver the shares of stock to Pitt and Campbell, and all payments are to be forfeited, and the rights of the parties to cease and determine. We are of opinion that this is far more than a mere option to purchase, terminable at the will of the purchaser upon failure [111] to make the payments required. The agreement contains positive provisions binding the owner to sell and the purchaser to buy upon the terms of the instrument. It is true the stock is to be deposited with the bank in escrow, and it is authorized to deliver the same to Pitt and Campbell upon default in payment. The findings do not show whether Pitt and Campbell took back the stock upon default of subsequent payments. There was no understanding that Pitt and Campbell should take back the stock when the payments were not made, and no agreement which put it in the power of the purchasers to relieve themselves of the obligations of their contract by failing to keep up the payments. The right of Pitt and Campbell to receive the stock from the bank and end the contract was stipulated; it was a provision inserted for their benefit, of which they might avail themselves at their election.

In our opinion, Stewart v. Griffith, 217 U. S. 323, 54 L. ed. 782, 30 Sup. Ct. Rep. 528, 19 Ann. Cas. 639, is controlling upon this point. In that case there was a sale of land, and the purchaser, by the terms of the agreement, paid $500 as part of the purchase price. It was provided that, in case of nonpayment of the balance of the first half of the purchase price on November 7, 1907, the $500 paid on the contract was to be forfeited, and the contract of sale and conveyance was to be null and void and of no effect. The contention was that the defendant was free to withdraw from the contract if he chose to lose the $500. But this court held, after considering the terms of the contract, that the $500 was part of the purchase price to be paid; that the land was described as being sold, and that, in view of such stipulations, the purchaser

had bound himself to take the land. As to the provision for the forfeiture of the $500, and the stipulation that the contract should become null and void upon nonpayment of the remainder of the purchase price, this court said: "The condition plainly is for the benefit of [112] the vendor, and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void' means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice. Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Oakes v. Manufacturers' F. & M. Ins. Co. 135 Mass. 248, 249; Titus v. Glen Falls Ins. Co. 81 N. Y. 410, 419."

The condition in the contract in Stewart v. Griffith, that nonpayment should render the contract null and void, is the equivalent of the stipulation in the present agreement, much relied upon by the respondent, that, upon nonpayment of the stipulated sums, the rights of each of said parties should cease and determine. We think the attempted distinction between Stewart v. Griffith and the instant case is untenable.

The circuit court of appeals reinforced its conclusion that the contract was an option by stating that it was usual to sell mining property under privileges of purchase, and, when investigation showed that the property was not valuable, to terminate such options by forfeiting the sums paid therefor, and declining to make future payments. It is true that undeveloped mining property is often sold under option agreements. See 3 Lindley, Mines, § 859. But there is nothing to show that this contract was dependent upon the development of the mining property. The written agreement contains a positive undertaking to sell, upon the one part, and, upon the other part, to buy, shares of the mining stock. Whether the shares sold constituted all the shares of the company does not appear. Nor is the relative proportion of those sold to the whole amount of the stock anywhere shown. The fact that the contract contains a privilege of ending it at the election of the vendor for nonpayment of the sum stipulated does not convert it into an option terminable [113] by the purchasers at their will. Stewart v. Griffith, supra.

As the recovery of the amount paid, with interest, as adjudged in the Circuit Court of Appeals, is founded upon its conclusion that the contract was an option, and the damages the amount paid and forfeited by the failure to stop the payment of the draft, and as we are not able to accept that view of the contract, it follows that the judgment of the Circuit Court of Appeals must be reversed, and the cause remanded to the District Court for further proceedings in conformity to this opinion.

Reversed.

UNITED STATES OF AMERICA and Interstate Commerce Commission, Appts.,
v.
ALASKA STEAMSHIP COMPANY, Central of Georgia Railway Company, Clyde Steamship Company, et al.

(See S. C. Reporter's ed. 113-117.)

Appeal — moot case — reversal for dismissal.

The enactment of the Transportation Act of February 28, 1920, which necessitates changes in bills of lading prescribed by the Interstate Commerce Commission, renders moot the controversy presented by a petition which seeks to set aside an order of the Commission requiring carriers to use such bills of lading, and requires that an order granting a preliminary injunction to restrain the Commission from putting into force the bills of lading in the form prescribed be reversed, and that the cause be remanded to the court below with directions to dismiss the petition without costs to either party, and without prejudice to the right of the complainants to assail in the future any order of the Commission prescribing bills of lading after the enactment of the Transportation Act.

[For other cases, see Appeal and Error, 3887-3920, 5481-5494, in Digest Sup. Ct. 1908.]

[No. 541.]

Argued December 16 and 17, 1919. Decided May 17, 1920.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree granting a preliminary injunction to restrain the Interstate Commerce Commission from putting in force certain modified bills of lading. Reversed and remanded with directions to dismiss the petition without prejudice.[1]

See same case below, 259 Fed. 713.

The facts are stated in the opinion.

Solicitor General **King** and Mr. **Charles W. Needham** argued the cause, and, with Mr. P. J. Farrell, filed a brief for appellants.

[1] See page 722, ante.

Messrs. **Roscoe H. Hupper** and **Theodore W. Reath** argued the cause, and, with Messrs. Edgar H. Boles, George F. Brownell, Blewett Lee, Thaddeus H. Swank, and F. H. Wood, filed a brief for appellees.

Mr. Justice **Day** delivered the opinion of the court:

A petition was filed in the United States district court for the southern district of New York by numerous interstate carriers and carriers by water against the United States and the Interstate Commerce Commission to set aside an order of the Interstate Commerce Commission dated March 14, 1919, requiring the carriers to use two certain modified bills of lading, one pertaining to domestic and the other to export transportation. The cause came on for hearing upon application for a temporary injunction and upon a motion to dismiss the petition. The hearing was had before three judges, a circuit judge and two district judges. A majority concurred in holding that the Interstate Commerce Commission had no authority to prescribe the terms of carriers' bills of lading, and that in any event there was no power to prescribe an inland bill of lading depriving the carriers of the benefits of certain statutes of the United States limiting the liability of vessel owners. 259 Fed. 713. One of the district judges dissented, holding that the Commission had the power to prescribe bills of lading, and that the particular bills of lading in question were within the authority of the Commission. An order was entered refusing to dismiss the petition, and an injunction pendente lite was granted. From this order an appeal was taken directly to this court under the Statute of October 22, 1913. 38 Stat. at L. 220, chap. 32.

[**115**] It appears that the matters in controversy as to the authority of the Commission and the character of the bills of lading were subjects of much inquiry before the Commission, where hearings were had, and an elaborate report upon the proposed changes in carriers' bills of lading resulted in the adoption by the Commission of the two bills of lading. 52 Inters. Com. Rep. 671.

Pending this appeal Congress passed on February 28, 1920, the act known as the "Transportation Act of 1920," which terminated the Federal control of railroads, and amended in various particulars previous acts to regulate interstate commerce. In view of this act of Congress this court, on March 22, 1920, entered an order requesting counsel to file briefs concerning the effect of the act upon this cause. Briefs have been filed, and we now come to consider the altered situation arising from the new legislation, and what effect should be given to it in the disposition of this case.

The thing sought to be accomplished by the prosecution of this suit was an annulment of the order of the Commission, and an injunction restraining the putting into effect and operation of such order, which prescribed the two forms of bills of lading. The temporary injunction granted was against putting into effect the Commission's order prescribing the forms of the bills of lading.

The Transportation Act of 1920, passed pending this appeal, makes it evident (and it is in fact conceded in the brief filed by appellants) that changes will be required in both forms of bills of lading in order that they may conform to the requirements of the statute. We need not now discuss the details of these changes. It is sufficient to say that the act requires them as to both classes of bills. We are of opinion that the necessary effect of the enactment of this statute is to make the cause a moot one. In the appellant's brief it is insisted that the power of the Commission to prescribe bills of lading is still existent, [**116**] and has not been modified by the provisions of the new law. But that is only one of the questions in the case. It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where, by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." California v. San Pablo & T. R. Co. 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876; United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466, 475, 476, 60 L. ed.

387, 391, 36 Sup. Ct. Rep. 212, and previous cases of this court therein cited.

In the present case what we have said makes it apparent that the complainants do not now need an injunction to prevent the Commission from putting in force bills of lading in the form prescribed. The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation, having that effect, renders the case moot. Berry v. Davis, 242 U. S. 468, 61 L. ed. 441, 37 Sup. Ct. Rep. 208.

In our view the proper course is to reverse the order, and remand the cause to the court below with directions to dismiss the petition, without costs to either party, and without prejudice to the right of the complainants to assail in the future any order of the Commission prescribing [117] bills of lading after the enactment of the new legislation. United States v. Hamburg American Line and Berry v. Davis, supra.

And it is so ordered.

E. B. SPILLER, Plff. in Err.,
v.
ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY. (No. 137.)

E. B. SPILLER, Plff. in Err.,
v.
CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY. (No. 138.)

E. B. SPILLER, Plff. in Err.,
v.
CHICAGO & ALTON RAILROAD COMPANY. (No. 139.)

E. B. SPILLER, Plff. in Err.,
v.
MISSOURI PACIFIC RAILWAY COMPANY. (No. 140.)

E. B. SPILLER, Plff. in Err.,
v.
ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY. (No. 141.)

E. B. SPILLER, Plff. in Err.,
v.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. (No. 142.)

E. B. SPILLER, Plff. in Err.,
v.
CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY. (No. 143.)

E. B. SPILLER, Plff. in Err.,
v.
ILLINOIS CENTRAL RAILROAD COMPANY. (No. 144.)

E. B. SPILLER, Plff. in Err.,
v.
MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY. (No. 145.)

(See S. C. Reporter's ed. 117-136.)

Error to circuit court of appeals — final decree.

1. Decrees of a circuit court of appeals which reversed decrees below for the recovery of amounts awarded in a reparation order made by the Interstate Commerce Commission, and remanded the cause for a new trial, are not final for the purpose of a writ of error.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — when allowable.

2. Decrees of a circuit court of appeals which reversed decrees below for the recovery of the amounts awarded in a reparation order made by the Interstate Commerce Commission, and remanded the cause for a new trial, are reviewable in the Federal Supreme Court by certiorari under the Judicial Code, § 240, in the case of those of such decrees which are made final by the combined effect of §§ 128 and 241, because the requisite jurisdictional amount is not involved, and in the case of the other

---

Note.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119; and Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302; Schlosser v. Hemphill, 49 L. ed. U. S. 1001; and Detroit & M. R. Co. v. Michigan R. Commission, 60 L. ed. U. S. 802.

On certiorari from Federal Supreme Court to circuit courts of appeals—see notes to Furness, W. & Co. v. Yang-Tsze Ins. Asso. 61 L. ed. U. S. 409; and United States v. Dickinson, 53 L. ed. U. S. 711.

As to recovery back of excessive payments to public service corporation—see note to Illinois Glass Co. v. Chicago Teleph. Co. 18 L.R.A.(N.S.) 124.

As to remedy to enforce order of public service commissions—see note to State ex rel. Caster v. Southwestern Bell Teleph. Co. L.R.A.1918E, 303.

decrees by virtue of § 262, in aid of the ultimate jurisdiction of the Supreme Court to review such decrees by writ of error.

[For other cases, see Certiorari, II. a, in Digest Sup. Ct. 1908.]

Evidence — documentary — findings and reparation order of Interstate Commerce Commission.

3. The Interstate Commerce Commission is given a general degree of latitude in the investigation of reparation claims by the Act of February 4, 1887, §§ 13, 16, 17, as amended by the Acts of March 2, 1889, and June 29, 1906, and June 18, 1910, and the resulting findings and order of the Commission may not be rejected as evidence in a suit to recover the amounts of the reparation awards merely because of errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

[For other cases, see Evidence, IV. k; Interstate Commerce Commission, in Dig. Sup. Ct. 1908.]

Interstate Commerce Commission — review of decision — qualifications of expert witness.

4. Whether a witness called before the Interstate Commerce Commission had shown such special knowledge as to qualify him to testify as an expert was for the Commission to determine, and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded.

[For other cases, see Interstate Commerce Commission; Witnesses, IV. a, in Digest Sup. Ct. 1908.]

Appeal — objections to hearsay testimony — sufficiency — time.

5. Assertions by counsel during a hearing before the Interstate Commerce Commission in a reparation proceeding that there was a failure of proof, and suggestions that the proceeding ought to be dismissed, come too late and are too general in character to be equivalent to an objection to the reception of certain evidence as hearsay.

[For other cases, see Appeal and Error, VI. a, 2; VI. c, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — judicial review — consideration of hearsay testimony.

6. The Interstate Commerce Commission is not to be regarded as having acted arbitrarily in making a reparation order, nor may its findings and order be rejected as wanting in support, simply because hearsay evidence introduced without objection and substantially corroborated by original evidence clearly admissible against the parties to be affected was considered with the rest.

[For other cases, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Interstate Commerce Commission — judicial review — award substantially valid.

7. The refusal of the trial court in a suit for the recovery of amounts awarded in a reparation order made by the Interstate Commerce Commission to treat the award as void in toto is not erroneous if, to any substantial extent, the award was legally valid.

[For other cases, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Evidence — documentary — assignments — formal proof — hearing before Interstate Commerce Commission.

8. Formal proof of the handwriting of the assignors of reparation claims by subscribing witnesses or otherwise was not necessary in a hearing before the Interstate Commerce Commission in the absence of objection or contradiction.

[For other cases, see Evidence, IV. b, in Digest Sup. Ct. 1908.]

Parties — who may sue — assignee of legal title — reparation claims.

9. An assignee of the legal title to reparation claims may claim an award of reparation by the Interstate Commerce Commission, and recover the amounts awarded by an action at law, brought in his own name, but for the benefit of the equitable holders of the claim,—especially where such is the real purpose of the assignments.

[For other cases, see Parties, I. a, 3, in Digest Sup. Ct. 1908.]

Assignment — of reparation claims — validity.

10. There is nothing in the letter or spirit of the Interstate Commerce Acts inconsistent with the view that claims for reparation because of the exaction of unreasonable freight charges are assignable.

[For other cases, see Assignment, I. in Digest Sup. Ct. 1908.]

[Nos. 137, 138, 139, 140, 141, 142, 143, 144, and 145.]

Argued January 15, 1920. Decided May 17, 1920.

NINE WRITS of Error and of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which reversed decrees of the District Court for the Western District of Missouri for the recovery of the amounts awarded in the reparation order made by the Interstate Commerce Commission, and remanded the cause for a new trial. Writs of error dismissed. Writs of certiorari allowed. Judgments of Circuit Court of Appeals reversed and those of the District Court affirmed.

See same case below, 158 C. C. A. 227, 246 Fed. 1; on rehearing, 161 C. C. A. 587, 249 Fed. 677.

The facts are stated in the opinion.

Mr. **Buckner F. Deatherage** argued the cause, and, with Messrs. Samuel H. Cowan, I. H. Burney, and Goodwin Creason, filed a brief for plaintiff in error:

The Commission is an investigating

body, and is not bound by the strict rules of evidence.

Interstate Commerce Commission v. Baird, 194 U. S. 44, 48 L. ed. 869, 24 Sup. Ct. Rep. 563; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 93, 57 L. ed. 434, 33 Sup. Ct. Rep. 185; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. ed. 379, P.U.R. 1915A, 121, 35 Sup. Ct. Rep. 146; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 110, 54 L. ed. 957, 30 Sup. Ct. Rep. 651.

The evidence on which the award by the Commission was based was not hearsay, but, even if it were, it is competent and admissible if not objected to at the time it is offered.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Louisville & N. R. Co. v. Finn, 235 U. S. 606, 59 L. ed. 383, P.U.R. 1915A, 121, 35 Sup. Ct. Rep. 146; Kane v. Missouri P. R. Co. 251 Mo. 13, 157 S. W. 644; Wolf v. Edmunson, 153 C. C. A. 89, 240 Fed. 53; 1 Wigmore, Ev. §§ 18, 586; Gregory v. Dodge, 14 Wend. 617; 17 Cyc. 166, 564; Mathias v. O'Neill, 94 Mo. 527, 6 S. W. 253.

The shippers and owners, being in possession of the live stock when delivered to the carriers, were prima facie the owners.

16 Cyc. 1074; Bradshaw v. Ashley, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297; Belford, C. & Co. v. Scribner, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734; The Carlos F. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803; Hazard Powder Co. v. Volger, 7 C. C. A. 130, 12 U. S. App. 665, 58 Fed. 152; Hare v. Young, 26 Idaho, 691, 146 Pac. 107; Gulf, C. & S. F. R. Co. v. Johnson, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474; Northern P. R. Co. v. Lewis, 2 C. C. A. 446, 7 U. S. App. 254, 51 Fed. 658; Hudson v. Willis, 73 Tex. 256, 11 S. W. 273; Cooley, Torts, 3d ed. pp. 848–850; Hutchinson, Carr. 3d ed. §§ 1308, 1309, 1318, 1320.

The carriers cannot question the title of the consignors, because the carriers were bailees.

10 C. J. p. 229, § 318; The Idaho, 93 U. S. 575, 23 L. ed. 978; Denver, S. P. & P. R. Co. v. Frame, 6 Colo. 382; Carter v. Southern R. Co. 111 Ga. 38, 50 L.R.A. 354, 36 S. E. 308; Great Western R. Co. v. McComas, 33 Ill. 185; Valentine v. Long Island R. Co. 102 App. Div. 419, 92 N. Y. Supp. 645; Western Transp. Co. v. Barber, 56 N. Y. 544; Atchison v. Chicago, R. I. & P. R. Co. 80 Mo. 213; Ross v. Chicago, R. I. & P. R. Co. 119 Mo. App. 290, 95 S. W. 977.

The damages claimed, and for which the award was made, arose out of tort, and affected the property, and not the person, of the shipper. Such causes of action survive the death of the claimant, and are assignable.

Comegys v. Vasse, 1 Pet. 193, 7 L. ed. 108; Erwin v. United States, 97 U. S. 396, 24 L. ed. 1067; Edmunds v. Illinois C. R. Co. 80 Fed. 78; 4 Cyc. 23, 24, 26; Davis v. St. Louis & S. F. R. Co. 25 Fed. 786; 5 C. J. 593, 958, 985, 994; George v. Tate, 102 U. S. 564, 26 L. ed. 232; Pom. Rem. & Rem. Rights, § 617; Remmers v. Remmers, 217 Mo. 560, 117 S. W. 1117; Rucker v. Bolles, 25 C. C. A. 600, 49 U. S. App. 358, 80 Fed. 511.

Suppose the assignments were all for the benefit of the owners and shippers of the cattle, and that they retained an interest in them, it would not affect their validity.

4 Cyc. 67, 69, 71, 99, 100; 5 C. J. 145, 261, 262, 958, 985, 994, § 199; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Ballinger v. Vates, 26 Colo. App. 116, 140 Pac. 931; Denver Engineering Works Co. v. Elkins, 179 Fed. 922; George v. Tate, 102 U. S. 564, 26 L. ed. 232; Winstead v. Bingham, 4 Woods, 510, 14 Fed. 1; Cowdrey v. Vandenburgh, 101 U. S. 572, 25 L. ed. 923; Western U. Teleg. Co. v. Western & A. R. Co. 91 U. S. 283, 23 L. ed. 350; Pom. Rem. & Rem. Rights, 132; Withers v. Greene, 9 How. 213, 13 L. ed. 109; Scott v. Lunt, 7 Pet. 596, 8 L. ed. 797; Marvin v. Ellis, 9 Fed. 367; Krapp v. Eldridge, 33 Kan. 106, 5 Pac. 372; Cottle v. Cole, 20 Iowa, 481; Guerney v. Moore, 131 Mo. 650, 32 S. W. 1132; Foster v. Central Nat. Bank, 183 N. Y. 379, 76 N. E. 338; King v. Miller, 53 Or. 62, 97 Pac. 542; Cummings v. Morris, 25 N. Y. 625; Chase v. Dodge, 111 Wis. 70, 86 N. W. 548; The Rupert City, 213 Fed. 263; Sheridan v. New York, 68 N. Y. 30; Allen v. Brown, 44 N. Y. 228; Edmunds v. Illinois C. R. Co. 80 Fed. 78.

The fact that the rights to reparation are conferred by statute does not change the rule. There are no words in the statute indicating that the rights are confined to the person, and could not be enforced by an heir, legal representative, or assignee.

4 Cyc. 26; 5 C. J. 593.

The court of appeals erred in holding that the question of the reasonableness

of the rate is open for the jury or the court to pass upon, in an action on an order for reparation made by the Interstate Commerce Commission, after the Commission had found such rate to be unreasonable.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 444, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 110, 54 L. ed. 957, 30 Sup. Ct. Rep. 651; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; United States v. Louisville & N. R. Co. 235 U. S. 314, 320, 59 L. ed. 245, 250, 35 Sup. Ct. Rep. 113; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; Manufacturers R. Co. v. United States, 246 U. S. 457, 489, 62 L. ed. 831, 847, 38 Sup. Ct. Rep. 383; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

The court of appeals further erred in holding that where a rate subsequently condemned by the Interstate Commerce Commission as unreasonable was, when exacted, a legal rate, the shipper could not sue in a court of law and recover back any portion of such rate.

Southern P. Co. v. Darnell-Taenzer Lumber Co. 245 U. S. 531, 62 L. ed. 451, P.U.R.1918B, 598, 38 Sup. Ct. Rep. 186; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Southern R. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 59 L. ed. 644, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B. 691; Mills v. Lehigh Valley R. Co. 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. supra.

The court erred in holding that, in fixing the rate for a period of two years in the future, and allowing reparation for the exaction of an unreasonable rate during the two years prior to the order fixing the rate for the future, the Interstate Commerce Commission fixed the rate for a longer period than authorized by law, therefore the order of reparation was improper, and the shipper could not recover the difference between the rate paid and the rate found to be reasonable at the time of such payment.

Ibid.

The court of appeals erred in holding that the order of reparation made by the Commission is void for the want of sufficient evidence to support it, in this suit, to which the Commission is not a party. The court thereby attacked the validity of the order of the Commission in a collateral proceeding.

Eastern Texas R. Co. v. Railroad Commission, P.U.R.1917F, 554, 242 Fed. 304, 247 U. S. 214, 62 L. ed. 1084, 38 Sup. Ct. Rep. 460.

Orders of the Commission are final, and not reviewable in any court, on all questions of fact, unless: (1) Beyond the powers which it may constitutionally exercise; (2) beyond its statutory powers; (3) based upon a mistake of law; (4) when law and fact are intermixed. None of which conditions exist in this case. The findings of the Commission were based wholly upon facts, and were within its constitutional and statutory powers, and were not based upon a mistake of law, nor were facts and law intermixed.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 545, 56 L. ed. 308, 309, 32 Sup. Ct. Rep. 108; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Interstate Commerce Commission v. Northern P. R. Co. 216 U. S. 544, 54 L. ed. 609, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 146, 42 L. ed. 415, 18 Sup. Ct. Rep. 45; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; United States v. Louisville & N. R. Co. 235 U. S. 320, 59 L. ed. 250, 35 Sup. Ct. Rep. 113.

Failure to apply for a rehearing should preclude a party from afterwards attacking the order of the Commission on the ground that it is unsupported by sufficient evidence.

St. Louis Southwestern R. Co. v. S. Samuels & Co. 128 C. C. A. 188, 211 Fed. 588.

Mr. **T. J. Norton** argued the cause, and, with Messrs. Gardiner Lathrop, C. S. Burg, and James L. Coleman, filed a brief for defendants in error:

The action of the Commission in this case is contrary to its practice in a long

series of decisions in hard-fought cases. It was as much a departure from the settled practice of the Commission as it was from the fundamental rule of law that a judgment must be based upon proper evidence.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; 1 Wigmore, Ev. § 290, ¶ 5; Chamberlayne, Ev. § 464; Queen v. Hepburn, 7 Cranch, 290, 296, 3 L. ed. 348, 350; Englebretson v. Industrial Acci. Commission, 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545; Florida East Coast R. Co. v. United States, 234 U. S. 167, 188, 58 L. ed. 1267, 1272, 34 Sup. Ct. Rep. 867; Philadelphia & R. R. Co. v. United States, 240 U. S. 334, 341, 60 L. ed. 675, 678, 36 Sup. Ct. Rep. 354; Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co. 20 Inters. Com. Rep. 49; Nicola, S. & M. Co. v. Louisville & N. R. Co. 14 Inters. Com. Rep. 199; Griffing v. Chicago & N. W. R. Co. 32 Inters. Com. Rep. 286; Jacob E. Decker & Sons v. Minneapolis & St. L. R. Co. 38 Inters. Com. Rep. 228; Oden v. Seaboard Air Line R. Co. 37 Inters. Com. Rep. 345; Hygienic Ice Co. v. Chicago & N. W. R. Co. 37 Inters. Com. Rep. 384; J. W. Wells Lumber Co. v. Chicago, M. & St. P. R. Co. 38 Inters. Com. Rep. 466; Commercial Club v. Anderson & S. River R. Co. 27 Inters. Com. Rep. 310.

As Spiller failed to produce the best evidence, the presumption is that such evidence would have been against him.

Blatch v. Archer, Cowp. pt. 1, p. 66, 98 Eng. Reprint, 970; 2 Chamberlayne, Ev. § 1075; Wigmore, Ev. § 285; Bryant v. Lazarus, 235 Mo. 606, 139 S. W. 560; Robinson v. Union Cent. L. Ins. Co. 144 Fed. 1010; Kirby v. Tallmadge, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349.

Where the assignment is executed by an agent, his authority must be shown.

5 C. J. 1020.

The answer of defendants in the district court denied specifically that claims and rights of owners and shippers were duly or legally assigned to the said Spiller, and it was averred that no assignment for the owners or shippers to Spiller was made. That placed the burden upon the plaintiff in the district court to make proof in his trial de novo of the allegations of his petition which had thus been categorically denied. Where the issue is thus raised, evidence of the assignment should be of a direct and positive character.

5 C. J. 1019.

The provision of § 16 of the Act to Regulate Commerce, that the findings and order of the Commission shall be prima facie evidence of the facts therein stated, only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacles to a full contestation of all the issues, and takes no question of fact from either court or jury.

Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R. 1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691.

If the suit is to proceed like other civil suits for damages, then the court must have the power to govern the admission of evidence. If this is not true, then the court in this proceeding is required to admit hearsay evidence and adjudge a case upon hearsay, the exclusion of which has been mandatory from an early day in England, and from the beginning of Federal jurisdiction in the United States.

Queen v. Hepburn, 7 Cranch, 290, 3 L. ed. 348.

The objection to the evidence as hearsay was timely enough in the district court. It would have been timely enough on demurrer, or by way of an instruction to the jury.

Pittman v. Gaty, 10 Ill. 186.

It was the duty of the trial court to inquire whether there was any substantial evidence before the Commission to justify its order.

Atchison, T. & S. F. R. Co. v. Spiller, 158 C. C. A. 227, 246 Fed. 1, 161 C. C. A. 587, 249 Fed. 677; Michigan C. R. Co. v. Elliott, 167 C. C. A. 290, 256 Fed. 18.

Spiller, as assignee, is not within the provisions of the Act to Regulate Commerce, and the Interstate Commerce Commission was without jurisdiction to entertain a claim preferred by him.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 442, 51 L. ed. 553, 559, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Sutherland, Stat. Constr. § 371; Weber v. Chicago, R. I. & P. R. Co. 69 Kan. 611, 77 Pac. 533; Penny v. New Orleans G. N. R. Co. 135 La. 962, 66 So. 313; Sensenig v. Pennsylvania R. Co. 229 Pa. 168, 78 Atl. 92; Parsons v. Chicago & N. W. R. Co. 167 U. S. 447, 42 L. ed. 231, 17 Sup. Ct. Rep. 887; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844; Fulgham v. Midland Valley R. Co. 167 Fed. 660; Southern R. Co. v. Tift, 206 U. S. 428, 436, 51 L. ed. 1124, 1126, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846; Phillips v. Grand Trunk Western R. Co. 236 U. S. 662, 665, 59

L. ed. 774, 776, 35 Sup. Ct. Rep. 444; Southern P. Co. v. Darnell-Taenzer Lumber Co. 245 U. S. 531, 62 L. ed. 451, P.U.R.1918B, 598, 38 Sup. Ct. Rep. 186.

[120] Mr. Justice Pitney delivered the opinion of the court:

Plaintiff in error commenced an action against defendants in error jointly in the district court of the United States for the western district of Missouri under § 16 of the Act to Regulate Commerce, as amended (Act of February 4, 1887, chap. 104, 24 Stat. at L. 379, 384; June 29, 1906, chap. 3591, 34 Stat. at L. 584, 590, June 18, 1910, chap. 309, 36 Stat. at L. 539, 554, Comp. Stat. §§ 8563, 8584, 4 Fed. Stat. Anno. 2d ed. pp. 337, 475), to recover certain amounts awarded to him against them respectively in a reparation order made by the Interstate Commerce Commission January 12, 1914. His petition contained also a count setting up a conspiracy between defendants for the restraint of interstate commerce, and claiming treble damages under § 7 of the Sherman Anti-trust Act of July 2, 1890 (chap. 647, 26 Stat. at L. 209, 210, Comp. Stat. §§ 8820, 8829, 9 Fed. Stat. Anno. 2d ed. pp. 644, 713); but this was abandoned at the trial. Defendants having filed separate answers, a jury was waived by stipulation, and a test case tried before the court,—all defendants participating,—with the result that a decision was rendered in favor of plaintiff, pursuant to which a combined judgment was entered, amounting in effect to as many judgments as there were defendants, each for the amount of the Commission's award against the particular defendant, with interest and attorneys' fees. Defendants sued out separate writs of error from the circuit court of appeals, where, by stipulation, the cases were heard together upon a single record. That court reversed the judgments, ordered the cause remanded to the district court, with directions to grant a new trial (158 C. C. A. 227, 246 Fed. 1), and refused an application for a rehearing (161 C. C. A. 587, 249 Fed. 677). Writs of error were prayed for and allowed for the review of the judgments of reversal in this court; and afterwards, but in due season, a petition for the allowance of a writ of certiorari was filed, the consideration of which was postponed to the hearing under the writs of error.

The jurisdiction of the district court having been invoked, [121] not because of diversity of citizenship, but because the suit was one arising under laws of the United States other than those particularly mentioned in § 128, Judicial Code [36 Stat. at L. 1133, chap. 231], as amended (Act of January 28, 1915, chap. 22, § 2, 38 Stat. at L. 803, Comp. Stat. § 1120, 5 Fed. Stat. Anno. 2d ed. p. 607), it follows that the judgments were not made "final" by the section referred to, and, if final in the sense of concluding the litigation, would be reviewable in this court by writ of error, pursuant to § 241, Judicial Code, in each case where the matter in controversy exceeds $1,000 besides costs. In the cases of the Chicago & Alton and the Missouri Pacific Companies, the respective judgments, with interest up to the issuance of the writs of error from this court, were materially less than $1,000; in each of the other cases substantially in excess of that amount; the aggregate of the judgments being more than $150,000. For want of a sufficient amount in controversy the two smaller judgments would not be reviewable here by writ of error even were they final in effect; but all the writs of error must be dismissed because the judgments call for further proceedings in the trial court; it being elementary that this writ will lie to review final judgments only. McLish v. Roff, 141 U. S. 661, 665, 35 L. ed. 893, 894, 12 Sup. Ct. Rep. 118; Luxton v. North River Bridge Co. 147 U. S. 337, 341, 37 L. ed. 194, 195, 13 Sup. Ct. Rep. 356; Heike v. United States, 217 U. S. 423, 429, 54 L. ed. 821, 824, 30 Sup. Ct. Rep. 539.

However, upon consideration of the particular circumstances of the case, we have concluded that a writ of certiorari ought to be allowed, without further protracting the litigation to the extent that would be necessary in order to reach final judgments; the transcript of the record and proceedings returned in obedience to the writs of error to stand as the return to the writ of certiorari. This writ is allowable by virtue of § 240, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1217, 5 Fed. Stat. Anno. 2d ed. p. 854] (derived from § 6 of the Act of March 3, 1891, chap. 517, 26 Stat. at L. 826, 828), in the case of the two smaller judgments, because the decision of the circuit court of appeals is made final by the combined effect of §§ 128 and 241; and in the case of [122] the larger judgments it is allowable under § 262 of the Code (§ 716, Revised Stat. Comp. Stat. § 1239), in aid of the ultimate jurisdiction of this court to review those cases by writs of error. Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Re Chetwood.

165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385; Whitney v. Dick, 202 U. S. 132, 135, 50 L. ed. 963, 964, 26 Sup. Ct. Rep. 584; McClellan v. Carland, 217 U. S. 268, 277, et seq., 54 L. ed. 762, 765, 30 Sup. Ct. Rep. 501; United States v. Beatty, 232 U. S. 463, 467, 58 L. ed. 686, 687, 34 Sup. Ct. Rep. 392; Meeker v. Lehigh Valley R. Co. 234 U. S. 749, 58 L. ed. 1576, 34 Sup. Ct. Rep. 674; 236 U. S. 412, 417, 59 L. ed. 644, 652, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691.

Coming to the merits: The ground upon which the circuit court of appeals reversed the judgments, and the ground principally relied upon to sustain its decision, was the refusal by the trial court of a motion made by defendants to hold: (a) That, upon all the evidence, plaintiff was not entitled to recover against any or all of the defendants; and (b) that there was not sufficient evidence before the Commission to sustain its order of reparation. The latter is the substantial question actually presented.

The course of proceedings at the trial, as appears from the bill of exceptions, was as follows: Plaintiff introduced the report of the Interstate Commerce Commission (unreported opinion No. A-583 in case No. 732, Cattle Raisers' Asso. v. Missouri, K. & T. R. Co. dated Jan. 12, 1914), and the order of reparation made pursuant to it and upon which the action was based. Defendants having admitted the service of the order, and that the money awarded had not been paid, plaintiff rested. The report makes an award in favor of Spiller, plaintiff in error, as assignee of a large number of claims for reparation by reason of excessive rates charged by the respective carriers on interstate shipments of cattle from points of origin in Texas, Oklahoma, New Mexico, Colorado, and Kansas, to destinations at Kansas City, St. Louis, Chicago, St. Joseph, and New Orleans, on various dates between August 29, 1906, and November 17, 1908; and a further award to named shippers in the case of certain unassigned claims pertaining to similar shipments; the [**123**] several claims, assigned and unassigned, with distinguishing marks, being set forth in Appendix A, showing the delivering carriers against which the claims were allowed, and, in each case, the consignor, points of origin and destination, number of cars shipped, weight, rate paid, the lower rate sanctioned by the Commission, amount of refund required, and the interest thereon. The report contains appropriate findings adequate to support the award, among them the following: That the persons named in Appendix A as consignors shipped from the points of origin to the points of destination specified, by the line of road named as the "delivering road," the number of cars and of the aggregate net weight stated; that the shippers paid to the delivering carriers freight upon the shipments at certain rates named; that in each instance this rate was unreasonable and excessive, and a reasonable rate to have been charged would have been the lower rate specified as having been subsequently established by the Commission, and that therefore the delivering carriers collected from the shippers unreasonable charges on account of the shipments in amounts named in the column headed "Amount of Refund;" that the shipments of live stock were in all cases consigned to some person at the delivering market, usually a commission firm; that the freight was paid in the first instance by the "consignor" (evidently a misprint for "consignee") to the delivering carrier, and subsequently the cattle were sold upon the market and the amount of the freight deducted from the purchase price, remittance being made for the balance, so that in all cases the owner and shipper of the cattle finally paid the transportation charges; and that by the unreasonable exactions of the carriers the shippers were damaged in the amounts stated in the appropriate column of Appendix A, since they received for the cattle less by those amounts than they would have received had the rate found reasonable been charged; that in the case of [**124**] some of the claims the shippers made assignments to H. E. Crowley, then being secretary of the Cattle Raisers' Association, in a form set forth in the report; that subsequently Crowley ceased to be such secretary, and was succeeded by Spiller, the plaintiff, to whom Crowley assigned all claims previously assigned to him; and that other specified claims were assigned by the shippers to Spiller after he became secretary, the form of assignment being the same as that previously employed.

Defendants, endeavoring to show the insufficiency of the evidence upon which the findings and order of the Commission were based, introduced a transcript of the stenographer's notes of the testimony taken upon the hearing of the reparation claims; following this by introducing a sample page taken from one of the exhibits introduced before the Commission as illustrative of the form of

exhibits there introduced. After other evidence not necessary to be mentioned, and a request for judgment in favor of defendants, and for certain rulings on points of law that would have produced that result, all of which were refused, the case was closed.

It appears that in February, 1904, the Cattle Raisers' Association of Texas, in behalf of its members and of others interested, petitioned the Interstate Commerce Commission under § 13 of the Commerce Act, alleging the rates in force in the territory in question to be unjust and unreasonable, they having been advanced some time before to the extent (in most cases) of 3 cents per hundred pounds. On August 16, 1905, the Commission held (Cattle Raisers' Asso. v. Missouri, K. & T. R. Co. 11 Inters. Com. Rep. 296, 352) that the then-existing rates were unjust and unreasonable by the amount of the advance. At this time the Commission was not empowered to fix rates for the future. This power having been conferred by the Hepburn Act of June 29, 1906 (chap. 3591, 34 Stat. at L. 584, 589, Comp. Stat. §§ 8563, 8582), which, by Joint Resolution of June 30, 1906 (34 Stat. at L. 838, Comp. Stat. § 8640), [125] took effect sixty days after its approval by the President, or on August 28, 1906, the Cattle Raisers' Association immediately thereafter applied for and obtained a reopening of the matter, to the end that reasonable rates might be established; and on April 14, 1908, the Commission decided that the former rates should be restored, but that reparation would not be allowed upon claims accruing prior to August 29, 1906 (date of the application). 13 Inters. Com. Rep. 418, 435. The reduced rates finally were put into effect November 17, 1908.

The reparation claims in controversy appear to have been filed in due season by the Cattle Raisers' Association in behalf of its members and other shippers interested, and in the names of the alleged owners of the cattle shipped.

The transcript of the testimony taken by the Commission, as introduced in evidence in the district court, forms the basis of the decision of the circuit court of appeals that the reparation order was unsupported by evidence. But the transcript shows that important documentary evidence was introduced, and furnished the principal foundation for the findings made. This documentary evidence (except the single sheet offered for purposes of illustration) was not introduced in the district court, in order, as stated by counsel, to "avoid introducing a number of papers that would almost fill a farm wagon." But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced.

That this is a matter of substance will appear from a review of the course of the proceeding as disclosed by the stenographer's transcript. The evidence was taken by Mr. Commissioner Prouty at Chicago; there being three sessions, the first on September 19 and 20, 1912, the second on January 24, and the third on October 17 in the following year. They were held in the presence of counsel for the [126] Cattle Raisers' Association, who appeared for the claimants, and counsel for the several carriers interested. If we were called upon to review the proceeding as upon a writ of error or appeal it might be difficult to say that no improper evidence was admitted, that production of the best available was insisted upon, or that a different conclusion might not have been reached upon that which was admitted. But the scope of the judicial review is not so extensive. Section 13 of the Act to Regulate Commerce (Act of February 4, 1887, chap. 104, 24 Stat. at L. 379, 383, amended June 18, 1910, chap. 309, 36 Stat. at L. 539, 550, Comp. Stat. §§ 8563, 8581, 4 Fed. Stat. Anno. 2d ed. pp. 337, 453) requires the Commission, on receipt of a claim for reparation, to proceed on notice to the carrier to "investigate the matters complained of in such manner and by such means as it shall deem proper;" and by § 16 (34 Stat. at L. 590, chap. 3591, 36 Stat. at L. 554, chap. 309, Comp. Stat. § 8584, 4 Fed. Stat. Anno. 2d ed. p. 475), if, after such hearing, the Commission shall determine that any party complainant is entitled to an award of damages, the Commission is to make an order of reparation accordingly, and in a suit based thereon "the findings and order of the Commission shall be prima facie evidence of the facts therein stated." The same section contemplates that numerous parties may unite in a claim for reparation, and that numerous carriers may be joined as defendants; and similarly, that in a suit brought upon such award there may be a joinder of parties plaintiff and defendant. And, by § 17 (24 Stat. at L. 385, chap. 104; March 2, 1889, 25 Stat. at L. 861, chap. 382, Comp. Stat. § 8586,

4 Fed. Stat. Anno. 2d ed. p. 493), "the Commission may conduct its proceedings in such manner as will best conduce to the proper despatch of business and to the ends of justice."

These provisions allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

[127] In the present case, the hearing was informal, but not to the extent of sacrificing essential rights of parties; and it cannot be characterized as arbitrary or unfair. Many carriers were interested, and they were represented by counsel. Thousands of carload shipments were in question, but the points in real controversy were few, and there was a natural desire on all sides to expedite the hearing. In the main, counsel for the carriers co-operated in facilitating the investigation. It was not in dispute that all shipments under inquiry were made during a period when the tariff rates were under investigation, and that afterwards those rates were determined by the Commission to have been excessive. It appeared that itemized claims for reparation had been made out in duplicate (one copy of each being filed), in the names of the parties alleged to have made shipments of cattle as owners during the period in question, that these were based in most cases upon data furnished by the commission houses at the several points of destination, as taken from their books, in other cases by the shippers themselves, and that they were computed by applying the excess charges, as determined, to the actual weights of the shipments where known, in other cases to the minimum carload weights. There was evidence that few of the cattle shippers kept books, they relying upon the commission companies to do this, and that such companies were the consignees of the cattle, and made it a practice on receiving a shipment to pay the freight, sell the cattle, and remit the proceeds to the owner after deducting the freight paid and other charges. During the hearing, there was drawn off from the claims as made up and filed a summary for each carrier, purporting to show the consignor, consignee, originating road, point of origin, destination, date of delivery, number of cars moved, rate paid, rate established by the Commission, and the overcharge claimed. These were submitted to the several carriers for investigation by their accounting officers, and [128] some months later were reported back to Commissioner Prouty by their counsel, with the results of such investigation, which, in a majority of instances, verified the statements said to have been deduced from the records of the commission houses. In some cases, in addition to check marks, "O. K.," and other marks indicating that the items had been found correct, waybill references, car numbers, initials, etc., had been inserted; and where it had been found impossible to locate a shipment there were comments tending to add support to the verification of those that were located. No reparation was awarded by the Commission except with respect to such shipments as were acknowledged in the reports of the defendants to have moved as stated. These reports were introduced in evidence before Commissioner Prouty, but, as already shown, were not in evidence before the district court. What we have said as to their contents is gathered from the stenographer's transcript; what else may have appeared upon their face, in the nature of admissions, is left to be inferred. Counsel for some of the carriers undertook to qualify the effect of admissions contained in them, as by saying that the checking meant no more than that a particular car moved as stated, and that the carrier collected the amount of freight specified; that it was not intended to admit that remittance was made to the person named as claimant; that the statements were subject to confirmation by the books of the commission merchants, or the like. But the Commission was justified in according to the reports of the checking an evidential effect, not limited by the qualifying statements, treating the latter as merely argumentative. It might regard the fact that the shipments could be and were identified from the records of the carriers, in the manner described, as evidence that the details respecting the shippers of the cattle and the particulars of the shipments were true; might take the movement and delivery of the freight thus [129] acknowledged as evidence that the delivering carrier collected the freight charges according to the published tariffs, which, of course, included the overcharges; and might take this, in connection with the evidence as to the course of business, as showing that the shippers whose names were mentioned in the statements sustained damages to the extent of the excessive charge as de-

termined by the Commission. The minutes show that until near the conclusion of the hearing it was the intention to appoint an examiner to investigate the books of the commission merchants at the various points of destination in order to verify the details of the several shipments, and that this purpose was abandoned in view of the admissions made by the carriers. Perhaps it ought to have been carried out; but the court was not justified in treating the report of the Commission as a nullity for this reason, if there was substantial evidence of the essential facts without such verification. We think that what we have detailed of the course of the hearing, taken in connection with what we know and what may be presumed as to the contents of the unproduced documentary evidence, shows there was substantial evidence that the owners specified in the claims had been subjected to the excessive charges with respect to the shipments acknowledged by the carriers; and, as already remarked, the award of reparation was confined to these shipments.

The opinion of the circuit court of appeals severely criticizes the evidence on which these conclusions were based, characterizing it as hearsay. It is not to be disputed that much of the evidence—including essential parts of it—is properly so characterized. The only witness sworn was Mr. Williams, assistant secretary of the Cattle Raisers' Association, who had gathered the data upon which the claims were based, mostly from commission merchants, in some instances from the cattle shippers. He had prepared the claims, had spent much [130] time and pains in investigating them, and in the course of his duties had visited several of the points of destination and examined the books and records of the commission merchants to ascertain the method in which their business was conducted and records kept. It was he who testified as to the customary course of business of cattle shippers and commission merchants. He had been connected with the Cattle Raisers' Association for about eight years, and might be presumed to have some general familiarity with the business in addition to that gained in the special study he had made of it while investigating the claims. His explanation of the method of business and the details of the claims was accepted, and accepted without objection, very much as the testimony of an expert witness might have been accepted. Whether he had shown such special knowledge as to qualify him to testify as an expert was for the Interstate Commerce Commission to determine; and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded, which cannot be said in this case. Stillwell & B. Mfg. Co. v. Phelps, 130 U. S. 520, 527, 32 L. ed. 1035, 1037, 9 Sup. Ct. Rep. 601; Montana R. Co. v. Warren, 137 U. S. 348, 353, 34 L. ed. 681, 683, 11 Sup. Ct. Rep. 96.

The evidence was not objected to as hearsay when introduced, nor, indeed, at any time during the hearing before the Commission. Counsel did in some instances assert that there was a failure of proof, and suggest that the proceeding ought to be dismissed. But the objections came too late, and were too general in character, to be equivalent to an objection to the reception of the evidence because hearsay. Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible. Diaz v. United States, 223 U. S. 442, 450, 56 L. ed. 500, 503, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; Rowland v. Boyle, 244 U. S. 106, 108, 61 L. ed. 1022, 1023, P.U.R.1917C, 685, 37 Sup. Ct. Rep. 577; Damon v. Carrol, 163 Mass. 404, 408, 40 N. E. 185. And it is clear that the verification of the details of the [131] claims by the carriers after full investigation by their auditing departments constituted primary evidence against them, and went far towards showing that the facts as disclosed by the hearsay evidence might be depended upon.

We are not here called upon to consider whether the Commission may receive and act upon hearsay evidence seasonably objected to as hearsay; but we do hold that in this case, where such evidence was introduced without objection and was substantially corroborated by original evidence clearly admissible against the parties to be affected, the Commission is not to be regarded as having acted arbitrarily, nor may its findings and order be rejected as wanting in support, simply because the hearsay evidence was considered with the rest.

In Interstate Commerce Commission v. Baird, 194 U. S. 25, 44, 48 L. ed. 860, 869, 24 Sup. Ct. Rep. 563, it was said: "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to

interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof." In Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 93, 57 L. ed. 431, 434, 33 Sup. Ct. Rep. 185, the court recognized that "the Commission is an administrative body, and, even where it acts in a quasi judicial capacity, is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties." And the fact that a reparation order has at most only the effect of prima facie evidence (Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691; Meeker v. Lehigh Valley R. Co. 236 U. S. 434, 439, 59 L. ed. 659, 661, 35 Sup. Ct. Rep. 337; Mills v. Lehigh Valley R. Co. 238 U. S. 473, 482, 59 L. ed. 1414, 1418, 35 Sup. Ct. Rep. 888), being open to contradiction by the carrier when sued for recovery of the amount awarded, is an added reason for not binding down the [**132**] Commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted.

In this case the Commission did not act upon evidence of which the carriers were not cognizant, and to which they had no opportunity to reply, as in the case supposed in Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 93, 57 L. ed. 431, 433, 434, 33 Sup. Ct. Rep. 185. All the carriers participated in the hearing, and had full opportunity to object, to cross-examine, and to introduce evidence on their own part.

It is objected that the evidence failed to show who owned the cattle shipped or who paid the freight. This cannot be sustained. True, it appeared that the cattle were not in all instances billed in the name of the owner, but sometimes in the name of a caretaker, his name being inserted in the bill as evidence of his right to free transportation. But it is probable that in the latter cases there was a want of correspondence between the claims as presented and the carriers' books, and that, for want of checking by the carriers, they were omitted from the award. The evidence upon the whole was sufficient to sustain a finding, so far as the claims were allowed, that the parties in whose behalf they were allowed were consignors of the shipments, and presumably owners of the cattle shipped.

If there be doubt whether it was sufficient to sustain each and every claim that was allowed, we are not now concerned with this; the ruling in question being the refusal of the trial court to treat the award as void in toto. This was not erroneous if, to any substantial extent, the award was legally valid. If a part only of the claims was unsupported by evidence, the request for an adverse ruling should have been directed to these.

The principal defense before the Commission was that the payment of a published rate afterwards decided to have been excessive was not evidence that the party who paid [**133**] the freight sustained damage to the extent of the excess. The circuit court of appeals sustained this contention at the first hearing (158 C. C. A. 227, 246 Fed. 1, 23), but it has since been ruled otherwise by this court (Southern P. Co. v. Darnell-Taenzer Lumber Co. 245 U. S. 531, 534, 62 L. ed. 451, 455, P.U.R.1918B, 598, 38 Sup. Ct. Rep. 186); and, in view of this, upon the rehearing the circuit court of appeals withdrew this part of its former opinion (161 C. C. A. 587, 249 Fed. 677).

That court held, further, that upon the undisputed evidence the legal title to the claims for reparation never vested in Spiller, and hence that the Commission was wholly without authority to order reparation to be made to him. The minutes show that of the claims in favor of Spiller a number had been assigned to Crowley when he was secretary of the Cattle Raisers' Association, and afterwards assigned by him to Spiller when Crowley retired and Spiller succeeded him; that other claims were assigned by the consignors to Spiller direct; and that still others had not been assigned. The assignments were produced before Commissioner Prouty, and an offer made to file them, but, as we interpret the minutes, this was waived, a copy of one of the assignments (they were said to be alike in form) being inserted in the stenographer's notes instead. There was evidence that the assignments were made for nominal considerations because the Cattle Raisers' Association was prosecuting the claims for the benefit of the owners thereof. In the schedule of the claims as submitted to the Commission, those assigned were suitably identified, and the Commission awarded reparation to Spiller upon these, and in other cases made the order in favor of the parties named as owners. There was substantial evidence to support the finding that the claims had been assigned. Formal proof of the handwriting of the assignors by subscribing witnesses or otherwise was not

necessary in so summary a hearing, in the absence of objection or contradiction. What was shown as [134] to the relation of the shippers to the Association and the possession of the instruments of assignment by the representative of the Association who was prosecuting the claims gave a reasonable assurance of the genuineness of the instruments.

The circuit court of appeals held further, however, that, supposing there was sufficient evidence to support the finding that the claims had been legally assigned to Spiller, it showed that the purpose of the assignment was not such as to vest the legal title to the claims in him, so as to authorize the Commission to make the award of damages in his name. To this we cannot assent. The assignments were absolute in form, and plainly their effect —supposing the claims to be assignable— was to vest the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation, and enable him to recover it by action at law brought in his own name, but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments.

We have said enough to show that the reversal of the judgments of the district court cannot be sustained on the grounds upon which the circuit court of appeals based it. It is insisted, however, that, failing this, the same result ought to have been reached upon the ground that the provisions of the Commerce Act do not permit an assignment of a claim for reparation to a third party, and hence the Interstate Commerce Commission was without jurisdiction to award reparation to Spiller. This is based upon the language of §§ 8 and 9, which remain in their original form, of § 13, as amended June 18, 1910 (chap. 309, 36 Stat. at L. 550, chap. 309, Comp. Stat. § 8581, 4 Fed. Stat. Anno. 2d ed. p. 453), and of § 16, as amended June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. § 8563, 4 Fed. Stat. Anno. 2d ed. p. 337). Section 8 (24 Stat. at L. 382, chap. 104, Comp. Stat. § 8572, 4 Fed. Stat. Anno. 2d ed. p. 430) makes the common carrier, for anything done contrary to the prohibition of the act, "liable to the person or [135] persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act." Section 9 entitles any person claiming to be damaged either to make complaint to the Commission or to "bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable." Section 13 contains nothing that need be quoted. Section 16, as amended (34 Stat. at L. 590, chap. 3591, Comp. Stat. § 8584, 4 Fed. Stat. Anno. 2d ed. p. 475), provides that where an award of damages is made by the Commission, and the carrier does not comply with the order, "the complainant, or any person for whose benefit such order was made," may bring suit. Stress is laid upon the absence of language expressly extending the remedy to the representatives or assigns of the person aggrieved; but we attribute no controlling significance to this. The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier, must receive a reasonably liberal, and not a narrow, interpretation. A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty, but for compensation; is a property right assignable in its nature (Comegys v. Vasse, 1 Pet. 193, 213, 7 L. ed. 108, 117; Erwin v. United States, 97 U. S. 392, 395, 396, 24 L. ed. 1065–1067), and must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary. We find nothing in the letter or spirit of the act inconsistent with such assignability. We are referred to certain expressions in Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 442, 51 L. ed. 553, 559, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, and Southern P. Co. v. Darnell-Taenzer Lumber Co. 245 U. S. 531, 533, 534, 62 L. ed. 451, 454, 455, P.U.R.1918B, 598, 38 Sup. Ct. Rep. 186; but they do not bear upon the present question, and are not inconsistent with the view that reparation claims are assignable.

The Interstate Commerce Commission, by Conference Ruling No. 362 (June 4, 1912), declared: "In awarding reparation the Commission will recognize an assignment [136] by a consignor to a consignee, or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records." See Robinson Co. v. American Exp. Co. 38 Inters. Com. Rep. 733, 735. So far as this involves a construction of the act, we are unable to accept it, for reasons that have been indicated. Treating it as an administrative regulation, it, of course, constituted no limitation upon the jurisdiction of the Commission, even were it

consistent with a correct construction of the act, which we hold it was not. In any event, the Commission had power to disregard the regulation, as in effect it did, by recognizing the assignments in this case.

Other points discussed in the argument require no special comment.

It results that the judgments of the Circuit Court of Appeals must be reversed, and those of the District Court affirmed.

Writs of error dismissed.

Writs of certiorari allowed.

Judgments of Circuit Court of Appeals reversed, and judgments of District Court affirmed.

MECCANO, Limited, Petitioner,
v.
JOHN WANAMAKER, New York.

(See S. C. Reporter's ed. 136–142.)

Certiorari — to circuit court of appeals — preliminary orders.

1. The Federal Supreme Court may, under the Judicial Code, § 240, bring up by certiorari directed to a circuit court of appeals a cause in which the decree of the latter court is made final by § 128, and may treat the cause as if on appeal.

[For other cases, see Certiorari, II. a; II. c, in Digest Sup. Ct. 1908.]

Appeal — to circuit court of appeals — preliminary orders — judgment.

2. The power of circuit courts of appeals under the Judicial Code, § 129, to review preliminary orders granting injunctions, is not limited to the mere consideration of, and action upon, the order appealed from, but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.

[For other cases, see Appeal and Error, VIII. e; IX. e, in Digest Sup. Ct. 1908.]

Appeal — review — discretionary matters.

3. Whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court, and on appeal an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.

[For other cases, see Appeal and Error, VIII. l, 1, in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — review of discretionary matters.

4. A decree of a circuit court of appeals which, upon a view of all relevant circumstances, reversed an order of the trial court granting a preliminary injunction, will not be disturbed by the Federal Supreme Court on certiorari except for strong reasons.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

Appeal — review — changed conditions.

5. A circuit court of appeals, on appeal from an order of a district court which had granted a preliminary injunction in entire reliance upon a decree of another district court, properly takes notice of and considers the changed circumstances arising out of the subsequent reversal of such decree.

[For other cases, see Appeal and Error, VIII. n, in Digest Sup. Ct. 1908.]

Appeal — from interlocutory order — entering final decree on merits.

6. A final decree upon the merits may not be entered by a circuit court of appeals on grounds of estoppel by judgment upon an appeal from an order granting a preliminary injunction.

[For other cases, see Appeal and Error, IX. a, in Digest Sup. Ct. 1908.]

Patents — disclaimer.

7. Petitioner in a suit for infringement of a patent, for unfair competition, and for the infringement of a copyright, may not file a disclaimer as to the patent upon certiorari to a circuit court of appeals to review a decree which reversed an order of the trial court, granting a preliminary injunction.

[For other cases, see Patents, XII. in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — scope of review.

8. The Federal Supreme Court will not undertake, on certiorari sued out to review a decree of a circuit court of appeals which reversed a decree of a district court, granting a preliminary injunction, to decide which one of two conflicting views expressed by two circuit courts of appeals is the correct one, nor to decide the several issues involved upon the merits.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

[No. 187.]

Argued January 26 and 27, 1920. Decided May 17, 1920.

Note.—On certiorari from Federal Supreme Court to circuit courts of appeals—see notes to Furness, W. & Co. v. Yang-Tsze Ins. Asso. 61 L. ed. U. S. 409, and United States v. Dickinson, 53 L. ed. U. S. 711.

On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119, and Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605.

That the Federal Supreme Court will not review the discretionary action of the court below—see note to Barrow v. Hill, 14 L. ed. U. S. 48.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the District Court for the Southern District of New York, granting a preliminary injunction in a suit for the infringement of a patent, for unfair competition, and for the infringement of a copyright. Affirmed.

See same case below, 162 C. C. A. 520, 250 Fed. 450.

The facts are stated in the opinion.

Mr. Reeve Lewis argued the cause, and, with Messrs. C. A. L. Massie, W. B. Kerkam, and Ralph L. Scott, filed a brief for petitioner:

A decree, while in a strict technical sense interlocutory with respect to an accounting provided for therein, is nevertheless final in all other respects in which it conclusively adjudicates the rights of the parties.

Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 293; Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 41 L. ed. 810, 812, 17 Sup. Ct. Rep. 410; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 552; East Coast Cedar Co. v. People's Bank, 49 C. C. A. 422, 111 Fed. 446; Smith v. Farbenfabriken Co. 117 C. C. A. 133, 197 Fed. 894; Marian Coal Co. v. Peale, 122 C. C. A. 397, 204 Fed. 161; Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 Sup. Ct. Rep. 627; Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065, 27 Sup. Ct. Rep. 611; Hart Steel Co. v. Railroad Supply Co. 244 U. S. 294, 61 L. ed. 1148, 37 Sup. Ct. Rep. 506; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co. 235 U. S. 383, 387, 388, 59 L. ed. 282, 283, 35 Sup. Ct. Rep. 132; National Brake & Electric Co. v. Christensen, 169 C. C. A. 600, 258 Fed. 880.

Identity or privity of the defendants in the two suits is established.

Rock Spring Distilling Co. v. W. A. Gaines & Co. 246 U. S. 312, 62 L. ed. 738, 38 Sup. Ct. Rep. 327.

Identity of subject-matter and issues in the two suits is admitted and otherwise established.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

This court has full power and authority now to make such disposition of the case as justice may at this time require.

Watts, W. & Co. v. Unione Austriaca di Navigazione, 248 U. S. 9, 63 L. ed. 100, 3 A.L.R. 323, 39 Sup. Ct. Rep. 2; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771, 32 Sup. Ct. Rep. 488.

The Ohio decree established, as against the defendant Wagner of the Ohio suit, the right of Meccano, Limited, to prevent the making and selling of the unlawful American Model Builder product, and that right ought to be recognized in a suit against Wagner's customer, defended by him.

Penfield v. Potts, 61 C. C. A. 371, 126 Fed. 479; Sacks v. Kupferle, 127 Fed. 569; Warren Featherbone Co. v. De Camp, 154 Fed. 198.

The Ohio decree should have been upheld and enforced in the present suit, both as to the grant of preliminary injunction and as to petitioner's motion for a decision on the merits, carrying a permanent injunction and an accounting.

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665; New Orleans v. Citizens' Bank, 167 U. S. 371, 379, 42 L. ed. 202, 204, 17 Sup. Ct. Rep. 905; Southern P. R. Co. v. United States, supra; Bates v. Bodie, 245 U. S. 520, 62 L. ed. 444, L.R.A.1918C, 355, 38 Sup. Ct. Rep. 182; Case v. Beauregard (Case v. New Orleans & C. R. Co.) 101 U. S. 688, 25 L. ed. 1004; Hubbell v. United States, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828.

Regardless of identity of issues and identity or privity of parties in the two suits, the decision and decree of the court of appeals for the sixth circuit, a court of co-ordinate jurisdiction, should have been accepted and enforced by the court of appeals for the second circuit, as conclusively supporting the grant of preliminary injunction in this case, involving identically the same product as was held unlawful in the sixth circuit case.

National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Penfield v. Potts, 61 C. C. A. 371, 126 Fed. 475; Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. 68 C. C. A. 523, 133 Fed. 167; Gold v. Newton, 166 C. C. A. 270, 254 Fed. 824.

The judgment in the Ohio suit should also be upheld and applied under the rule that the finding of a trial court, based upon testimony given in open court, must be treated as unassailable.

Adamson v. Gilliland, 242 U. S. 350, 351, 61 L. ed. 356, 357, 37 Sup. Ct. Rep. 169; United States v. United Shoe Ma-

chinery Co. 247 U. S. 32, 62 L. ed. 968, 38 Sup. Ct. Rep. 473; L. A. Westermann Co. v. Dispatch Printing Co. 147 C. C. A. 417, 233 Fed. 609; Luten v. Sharp, 148 C. C. A. 478, 234 Fed. 880; Gibson v. American Graphophone Co. 148 C. C. A. 399, 234 Fed. 633.

The order granting a preliminary injunction should have been affirmed by the court of appeals for the second circuit under the established rule that such an order will not be disturbed unless it is clearly shown that, in granting it, the district court improvidently exercised or abused its legal discretion. Supported as it is by the unanimous opinions and judgments of four judges in the sixth circuit, the New York district court would have failed to exercise proper discretion had it refused the injunction.

Rahley v. Columbia Phonograph Co. 58 C. C. A. 639, 122 Fed. 625; Neff v. Coffield Motor Washer Co. 127 C. C. A. 24, 210 Fed. 166; Blount v. Société Anonyme, 3 C. C. A. 455, 6 U. S. App. 335, 53 Fed. 100; Magruder v. Belle Fourche Valley Water Users' Asso. 133 C. C. A. 524, 219 Fed. 82; Duplex Printing-Press Co. v. Campbell Printing-Press & Mfg. Co. 16 C. C. A. 220, 37 U. S. App. 250, 69 Fed. 252; Kings County Raisin & Fruit Co. v. United States Consol. Seeded Raisin Co. 104 C. C. A. 499, 182 Fed. 60; Stearns-Roger Mfg. Co. v. Brown, 52 C. C. A. 559, 114 Fed. 939.

This court may grant the relief sought.

Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; Hart Steel Co. v. Railroad Supply Co. 244 U. S. 294, 61 L. ed. 1148, 37 Sup. Ct. Rep. 506; Rock Spring Distilling Co. v. W. A. Gaines & Co. 246 U. S. 312, 62 L. ed. 738, 38 Sup. Ct. Rep. 327; Hanover Star Mill. Co. v. Metcalf, 240 U. S. 403, 408, 60 L. ed. 713, 716, 36 Sup. Ct. Rep. 357.

This court has been asked to intervene in this suit upon the ground that the judgment in the Ohio suit (right or wrong) is controlling and conclusive in the New York suit, and this court will confine its discussion and consideration to the matters relied upon in asking the intervention of this court.

Alice State Bank v. Houston Pasture Co. 247 U. S. 240, 62 L. ed. 1096, 38 Sup. Ct. Rep. 496.

This court will not pass upon the merits of the questions of unfair competition and copyright infringement for the further reason that the court of appeals for the second circuit has, by statute, final jurisdiction over those matters; and that court has not yet finally adjudicated such matters, but has only decided that the same have not been sufficiently established by the showing in support of preliminary injunction motion.

Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 54 L. ed. 757, 30 Sup. Ct. Rep. 505; Marconi Wireless Teleg. Co. v. Simon, 246 U. S. 46, 62 L. ed. 568, 38 Sup. Ct. Rep. 275; Brown v. Fletcher, 237 U. S. 583, 59 L. ed. 1128, 35 Sup. Ct. Rep. 750; Hubbard v. Tod, 171 U. S. 474, 43 L. ed. 246, 19 Sup. Ct. Rep. 14; Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495.

The decision and decree in the Ohio suit are a final adjudication that the American Model Builder product constitutes unfair competition and copyright infringement, and that adjudication is not before this court for review. The question of law here is the effect to be given that adjudication in the present case.

Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275, 62 L. ed. 286, 38 Sup. Ct. Rep. 80.

Mr. H. A. Toulmin argued the cause, and, with Mr. H. A. Toulmin, Jr., filed a brief for respondent:

The decree which it is contended the court of appeals for the second circuit should have followed is purely interlocutory.

Hills & Co. v. Hoover, 142 Fed. 904; Brush Electric Co. v. Western Electric Co. 22 C. C. A. 543, 46 U. S. App. 355, 76 Fed. 761; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 564; Australian Knitting Co. v. Gormly, 138 Fed. 92; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Barnard v. Gibson, 7 How. 650, 12 L. ed. 857; Humiston v. Stainthorp, 2 Wall. 106, 17 L. ed. 905; Estey v. Burdett, 109 U. S. 633, 637, 27 L. ed. 1058, 1059, 3 Sup. Ct. Rep. 531; Hohorst v. Hamburg-American Packet Co. 148 U. S. 262, 37 L. ed. 443, 13 Sup. Ct. Rep. 590; Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; California Nat. Bank v. Stateler, 171 U. S. 447, 449, 43 L. ed. 233, 234, 19 Sup. Ct. Rep. 6; Craighead v. Wilson, 18 How. 199, 15 L. ed. 332; Beebe v. Russell, 19 How. 283, 15 L. ed. 668; Lodge v. Twell, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318; Hollander v.

Feehheimer, 162 U. S. 326, 40 L. ed. 985, 16 Sup. Ct. Rep. 795.

The court of appeals for the second circuit was right in making its own decision.

Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; Consolidated Rubber Tire Co. v. Diamond Rubber Co. 85 C. C. A. 349, 157 Fed. 677.

Mr. Justice McReynolds delivered the opinion of the court:

Proceeding against Wagner and others in the United States district court, southern district of Ohio, Meccano, Limited, obtained a decree (July 8, 1916) affirming the validity, and restraining infringement, of its patent for mechanical toys; also restraining unfair competition in making and selling such toys and the further infringement of its copyright upon trade catalogue and illustrated [138] manual relating thereto. 234 Fed. 912. An appeal was taken to the circuit court of appeals, sixth circuit. The same corporation instituted the present suit in the United States district court, southern district of New York (December 9, 1916), seeking like relief against John Wanamaker, a customer of Wagner.

The trial court granted a preliminary injunction, asked upon the bill, supporting affidavits, and exhibits, January 12, 1917. It expressed general agreement with the conclusions announced in the Ohio cause and said: "It seems quite apparent that the patent is infringed and that diagrams and directions as to construction have been borrowed by defendant from complainant's copyrighted catalogues, and that the system of construction adopted by the defendant is a direct imitation of complainant's system." An appeal followed; pending which the circuit court of appeals, sixth circuit (November, 1917), reversed the Ohio district court's decree so far as it sustained the patent, approved it otherwise, and remanded the cause for further proceedings. 158 C. C. A. 573, 246 Fed. 603.

January 25, 1918, after argument, but before determination of appeal from the preliminary order, petitioner moved for final decision on the merits, claiming that the decree of the circuit court of appeals, sixth circuit, "is final and conclusive as to the case at bar, under principles enunciated by the Supreme Court." Being opposed, the motion was denied March 24, 1918. The court said of it:

"This was a motion for a decision on the merits of this cause by this court under the following circumstances: A suit was brought in the district court for the southern district of New York for an injunction for infringement of a copyright, and of a patent, and for unfair competition in the manufacture of a mechanical toy in absolute imitation of the plaintiff's. The plaintiff applied for and got [139] an injunction pendente lite, from which the defendant appealed. That appeal is still pending undetermined in this court. Meanwhile the plaintiff had, in the district court, required the defendant to answer certain interrogatories by which it appeared that the defendant procured from one Wagner the toys which it sold in alleged unfair competition and in violation of the patent, and also the 'manuals' which went with the toys and explained their uses, which are alleged to infringe the copyright. The interrogatories further showed that Wagner had agreed to hold the defendant harmless for any sales of the toys and manuals, and that in pursuance of that undertaking he had taken a share in the defense of this suit. While it did not appear exactly what that share was, it may be assumed, for the purposes of the motion only, that Wagner has assumed the chief conduct of the case, and that the defendant remains only formally represented.

"The plaintiff sued Wagner in Ohio upon the three same causes of equity and obtained a decree upon all. Later, an appeal was taken to the circuit court of appeals for the sixth circuit and the decree was affirmed except as to the patent, which was declared invalid, and which the plaintiff has now withdrawn from this suit. No final decree has been entered, and the Ohio cause now stands for an accounting in the district court. This motion is upon the record in the Ohio suit, which is made a part of the moving papers, and it presupposes that this court may pass a final decree for the plaintiff upon the appeal from the injunction pendente lite upon the assumption that that record is a complete estoppel against the defendant here, and leaves open no issues for determination between the parties."

"We pass the question of practice whether this court, under the doctrine of Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 488, 44 L. ed. 858, 20 Sup. Ct. Rep. 708, may enter a decree for the plaintiff upon such [140] an appeal as that now pending. Mast, F. & Co. v. Stover, supra, was a case where the bill was dismissed, and no case has so far held that the plaintiff could obtain an affirmative decree. As we think the motion must be denied upon the

merits, we leave open the question whether the plaintiff may, in any event, so terminate the litigation. . . . It is apparent that some of the issues are different from those litigated in Ohio; they involve not only the defendant's rights to sell Wagner's toys and manuals, but any others which it may procure elsewhere. . . . At best the rule in Mast, F. & Co. v. Stover Mfg. Co. supra, is limited to those cases in which the court can see that the whole issues can be disposed of at once without injustice to the parties. Whatever may be the result here, it is apparent that the case involves more than can be so decided."

April 15, 1918, the court below reversed the challenged preliminary order. After stating that the trial court very naturally followed the Ohio district court, it referred to the partial reversal of the decree there announced, and expressed entire agreement with the circuit court of appeals, sixth circuit, in holding the patent invalid. And, having considered the evidence relating to copyright and unfair competition, it found no adequate ground for an injunction. 162 C. C. A. 520, 250 Fed. 450. The cause comes here by certiorari. See Ex parte Wagner, 249 U. S. 465, 63 L. ed. 709, 39 Sup. Ct. Rep. 317.

Decrees by circuit courts of appeals are declared final by § 128, Judicial Code [36 Stat. at L. 1133, chap. 231, Comp. Stat. § 1120, 5 Fed. Stat. Anno. 2d ed. p. 607], in cases like the present one. We, therefore, had authority to bring this cause up by certiorari, and may treat it as if here on appeal. Section 240, Judicial Code; Harriman v. Northern Securities Co. 197 U. S. 244, 287, 49 L. ed. 739, 760, 25 Sup. Ct. Rep. 493; Denver v. New York Trust Co. 229 U. S. 123, 136, 57 L. ed. 1101, 1121, 33 Sup. Ct. Rep. 657. The power of circuit courts of appeals to review preliminary orders granting injunctions arises from § 129, Judicial Code, which has been often considered. Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; [141] Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 494, 44 L. ed. 856, 860, 20 Sup. Ct. Rep. 708; Harriman v. Northern Securities Co. supra; United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 214, 56 L. ed. 1055, 1061, 32 Sup. Ct. Rep. 620; Denver v. New York Trust Co. supra. This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.

The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. Rahley v. Columbia Phonograph Co. 58 C. C. A. 639, 122 Fed. 623; Texas Traction Co. v. Barron G. Collier, 115 C. C. A. 82, 195 Fed. 65, 66; Southern Exp. Co. v. Long, 120 C. C. A. 568, 202 Fed. 462; Amarillo v. Southwestern Teleg. & Teleph. Co. 165 C. C. A. 264, 253 Fed. 638. The informed judgment of the circuit court of appeals, exercised upon a view of all relevant circumstances, is entitled to great weight. And, except for strong reasons, this court will not interfere with its action. No such reasons are presented by the present record.

Pending the New York appeal, the situation underwent a radical change,—the circuit court of appeals, sixth circuit, reversed the decree upholding petitioner's patent. Evidently the trial court had granted the preliminary injunction in entire reliance upon that decree, and after its reversal the court below properly took notice of and considered the changed circumstances. Gulf, C. & S. F. R. Co. v. Dennis, 224 U. S. 503, 505, 506, 56 L. ed. 860-862, 32 Sup. Ct. Rep. 542.

Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order, and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that [142] no ground exists for equitable relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by ex parte affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court, with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled. Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275, 281, 62 L. ed. 286, 289, 38 Sup. Ct. Rep. 80.

Petitioner's motion to enter a disclaimer must be denied.

If the two circuit courts of appeals have expressed conflicting views, we cannot now declare which is right, or undertake finally to decide the several issues involved upon their merits. The matter for review here is the action of the courts below upon the preliminary order

for injunction, and we may go no further. Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 311, 53 L. ed. 805, 809, 29 Sup. Ct. Rep. 495; Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 267, 54 L. ed. 757, 761, 30 Sup. Ct. Rep. 505.

The judgment of the Circuit Court of Appeals is affirmed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

DANIEL O'CONNELL et al., Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 142–148.)

Appeal — bill of exceptions — time of filing.

1. The trial court could not, without the consent of the adverse party, extend the time for filing a bill of exceptions by an order made after the term had expired, and subsequent to the day to which the term was extended, by a general rule for the purpose of filing such bills.

[For other cases, see Appeal and Error, V. a, 3, in Digest Sup. Ct. 1908.]

Appeal — bill of exceptions — when filed too late.

2. The Federal Supreme Court may not consider a bill of exceptions not presented until after the power of the trial court over the same had expired.

[For other cases, see Appeal and Error, V. a, 3, in Digest Sup. Ct. 1908.]

Constitutional law — power of Congress — Selective Service Act — Espionage Act.

3. The Selective Service Act of May 18, 1917, and the Espionage Act of June 15, 1917, are constitutional.

[For other cases, see Constitutional Law, IV. d; Army and Navy, IV. in Digest Sup. Ct. 1908.]

Appeal — reversible error — verdict — in criminal case.

4. A verdict on the trial of an indictment containing two counts which finds defendants "guilty on the —— count of the indictment, and —— on the —— count of the indictment," will be regarded on writ of error as a general verdict of guilty upon both counts, where apparently a printed form was used in preparing the jury's verdict, and when presented no objection was made to its form or wording, neither the motion for new trial nor in arrest of judgment indicating any such objection, and defendants mentioning none when called upon to show why sentence should not be imposed.

[For other cases, see Appeal and Error, VIII. m, 7, in Digest Sup. Ct. 1908.]

Conspiracy — obstructing recruiting and enlistment service — Espionage Act.

5. The Espionage Act of June 15, 1917, § 3, makes criminal a conspiracy to obstruct the recruiting and enlistment service of the United States by inducement or persuasion.

[For other cases, see Conspiracy, II. in Digest Sup. Ct. 1908.]

Conspiracy — to violate Selective Service Act — nonofficials.

6. Nonofficial persons may be convicted of a conspiracy to violate the provisions of the Selective Service Act of May 18, 1917, § 6, that any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, shall be guilty of a misdemeanor.

[For other cases, see Conspiracy, II. in Digest Sup. Ct. 1908.]

[No. 221.]

Argued April 23 and 26, 1920. Decided May 17, 1920.

IN ERROR to the District Court of the United States for the Northern District of California to review convictions for conspiring to violate the Selective Service and Espionage Acts. Affirmed.

The facts are stated in the opinion.

Mr. **Gilbert E. Roe** argued the cause, and, with Messrs. Daniel O'Connell and Carl J. F. Wacker, pro sese, and Messrs. Joseph L. Tepper and Seth Shepard, Jr., filed a brief for plaintiffs in error:

Prejudice is presumed from error unless it clearly appears beyond all doubt from the record that the error could not and did not prejudice.

Smith v. Shoemaker, 17 Wall. 630, 639, 21 L. ed. 717.

The Espionage Act, or any act of Congress, or any construction of an act of Congress (and such construction thereby becomes a part of the statute) which in the slightest degree, directly or indirectly, abridges the freedom of the press, or freedom of speech, or the right to peaceably assemble, to consider, crit-

---

Note.—As to when exceptions must be taken to be available on review—see note to Phelps v. Mayer, 14 L. ed. U. S. 643.

For a review of decisions under the Espionage Act of June 15, 1917—see note to United States v. Krafft, L.R.A. 1918F, 410.

As to validity of legislation directed against social or industrial propaganda deemed to be of a dangerous tendency—see note to State v. Moilen, 1 A.L.R. 336.

icize, denounce, or demand the change or repeal of any act or policy of the national or state government, no matter on what ground or reason that attempt to abridge is placed, is a plain violation of the Constitution of the United States and also of the Constitution of the state of California, and absolutely without power, and null and void.

People v. Brady, 40 Cal. 198, 6 Am. Rep. 604; New Orleans v. Abbagnato, 26 L.R.A. 334, 10 C. C. A. 361, 23 U. S. App. 533, 62 Fed. 245; Western U. Teleg. Co. v. Pendleton, 95 Ind. 15, 48 Am. Rep. 695; Monongahela Nav. Co. v. United States, 148 U. S. 324, 37 L. ed. 467, 13 Sup. Ct. Rep. 622; Re Quarles, 158 U. S. 535, 39 L. ed. 1081, 15 Sup. Ct. Rep. 959; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 679, 28 L. ed. 296, 4 Sup. Ct. Rep. 185; Wilson v. Shaw, 204 U. S. 31, 51 L. ed. 355, 27 Sup. Ct. Rep. 233; Wayman v. Southard, 10 Wheat. 50, 6 L. ed. 264; Brown v. Maryland, 12 Wheat. 439, 6 L. ed. 685; United States v. Cruikshank, 92 U. S. 552, 23 L. ed. 591; People v. Seeley, 139 Cal. 118, 72 Pac. 834; Dailey v. Superior Ct. 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458.

Desirability, no matter how great, and circumstances, no matter how strong and meritorious, will not give Congress any power to legislate, nor persuade this court to approve any such attempted legislation.

Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

Acts and declarations before the formation of the conspiracy are not admissible.

People v. Parker, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; Langford v. State, 130 Ala. 74, 30 So. 503; Paul v. State, 12 Tex. App. 346.

It is necessary that first proof of the conspiracy be made.

Winchester & P. Mfg. Co. v. Creary, 116 U. S. 161, 29 L. ed. 591, 6 Sup. Ct. Rep. 369.

A bare suspicion of collusion or concert or understanding is not sufficient to admit evidence of acts or declarations of defendants.

Hart v. Hopson, 52 Mo. App. 177; Benford v. Sanner, 40 Pa. 9, 80 Am. Dec. 545; People v. Stevens, 68 Cal. 113, 8 Pac. 712; Henrich v. Saier, 124 Mich. 86, 82 N. W. 879.

Even though it was by the joint act of the defendants, if it was not done in pursuance of the conspiracy, it was not admissible.

Sparf v. United States, 156 U. S. 56, 39 L. ed. 345, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168.

The existence or nature of a conspiracy cannot be established by the acts or declaration of one conspirator, in the absence and without the knowledge or concurrence of the others.

United States v. Babcock, 3 Dill. 585, Fed. Cas. No. 14,487; Rea v. Missouri, 17 Wall. 532, 21 L. ed. 707; Winchester & P. Mfg. Co. v. Creary, supra; United States v. Newton, 52 Fed. 275; People v. Irwin, 77 Cal. 494, 20 Pac. 56; Cuyler v. McCartney, 40 N. Y. 221; Blain v. State, 33 Tex. Crim. Rep. 236, 26 S. W. 63; United States v. McKee, 3 Dill. 546, Fed. Cas. No. 15,685; People v. Parker, supra; Dealy v. United States, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; United States v. Grodson, 164 Fed. 157; United States v. Richards, 149 Fed. 443; Wilson v. People, 94 Ill. 299; State v. Moberly, 121 Mo. 604, 26 S. W. 364; Gill v. State, 56 Tex. Crim. Rep. 202, 119 S. W. 684, 17 Ann. Cas. 1164; McDonald v. People, 126 Ill. 150, 9 Am. St. Rep. 547, 18 N. E. 817, 7 Am. Crim. Rep. 137.

Only those acts and declarations of one conspirator are admissible which are done and made while the conspiracy is pending, and in furtherance of its object.

Logan v. United States, 144 U. S. 264, 309, 36 L. ed. 430, 445, 12 Sup. Ct. Rep. 617; Brown v. United States, 150 U. S. 98, 37 L. ed. 1013, 14 Sup. Ct. Rep. 37.

The government failed to offer any evidence to prove the offenses charged in the indictment, and the district court should have granted the motion to quash the indictment and direct an acquittal at the close of the government's evidence.

Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249; Williamson v. United States, 207 U. S. 426, 449, 52 L. ed. 278, 291, 28 Sup. Ct. Rep. 163; United States v. Newton, 52 Fed. 275; United States v. Cassidy, 67 Fed. 698; Hopt v. Utah, 114 U. S. 488, 29 L. ed. 183, 5 Sup. Ct. Rep. 972; Johnson v. United States, 225 U. S. 405, 56 L. ed. 1142, 32 Sup. Ct. Rep. 748; Wiborg v. United States, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; People v. Powell, 63 N. Y. 88; State, Wood, Prosecutor, v. State, 47 N. J. L. 461, 1 Atl. 509, 5 Am. Crim. Rep. 123; People v. Flack, 125 N. Y. 324, 11

L.R.A. 807, 26 N. E. 267; Prettyman v. United States, 103 C. C. A. 384, 180 Fed. 43; Cruickshank v. Bidwell, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280; Williams v. State, 81 Ala. 1, 60 Am. Rep. 133, 1 So. 179, 7 Am. Crim. Rep. 443; Lyons v. State, 30 Tex. App. 642, 18 S. W. 416; 8 Cyc. 642; Myers v. State, 43 Fla. 500, 31 So. 275; Handley v. State, 115 Ga. 584, 41 S. E. 992, 15 Am. Crim. Rep. 94.

Matters of mere opinion, or expressions of opinion, do not come within the act.

Sandberg v. United States, 168 C. C. A. 593, 257 Fed. 643; Shidler v. United States, 168 C. C. A. 570, 257 Fed. 620.

The district court committed plain errors in the charge to the jury.

Masters v. United States, 42 App. D. C. 350, Ann. Cas. 1916A, 1243; Breese v. United States, 48 C. C. A. 36, 108 Fed. 804; Beard v. United States, 158 U. S. 554, 564, 39 L. ed. 1088, 1092, 15 Sup. Ct. Rep. 962, 9 Am. Crim. Rep. 324; Bird v. United States, 180 U. S. 362, 45 L. ed. 573, 21 Sup. Ct. Rep. 403; Allison v. United States, 160 U. S. 203, 212, 40 L. ed. 395, 399, 16 Sup. Ct. Rep. 252, 10 Am. Crim. Rep. 432; Williams v. United States, 88 C. C. A. 296, 158 Fed. 30; Hibbard v. United States, 96 C. C. A. 554, 172 Fed. 66, 18 Ann. Cas. 1040; Mills v. United States, 164 U. S. 644, 41 L. ed. 584, 17 Sup. Ct. Rep. 210; Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; Hicks v. United States, 150 U. S. 442, 37 L. ed. 1137, 14 Sup. Ct. Rep. 144; Sandals v. United States, 130 C. C. A. 149, 213 Fed. 569; Rudd v. United States, 97 C. C. A. 462, 173 Fed. 912; Mullen v. United States, 46 C. C. A. 22, 106 Fed. 892; Stewart v. United States, 127 C. C. A. 477, 211 Fed. 41; Starr v. United States, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; Thompson v. United States, 155 U. S. 271, 281, 39 L. ed. 146, 151, 15 Sup. Ct. Rep. 73, 9 Am. Crim. Rep. 209; Hickory v. United States, 160 U. S. 408, 422, 425, 40 L. ed. 474, 479, 480, 16 Sup. Ct. Rep. 327; Cornelius v. Com. 15 B. Mon. 539.

The punishment being different for each count, evidence having been offered on both counts which was insufficient to support either of the two counts, and the general verdict of guilty, make it impossible to say on which count they were convicted, and there must be a new trial.

People v. Mitchell, 92 Cal. 590, 28 Pac. 597; People v. Garnett, 129 Cal. 365, 61 Pac. 1114; People v. Lee Yune Chong, 94 Cal. 386, 29 Pac. 776; People v. Eppinger, 109 Cal. 297, 41 Pac. 1037.

Messrs. Gilbert E. Roe and Joseph L. Tepper also filed a separate brief for plaintiffs in error:

The verdict is fatally defective.

Campbell v. Reg. 11 Q. B. 799, 116 Eng. Reprint, 674, 2 New. Sess. Cas. 297, 17 L. J. Mag. Cas. N. S. 89, 12 Jur. 117, 2 Cox, C. C. 463, affirmed on error to the Exchequer Chamber, 11 Q. B. 814, 116 Eng. Reprint, 680; Day v. People, 76 Ill. 380; Scott v. State, 4 Okla. Crim. Rep. 70, 109 Pac. 240; State v. Snider, 32 Wash. 299, 73 Pac. 355; Holmes v. State, 58 Neb. 297, 78 N. W. 641; State v. King, 194 Mo. 474, 92 S. W. 670; Patterson v. United States, 2 Wheat. 221, 4 L. ed. 224; Garland v. Davis, 4 How. 131, 11 L. ed. 907; Wiborg v. United States, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Crawford v. United States, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; Weems v. United States, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705; Williams v. United States, 88 C. C. A. 296, 158 Fed. 30; Morse v. United States, 98 C. C. A. 321, 174 Fed. 539, 20 Ann. Cas. 938; Humes v. United States, 105 C. C. A. 158, 182 Fed. 486; Pettine v. New Mexico, 119 C. C. A. 581, 201 Fed. 489; Gillette v. United States, 149 C. C. A. 405, 236 Fed. 218; Oppenheim v. United States, 154 C. C. A. 383, 241 Fed. 628; Taylor v. United States, 156 C. C. A. 607, 244 Fed. 324; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; Simmons v. United States, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171.

The court erred in refusing to direct a verdict of not guilty at the conclusion of all the evidence, on the ground that the conspiracy charged in the indictment had not been proved.

United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539; Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; Logan v. United States, 144 U. S. 263, 309, 36 L. ed. 429, 445, 12 Sup. Ct. Rep. 617; Brown v. United States, 150 U. S. 93, 98, 37 L. ed. 1010, 1013, 14 Sup. Ct. Rep. 37; Winchester & P. Mfg. Co. v. Creary, 116 U. S. 161, 29 L. ed. 591, 6 Sup. Ct. Rep. 369; Union Pacific Coal Co. v. United States, 97 C. C. A. 578, 173 Fed. 737; Langford v. State, 130 Ala. 74, 30 So. 503; Jones, Ev. § 254; Greenl. Ev. 16th ed. § 94; Abrams v. United States, 250

U. S. 616, 63 L. ed. 1173, 40 Sup. Ct. Rep. 17.

The court erred in the admission of evidence.

Sparf v. United States, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168.

The learned trial judge erred in his charge to the jury.

Hickory v. United States, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327; Allison v. United States, 160 U. S. 203, 40 L. ed. 395, 16 Sup. Ct. Rep. 252, 10 Am. Crim. Rep. 432; Thompson v. United States, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73, 9 Am. Crim. Rep. 209; Bird v. United States, 180 U. S. 356, 45 L. ed. 570, 21 Sup. Ct. Rep. 403; Beard v. United States, 158 U. S. 554, 39 L. ed. 1088, 15 Sup. Ct. Rep. 962, 9 Am. Crim. Rep. 324; Oppenheim v. United States, 154 C. C. A. 383, 241 Fed. 625; United States v. Baker, 247 Fed. 124; Masses Pub. Co. v. Patten, 244 Fed. 535; L.R.A.1918C, 79, 158 C. C. A. 250, 246 Fed. 24, Ann. Cas. 1918B, 999.

The bill of exceptions was duly settled and signed, and is properly before this court for consideration.

Hunnicutt v. Peyton, 102 U. S. 333, 356, 26 L. ed. 113, 116; United States v. Breitling, 20 How. 252, 15 L. ed. 900; Davis v. Patrick, 122 U. S. 138, 30 L. ed. 1090, 7 Sup. Ct. Rep. 1102; Waldron v. Waldron, 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383; Yellow Poplar Lumber Co. v. Chapman, 20 C. C. A. 503, 42 U. S. App. 21, 74 Fed. 444; Talbot v. Press Pub. Co. 80 Fed. 567; Koewing v. Wilder, 61 C. C. A. 312, 126 Fed. 472; Roberts v. Bennett, 68 C. C. A. 386, 135 Fed. 748; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. 81 C. C. A. 76, 151 Fed. 466; Dalton v. Gunnison, 91 C. C. A. 457, 165 Fed. 873; Camden Iron Works Co. v. Sater, 139 C. C. A. 157, 223 Fed. 611; E. I. Du Pont de Nemours & Co. v. Smith, 161 C. C. A. 377, 249 Fed. 403.

In many cases where the charge was less objectionable than in the case at bar, reversals have been ordered.

Stokes v. United States, — C. C. A. —, 264 Fed. 18; Wolf v. United States, 170 C. C. A. 364, 259 Fed. 388; Elmer v. United States, 171 C. C. A. 410, 260 Fed. 649; August v. United States, 168 C. C. A. 428, 257 Fed. 388; Hall v. United States, 168 C. C. A. 94, 256 Fed. 748; Cummins v. United States, 147 C. C. A. 38, 232 Fed. 846.

Messrs. David J. Smith and Herman B. Smith filed a brief in their own behalf:

The trial court erred in overruling the demurrer to the indictment, and particularly those portions of the demurrer directed against the Selective Service and Espionage Acts.

Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522.

The evidence is insufficient to warrant a verdict of guilty.

Ryan v. United States, 132 C. C. A. 257, 216 Fed. 13.

The trial court erred in not appointing counsel to conduct the defense of David Jay Smith.

8 R. C. L. 83; 16 C. J. 822; Garner v. State, 97 Ark. 63, 132 S. W. 1010, Ann. Cas. 1912C, 1059; Dietz v. State, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732; People v. Goldenson, 76 Cal. 344, 19 Pac. 161; Stephenson v. State, 21 Ohio C. C. N. S. 287.

The first overt act of a conspiracy fixes the locus penitentiæ. Before that act is done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.

United States v. Britton, 108 U. S. 199, 204, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531.

Mr. T. C. West filed a brief for plaintiffs in error Thomas Carey and E. R. Hoffman.

Assistant Attorney General Stewart argued the cause, and, with Mr. W. C. Herron, filed a brief for defendant in error:

The bill of exceptions cannot be considered by this court, for the reason that the trial court had lost jurisdiction to allow and sign it.

Michigan Ins. Bank v. Eldred, 143 U. S. 293, 298, 36 L. ed. 162, 163, 12 Sup. Ct. Rep. 450; Harlan v. McGourin, 218 U. S. 442, 450, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849; Richmond & D. R. Co. v. McGee, 2 C. C. A. 81, 8 U. S. App. 86, 50 Fed. 907; Waldron v. Waldron, 156 U. S. 361, 378, 39 L. ed. 453, 457, 15 Sup. Ct. Rep. 383; Missouri, K. & T. R. Co. v. Russell, 9 C. C. A. 108, 19 U. S. App. 641, 60 Fed. 501; Jennings v. Philadelphia, B. & W. R. Co. 31 App. D. C. 173, 218 U. S. 255, 257, 258, 54 L. ed. 1031, 1032, 31 Sup. Ct. Rep. 1; United States v. Mayer, 235 U. S. 55, 67, 70, 58 L. ed. 129, 135, 136, 35 Sup. Ct. Rep. 16.

The verdict was good.

Statler v. United States, 157 U. S. 277, 279, 39 L. ed. 700, 701, 15 Sup. Ct. Rep. 616; Ballew v. United States, 160

U. S. 187, 40 L. ed. 388, 16 Sup. Ct. Rep. 263.

The second count of the indictment was good.

Fraina v. United States, 166 C. C. A. 356, 255 Fed. 28; United States v. Miller, 249 Fed. 985; United States v. Blakeman, 251 Fed. 306; United States v. Sugar, 243 Fed. 439, 164 C. C. A. 191, 252 Fed. 84, 248 U. S. 578, 63 L. ed. 429, 39 Sup. Ct. Rep. 19.

There was evidence which, taken by itself, or with the inferences which the jury were legitimately entitled to draw from it, could have justified reasonable men in finding a verdict of guilty on both counts.

Debs v. United States, 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. Rep. 252; Goldstein v. United States, 169 C. C. A. 628, 258 Fed. 910; Hyde v. United States, 225 U. S. 347, 368, 372, 56 L. ed. 1114, 1126, 1128, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614.

The evidence regarding the attempted circulation on June 3 of the Socialist platform and war program, and the meeting of July 3, was competent, if not against all the defendants, at any rate against the Smiths, as tending to show their real intent in the organization and activities of "the American Patriots."

Wood v. United States, 16 Pet. 342, 359, 361, 10 L. ed. 987, 994, 995; Holmes v. Goldsmith, 147 U. S. 150, 163, 164, 37 L. ed. 118, 123, 13 Sup. Ct. Rep. 288; Moore v. United States, 150 U. S. 57, 60, 61, 37 L. ed. 996, 997, 998, 14 Sup. Ct. Rep. 26; Allis v. United States, 155 U. S. 117, 119, 39 L. ed. 91, 92, 15 Sup. Ct. Rep. 36; Clune v. United States, 159 U. S. 590, 592, 593, 40 L. ed. 269, 270, 271, 16 Sup. Ct. Rep. 125; Bird v. United States, 180 U. S. 356, 359, 360, 45 L. ed. 570, 572, 573, 21 Sup. Ct. Rep. 403; Williamson v. United States, 207 U. S. 425, 449, 451, 52 L. ed. 278, 291, 292, 28 Sup. Ct. Rep. 163; Standard Oil Co. v. United States, 221 U. S. 1, 76, 55 L. ed. 619, 651, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; Heike v. United States, 227 U. S. 131, 57 L. ed. 450, 33 Sup. Ct. Rep. 226, Ann. Cas. 1914C, 128; Wright v. Stewart, 130 Fed. 918; Kettenbach v. United States, 120 C. C. A. 505, 202 Fed. 383; Huff v. United States, 143 C. C. A. 290, 228 Fed. 892; Deason v. United States, 165 C. C. A. 547, 254 Fed. 260; Herman v. United States, 168 C. C. A. 551, 257 Fed. 603; Withaup v. United States, 62 C. C. A. 328, 127 Fed. 532; Schultz v. United States, 118 C. C. A. 420, 200 Fed. 237; Equi v. United States, 171 C. C. A. 649, 261 Fed. 56; Stern v. United States, 139 C. C. A. 292, 223 Fed. 764; Farmer v. United States, 139 C. C. A. 341, 223 Fed. 911.

If the evidence be competent for any purpose, it is admissible; and if it be claimed not to be competent for all purposes, a specific request must be made of the court to limit it to the particular matter as to which it is competent.

Texas & P. R. Co. v. Volk, 151 U. S. 73, 78, 38 L. ed. 78, 80, 14 Sup. Ct. Rep. 239; Isaacs v. United States, 159 U. S. 487, 490, 491, 40 L. ed. 229, 230, 16 Sup. Ct. Rep. 51; Goldsby v. United States, 160 U. S. 70, 77, 40 L. ed. 343, 346, 16 Sup. Ct. Rep. 216; Ball v. United States, 78 C. C. A. 126, 147 Fed. 40; Schultz v. United States, 188 C. C. A. 420, 200 Fed. 234; Moffatt v. United States, 146 C. C. A. 480, 232 Fed. 533; Hallowell v. United States, 165 C. C. A. 345, 253 Fed. 867.

Since the bill of exceptions shows that the plaintiffs in error did not except to the rulings or actions of the trial judge in any of the matters referred to in their motion for a diminution of the record, nor, indeed, except to any other matters than those already discussed in this brief, this court will not, on proceedings in error, go dehors the record, and, in contravention of the official certificate of the trial judge, treat as properly excepted to and assigned for error the matters not of record, set up in the motion for a diminution of the record, and referred to also in the amended assignments of error.

Claassen v. United States, 142 U. S. 140, 147, 148, 35 L. ed. 966, 968, 12 Sup. Ct. Rep. 169; Thiede v. Utah, 159 U. S. 510, 522, 523, 40 L. ed. 237, 243, 244, 16 Sup. Ct. Rep. 62; Clune v. United States, 159 U. S. 590, 593, 594, 40 L. ed. 269, 270, 271, 16 Sup. Ct. Rep. 125; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 540, 52 L. ed. 606, 610, 28 Sup. Ct. Rep. 367.

A judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, such expressions of opinion are not reviewable on writ of error.

Rucker v. Wheeler, 127 U. S. 85, 93, 32 L. ed. 102, 105, 8 Sup. Ct. Rep. 1142; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 553, 30 L. ed. 257, 258, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; St. Louis, I. M. & S. R. Co. v. Vickers, 122

U. S. 360, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1216; United States v. Philadelphia & R. R. Co. 123 U. S. 113, 114, 31 L. ed. 138, 139, 8 Sup. Ct. Rep. 77; Reynolds v. United States, 98 U. S. 145, 167, 168, 25 L. ed. 244, 250, 251; Lovejoy v. United States, 128 U. S. 171, 173, 32 L. ed. 389, 390, 9 Sup. Ct. Rep. 57; Simmons v. United States, 142 U. S. 148, 155, 35 L. ed. 968, 971, 12 Sup. Ct. Rep. 171; Coffin v. United States, 162 U. S. 664, 679–682, 40 L. ed. 1109, 1115, 1116, 16 Sup. Ct. Rep. 945; Allis v. United States, 155 U. S. 117, 123, 39 L. ed. 91, 93, 15 Sup. Ct. Rep. 36.

The honesty of the views of the defendants, or their ignorance of the legal consequences of their acts, did not, as matter of law, excuse them.

Reg. ex rel. Scott v. Hicklin, L. R. 3 Q. B. 360, 37 L. J. Mag. Cas. N. S. 89, 18 L. T. N. S. 395; 16 Week. Rep. 801, 11 Cox, C. C. 19, 8 Eng. Rul. Cas. 60; Reg. v. Senior [1899] 1 Q. B. 283, 68 L. J. Q. B. N. S. 175, 63 J. P. 8, 47 Week. Rep. 367, 79 L. T. N. S. 562, 15 Times L. R. 102, 19 Cox, C. C. 219; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; United States v. Anthony, 11 Blatchf. 207, Fed. Cas. No. 14,459; Fraina v. United States, 166 C. C. A. 356, 255 Fed. 36.

Charges in all substantial respects similar to or stronger than that in the case at bar, on the matter of criminal intent, have been sustained by the highest authority.

Rex v. Sheppard, Russell & R. 169, 1 Leach, C. C. 226, 2 East, P. C. 967; Rex v. Philpot, 7 Cr. App. Rep. 140, 144; Boyd v. United States, 142 U. S. 450, 455, 456, 35 L. ed. 1077, 1078, 12 Sup. Ct. Rep. 292; Pettibone v. United States, 148 U. S. 197, 207, 37 L. ed. 419, 424, 13 Sup. Ct. Rep. 542; Rosen v. United States, 161 U. S. 29, 41, 40 L. ed. 606, 610, 16 Sup. Ct. Rep. 434, 480, 10 Am. Crim. Rep. 251; Allen v. United States, 164 U. S. 492, 496, 41 L. ed. 528, 529, 17 Sup. Ct. Rep. 154; Agnew v. United States, 165 U. S. 36, 49, 51, 41 L. ed. 624, 629, 630, 17 Sup. Ct. Rep. 235; Aikens v. Wisconsin, 195 U. S. 194, 205, 206, 49 L. ed. 154, 159, 160, 25 Sup. Ct. Rep. 3; United States v. Patten, 226 U. S. 525, 543, 57 L. ed. 333, 341, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; Schenck v. United States, 249 U. S. 47, 51, 63 L. ed. 470, 473, 39 Sup. Ct. Rep. 247; Frohwerk v. United States, 249 U. S. 204, 209, 63 L. ed. 561, 565, 39 Sup. Ct. Rep. 249; Debs v. United States, 249 U. S. 211–216, 63 L. ed. 566–569, 39 Sup. Ct. Rep. 252; Abrams v. United States, 250 U. S. 616, 621, 63 L. ed. 1173, 1176, 40 Sup. Ct. Rep. 17; O'Hare v. United States, 165 C. C. A. 208, 253 Fed. 538; Doe v. United States, 166 C. C. A. 3, 253 Fed. 906; Fraina v. United States, 166 C. C. A. 356, 255 Fed. 36; Kirchner v. United States, 166 C. C. A. 471, 255 Fed. 305; Rhuberg v. United States, 167 C. C. A. 185, 255 Fed. 865.

Mr. Justice McReynolds delivered the opinion of the court:

Plaintiffs in error were tried under an indictment with two counts. The first charges a conspiracy to violate the Espionage Act (§ 3, Act June 15, 1917, chap. 30, 40 Stat. at L. 217, 219, Comp. Stat. §§ 10,212a, 10,483a, Fed. Stat. Anno. Supp. 1918, pp. 120, 122), by obstructing the recruiting and enlistment service; the second, a conspiracy to violate the Selective Service Law (§ 6, Act May 18, 1917, chap. 15, 40 Stat. at L. 76, 80, Comp. Stat. §§ 2044a, 2044f).

A demurrer, challenging the constitutionality of both acts and the sufficiency of each count, was overruled.

The trial continued from September 12 to 25, 1917, and resulted in the following verdict: "We, the jury, find Daniel O'Connell, David J. Smith, Herman B. Smith, Carl J. F. Wacher, Thomas Carey, and E. R. Hoffman, the defendants at the bar, guilty on the — count of the indictment, and — on the — count of the indictment. Thomas H. Haskins, Foreman." No objection was made to this verdict when returned, nor at any time prior to May 31, 1919, long after the record came here, when permission was asked to amend the assignments of error.

Motions for new trial and in arrest of judgment were overruled. The former attacked the verdict as contrary to law and the evidence, but said nothing concerning its form. The latter recited: "And now, after verdict against the said defendants, and before sentence, come the said defendants in their own proper persons and by Daniel O'Connell, their attorney, and move the court here to arrest judgment herein, and not pronounce the same," [145] and specified the following grounds: (1) The indictment fails to set forth facts sufficient to constitute an offense; (2) the first count is repugnant to itself for reasons set forth in the demurrer; (3) the second count is based on the Act of May 18, 1917, inapplicable to the defendants because they were not engaged in carrying out its terms; (4) the first count does not adequately inform defendants concerning nature of charge against them; (5) both the Acts of May

18 and June 15, 1917, are in conflict with the Constitution and are invalid.

September 29, O'Connell was sentenced to the penitentiary for five years on the first count and for two years on the second, the terms to run consecutively. The other plaintiffs in error were sentenced to varying concurrent terms under both counts, none being in excess of three years. On the same day a writ of error from this court was allowed.

The record contains a bill of exceptions, with an elaborate explanatory certificate signed by the district judge.

The trial took place during July term, 1917; the next term, as appointed by statute, began November 15. On September 29, thirty days were granted for preparation and presentation of a bill of exceptions. October 23 an order undertook to extend the time to November 15; on November 12 a like order specified November 27; on November 26 an order specified December 15; on December 14 a further order undertook to extend it to December 24, when a still further extension was ordered to December 31. On the latter date a proposed bill was presented. January 9, 1918, the United States attorney procured an order granting time in which to prepare amendments to the proposed bill which were thereafter presented.

Rule 9 of the district court provided: "For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each [146] term of this court shall be and hereby is extended so as to comprise a period of three calendar months, beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered." Rule 61 provided: When an act to be done in any pending suit relates to the preparation of bills of exceptions or amendments thereto, "the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time, but no such extension or extensions shall exceed thirty days in all without the consent of the adverse party."

After expiration of the three months specified by rule 9, plaintiffs in error having in open court requested further extension, the United States attorney announced that he would not consent, but would ask the court to refuse to settle any bill thereafter proposed. In April, 1918, he moved that settlement of the proposed bill be refused and that it be stricken from the files. The court expressed the opinion that the bill was too late unless the United States attorney had waived objection thereto, and on that point said: "I am very strongly of the view that, owing to the attitude of the United States attorney, distinctly stated theretofore, which was all that could be done under the circumstances, this was not such a waiver." But, in order that the matter might be brought here for final determination, the facts were set out and the certificate signed.

Under the statute the trial term expired November 15; but, for the purpose of filing the bill of exceptions, a general rule extended it to December 4,—three months from the first Tuesday in September. The last order of court within the extended term designated December 14 as the final day for action.

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a [147] formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties. . . . After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." Michigan Ins. Bank v. Eldred, 143 U. S. 293, 298, 36 L. ed. 162, 163, 12 Sup. Ct. Rep. 450.

We think the power of the trial court over the cause expired not later than the 14th of December, 1917, and any proceedings concerning settlement of a bill thereafter were coram non judice. We may not, therefore, consider the bill copied in the record. Hunnicutt v. Peyton, 102 U. S. 333, 26 L. ed. 113; Davis v. Patrick, 122 U. S. 138, 30 L. ed. 1090, 7 Sup. Ct. Rep. 1102; Waldron v. Waldron, 156 U. S. 361, 39 L. ed. 453, 15 Sup. Ct. Rep. 383; Jennings v. Philadelphia, B. & W. R. Co. 218 U. S. 255, 257, 54 L. ed. 1031, 1032, 31 Sup. Ct. Rep. 1. And the same is true of certain notes of proceedings taken during trial which we directed to be brought here, without prejudice, by order of June 9, 1919.

The motion to amend original assignments of error is granted. Having regard to the record properly before us, only four of the assignments require

special notice: (1) Unconstitutionality of the Selective Service and the Espionage Acts; (2) that the first count is bad because it only charges a conspiracy to obstruct the recruiting and enlistment service by inducement and persuasion; (3) the verdict was fatally defective and the judgment invalid; (4) the second count is bad. It charges a conspiracy to make false certificates concerning liability for military service, and to aid in evading the act without alleging that the conspirators were officers or persons charged with the duty of carrying it into effect.

The constitutionality of the two acts is settled by opinions [148] of this court announced since the writ of error was sued out. Goldman v. United States, 245 U. S. 474, 62 L. ed. 410, 38 Sup. Ct. Rep. 166; Schenck v. United States, 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. Rep. 247; Frohwerk v. United States, 249 U. S. 204, 63 L. ed. 561, 39 Sup. Ct. Rep. 249. Also the criminality of a conspiracy to obstruct recruiting and enlistment by persuasion has been determined. Schenck v. United States, supra.

Apparently a printed form was used in preparing the jury's verdict, defendants' names and the word "guilty" being inserted. When presented, no objection was made to its form or wording, neither the motion for new trial nor in arrest of judgment indicated any such objection, and plaintiffs in error mentioned none when called upon to show cause why sentence should not be imposed. We think the intention to find a general verdict of guilty upon both counts is sufficiently plain. Evidently all parties so understood at the time. See Stadler v. United States, 157 U. S. 277, 279, 39 L. ed. 700, 702, 15 Sup. Ct. Rep. 616; Ballew v. United States, 160 U. S. 187, 197, 40 L. ed. 388, 393, 16 Sup. Ct. Rep. 263.

The second count charges a conspiracy to violate § 6 of the Selective Service Act. Its provisions include: "Any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations." Other words of the section relate to officers and persons charged with the duty of carrying the act into effect, but the quoted ones are broad enough to include nonofficial persons, and, when considered in connection with the general purpose in view, there can be no reasonable doubt that plaintiffs in error were within their meaning. See Fraina v. United States, 166 C. C. A. 356, 255 Fed. 28, 33.

We find no adequate cause for interfering with the judgment of the court below, and it is affirmed.

---

[149] KNICKERBOCKER ICE COMPANY, Plff. in Err.,
v.
LILLIAN E. STEWART.

(See S. C. Reporter's ed. 149-170.)

Admiralty — exclusiveness of Federal jurisdiction — state legislation affecting maritime law.

1. The Federal Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters, and bring them within control of the Federal government, was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

[For other cases, see Admiralty, I. b, 3, in Digest Sup. Ct. 1908.]

Admiralty — Federal jurisdiction — state and Federal regulations.

2. The mere reservation of partially concurrent cognizance to state courts by an act of Congress conferring an otherwise exclusive admiralty jurisdiction upon the Federal courts could not create substantive rights or obligations, nor indicate assent to their creation by the states.

[For other cases, see Admiralty, I. b, 3, in Digest Sup. Ct. 1908.]

Note.—As to applicability of Federal Employers' Liability Act or state compensation acts to injuries within maritime jurisdiction—see note to Southern P. Co. v. Jensen, L.R.A.1918C, 474.

On jurisdiction of, and law governing, action for death on waters—see note to Rainey v. W. R. Grace & Co. L.R.A. 1916A, 1157.

On limitation of application of workmen's compensation statutes by Federal laws—see note to Staley v. Illinois C. R. Co. L.R.A.1916A, 461.

Admiralty — exclusiveness of Federal jurisdiction — state Workmen's Compensation Laws — power of Congress.

3. Congress exceeded its constitutional power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, by attempting, as it did in the Act of October 6, 1917, to permit the application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction, thus virtually destroying the harmony and uniformity which the Constitution not only contemplated, but actually established.

[For other cases, see Admiralty, I. b, 3, in Digest Sup. Ct. 1908.]

[No. 543.]

Argued December 16, 1919. Decided May 17, 1920.

IN ERROR to the Supreme Court of the State of New York, Appellate Division, Third Department, to review a judgment affirmed by the Court of Appeals of that state, upholding an award of the State Industrial Commission for injuries received by an employee doing work of a maritime nature. Reversed and remanded for further proceedings.

See same case below in appellate division, 187 App. Div. 915, 173 N. Y. Supp. 924; in court of appeals, 226 N. Y. 302, 123 N. E. 382.

The facts are stated in the opinion.

Mr. **Frank R. Savidge** argued the cause, and, with Mr. Frederick M. Thompson, filed a brief for plaintiff in error:

The work of unloading a vessel is a maritime employment, and is in performance of a maritime contract.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A. (N.S.) 1157, 34 Sup. Ct. Rep. 733; Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; Anderson v. Johnson Lighterage Co. 224 N. Y. 539, 120 N. E. 55; Doey v. Clarence P. Howland Co. 224 N. Y. 30, 120 N. E. 53; Keator v. Rock Plaster Mfg. Co. 224 N. Y. 540, 120 N. E. 56.

The uniformity of the maritime law is preserved for all time in the Constitution.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

Congress has power to amend or create the maritime law which shall prevail throughout the country (Butler v. Boston & S. S. S. Co. 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612; Re Garnett, 141 U. S. 1, 14, 35 L. ed. 631, 634, 11 Sup. Ct. Rep. 840), but that is the limit of its power. It cannot delegate this power to the states, nor, under the limitation of the Constitution, authorize the enactment of laws that will destroy the uniformity of the maritime law.

The New York Workmen's Compensation Law, as applied to maritime employments, is also unconstitutional in that an essential part of the law bars rights of action in admiralty, which cannot be barred by legislation of the states.

Jensen v. Southern P. Co. 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276, 9 N. C. C. A. 286; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733; The Transfer No. 12, 137 C. C. A. 207, 221 Fed. 409; Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; The Max Morris, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; The Thode Fagelund, 211 Fed. 685; The Fred E. Sander, 208 Fed. 724, 4 N. C. C. A. 891; The Rosalie Mahony, 218 Fed. 695.

Mr. **Mark Ash** filed a brief as amicus curiæ:

The Act of Congress of October 6, 1917, amending the Judicial Code, §§ 24 and 256, has not removed the unconstitutionality of the Workmen's Compensation Law, as declared by this court in Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 22 L. ed. 654; The St. Lawrence (Meyer v. Tupper) 1 Black, 526, 527, 17 L. ed. 182, 183; Martin v. Hunter, 1 Wheat. 304, 330, 4 L. ed. 97, 103; Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; The Chusan, 2 Story, 455, Fed. Cas. No. 2717; Butler v. Boston & S. S. S. Co. 130 U. S. 527, 555, 32 L. ed. 1017, 1023, 9 Sup. Ct. Rep. 612.

Mr. **E. Clarence Aiken** argued the cause, and, with Mr. Charles D. Newton, Attorney General of New York, filed a brief in behalf of the New York State Industrial Commission:

Congress had jurisdiction to enact the amendments to the Judicial Code, reserving the rights and remedies under

the compensation law of any state where such rights and remedies had been given by any state.

Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; Martin v. Hunter, 1 Wheat. 326, 327, 4 L. ed. 102, 103; United States v. Bevans, 3 Wheat. 336, 386, 4 L. ed. 404, 416; Gibbons v. Ogden, 9 Wheat. 1, 189, 196, 203, 6 L. ed. 23, 68, 70, 71; Lottery Case (Champion v. Ames) 188 U. S. 321, 346, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Passenger Cases, 7 How. 283, 549, 12 L. ed. 702, 813; M'Culloch v. Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601; Rhode Island v. Massachusetts, 12 Pet. 657, 721, 9 L. ed. 1233, 1259; Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; United States v. Sayward, 160 U. S. 493, 498, 40 L. ed. 508, 509, 16 Sup. Ct. Rep. 371; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 38 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; People v. Welch, 141 N. Y. 266, 24 L.R.A. 117, 38 Am. St. Rep. 793, 36 N. E. 328; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; The Abby Dodge, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; Mobile County v. Kimball, 102 U. S. 691, 697, 26 L. ed. 238, 239; Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; Leovy v. United States, 177 U. S. 621, 625, 44 L. ed. 914, 916, 20 Sup. Ct. Rep. 797; Cummings v. Chicago, 188 U. S. 410, 427, 47 L. ed. 525, 530, 23 Sup. Ct. Rep. 472; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559, 563, 26 L. ed. 1169, 1171; Parkersburg & P. River Transp. Co. v. Parkersburg, 107 U. S. 691, 702, 27 L. ed. 584, 588, 2 Sup. Ct. Rep. 732; Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 447, 30 L. ed. 976, 977, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Sands v. Manistee River Improv. Co. 123 U. S. 288, 295, 31 L. ed. 149, 151, 8 Sup. Ct. Rep. 113; Port Richmond & B. P. Ferry Co. v. Hudson County, 234 U. S. 317, 331, 58 L. ed. 1330, 1336, 34 Sup. Ct. Rep. 821; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; Wilmington Transp. Co. v. Railroad Commission, 236 U. S. 151, 156, 59 L. ed. 508, 517, P.U.R.1915A, 845, 35 Sup. Ct. Rep. 276; Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 644, 44 L. ed. 921, 924, 20 Sup. Ct. Rep. 824; American S. B. Co. v. Chase, 16 Wall. 522, 21 L. ed. 369; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133; Dougan v. Champlain Transp. Co. 56 N. Y. 1.

Congress is not attempting to disturb the uniformity of the maritime law. Whenever a case is brought in an admiralty court, the admiralty law will be enforced, the same in one state as in another; but wherever there is another remedy by way of workmen's compensation or a common-law remedy, such remedies will be asserted and enforced in their respective jurisdictions according to the law of that jurisdiction. So far as the common-law remedy is concerned, it cannot be claimed that that is the same the country over. New York has a system of practice under a code. Other states have codes of their own, and some states still retain the common-law practice and procedure.

Wheaton v. Peters, 8 Pet. 658, 8 L. ed. 1079.

Mr. Warren H. Pillsbury filed a brief as amicus curiæ in behalf of the Industrial Accident Commission of the State of California:

No unconstitutional interference is created by the Johnson amendment between the judicial power of the states and of the United States.

The Howell, 257 Fed. 578; Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; United States v. Sayward, 160 U. S. 493, 498, 40 L. ed. 508, 509, 16 Sup. Ct. Rep. 371; Fishback v. Western U. Teleg. Co. 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506; United States v. Union P. R. Co. 98 U. S. 569, 603, 25 L. ed. 143, 150; Cooley, Const. Law, 3d ed. p. 124.

No unconstitutional interference is created by the Johnson amendment between legislative power of the states and of the United States.

Hobart v. Drogan, 10 Pet. 108, 9 L. ed. 363; Sturges v. Crowninshield, 4 Wheat. 122, 196, 4 L. ed. 529, 548; Cooley, Const. Law, 3d ed. 35.

Neither the New York act nor the Johnson amendment violates the commerce clause.

Re Rahrer, 140 U. S. 545, 35 L. ed.

572, 11 Sup. Ct. Rep. 865; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

If the act be considered not to be of uniform application, it still violates no constitutional requirement.

United States v. Union P. R. Co. 98 U. S. 569, 603, 25 L. ed. 143, 150.

The Johnson amendment is, in its last analysis, of uniform application throughout the country.

Re Rahrer, supra.

The present case is not one of maritime cognizance, as the injury occurred upon the land.

The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125; Keator v. Rock Plaster Mfg. Co. 256 Fed. 574.

Mr. Justice **McReynolds** delivered the opinion of the court:

While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson river and drowned August 3, 1918. His widow, defendant in error, claimed under the Workmen's Compensation Law of New York; the Industrial Commission granted an award against the company for her and the minor children; and both appellate [**156**] division and the court of appeals approved it. 226 N. Y. 302, 123 N. E. 382. The latter concluded that the reasons constrained us to hold the Compen Law inapplicable to an employee en in maritime work (Southern P. Jensen, 244 U. S. 205, 61 L. ed. L.R.A.1918C, 451, 37 Sup. Ct. Rep Ann. Cas. 1917E, 900, 14 N. C. 596) had been extinguished by "A to Amend Sections Twenty-four an Hundred and Fifty-six of the Ju Code [36 Stat. at L. 1091, 1160, 231, Comp. Stat. §§ 991(1), 1233, Stat. Anno. 2d ed. p. 838, 5 Fed. Anno. 2d ed. p. 921], Relating Jurisdiction of the District Courts, to Save to Claimants the Right Remedies under the Workmen's Co sation Law of Any State," approv tober 6, 1917, chap. 97, 40 Stat. 395, Comp. Stat. § 991(3), Fed. Anno. Supp. 1918, p. 401.

The provision of § 9, Judiciary 1789 (chap. 20, 1 Stat. at L. 76), ing to United States district court clusive original cognizance of al causes of admiralty and maritime diction . . . , saving to suitors, cases the right of a common-law re where the common law is compet give it," was carried into the R Statutes (§§ 563 and 711, Comp. S 991, 1233), and thence into the Ju Code (clause 3, §§ 24 and 256). saving clause remained unchanged the Statute of October 6, 1917, *"and to claimants the rights and re under the Workmen's Compensatio of any state."*[1]

[1] Judiciary Act, September 24, 1789, chap. 20, 1 Stat. at L. 73, 76, 77, Comp. Stat. §§ 530, 991:

Sec. 9. "That the district courts shall have, exclusively of the courts of the several states . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it; . . ."

Rev. Stat. § 563. "The district courts shall have jurisdiction as follows: . . .

"Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the courts. [And shall have original a clusive cognizance of all prizes brou to the United States, except as pr in ¶ 6 of § 629, Comp. Stat. § 991(3

Rev. Stat. § 711. "The jurisdictio ed in the courts of the United Sta the cases and proceedings hereinafte tioned, shall be exclusive of the co the several states: . . .

"Third. Of all civil causes of adm and maritime jurisdiction; saving t ors, in all cases, the right of a comm remedy, where the common law is tent to give it."

The Judicial Code:

"Sec. 24. The district courts shal original jurisdiction as follows: .

"Third. Of all civil causes of adm and maritime jurisdiction, saving t ors in all cases the right of a comm remedy where the common law is com to give it; . . .

"Sec. 256. The jurisdiction vested courts of the United States in the and proceedings hereinafter men shall be exclusive of the courts of t eral states: . . .

[157] In Southern P. Co. v. Jensen (May, 1917), supra, we declared that under § 2, article 3, of the Constitution ("the judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction"), and § 8, art. 1 (Congress may make necessary and proper laws for carrying out granted powers), "in the absence of some controlling statute the general maritime law as accepted by the Federal courts constitutes part of our [158] national law applicable to matters within the admiralty and maritime jurisdiction:" also that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." And we held that, when applied to maritime injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution, and to that extent is invalid. "The necessary consequence would be destruction of the very uniformity in respect of maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

We also pointed out that the saving clause taken from the original Judiciary Act had no application, since, at most, it only specified common-law remedies, whereas the remedy prescribed by the Compensation Law was unknown to the common law and incapable of enforcement by the ordinary processes of any court. Moreover, if applied to maritime affairs, the statute would obstruct the policy of Congress to encourage investments in ships.

In Chelentis v. Luckenbach S. S. Co. (June, 1918) 247 U. S. 372, 62 L. ed. 1171, 38 Sup. Ct. Rep. 501, an action at law seeking full indemnity for injuries received by a sailor while on shipboard, we said: "Under the doctrine approved in Southern P. Co. v. Jensen, no state has power to abolish the well-recognized maritime rule concerning measure of recovery, and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely [159] change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.'" And, concerning the clause, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," this: "In Southern P. Co. v. Jensen, we definitely ruled that it gave no authority to the several states to enact legislation which would work 'material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony and uniformity of that law in its international and interstate relations.' . . . Under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law." Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the states so to do. It referred only to remedies, and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law.

In Union Fish Co. v. Erickson, 248 U. S. 308, 63 L. ed. 261, 39 Sup. Ct. Rep. 112, an admiralty cause, a master sought to recover damages for breach of an oral contract with the owner of a vessel for services to be performed principally upon the sea. The latter claimed invalidity of the contract under a statute of California, where

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy; where the common law is competent to give it."

Act Oct. 6, 1917, chap. 97, 40 Stat. at L. 395, Comp. Stat. § 991(3), Fed Stat. Anno Supp. 1918. p. 401.

That clause 3 of § 24 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize."

Sec. 2. That clause 3 of § 256 of the Judicial Code is hereby amended to read as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state."

made, because not in writing, and not to be performed within a year. We ruled: "The circuit court of appeals correctly held that this contract was maritime in its nature, and an action in admiralty thereon for its breach could not be defeated by the statute of [160] California relied upon by the petitioner." "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made." See also The Blackheath (United States v. Evans) 195 U. S. 361, 365, 49 L. ed. 236, 237, 25 Sup. Ct. Rep. 46.

As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Since the beginning, Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states,—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago. "That we have a maritime law of our own, operative throughout the United States, cannot [161] be doubted. . . . One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 574, 575, 22 L. ed. 654, 661, 662. The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true, it is quite impossible to account for a multitude of adjudications by the admiralty courts. See Workman v. New York, 179 U. S. 552, 557, et seq., 45 L. ed. 314, 319, 21 Sup. Ct. Rep. 212.

The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce, without more, should not be forgotten. Also, it should be noted that Federal laws are constantly applied in state courts,—unless inhibited, their duty so requires. Const. art. 6, cl. 2; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 56 L. ed. 327, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 895. Consequently mere reservation of partially concurrent cognizance to such courts by an act of Congress conferring an otherwise exclusive jurisdiction upon national courts could not create substantive rights or obligations, or indicate assent to their creation by the states.

When considered with former decisions of this court, a satisfactory interpretation of the Act of October 6, 1917, is difficult, perhaps impossible. The Howell, 257 Fed. 578, and Rhode v. Grant Smith Porter Co. 259 Fed. 304, illustrate some of the uncertainties. In the [162] first, the district court in New York dismissed a libel, holding that rights and remedies prescribed by the Compensation Law of that state are exclusive and pro tanto supersede the maritime law. In the second, the district court of Oregon ruled that when an employee seeks redress for a maritime tort by an admiralty court, rights, obligations, and liabilities of the respective parties must be measured by the maritime law, and these cannot be barred, enlarged, or taken away by state

legislation. Other difficulties hang upon the unexplained words, "Workmen's Compensation Law of *any* state."

Moreover, the act only undertook to add certain specified rights and remedies to a saving clause within a Code section conferring jurisdiction. We have held that before the amendment, and irrespective of that section, such rights and remedies did not apply to maritime torts because they were inconsistent with paramount Federal law,—within that field they had no existence. Were the added words therefore wholly ineffective? The usual function of a saving clause is to preserve something from immediate interference,—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlich, Interpretation of Stat. § 372.

Neither branch of Congress devoted much debate to the act under consideration—altogether, less than two pages of the Record (65th Cong., pp. 7605, 7843). The Judiciary Committee of the House made no report; but a brief one by the Senate Judiciary Committee, copied below,[2] [163] probably indicates the general legislative purpose. And with this and accompanying circumstances, the words must be read.

Having regard to all these things, we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by Southern P. Co. v. Jensen. It sought to authorize and sanction action by the states in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities, [164] and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

And, so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do

[2] 65th Congress, 1st Session. Senate Report No. 139. Amending the Judicial Code. October 2, 1917. Ordered to be printed. Mr. Ashurst, from the Committee on the Judiciary, submitted the following report. [To accompany S. 2916.]

The Committee on the Judiciary, to which was referred the bill (S. 2916) to amend §§ 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state, having considered the same, recommend its passage without amendment.

The Judicial Code, by §§ 24 and 256, confers exclusive jurisdiction on the district courts of the United States of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." It was declared by the Supreme Court of the United States in the case of Southern P. Co. v. Jensen that "the remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." The bill (S. 2916) proposes only to amend the Judicial Code by so enlarging the saving clause as to include the rights and remedies under the Compensation Law of any state. Inasmuch as not only the remedy but sometimes the right under the compensation plan is unknown to the common law, both rights and remedies are included in the bill. The bill, if enacted, will not disrupt the admiralty jurisdiction of the Federal courts. The most that can be said of it will be that it is a recognition by Congress that a concurrent jurisdiction, state and Federal, should exist over certain matters. Actions that were formerly triable in admiralty courts will still be triable there. Where the cases were formerly triable only in such courts, it will now be possible for the state, through its compensation plan, to determine the rights of the parties concerned. In other words, there being concurrent jurisdiction, the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan.

so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established,—it would defeat the very purpose of the grant. See Sudden & Christenson v. Industrial Acci. Commission, — Cal. —, 188 Pac. 803.

Congress cannot transfer its legislative power to the states,—by nature this is nondelegable. Re Rahrer, 140 U. S. 545, 560, 35 L. ed. 572, 576, 11 Sup. Ct. Rep. 865; Marshall Field & Co. v. Clark, 143 U. S. 649, 692, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; Butte City Water Co. v. Baker, 196 U. S. 119, 126, 49 L. ed. 409, 412, 25 Sup. Ct. Rep. 211; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 214, 56 L. ed. 729, 737, 32 Sup. Ct. Rep. 436.

In Clark Distilling Co. v. Western Maryland R. Co. 242 U. [**165**] S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, notwithstanding the contention that it violated the Constitution (art. 1, § 8, clause 3), this court sustained an act of Congress which prohibited the shipment of intoxicating liquors from one state into another when intended for use contrary to the latter's laws. Among other things, it was there stated that "the argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act [March 1, 1913, 37 Stat. at L. 699, chap. 90, Comp. Stat. § 8739, 4 Fed. Stat. Anno. 2d ed. p. 593] contains, permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress;" i. e., Congress itself forbade shipments of a designated character. And further: "The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest," i. e., different considerations would apply to innocuous articles of commerce.

The reasoning of that opinion proceeded upon the postulate that because of the peculiar nature of intoxicants, which gives enlarged power concerning them, Congress might go so far as entirely to prohibit their transportation in interstate commerce. The statute did less. "We can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power." See Delamater v. South Dakota, 205 U. S. 93, 97, 51 L. ed. 724, 728, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733.

[**166**] Here, we are concerned with a wholly different constitutional provision, —one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the states. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.

In The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133, an admiralty proceeding, effect was given, as against a ship registered in Delaware, to a statute of that state which permitted recovery by an ordinary action for fatal injuries, and the power of a state to supplement the maritime law to that extent was recognized. But here the state enactment prescribes exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions, and provides novel remedies incapable of enforcement by an admiralty court. See New York C. R. Co. v. White, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; Southern P. Co. v. Jensen, supra. The doctrine of The Hamilton may not be extended to such a situation.

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

Reversed and remanded.

Mr. Justice **Holmes**, dissenting:

In Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A.1918C, 451,

37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596, the question was whether there was anything in the Constitution or laws of the United States to prevent a state from imposing upon an employer a limited but absolute liability for the death of an employee upon a gangplank between a vessel and a wharf, which the state unquestionably [167] could have imposed had the death occurred on the wharf. A majority of the court held the state's attempt invalid, and thereupon, by an Act of October 6, 1917, chap. 97, 40 Stat. at L. 395, Comp. Stat. § 991 (3), Fed. Stat. Anno. Supp. 1918, p. 401, Congress tried to meet the effect of the decision by amending § 24, cl. 3, and § 256, cl. 3, of the Judicial Code; Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, Comp. Stat. § 968, 4 Fed. Stat. Anno. 2d ed. p. 815. Those sections in similar terms declared the jurisdiction of the district court and the exclusive jurisdiction of the courts of the United States, "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The amendment added, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." I thought that claimants had those rights before. I think that they do now, both for the old reasons and for new ones.

I do not suppose that anyone would say that the words, "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction" (Const. art. 3, § 3), by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other, the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several states, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the liability can change it, and I suppose that Congress can do as much as the judges who introduced the rules. For we know that they were introduced, and cannot have been elicited by logic alone from the medieval sea laws.

But if Congress can legislate, it has done so. It has adopted statutes that were in force when the Act of October 6, 1917, was passed, and to that extent has acted as definitely as if it had repeated the words used by the [168] several states,—a not unfamiliar form of law. Gibbons v. Ogden, 9 Wheat. 1, 207, 6 L. ed. 23, 72; Hobart v. Drogan, 10 Pet. 108, 119, 9 L. ed. 363, 367; Cooley v. Port Wardens, 12 How. 299, 317, 318, 13 L. ed. 996, 1004; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 84, 85, 52 L. ed. 111, 114, 115, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; Franklin v. United States, 216 U. S. 559, 54 L. ed. 615, 30 Sup. Ct. Rep. 434; Louisville & N. R. Co. v. Western U. Teleg. Co. 237 U. S. 300, 303, 59 L. ed. 965, 966, 35 Sup. Ct. Rep. 598. An act of Congress, we always say, will be construed so as to sustain it, if possible, and therefore, if it were necessary, the words "rights and remedies under the Workmen's Compensation Law of any state" should be taken to refer solely to laws existing at the time, as it certainly does at least include them. See United States v. Paul, 6 Pet. 141, 8 L. ed. 348. Taking the act as so limited, it is to be read as if it set out at length certain rules for New York, certain others more or less different for California, and so on. So construed, the single objection that I have heard to the law is that it makes different rules for different places, and I see nothing in the Constitution to prevent that. The only matters with regard to which uniformity is provided for in the instrument, so far as I now remember, are duties, imposts, and excises, naturalization and bankruptcy, in article 1, § 8. As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is educed from the express requirement of equality in the 14th Amendment seems to me extravagant. Indeed, it is contrary to the construction of the Constitution in the very clause of the Judiciary Act that is before us. The saving of a common-law remedy adopted the common law of the several states within their several jurisdictions, and, I may add by way of anticipation, included at least some subsequent statutory changes. American S. B. Co. v. Chase, 16 Wall. 522, 530–534, 21 L. ed. 369, 371–373; Knapp, S. & Co. Co. v. McCaffrey, 177 U. S. 638, 645, 646, 44 L. ed. 921, 925, 20 Sup. Ct. Rep. 824; Rounds v. Cloverport Foundry & Mach. [169] Co. 237 U. S. 303, 307, 59 L. ed. 966, 35 Sup. Ct. Rep. 596. I cannot doubt that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely dif-

ferent needs. See United States v. Press Pub. Co. 219 U. S. 1, 9, 55 L. ed. 65, 66, 31 Sup. Ct. Rep. 212, 21 Ann. Cas. 942.

I thought that Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that, apart from the 18th Amendment, special constitutional principles exist against strong drink. The fathers of the Constitution, so far as I know, approved it. But I can see no constitutional objection to such an adoption in this case if the act of Congress be given that effect. I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district. But when institutions are established for ends within the power of the states, and not for any purpose of affecting the law of the United States, I take it to be an admitted power of Congress to provide that the law of the United States shall conform as nearly as may be to what, for the time being, exists. A familiar example is the law directing the common-law practice, etc., in the district courts, to "conform, as near as may be, to the practice, etc., existing at the time" in the state courts. Rev. Stat. § 914, Comp. Stat. § 1537, 6 Fed. Stat. Anno. 2d ed. p. 21. This was held by the unanimous court to be binding in Amy v. Watertown, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530. See Gibbons v. Ogden, 9 Wheat. 1, 207, 208, 6 L. ed. 23, 72, 73; Cooley v. Port Wardens, 12 How. 299, 317, 318, 13 L. ed. 996, 1004. I have mentioned the scope given to the saving of a common-law remedy, and have referred to cases on the statutes adopting state pilotage laws. Other instances are to be found in the acts of Congress, but these are enough. I think that the same principle applies here. It should be observed that the objection now dealt with is the only one peculiar to the adoption of local law in advance. That of [170] want of uniformity applies equally to the adoption of the laws in force in 1917. Furthermore, we are not called on now to consider the collateral effects of the act. The only question before us is whether the words in the Constitution, "The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction," prohibit Congress from passing a law in the form of the New York Workmen's Compensation Act; if not in its present form, at least in the form in which it stood on October 6, 1917. I am of opinion that the New York law at the time of the trial should be applied, and that the judgment should be affirmed.

Mr. Justice **Pitney**, Mr. Justice **Brandeis**, and Mr. Justice **Clarke** concur in this opinion.

C. C. CALHOUN, Petitioner,
v.
BLAND MASSIE.

(See S. C. Reporter's ed. 170–182.)

Claims — against United States — assignment before allowance.

1. A provision in a contract for the prosecution of a claim against the United States which purports to make the contingent attorney's fee therein provided for a lien upon any warrant which may be issued in payment of such claim is repugnant to U. S. Rev. Stat. § 3477, annulling assignments of such claims, or of any part or interest therein, made in advance of the allowance of the claim.

[For other cases, see Claims, I. d, 2, d, in Digest Sup. Ct. 1908.]

Claims — against United States — compensation for prosecution — contingent-fee legislation — effect on existing contracts.

2. An existing contract for the payment to an attorney for professional services to be rendered in the prosecution of a Civil War claim against the United States of a sum equal to 50 per cent of whatever might be collected was invalidated by the provision of the Omnibus Claims Act of March 4, 1915, which, after making an appropriation for payment of such claim, made it unlawful for any attorney to exact,

---

Note.—As to validity of assignment of claims against United States—see note to Lopez v. United States, 2 L.R.A. 571.

As to attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage—see note to McMicken v. Perin, 15 L. ed. U. S. 504.

As to lien of attorney for compensation—see note to Texas v. White, 19 L. ed. U. S. 992.

On right of attorney who takes case on contingent fee or for certain percentage to implied or equitable lien on fund recovered—see note to DeWinter v. Thomas, 27 L.R.A.(N.S.) 634.

As to validity of agreement by which compensation is contingent upon success in procuring contract with, or allowance of claim against, the United States—see note to Crocker v. United States, 60 L. ed. U. S. 533.

collect, withhold, or receive any sum which, in the aggregate, exceeds 20 per cent of the amount of any item appropriated in that act, on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding.

[For other cases, see Claims, I. d, 2, d, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — freedom to contract — limiting attorneys' fees — claims against United States.

3. The limitation of the compensation of attorneys in the prosecution of claims against the United States to 20 per cent of the amount collected, any contract to the contrary notwithstanding, which was made by the Omnibus Claims Act of March 4, 1915, § 4, does not contravene U. S. Const., 5th Amend., when applied to invalidate a contingent-fee contract entered into and substantially performed before the passage of the statute,—especially where, at the time the contract was made, there was no legislation, general or special, which conferred upon the claimant any right of recovery, even if he should establish to the satisfaction of Congress that his claim was equitable, and where the attorney accepted and received from the United States Treasury a warrant for 20 per cent of the amount appropriated, although this was not accepted by him as a full settlement of his rights against the client.

[For other cases, see Constitutional Law, 591–596; Claims, I. d, 2, b, in Digest Sup. Ct. 1908.]

[No. 294.]

Argued March 11, 1920. Decided May 17, 1920.

ON WRIT of Certiorari to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Circuit Court of Nelson County, in that state, in favor of defendant in an action of assumpsit. Affirmed.[1]

See same case below, 123 Va. 673, 97 S. E. 576.

The facts are stated in the opinion.

Mr. **Charles F. Consaul** argued the cause, and, with Mr. J. C. Brooke, filed a brief for petitioner:

The court erred in holding that § 4 of the Act of March 4, 1915, does more than to limit the application or use of the fund appropriated, by prohibiting payment from such fund of more than 20 per cent thereof on account of attorney fees.

Capital Trust Co. v. Calhoun, 250 U. S. 208, 63 L. ed. 942, 39 Sup. Ct. Rep. 486; Black v. Crouch, — W. Va. —, 100 S. E. 750.

The court erred in holding that the statute, as construed, does not deprive Calhoun of his property without due process of law.

Sinking Fund Cases, 99 U. S. 700, 727, 25 L. ed. 496, 504; McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955, 35 Sup. Ct. Rep. 543; Osborn v. Nicholson, 13 Wall. 654, 20 L. ed. 689; Sheldon v. Sill, 8 How. 441, 449, 12 L. ed. 1147, 1151; Haskell v. Blair, 3 Cush. 535; Green v. Edwards, 31 R. I. 1, 77 Atl. 188, Ann. Cas. 1912B, 41; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 17 L. ed. 805.

Mr. **James R. Caskie** argued the cause, and, with Mr. Fred Harper, filed a brief for respondent:

The purpose of the act of Congress is plain, and similar purposes in cases of this kind have been expressly approved.

Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554.

The act is constitutional.

Frisbie v. United States, 157 U. S. 162, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; Ralston v. Dunaway, 123 Ark. 12, 184 S. W. 425, Ann. Cas. 1918C, 870.

The act of Congress itself, in making the appropriation, alone gave a right to compensation, and an act which gives the right can necessarily limit that right.

Beers v. Arkansas, 20 How. 529, 15 L. ed. 992; Gritts v. Fisher, 224 U. S. 640, 56 L. ed. 928, 32 Sup. Ct. Rep. 580.

Mr. Justice **Brandeis** delivered the opinion of the court:

The Omnibus Claims Act (March 4, 1915, chap. 140, 38 Stat. at L. 962) made appropriations for the payment of 1,115 claims arising out of the Civil War which had, from time to time during the preceding twenty-eight years, been referred by resolution of the House or of the Senate to the court of claims for investigation, either under the Bowman Act (March 3, 1883, chap. 116, 22 Stat. at L. 485, Comp. Stat. § 1139), or under the Tucker Act (March 3, 1887, chap. 359, 24 Stat. at L. 505), [172] or under § 151 of the Judicial Code [36 Stat. at L. 1138, chap. 231, Comp. Stat. § 1142, 5 Fed. Stat. Anno. 2d ed. p. 665.] Among the claims which that court reported favorably was one of Bland Massie, which had been referred to it by resolution of

[1] Leave granted on June 7, 1920, to present a petition for rehearing herein within thirty days.

the House on February 3, 1911.[2] By § 1 of the Omnibus Claims Act (p. 989), the Secretary of the Treasury was directed to pay Massie $1,900. Section 4 of the act (p. 996) provided as follows:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000."

Massie had executed on April 18, 1911, an agreement as follows:

"Fee agreement.—This agreement witnesseth: that I, Bland Massie, of Tyro, Nelson county, Virginia, have employed C. C. Calhoun, of Washington, District of Columbia, as my attorney to prosecute my claim against the government of the United States for property taken by the Federal forces during the late Civil War; and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representatives, to pay him, his heirs or legal representatives, as a fee a sum equal to 50 per cent of the amount which may [173] be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim."

Calhoun prosecuted Massie's claim before the court of claims and secured the allowance of a motion to transmit its report to Congress, which thereafter made the appropriation above stated. On May 5, 1915, the government paid the $1,900 by means of two Treasury warrants, one for $380 (20 per cent thereof), made payable to Calhoun, the other for $1,520 (80 per cent thereof), made payable to Massie. Calhoun demanded of Massie a further sum of $570, equal to 30 per cent of the claim. Payment was refused, and he brought this suit in a state court of Virginia to recover the amount, claiming that the warrant for 20 per cent had been accepted by him without waiving or releasing his right under the contract to the balance. A declaration setting forth in substance the above facts was demurred to on the ground that recovery was prohibited by § 4 of the act under which the appropriation was made. The demurrer was sustained, and judgment entered thereon was affirmed by the supreme court of appeals of the state of Virginia (123 Va. 673, 97 S. E. 576). The case comes here on writ of certiorari (249 U. S. 596, 63 L. ed. 794, 39 Sup. Ct. Rep. 289), Calhoun having contended in both lower courts, as here, that § 4 deprives him of liberty and property guaranteed by the 5th Amendment to the Federal Constitution, and hence is void.

For nearly three quarters of a century Congress has undertaken to control in some measure the conditions under which claims against the government may be prosecuted. Its purpose has been in part to protect just claimants from extortion or improvident bargains, and in part to protect the Treasury from frauds and imposition. See United States v. Van Leuven, 62 Fed. 52, 56. While recognizing the common need for the services of agents and attorneys in the presentation of such claims, and that parties would often be denied the opportunity of [174] securing such services if contingent fees were prohibited (Taylor v. Bemiss, 110 U. S. 42, 45, 28 L. ed. 64, 65, 3 Sup. Ct. Rep. 441), Congress has manifested its belief that the causes which gave rise to laws against champerty and maintenance are persistent. By the enactment, from time to time, of laws prohibiting the assignment of claims, and placing limitations upon the fees properly chargeable for services,[3] Congress has sought both to prevent the stirring up of unjust

[2] 63d Congress, 2d Session, House Report No. 97; Senate Report No. 357; 63d Congress, 1st Session, House Doc. 64.

[3] Assignment of claims against the United States: Acts of July 29, 1846, chap. 66, 9 Stat. at L. 41; February 26, 1853, chap. 81, § 1, 10 Stat. at L. 170, Rev. Stat. § 3477, Comp. Stat. § 6383, 2 Fed. Stat. Anno. 2d ed. p. 179. Repayment of moneys collected by direct tax: March 2, 1891, chap. 496, § 3, 26 Stat. at L. 822. Indian depredation claims: Act of March 3, 1891, chap. 538, § 9, 26 Stat. at L. 851, 854, 2 Fed. Stat. Anno. 2d ed. pp. 229, 240. Pensions: Rev. Stat. § 4785 (Act of July 8, 1870, chap. 225, § 7, 16 Stat. at L. 193, 194, as amended by Act of July 4, 1884, chap. 181, § 4, 23 Stat. at L. 98, 99, Comp. Stat. § 9115, 7 Fed. Stat. Anno. 2d ed. p. 1056); Rev. Stat. § 5485 (Act of March 3, 1873, chap. 234, §§ 31, 32, 17 Stat. at L. 566, 575, Comp. Stat. §§ 9114, 9077, 7 Fed. Stat. Anno. 2d ed. pp. 1035, 1037); Rev. Stat. §

claims against the government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees, contingent upon success, have sometimes been supposed to encourage. The constitutionality of such legislation, although resembling in its nature the exercise of the police power, has long been settled (Marshall v. Baltimore & O. R. Co. 16 How. 314, 336, 14 L. ed. 953, 962; United [175] States v. Hall, 98 U. S. 343, 354, 355, 25 L. ed. 180, 183, 184; Ball v. Halsell, 161 U. S. 72, 82, 84, 40 L. ed. 622, 625, 626, 16 Sup. Ct. Rep. 554).

The provision in the contract sued on, purporting to give a lien upon any warrant issued, was void under § 3477 of the Revised Statutes (Comp. Stat. § 6383, 2 Fed. Stat. Anno. 2d ed. p. 179). Nutt v. Knut, 200 U. S. 12, 20, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216. It is urged that the act here in question should be construed as limiting only the proportion of the specific funds received from the government which may be applied to payment of attorneys' fees; but the second paragraph of the law leaves no room for construction. It provides that "it shall be unlawful for any attorney . . . to receive any sum which in the *aggregate* exceeds twenty per centum" of the claim. Calhoun contends, however, that if the act is construed as limiting the amount recoverable from a claimant upon his personal obligation, it is void as applied to contracts in existence at the time of its passage; at least where, as here, the services contemplated had then been substantially performed.

That an act limiting the compensation of attorneys in the prosecution of claims against the government is valid also as to contracts which had been entered into before its passage was expressly held in Ball v. Halsell, 161 U. S. 72, 82, 84, 40 L. ed. 622, 625, 626, 16 Sup. Ct. Rep. 554. The act there in question was passed seventeen years after the date of the contract, and the attorney had performed important services before its enactment. Here, it is said, substantially all the services required of Calhoun had been performed when the act was passed. The difference in the percentage of services performed cannot here affect the legal result. An appropriate exercise by a state of its police power is consistent with the 14th Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the 5th Amendment, impose, for a permitted purpose, restrictions upon property which produce like results. Lottery Case (Champion v. Ames) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Hipolite Egg Co. v. United States, 220 U. S. 45, 58, 55 L. ed. 364, 368, 31 Sup. Ct. Rep. 364; Hoke v. United [176] States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106. The sovereign right of the government is not less because the property affected happens to be a contract. Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 484, 55 L. ed. 297, 304, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; Union Dry Goods Co. v. Georgia Public Service Corp. 248 U. S. 372, 63 L. ed. 309, 9

4711 (Act of March 3, 1873, chap. 234, § 17, 17 Stat. at L. 566, 572, Comp. Stat. § 8999, 7 Fed. Stat. Anno. 2d ed. p. 1024); Act of January 25, 1879, chap. 23, § 4, 20 Stat at L. 265, Comp. Stat. § 9113, 7 Fed. Stat. Anno. 2d ed. p. 1071; Acts of June 27, 1890, chap. 634, § 4, 26 Stat. at L. 182, 183, Comp. Stat. §§ 8992, 8938, 7 Fed. Stat. Anno. 2d ed. pp. 1084, 1086; March 3, 1891, chap. 542, 26 Stat. at L. 948, 979, Comp. Stat. §§ 8485, 9124, 7 Fed. Stat. Anno. 2d ed. p. 1119; March 3, 1891, chap. 548, 26 Stat. at L. 1081, 1082, 7 Fed. Stat. Anno. 2d ed. p. 1088; August 5, 1892, chap. 379, § 2, 27 Stat. at L. 348, 349, Comp. Stat. §§ 9070, 9071, 7 Fed. Stat. Anno. 2d ed. pp. 1093, 1094; February 28, 1903, chap. 858, § 3, 32 Stat. at L. 920, 921, Comp. Stat. §§ 8993, 8995, 7 Fed. Stat. Anno. 2d ed. pp. 1022, 1104; April 19, 1908, chap. 147, § 3, 35 Stat. at L. 64, Comp. Stat. § 8985, 7 Fed. Stat. Anno. 2d ed. p. 1109; May 28, 1908, chap. 208, 35 Stat. at L. 418, 419; September 8, 1916, chap. 470, § 4, 39 Stat. at L. 844, 845, Comp. Stat. §§ 8981a, 8981d, Fed. Stat. Anno. Supp. 1918, p. 584; Act of July 16, 1918, chap. 153, § 2, 40 Stat. at L. 903, 904, Comp. Stat. § 8985b, Fed. Stat. Anno. Supp. 1918, p. 589. Pay and bounty of colored soldiers: Act of March 3, 1879, chap. 182, § 2, 20 Stat. at L. 377, 402, Comp. Stat. § 3969, 3 Fed. Stat. Anno. 2d ed. p. 410. Arrears of pay or allowances in connection with services in the Civil War: Act of December 22, 1911, chap. 6, 37 Stat. at L. 47, 49, 9 Fed. Stat. Anno. 2d ed. p. 1233. Mississippi Choctaws: Act of May 31, 1900, chap. 598, 31 Stat. at L. 221, 237. Service for Indians: Rev. Stat. § 2104; Act of June 30, 1913, chap. 4, § 17, 38 Stat. at L. 77, 95; Act of August 1, 1914, chap. 222, § 17, 38 Stat. at L. 582, 599, Comp. Stat. § 4205e, 3 Fed. Stat. Anno. 2d ed. p. 803. Claims under War Risk Insurance Act: Act of June 12, 1917, chap. 26, § 8, 40 Stat. at L. 102, 104, Comp. Stat. §§ 514a, 514ee, 9 Fed. Stat. Anno. 2d ed. pp. 1299, 1303.

A.L.R. 1420, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117. Here, unlike New York C. & H. R. R. Co. v. Gray, 239 U. S. 583, 587, 60 L. ed. 451, 453, 36 Sup. Ct. Rep. 176, a performance of a substitute for the obligation undertaken and later prohibited by the statute is impossible, because the act forbids the collection or receipt of any compensation in excess of 20 per cent.

In the case at bar there are special reasons why the contract cannot prevail over the statute enacted later. At the time when the contract was entered into there was no legislation, general or special, which conferred upon Massie any right of recovery even if he should establish to the satisfaction of Congress that his claim was equitable. A statute making an appropriation to pay the claim was thus a condition precedent to liability on the part of Massie to Calhoun; and the thing contracted for was Calhoun's aid in securing its enactment. The aid was to be given by representing Massie before the court of claims. But both of the parties knew that, although Calhoun might have success before the court of claims, Congress would still be free to refuse both to recognize the claim as an equitable one, and to make an appropriation for its payment. They also knew that if it concluded to grant relief, Congress was free to do so upon such conditions as it deemed proper. Compare Ball v. Halsell, supra, pp. 82, 84; Kendall v. United States, 7 Wall. 113, 117, 19 L. ed. 85, 86. In view of the past action of Congress limiting attorneys' fees, referred to above, it was at least conceivable when the contract was made that Congress might, as it proved,[4] be unwilling to enact any legislation without assuring itself that the benefits thereof would not inure [177] largely to others than those named in the act. Assent by Calhoun to the insertion in the act of a condition such as this, which he might reasonably have contemplated would be required to insure its passage, was, therefore, implied in the contract to aid in securing the legislation. Compare the Kronprinzessin Cecilie (North German Lloyd v. Guaranty Trust Co.) 244 U. S. 12, 22, 23, 61 L. ed. 960, 965, 966, 37 Sup. Ct. Rep. 490.

Furthermore, Calhoun accepted and received from the Treasury a warrant for 20 per cent of the sum appropriated. The money was paid and it was received under the act which provided that it was unlawful to collect any sum in excess of 20 per cent, "any contract to the contrary notwithstanding." Calhoun cannot take under the act and repudiate its provisions. Compare Shepard v. Barron, 194 U. S. 553, 567, 48 L. ed. 1115, 1120, 24 Sup. Ct. Rep. 737; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 29, 48 L. ed. 598, 604, 24 Sup. Ct. Rep. 310; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555. The allegation in the declaration that he accepted the 20 per cent "without waiving or releasing any of his rights under the aforesaid contract" was doubtless intended as a statement that the amount collected from the government was not accepted as a full settlement of his rights against the defendant under the contract. But it was a protestation totally at variance with his conduct. The payment to him by the Treasury of the 20 per cent could be made only under the act. It must be held to have been accepted according to the terms of the act. Any reservation which he may have made in words was futile. Capital Trust Co. v. Calhoun, 250 U. S. 208, 218, 219, 63 L. ed. 942, 946, 39 Sup. Ct. Rep. 486.

Affirmed.

Mr. Justice **McReynolds**, dissenting:

In 1911 Calhoun made a lawful agreement with Massie to prosecute the latter's claim against the United States [178] for property taken during the Civil War (Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441): and Massie expressly bound himself to pay, as a fee for such services, "a sum equal to 50 per cent of the amount which may be collected, said fee to be a lien on any warrant," etc.

Calhoun performed his full part in strict accordance with the contract. As a result of his proper efforts, Congress finally approved the claim and appropriated $1,900 to pay it (Act March 4, 1915, chap. 140, 38 Stat. at L. 962, 989).

But the same act, § 4 (p. 996), provided that not more than 20 per cent of the amount appropriated should be paid, or delivered to, or received by, any attorney for services, etc. Also, "It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which, in the aggregate, exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of

[4] See 51 Cong. Rec. p. 324; 52 Cong. Rec. 5289, 5316.

this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

Capital Trust Co. v. Calhoun, 250 U. S. 208, 63 L. ed. 942, 39 Sup. Ct. Rep. 486, affirms the power of Congress to exempt the appropriated fund from any demand for counsel fees.

In that case Calhoun, relying upon a contract like the one presently before us, recovered a judgment in the state court for the difference between 20 per cent received from the Treasury and 50 per cent of the appropriation. The matter came here and we expressly declared (p. 216): "If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States, but from other assets of the estate, a situation is presented which it was said in Nutt v. Knut, 200 U. S. 12, 21, 50 L. ed. 348, 353, 26 Sup. Ct. Rep. 216, would not encounter legal objection. In other words, the limitation [179] in the act appropriating the money to 20 per cent as the amount to be paid to an agent or attorney would have no application or be involved." In effect, the court now holds that statement was obviously erroneous; and that Calhoun would have committed a misdemeanor if he had accepted a fee exceeding the 20 per cent!

As to certain "special reasons why the contract cannot prevail over the statute enacted later."

(1) It is said that when he executed the contract of employment, Calhoun impliedly assented to the insertion in any future appropriation act of a condition like the one under consideration; therefore, he cannot recover. This assumes, first, a construction of the act in direct conflict with the meaning heretofore attributed to it, and, second, that, so construed, it is within the power of Congress. If these two assumptions are correct, of course there is no right to recover. This special reason can only serve to mislead.

(2) It is further said that, as Calhoun received 20 per cent of the amount appropriated by an act which declared unlawful the collection of anything more, he thereby in effect estopped himself from making a personal demand against his client. But this again assumes a construction of the act contrary to what we have declared, and further assumes that, so construed, it is valid. If these assumptions are correct, no further discussion is needed. This special reason lacks substance and can serve no good purpose.

The meaning of section 4.

Considering the definite statement concerning the true meaning of this section, made twelve months ago in Capital Trust Co. v. Calhoun, supra, and quoted above, it would seem at least unusual now to announce a wholly different view, accompanied by the mere assertion that there is "no room for construction." No mention [180] is made of what was then said in very plain terms. Of course, this has been accepted as authoritative both by lawyers and courts. The result is necessarily injurious both to the court and the public.

In United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527, this was said: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." As that statement has been repeated several times, it would seem worthy of some consideration now.

I presume nobody doubts that Congress has power to prescribe reasonable rules concerning champerty, maintenance, or kindred matters in United States courts, and to regulate assignments of claims against the government. But, under the adopted construction, § 4 (Act of March 4, 1915) destroys an entirely lawful contract made long before its passage, deprives counsel of his right to enforce the personal liability of his client to pay for services already performed, and renders criminal the acceptance by him of more than an arbitrarily specified amount.

Marshall v. Baltimore & O. R. Co. 16 How. 314, 316, 14 L. ed. 953, 954; United States v. Hall, 98 U. S. 343, 354, 355, 25 L. ed. 180, 183, 184; Ball v. Halsell, 161 U. S. 72, 84, 40 L. ed. 622, 625, 16 Sup. Ct. Rep. 554, are referred to as authority for such oppressive legislation. They give it no support.

Marshall v. Baltimore & O. R. Co. was an attempt to collect compensation for lobbying; and the holding was that a contract is void, as against public policy, and can have no standing in court, by which one party stipulates to employ a number of secret agents in order to obtain the passage of a particular law by the legislature of a state, and the other party promises to pay a large sum of money in case the law should pass. The case appears unimportant in connection with this controversy.

In United States v. Hall, the court ruled, Congress has power to declare that embezzlement or fraudulent conversion [181] to his own use by a guardian of pension money received on behalf of his ward from the government is an offense against the United States. This case might be relevant if Calhoun were seeking to reach the fund appropriated by Congress, but he is not.

In Ball v. Halsell, an attorney sought to recover under a written agreement, concerning which this court said (p. 82): "The instrument was an unilateral contract, not signed by the attorney, nor containing any agreement on his part, and —so long, at least, as it had not been carried into execution—might be revoked by the principal; or might be disregarded by him in making a settlement with the United States; or might be treated by him as absolutely null and void in any contest between him and the attorney. . . . By the very terms of the contract, the attorney was to be paid only out of money recovered and received by him from the United States." The case is wholly unlike the one now before us. Mr. Justice Gray took pains to explain the difference between it and Davis v. Com. 164 Mass. 241, 30 L.R.A. 743, 41 N. E. 292, where the Massachusetts court ruled that an agent of the state employed to prosecute a claim against the United States could recover compensation notwithstanding the act of Congress appropriating money to meet the claim, provided that no part of such sum should be paid by the state to any attorney under previous contract.

Davis v. Com. and the language by Mr. Justice Gray in Ball v. Halsell, wherein he pointed out the clear distinction between the two cases, ought not to be lightly disregarded.

It is certainly a very serious thing to decide that Congress, by its arbitrary fiat, may wholly deprive counsel of the right to enforce payment of compensation for long-continued efforts theretofore lawfully put forth, and prevent him, indeed, from accepting anything therefor. If a limit may be set at 20 per cent, any payment may [182] be proscribed. We should follow Capital Trust Co. v. Calhoun, and reverse the judgment below.

The 5th Amendment was intended to protect the individual against arbitrary exercise of Federal power. It declares, no person shall be deprived of life, liberty, or property, without due process of law; and this inhibition protects every man in his right to engage in honest and useful work for compensation. Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973.

Mr. Justice **McKenna**, Mr. Justice **Van Devanter**, and Mr. Justice **Pitney** concur in this dissent.

SUE ERSKINE NEWMAN, Administratrix of the Estate of Ursula Ragland Erskine, Deceased, David F. Houston,[1] Secretary of the Treasury, and John Burke, Treasurer of the United States, Appts.,

v.

IDA M. MOYERS and Charles F. Consaul, Partners, Trading as Moyers & Consaul.

(See S. C. Reporter's ed. 182–186.)

Claims — against United States — compensation for prosecution — contingent-fee legislation — effect of existing contracts.

1. An existing contract for the payment to an attorney for professional services to be rendered in the prosecution of a Civil War claim against the United States of a sum equal to 50 per cent of whatever might be collected was invalidated by the provision of the Omnibus Claims Act of March 4, 1915, which, after making an appropriation for payment of such claim, made it unlawful for any attorney to exact, collect, withhold, or receive, any sum which, in the aggregate, exceeds 20 per cent of the amount of any item appropriated in that act, on account of services rendered or advances made in connection with said claim,

[1] Motion to substitute as one of the appellants Carter Glass, Secretary of the Treasury, in place of William G. McAdoo, former Secretary of the Treasury, granted October 13, 1919, on motion of counsel for the appellants.

Motion to substitute as one of the appellants David F. Houston, present Secretary of the Treasury, in the place of Carter Glass, former Secretary of the Treasury, granted March 1, 1920, on motion of counsel for the appellants.

Note.—As to validity of assignment of claims against United States—see note to Lopez v. United States, 2 L.R.A. 571.

As to attorney's compensation contingent on success or from proceeds of suit; a fixed sum or percentage—see

any contract to the contrary notwithstanding.

[For other cases, see Claims, I. d, 2, d, in Digest Sup. Ct. Rep. 1908.]

Appeal — judgment — remanding for dismissal.

2. Error below in overruling the objection of Treasury officials in a suit by attorneys against their client and such officials, that a valid act of Congress prohibited the recovery sought, requires that a judgment for plaintiffs be reversed upon the appeals of such officials, and that the cause be remanded, with directions to dismiss the bill as to them.

[For other cases, see Appeal and Error, IX. i, 1, d, in Digest Sup. Ct. 1908.]

Appeal — judgment — want of prosecution by one of several appellants — affirmance.

3. The want of prosecution of an appeal by one of several joint appellants should not result in the affirmance of the judgment below as to such appellant, where the judgment is reversed on the merits upon the appeal of the other appellants.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

Appeal — judgment — dismissal for proceedings below.

4. A dismissal of an appeal for want of prosecution will remit the cause to the lower court in the same condition as before the appeal was taken, and will leave the lower court free to take appropriate action to prevent itself from being used as an instrument in illegality.

[For other cases, see Appeal and Error, IX. l, in Digest Sup. Ct. 1908.]

[No. 85.]

Argued March 11, 1920. Decided May 17, 1920.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District in favor of plaintiffs in a suit by attorneys against their client and United States Treasury officials for the recovery of a 50 per cent contingent fee for prosecuting a claim against the United States. Decree reversed as to Treasury officials and cause remanded with directions to dismiss the bill as to them. Appeal of the administratrix of the client dismissed for want of prosecution, and cause remanded for further proceedings.[2]

See same case below, 47 App. D. C. 102, Ann. Cas. 1918E, 528.

The facts are stated in the opinion.

Assistant Attorney General **Frierson** argued the cause, and Solicitor General King and Mr. A. F. Myers filed a brief for appellants.

Mr. **Charles F. Consaul** argued the cause, and, with Mrs. Ida M. Moyers, filed a brief for appellees in propriis personis.

Mr. Justice **Brandeis** delivered the opinion of the court:

By the Omnibus Claims Act of March 4, 1915, chap. 140, 38 Stat. at L. 962, 963, discussed in Calhoun v. Massie, decided this day [253 U. S. 170, ante, 843, 40 Sup. Ct. Rep. 474], Ursula Ragland Erskine became entitled to receive from the Secretary of the Treasury the sum of $1,836.66. Long before that date she and the firm of Moyers & Consaul, attorneys, had entered into a contract for the prosecution of her claim against the government. The contract provided that the attorneys should receive an amount equal to 50 per cent of the sum collected. Its terms and the services rendered were, in substance, identical with those set forth in Calhoun v. Massie. In reliance upon § 4 of the above act, Mrs. Erskine refused to pay or assent to the payment to the attorneys of an amount greater than 20 per cent of the appropriation; and the Treasury officials were proposing to issue a warrant for 20 per cent thereof to [184] the attorneys and another for the balance to her. Moyers & Consaul insisted that the provision of the act limiting fees of attorneys to 20 per cent was invalid; and they brought this suit in the supreme court of the District of Columbia against Mrs. Erskine, the Secretary of the Treasury, and the Treasurer of the United States, to recover the full 50 per cent. As in McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955, 35 Sup. Ct. Rep. 543, the plaintiffs prayed that they be declared

[2] Leave granted on June 7, 1920, to present a petition for rehearing herein within thirty days.

note to McMicken v. Perin, 15 L. ed. U. S. 504.

As to lien of attorney for compensation—see note to Texas v. White, 19 L. ed. U. S. 992.

On right of attorney who takes case on contingent fee or for certain percentage to implied or equitable lien on fund recovered—see note to De Winter v. Thomas, 27 L.R.A.(N.S.) 634.

As to validity of agreement by which compensation is contingent upon success in procuring contract with, or allowance of claim against, the United States—see note to Crocker v. United States, 60 L. ed. U. S. 533.

entitled to recover from Mrs. Erskine the amount claimed; that the issuance to and the collection by her of any amount from the government be enjoined; and that either the whole amount be paid into the registry of the court, or that a receiver be appointed who should collect from the government the whole amount, and pay therefrom to plaintiffs an amount equal to 50 per cent of the collection. Mrs. Erskine died soon after the filing of the bill, whereupon Sue Erskine Newman, the administratrix of her estate, was made defendant.

The Secretary of the Treasury and the Treasurer moved to dismiss the bill of complaint, among other reasons, on the ground that collection of more than 20 per cent was prohibited by § 4, and that the limitation thereby imposed was a valid exercise of congressional power. Sue Erskine Newman, as administratrix, moved to dismiss on the same ground, among others. The motions were overruled; and the court entered a decree directing payment of the money into court, ordering that plaintiff recover from the administratrix an amount equal to 50 per cent of the collection from the government, and directing that this sum be paid out of the funds to be so paid into court. From the decree for plaintiffs entered by the supreme court of the District of Columbia, all the defendants appealed to the court of appeals for the District of Columbia; and when the latter affirmed the decree of the lower court, all the defendants joined in the appeal to this court. The Honorable [185] Carter Glass, upon becoming Secretary of the Treasury, was substituted for the Honorable William G. McAdoo; and the further substitution of the Honorable David F. Houston was made when he became Secretary of the Treasury. The appellees now move to dismiss the appeals of the Secretary of the Treasury and the Treasurer of the United States on the ground that neither they nor the government have any pecuniary or other interest in the suit. They also move to dismiss the appeal of the administratrix on the ground that she did not formally enter her appearance in this court, nor take any part in the proceedings here.

The merits of the former motion we have no occasion to consider, for the following reason: Section 4 of the act limited the compensation which the attorneys may collect or receive to 20 per cent. The act is valid. Capital Trust Co. v. Calhoun, 250 U. S. 208, 63 L. ed. 942, 39 Sup. Ct. Rep. 486; Calhoun v. Massie, supra. The plaintiffs were seeking the aid of the courts to recover moneys which an act of Congress prohibited them from collecting or receiving. If the bill had not alleged that this act was invalid, it would have been the duty of the lower court to dismiss the bill even if none of the defendants had raised any objection to the maintenance of the suit. Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 267, 26 L. ed. 539, 542; Lee v. Johnson, 116 U. S. 48, 52, 29 L. ed. 570, 571, 6 Sup. Ct. Rep. 249; Coppell v. Hall, 7 Wall. 542, 558, 19 L. ed. 244, 248. The Secretary of the Treasury and the Treasurer of the United States did make such objection. The overruling of it in the courts below was error. The judgment must be reversed and the cause remanded with directions to dismiss the bill as to them.

The fact that the administratrix did not persist in her appeal should not result in affirmance of the judgment as to her. In Montalet v. Murray, 3 Cranch 249, 2 L. ed. 429, Mr. Chief Justice Marshall "stated the practice of the court to be, that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and [186] dismiss the writ of error; or may open the record and pray for an affirmance." This practice is still in force under Rules 9 and 16 of this court. Todd v. Daniel, 16 Pet. 521, 10 L. ed. 1054; Hurley v. Jones, 97 U. S. 318, 24 L. ed. 1008; The Osborne (Winslow v. Wilcox) 105 U. S. 447, 450, 451, 26 L. ed. 1065, 1066. It is applicable to one of several joint appellants who fails to perfect his appeal. Yates v. Jones Nat. Bank, 206 U. S. 158, 166, 181, 51 L. ed. 1002, 1009, 1015, 27 Sup. Ct. Rep. 638.

If the appellee had asked for an affirmance, it is clear that it must have been denied because of the illegal purpose of the suit. But the court might go further. Since of its own motion it might dismiss this appeal (Hilton v. Dickinson, 108 U. S. 165, 168, 27 L. ed. 688, 689, 2 Sup. Ct. Rep. 424), and since on dismissing it a mandate to the lower court might issue (United States v. Gomez, 23 How. 326, 330, 16 L. ed. 552, 553), this court might also of its own motion entertain the alternative to dismissal spoken of by Mr. Chief Justice Marshall,—i. e., open the record. If it did so, and perceived that the court was being used to attain an illegal result, there would be power to reverse the decree and remand the cause with instructions to dismiss the bill. But in the present case such a course is not necessary. The appellees have

asked not for an affirmance, but for a dismissal, of the appeal of the administratrix. A dismissal for want of prosecution will remit the case to the lower court in the same condition as before the appeal was taken; and the lower court will then be free to take appropriate action to prevent itself from being used as an instrument in illegality. United States v. Pacheco, 20 How. 261, 15 L. ed. 820; United States v. Gomez, 23 How. 326, 339, 340, 16 L. ed. 552, 556.

Decree reversed as to appellants Houston and Burke, and cause remanded with directions to dismiss the bill as to them.

Appeal of Newman, administratrix, dismissed for want of prosecution, and cause remanded for further proceedings in conformity with this opinion.

---

[187] E. W. BLISS COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 187–193.)

Claims — against United States — jurisdiction — contract.

1. A cause of action ex contractu, based on the government use of a patented invention, is not presented by a petition, the allegations of which, taken together, not only do not show a contract of the parties, express or implied, to pay a royalty in any amount, but distinctly and in terms negative the making of any such contract as is necessary to give the court of claims jurisdiction.

[For other cases, see Claims, I. d, 2, a, in Digest Sup. Ct. 1908.]

Patents — infringement by government — who may maintain suit — owner.

2. The suit against the United States for the infringement of a patent, given by the Act of June 25, 1910, to the "owner" of the infringed patent, may only be maintained by one who has at least such an interest in the patent as, without the statute, would support such a suit against a defendant other than the United States.

[For other cases, see Patents, XV. c, in Digest Sup. Ct. 1908.]

Patents — infringement by government — who may maintain suit — owner.

3. The licensee of a patent who has no such assignment, grant, or conveyance, either of the whole patent or of an undivided part of it, or of an exclusive right under it within and throughout a specified part of the United States as is necessary under U. S. Rev. Stat. § 4919, in order to enable him to sue in his own name for infringement at law or in equity without joining the owner of the patent, may not maintain a suit against the United States for infringement under the Act of June 25, 1910, which empowers the "owner" of an infringed patent to recover reasonable compensation in the court of claims, and reserves to the United States all defenses, general or special, which might be pleaded by a defendant in an action for infringement.

[For other cases, see Patents, XV. c, in Digest Sup. Ct. 1908.]

[No. 240.]

Argued March 12 and 15, 1920. Decided May 17, 1920.

APPEAL from the Court of Claims to review the dismissal of a petition in a suit against the United States, based on the government's use of a patented invention. Affirmed.

See same case below, 53 Ct. Cl. 47.

The facts are stated in the opinion.

Mr. **Arthur C. Fraser** argued the cause, and, with Mr. Frank H. Platt, filed a brief for appellant:

Plaintiff's petition presents a case of contract, express or implied, and not a case of infringement.

United States v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; McKeever v. United States, 14 Ct. Cl. 396; Société Anonyme Des Anciens Establissements Cail v. United States, 224 U. S. 309, 56 L. ed. 778, 32 Sup. Ct. Rep. 479; United States v. Berdan Firearms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420; Bethlehem Steel Co. v. United States, 42 Ct. Cl. 365; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co. 246 U. S. 28, 40, 62 L. ed. 560, 565, 38 Sup. Ct. Rep. 271.

Plaintiff's rights under the Sodeau patents, even if merely license rights, are exclusive, and justify plaintiff's claim for royalty.

Dunlop Pneumatic Tyre Co. v. North British Rubber Co. 21 Rep. Pat. Cas. 161, 172; Littlefield v. Perry, 21 Wall. 220, 22 L. ed. 578.

Plaintiff is, in any event, entitled to recover under the Act of June 25, 1910.

Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. 235 U. S. 641, 59 L. ed. 398, 35 Sup. Ct. Rep. 221; Farnham v.

Note.—On implication from use of patented article of promise to pay royalty—see note to May v. Western Line Co. 44 L.R.A.(N.S.) 333.

As to when assignee of patent may sue for infringement—see note to Holliday v. Batson, 11 L. ed. U. S. 1140.

United States, 240 U. S. 537, 60 L. ed. 786, 36 Sup. Ct. Rep. 427.

Assistant Attorney General **Davis** and Mr. **Daniel L. Morris** argued the cause, and, with Mr. Edward G. Curtis, filed a brief for appellee:

No contract between appellant and the United States existed.

Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; Harley v. United States, 198 U. S. 229, 49 L. ed. 1029, 25 Sup. Ct. Rep. 634; Russell v. United States, 182 U. S. 516, 45 L. ed. 1210, 21 Sup. Ct. Rep. 899.

An exclusive license is not an assignment.

Hayward v. Andrews, 106 U. S. 672, 27 L. ed. 271, 1 Sup. Ct. Rep. 544; Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322; Brush Electric Co. v. California Electric Light Co. 3 C. C. A. 368, 7 U. S. App. 409, 52 Fed. 959; Walker, Patents, p. 356, ¶ 296; Sanford v. Messer, Holmes, 149, Fed. Cas. No. 12,314; Hill v. Whitcomb, Holmes, 317, Fed. Cas. No. 6,502; Waterman v. Mackenzie, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334, 2 Robinson, Patents, p. 520; Gamewell Fire-Alarm Teleg. Co. v. Brooklyn, 14 Fed. 255.

A licensee cannot maintain an action for infringement.

Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Waterman v. Mackenzie, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334; Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 248, 36 L. ed. 423, 12 Sup. Ct. Rep. 641; Birdsell v. Shaliol, 112 U. S. 485, 28 L. ed. 768, 5 Sup. Ct. Rep. 244; Paper-Bag Mach. Cases, 105 U. S. 766, 771, 26 L. ed. 959, 961.

[188] Mr. Justice **Clarke** delivered the opinion of the court:

In this suit compensation is sought from the government for the use which it made of a patented "superheater," in connection with Whitehead torpedoes.

A "superheater" is a device in which fuel is burned in the compressed air which drives the motor by which a torpedo is propelled through the water, so that the air is heated to such a degree that its energy is greatly increased, with the result that the range of the use of the torpedo is much extended.

The court of claims interpreted the petition as containing a claim that the defendant had contracted to pay appellant for fifty "superheaters" at $500 each, and also as claiming that it had infringed rights of the appellant in certain United States patents by the purchase of 360 "superheaters" from Whitehead & Company, a British corporation, and by itself manufacturing one hundred such "superheaters." Concluding as to the first claim that the petition did not state a cause of action in contract, and, as to the second, that it did not show title to the patents involved sufficient to support infringement, a demurrer to the petition was sustained and the suit dismissed.

The main contention in this court is that a cause of action in contract is stated with respect to all of the 510 "superheaters," but in the alternative, though faintly, it is claimed that the allegations also make out a case of infringement.

The appellant alleges that it was the owner of two United States patents issued in 1902, covering the "superheater" device, and that in 1905 it entered into a written contract with the Armstrong Company, a British corporation, for the use of improvements in "superheaters" owned by that company and at the time protected in [189] Great Britain by a provisional specification for a patent. A copy of this contract, attached to the petition, after reciting that the Armstrong Company proposes to apply for a patent in the United States upon the improvements in "superheaters" which it owns, and that it is desirous of granting to the appellant the exclusive license to use such invention "in connection with the Bliss-Leavitt torpedo" manufactured by appellant, proceeds to grant to appellant the "sole and exclusive license" to use such inventions for the full term of the letters patent thereafter to be procured for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Company, and "Whitehead torpedoes sold only to the United States government."

The contract provides for the payment by the appellant of a royalty of $25 for each torpedo fitted with the Armstrong inventions, under penalty of cancelation, and that the Armstrong Company shall pay all costs and expenses of procuring the contemplated patents and of protecting them against infringement.

The petition alleges that eight United States patents on the "superheater" device were procured by the Armstrong Company, variously dated from August 7, 1906, to November 14, 1911, but no assignment of rights under them was made to appellant other than such as it derives from the contract of 1905, which, it avers, has been fully recognized and its terms complied with, by both of the parties to it.

The references in the amended petition to the two patents owned by the appellant are so meager and so vague that we conclude that liability in contract or for infringement must be derived, if at all, from the allegations applicable to the contract of 1905.

As to the contract:

The allegations are: That, prior to 1907, Armstrong & Company licensed Whitehead & Company, a British corporation, to [190] "use and exercise" its superheater inventions patented in Great Britain and in the United States, but subject to the rights of appellant under its contract of 1905; that in June, 1907, the appellant granted a request by the defendant for permission to purchase from Whitehead & Company not more than one hundred torpedoes containing the "superheater" invention, the amount of royalty "to be later settled;" that subsequently fifty torpedoes so equipped were purchased, and were brought into the United States subsequent to June 1, 1908; but that no royalty was ever paid to appellant for the use of the "superheaters" upon them.

If the petition had stopped here, there might be substance in the claim that, as to these fifty torpedoes, a contract for royalty on the basis of quantum meruit should be implied. But the petition goes on and alleges: That in November, 1907, before the alleged purchase of the fifty torpedoes, in a treaty between the parties as to the amount of royalty to be paid, a demand by the petitioner of $500 for each "superheater" installed in a Whitehead torpedo was refused by the government; that in December, 1910, and again in March, 1912, long after the alleged purchase, the prior discussion as to royalty was renewed, but without agreement; and finally it is averred "that petitioner, by letter dated March 19, 1912, declined to grant any reduction, and no reduction has ever been granted, and petitioner has never consented to the use of said patented invention or of said patented improvements thereon or any of them by defendant without payment of said royalty of $500 each."

It is too clear for discussion that these allegations, taken together, not only do not show a contract of the parties, express or implied, to pay a royalty in any amount, but that they distinctly and in terms negative the making of any such contract as is necessary to give the court of claims jurisdiction under the applicable section of the [191] Judicial Code, § 145 [36 Stat. at L. 1136, chap. 231, Comp. Stat. § 1136 (1) 5 Fed. Stat. Anno. 2d ed. p. 649], and the decisions of this court. Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; United States v. Berdan Fire-Arms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420; Russell v. United States, 182 U. S. 516, 45 L. ed. 1210, 21 Sup. Ct. Rep. 899; Bigby v. United States, 188 U. S. 400, 47 L. ed. 519, 23 Sup. Ct. Rep. 468; Harley v. United States, 198 U. S. 229, 49 L. ed. 1029, 25 Sup. Ct. Rep. 634; Juragua Iron Co. v. United States, 212 U. S. 297, 309, 53 L. ed. 520, 524, 29 Sup. Ct. Rep. 385; Farnham v. United States, 240 U. S. 537, 540, 60 L. ed. 786, 787, 36 Sup. Ct. Rep. 427.

Treating for peace with one claiming patent rights for which it paid a royalty of $25 falls far short of a "convention between the parties,—a coming together of the minds,"—to pay $500, or any other amount, for the use of the device.

As to the claim for infringement:

The contract of 1905, relied upon, in terms granted to the appellant the "sole and exclusive license" to use the Armstrong inventions for the terms of the patents thereafter to be procured in Great Britain and in the United States "for the purpose of propelling Bliss-Leavitt torpedoes" (with which we are not concerned) "wherever sold by the Bliss Company, and the Whitehead torpedoes sold only to the United States government."

Authority to maintain a suit for infringement against the United States can be derived only from the Act of Congress of June 25, 1910 (36 Stat. at L. 851, chap. 423, Comp. Stat. § 9465, 7 Fed. Stat. Anno. 2d ed. p. 375), which provides that the "owner" of an infringed patent may recover reasonable compensation in the court of claims, and reserves to the United States "all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in title LX. of the Revised Statutes of the United States, or otherwise."

Giving to this statute, as we do, the liberal interpretation placed upon it in Crozier v. Fried Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771, 32 Sup. Ct. Rep. 488, and in William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co. 246 U. S. 28, 62 L. ed. 560, 38 Sup. Ct. Rep. 271, the "owner" who may maintain an infringement suit against the government must have at least such an interest in the patent as, without the [192] statute, would support such a

suit against a defendant other than the United States.

It has long been settled that a licensee may not maintain a suit for infringement (Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Paper Bag Mach. Cases, 105 U. S. 766, 26 L. ed. 959; Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 248, 36 L. ed. 423, 12 Sup. Ct. Rep. 641), and that to entitle an assignee or grantee to maintain such a suit under warrant of Rev. Stat. 4919, Comp. Stat. § 9464, 7 Fed. Stat. Anno. 2d ed. 288, such assignee or grantee must have an assignment, grant, or conveyance, either of the whole patent, of an undivided part of it, or of an exclusive right under it "within and throughout a specified part of the United States." Any assignment or transfer short of one of these is a mere license, giving the licensee no interest in the patent sufficient to sue at law in his own name for infringement, or in equity without joining the owner of the patent. Waterman v. Mackenzie, 138 U. S. 252, 255, 34 L. ed. 923, 925, 11 Sup. Ct. Rep. 334; Pope Mfg. Co. v. Gormully & J. Mfg. Co. 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632.

While the legal effect of the terms used, and not the name applied to the instrument containing them, will determine whether a transfer is an assignment or a license, nevertheless the language used is often, as in this case, of great significance in determining what that legal effect shall be.

The right granted the appellant by the contract of 1905 is termed in it a "license;" the appellant contracts, as licensees usually do, to pay a royalty for each torpedo fitted with the devices to be patented; the contract does not purport to grant an interest in the patent or any exclusive territorial rights, but only, with respect to the Whitehead torpedo, rights as to a single prospective purchaser,—the government of the United States; and the Armstrong Company contracts at its own cost "to take all necessary proceedings for protecting and defending the license to use . . . hereby granted" against [193] infringers. Palpably this is a mere license, not sufficient to sustain a suit for infringement.

Several minor questions, including some of practice, are argued in the brief for appellant, but the opinion of the Court of Claims deals with them thoroughly and satisfactorily, and its judgment is affirmed.

64 L. ed.

PIEDMONT POWER & LIGHT COMPANY, Appt.,
v.
TOWN OF GRAHAM et al. (No. 684.)

J. R. PASCHALL and Warner Moore, Appts.,
v.
TOWN OF GRAHAM et al. (No. 685.)

(See S. C. Reporter's ed. 193–195.)

Electric light and power — exclusive privilege.

1. An exclusive grant of the right to use the streets of a town for the distribution of electric current may not be deduced from the declaration in the paragraph of the franchise ordinance relating to the trimming of trees that the town warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes, etc.

Appeal — from district court — frivolous Federal question.

2. The contention, by the owner of a nonexclusive franchise to use the streets of a town for the distribution of electric current, that competition in business likely to result from a similar grant to another corporation would be a violation of its own contract, or a taking of its property in violation of the Federal Constitution, is too plainly frivolous to serve as the basis of an appeal to the Federal Supreme Court from a decree of a district court, dismissing a suit for injunctive relief.

[For other cases, see Appeal and Error, 938–989, in Digest Sup. Ct. 1908.]

[Nos. 684 and 685.]

Submitted on motion to dismiss or affirm, or transfer to summary docket, April 19, 1920. Decided May 17, 1920.

TWO APPEALS from the District Court of the United States for the Western District of North Carolina to review decrees dismissing complaints in suits to enjoin town officials from granting an electric light and power franchise, and to enjoin the grantee from using the town streets. Dismissed for want of jurisdiction.

Note.—On power of municipality, in absence of express legislative authority, to grant street franchises—see note to Elizabeth City v. Banks, 22 L.R.A. (N.S.) 925.

On direct review in Federal Supreme Court of judgments of district or circuit court—see notes to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed. U. S. 894; and Berkman v. United States, 63 L. ed. U. S. 877.

Mr. **James H. Bridgers** submitted the cause for appellants:

This court determines for itself whether a substantial Federal question is raised, and if so, it determines all questions.

Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88.

The grant resulting from the acceptance of the municipal offer by the establishment of a plant devoted to the described public use constituted a contract, and vested in the accepting individual or corporation a property right protected by the Federal Constitution against impairment.

Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.1918E, 882, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 57 L. ed. 1389, 33 Sup. Ct. Rep. 988.

Municipal corporations are the creatures of the legislature; their powers may be curtailed, enlarged, or withdrawn at the will of the creator, whose control over them is limited only by the restriction that no statute will be enforced which impairs the obligation of a contract, interferes with vested rights, or is in conflict with any provision of the organic law of the state or nation.

State v. Johnson, 114 N. C. 846, 19 S. E. 599.

This court has uniformly upheld the power of the state to regulate the return on property devoted to public use, and has frequently said that governmental powers cannot be taken from the people by any form of contract, but not so when a state or municipality is acting in its proprietary capacity.

Los Angeles v. Los Angeles Gas & E. Corp. 251 U. S. 32, ante, 121, 40 Sup. Ct. Rep. 76.

Warrant means possession as well as title.

Allen v. Caffee, 85 Miss. 766, 38 So. 186.

Warrant is construed as full covenant of seisin,—good right to convey against encumbrances.

Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473.

A municipality in North Carolina has the power to grant an exclusive franchise or a warranted franchise in its legal meaning.

Fawcett v. Mt. Airy, 134 N. C. 125, 63 L.R.A. 870, 101 Am. St. Rep. 825, 45 S. E. 1029; Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633; Re Spease Ferry, 138 N. C. 219, 50 S. E. 625; Carolina-Tennessee Power Co. v. Hiawassee River Power Co. 175 N. C. 668, 96 S. E. 99; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Georgia v. Cincinnati Southern R. Co. 248 U. S. 26, 63 L. ed. 104, 39 Sup. Ct. Rep. 14.

Messrs. **Charles W. Tillett** and **William P. Bynum** submitted the cause for appellees. Messrs. Clyde R. Hoey, James S. Cook, Jacob A. Long, and Sidney S. Alderman were on the brief:

No right of the complainant arising under the Federal Constitution is involved in this suit.

Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; 4 Enc. U. S. Sup. Ct. Rep. 908.

Whether, under the laws of the state of North Carolina, an exclusive franchise could lawfully be granted, is undoubtedly a question of state law, and involves no Federal question whatever.

Thrift v. Elizabeth City, 122 N. C. 31, 44 L.R.A. 427, 30 S. E. 349.

Before an exclusive franchise or a monopoly can be granted by a municipality, such municipality must have clear legislative authority to grant the same, and it must appear that the exclusive privilege has been expressly granted. Such an exclusive privilege cannot be granted by inference or implication.

Detroit Citizens' Street R. Co. v. Detroit R. Co. 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135. See also note in 22 L.R.A.(N.S.) 934; 12 C. J. 1033, notes 49–51.

If a franchise be granted in terms which are not exclusive, there is no constitutional obligation on the state or municipality not to grant to another corporation a similar franchise, even though the latter greatly impairs the value of the former.

12 C. J. 1032, note 41; Stein v. Bienville Water Supply Co. 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; Washington & C. Turnp. Co. v. Maryland, 3 Wall. 210, 18 L. ed. 180; Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571; Fanning v. Gregoire, 16 How. 524, 14 L. ed. 1043; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Allen v. Buncombe Turnp. Co. 16 N. C. (1 Dev. Eq.) 119.

Accordingly, no compensation need be made to the first corporation for the consequential injury arising out of the grant of a similar franchise to another corporation.

12 C. J. 1032, note 43.

Complainants have not set out any facts which really and substantially involve the construction of the 14th Amendment to the Federal Constitution, which is the only one relied upon, and the direct appeal to this court should therefore be dismissed.

1 Enc. U. S. Sup. Ct. Rep. 461; Knop v. Monongahela River Consol. Coal & Coke Co. 211 U. S. 485, 53 L. ed. 294, 29 Sup. Ct. Rep. 188; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489.

[194] Memorandum opinion by direction of the court by Mr. Justice Clarke:

These are appeals direct from decrees of the district court sustaining motions to dismiss complaints for the reason that they did not state facts sufficient to constitute a valid cause of action in equity. The cases involve the same facts differently stated by different complainants. The asserted warrant for the appeals is that action taken by the officials of the town of Graham, North Carolina, if allowed to become effective, would result in violation of appellants' contract with that town, and in depriving them of their property without due process of law, in violation of the Constitution of the United States.

Since the bill in No. 684 contains all of the elements of strength which the bill in No. 685 contains, and lacks some of its elements of weakness, the disposition of the former will rule the latter.

In No. 684 the appellant, a corporation, averring that it is the owner of a franchise to use the streets of the town of Graham for the distribution of electric current, prays that the officials of the town be restrained from certifying as lawfully passed an ordinance granting a like franchise to the defendant, the Mutual Power & Light Company, and that the company be enjoined from using the streets for such purpose.

The grant to the appellant is set out in full in the bill, and plainly it is not one of exclusive rights in the streets. The attempt to derive an exclusive grant from the declaration, in the paragraph of the ordinance relating to the trimming of trees, that "said town of Graham hereby warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes," etc., is fatuous and futile. Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocally granted is withheld,—nothing passes [195] by implication. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 34, 50 L. ed. 353, 359, 26 Sup. Ct. Rep. 224; Blair v. Chicago, 201 U. S. 400, 471, 50 L. ed. 801, 830, 26 Sup. Ct. Rep. 427; Mitchell v. Dakota Cent. Teleph. Co. 246 U. S. 396, 412, 62 L. ed. 793, 801, 38 Sup. Ct. Rep. 362. The grant to appellant not being an exclusive one, the contention that competition in business, likely to result from a similar grant to another company, would be a violation of appellant's contract, or a taking of its property in violation of the Constitution of the United States, is so plainly frivolous that the motion to dismiss for want of jurisdiction, filed in each case, must be sustained. David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; Toop v. Ulysses Land Co. 237 U. S. 580, 59 L. ed. 1127, 35 Sup. Ct. Rep. 739; Sugarman v. United States, 249 U. S. 182, 63 L. ed. 550, 39 Sup. Ct. Rep. 191.

Dismissed.

UNITED STATES OF AMERICA, Plff. in Err.,
v.
THOMAS C. MacMILLAN and the Empire State Surety Company.

(See S. C. Reporter's ed. 195–205.)

Clerks — fees and commissions — interest.

1. Fees and emoluments collected by a clerk of a Federal district court, and deposited by him in a bank at interest, were not public moneys of the United States, so as to entitle the United States to the interest as an increment of its ownership, even where such clerk was, by exceptional legislation, an officer whose salary was specifically appropriated, it not being disputed that he was under obligation to meet the expenses of his office from the fees and emoluments thereof, and to pay over to the United States only the resulting surplus. [For other cases, see Clerks, I. b, in Digest Sup. Ct. 1908.]

Clerks — fees and commissions — interest.

2. Interest on the sum of the fees and emoluments deposited by the clerk of a Federal district court in a bank is not, in

and of itself, an emolument for which he is liable to account to the United States. [For other cases, see Clerks, I. b, in Digest Sup. Ct. 1908.]

[No. 167.]

Submitted January 23, 1920. Decided June 1, 1920.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of Illinois, Eastern Division, in favor of defendants in a suit by the United States on the official bond of the clerk of said court. Affirmed.

See same case below, 163 C. C. A. 305, 251 Fed. 55.

The facts are stated in the opinion.

Solicitor General **King** and Mr. **A. F. Myers** submitted the cause for plaintiff in error:

The clerk of the district court for the northern district of Illinois during the period involved was a salaried officer of the United States, expressly prohibited by law from receiving any additional pay, allowance, or compensation.

Hoyt v. United States, 10 How. 109, 13 L. ed. 348; Lewis v. United States, 244 U. S. 134, 61 L. ed. 1039, 37 Sup. Ct. Rep. 570; United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439.

The moneys included in the clerk's semiannual returns, on which interest was collected and retained, were received by defendant in his official capacity as clerk. He is, therefore, bound to account for the interest so collected as emoluments of his office.

United States v. McMillan, 165 U. S. 504, 41 L. ed. 805, 17 Sup. Ct. Rep. 395; United States v. Abeel, 98 C. C. A. 50, 174 Fed. 12; United States v. Mason, 211 Fed. 233, 135 C. C. A. 315, 219 Fed. 547; Alexander v. United States, 43 Ct. Cl. 395; United States v. Oliphant, 144 C. C. A. 299, 230 Fed. 7; Hoyt v. United States, 10 How. 109, 135, 13 L. ed. 348, 359; Vansant v. State, 96 Md. 128, 53 Atl. 711; Hughes v. People, 82 Ill. 78; Hunt v. State, 124 Ind. 306, 24 N. E. 887; Rhea v. Brewster, 130 Iowa, 729, 107 N. W. 940, 8 Ann. Cas. 389.

The United States, as obligee on the clerk's bond, may maintain a suit against the clerk and his surety for failure to account for interest collected and retained on moneys deposited by litigants, subject to disbursement.

Re Moneys, 170 Fed. 470; United States v. Abeel, 98 C. C. A. 50, 174 Fed. 20; United States v. Davis, 243 U. S. 570, 572, 61 L. ed. 906, 37 Sup. Ct. Rep. 442; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Rhea v. Brewster, 130 Iowa, 729, 107 N. W. 940, 8 Ann. Cas. 389; United States v. Griswold, 8 Ariz. 453, 76 Pac. 596, 9 Ariz. 304, 80 Pac. 317; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 593, 595, 28 L. ed. 527, 532, 4 Sup. Ct. Rep. 566; Webb v. Southern R. Co. 235 Fed. 585; Southern R. Co. v. Blunt, 165 Fed. 261; Long v. Kansas City, M. & B. R. Co. 170 Ala. 642, 54 So. 62; State v. McFetridge, 84 Wis. 473, 20 L.R.A. 223, 54 N. W. 1, 998; Eshelby v. Cincinnati Bd. of Edu. 66 Ohio St. 71, 63 N. E. 586; Gartley v. People, 28 Colo. 227, 64 Pac. 208; People ex rel. Nash v. Faulkner, 107 N. Y. 477, 14 N. E. 415, 31 Cyc. 100.

Messrs. **George T. Buckingham** and **Marquis Eaton** submitted the cause for defendants in error. Mr. Charles Troup was on the brief:

Even if all the money in question is public money in the hands of the clerk, for disbursement, yet the government, before accounting and default, could not maintain an action for interest on the fund.

United States v. Mason, 218 U. S. 517, 54 L. ed. 1133, 31 Sup. Ct. Rep. 28.

As to the money deposited by litigants, and not yet disbursed, the same is, and always remains, individual money. As to this money, the clerk is debtor to the litigant who deposited it. Neither such litigant nor the United States, acting for him, as obligee on the bond, could maintain an action for interest, except where the clerk had defaulted in making account for the funds when demanded.

United States v. Mason, 218 U. S. 517, 54 L. ed. 1133, 31 Sup. Ct. Rep. 28.

It cannot be claimed that the increment, or interest earned on litigants' individual money, not yet disbursed, is an emolument, because it is not earned by the clerk, either as compensation or in his official capacity as clerk.

United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510.

As to the money earned by the clerk as fees and emoluments, and before a surplus is ascertained and paid, the same is the money of the clerk, and not the property or money of the United States, and concerning it the government has no right, title, or interest.

United States v. Hill, 120 U. S. 169, 182, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510.

The long practice in respect to this interest matter amounts to an administrative interpretation of the statute, and as against the clerks and their bondsmen, who are entirely innocent of wrongdoing, should not be reopened to their detriment.

Ibid.; Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; United States v. Philbrick, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413.

Mr. Chief Justice White delivered the opinion of the court:

The relation of the United States to moneys alleged to have been collected by a clerk of a district court of the United States as fees or emoluments of his office, and the scope of his duty to account semiannually for the same to the Attorney General, so as to fix, if any there was, the surplus due to the United States after paying the expenses of the clerk's office and the clerk's salary, as fixed by law, is the general subject here arising for consideration. Rev. Stat. §§ 833, 839, 844, Comp. Stat. §§ 1394, 1404, 1414, 4 Fed. Stat. Anno. 2d ed. pp. 699, 703, 707; Act of June 28, 1902, 32 Stat. at L. 475, 476, chap. 1301.

[199] The controversy originated by a suit commenced by the United States against the defendant in error as clerk of the district court of the United States for the northern district of Illinois, eastern division, and the surety on his official bond, to recover $3,861.05. The right to the relief was based upon averments that, during the period from December 27, 1905, to January 27, 1910, the clerk had collected the sum named as interest on the average daily balances of his bank accounts resulting from the deposit by him of the fees and emoluments of his office and of moneys placed by litigants with him to meet payments for costs or otherwise which they might lawfully be required to make during the course of the litigation.

It was further alleged that although the interest thus received constituted a fee or emolument of the office of the clerk, or money held in trust by him for the United States, for the receipt of which he was bound by law semiannually to account, he had failed to do so, and was therefore liable.

By plea the defendants admitted the collection by the clerk of the amount sued for as interest on the average daily balances of his bank accounts, made up, as alleged, of moneys derived from fees and emoluments and deposits by litigants under the rules or orders of court. The plea averred that, as required by law, the clerk had made his semiannual accountings in which, although he did not charge himself with the interest allowed him on his bank balances as stated, he had charged himself with every item constituting a fee or emolument of his office, from whatever source due, and after debiting the charge thus made with the proper proportion of his salary and the expenses of his office, had turned the balance, if any there was, into the Treasury of the United States. There was annexed to the plea a copy of the rules of court relating to the placing by litigants of money with the clerk, and the plea alleged that whenever, out of such money, any [200] charge, whether for a fee or emolument or otherwise, became due, it was at once paid, so that the amount of that deposit always solely represented money belonging to and held for the account of the depositing litigant to meet payments due by him which might thereafter arise.

To this plea the United States demurred as stating no defense, and, after hearing, its demurrer was overruled. In consequence of an election by the United States to plead no further, the case was submitted for judgment on the petition and plea.

At that time the court had under advisement eight other cases involving the questions arising in this, five being suits by the United States against the clerks of other United States courts, and three, in addition to this, being against the clerk who is defendant here, covering interest collected for different periods. The court disposed of the nine cases in one opinion. It held that as there was no contention as to a default by the clerk concerning any money deposited with him by litigants, that subject would be put out of view. Carefully considering the pleadings, it held that the claim of the United States to the interest rested upon one or the other of two propositions: (1) that the money deposited by the clerk, and upon which the interest was allowed, was public moneys of the United States, and therefore the interest belonged to the United States; (2) that without reference to whether the deposits were public moneys, the interest paid was an emolument for which the clerk was bound to account. Elaborately considering these questions the court decided both against the United States.

Reviewing on error one of the cases against this defendant which was de-

cided, as we have seen, by the trial court along with this, the circuit court of appeals affirmed the trial court in a brief per curiam opinion in which it approved the analysis of the case as made by the trial court, and concurred in holding decisive the cases in this [201] court which the trial court relied upon. Subsequently, when the case now before us came to be heard, the ruling in the case just stated was applied to this, and the judgment was therefore also affirmed.

In argument here it is suggested by the United States that, as the defendant clerk was, by exceptional legislation, an officer whose salary was specifically appropriated for (Acts of July 31, 1894, 28 Stat. at L. 162, 204, chap. 174, Comp. Stat. § 57, 2 Fed. Stat. Anno. 2d ed. p. 510; March 2, 1895, 28 Stat. at L. 764, 806, chap. 177; August 24, 1912, 37 Stat. at L. 417, 465, chap. 355, Comp. Stat. § 1407, 4 Fed. Stat. Anno. 2d ed. p. 705), therefore the principles passed upon below are not necessarily decisive. But, aside from the disregard of the admissions resulting from the pleadings which the suggestion involves, and the entire absence of even an intimation that such a contention was raised in either of the courts below, we put the belated suggestion out of view, since, as it is not disputed that the defendant clerk was under obligation to meet the expenses of his office from the fees and emoluments thereof, and to pay over to the United States only the surplus resulting, we think the distinction assumed to arise from the proposition stated makes no difference in the application of the principles which the court below held to be conclusive, and the soundness of which we are now therefore required to pass upon.

As we agree with the lower court that the two propositions decided by the trial court embraced the whole case, we are thus brought, first, to determine whether the fees and emoluments collected by the clerk and deposited by him in bank, and upon which interest was allowed him, were public moneys of the United States, thus entitling the United States to the interest as an increment of its ownership. That it was not is so completely foreclosed as to cause it to be only necessary to consider the previous ruling on the subject.

In United States v. Mason, 218 U. S. 517, 54 L. ed. 1133, 31 Sup. Ct. Rep. 28, the court was called upon to determine the validity of the action of a [202] circuit court of the United States in quashing three indictments against the clerk of a circuit court of the United States for the "embezzlement of certain moneys of the United States," which moneys were a portion of the surplus of fees and emoluments of his office over and above the compensation and allowances authorized by law to be retained by him. The indictments were based, and the sole reliance to sustain them and thus reverse the court below was rested, upon §§ 5490 and 5497, Revised Statutes (Comp. Stat. §§ 10,257, 10,265), with the amendments made by the Act of February 3, 1879, chap. 42, 20 Stat. at L. 280, Comp. Stat. § 10,265, each of which sections exclusively dealt with embezzlement of "public moneys." Whether, therefore, the particular moneys which were there in question, being derived from fees and emoluments of the clerk, were public moneys, required necessarily to be decided. Reviewing historically the legislation covering clerks of courts of the United States, which had been previously recapitulated in United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510, it was pointed out, first, that originally clerks of courts were not salaried, but were remunerated by the right to collect and retain established fees and emoluments, and that under such legislation the sums collected by the clerks were in no sense public moneys of the United States, but were moneys of the clerks, held by them in their personal capacity in payment for their official services.

Coming to state the evolution in the situation by which in time it came to pass that a limit was placed on the amount of compensation which a clerk should annually receive, and consequently making it his duty to account for his fees and emoluments, and to turn over to the United States the surplus, if any, remaining after the payment of his compensation and the expenses of his office, the court observed (pp. 523, 524):

"The plain object of this statute was to limit the amount which the clerk was to retain and to require an accounting, an audit of expenses, and a payment of the surplus. Otherwise [203] the established method of administering the office was not changed. The fees were to be recovered as theretofore; and to the extent of the amount of the fixed compensation of the clerk and the necessary expenses of his office, he was entitled to use and to pay as formerly. The statute suggests no other course. What, if anything, should be paid into the public treasury at the end of the half year, when he had to make his return, de-

pended upon the amount of the fees, the amount of the expenses, and the result of the audit. If his fixed compensation and his necessary expenses exhausted the fees, there would be nothing to pay. The amount payable was to be determined when the return was made."

Testing the possible application of the statutes dealing with the embezzlement of public moneys to the rights and duties of a clerk to collect the fees and emoluments of his office and to make use of them as authorized by law, it was pointed out that such application could not be made because of the incompatibility between the powers and duties of the clerk, on the one hand, and the provisions of the statutes relied upon, on the other. This incongruity was aptly illustrated by the statement which follows, dealing with the duties of the clerk and the impossibility of applying to them the prohibitions of one of the statutes in question (p. 525):

"They lay outside of the prohibition of § 16 against loaning, using, converting to his own use, depositing in banks, and exchanging for other funds, for it was upon these fees that the clerk depended for his livelihood and for the payment of the expenses of his office, subject only to the duty twice a year to make his accounting and to pay over the surplus if the fees exceeded the total amount allowed him."

Again marking the broad line which lay between public money and the clerk's fees and emoluments and his right to collect and disburse the same, the court declared (p. 529):

"There has thus been established a distinct system with [204] respect to the fees and emoluments of the clerks. Its features are to be explained by the history of the clerk's office and the requirements of its convenient administration. It is urged that the fees and emoluments are attached to the office, and are received in an official capacity. This consideration, however, does not aid the prosecution, for they were attached to the office before the Statute of 1841, when they belonged to the clerk without any duty on his part to account for any portion of them."

And once more emphasizing the distinction it was said (p. 531):

"The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties: and with respect to the amount payable when the return is made, the clerk is not trustee but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent."

Indeed, the decisive principles which were thus announced in the Mason Case were but a reiteration and application of the general doctrine on the subject announced in United States v. Hill, 123 U. S. 681, 31 L. ed. 275, 8 Sup. Ct. Rep. 308, where it was in express terms pointed out that "a clerk of a court of the United States collects his taxable compensation, not as the revenue of the United States, but as fees and emoluments of his office, with the obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law."

Conclusively disposing, as these cases do, of the contention of the government as to public moneys of the United States, it leaves only for consideration the question of whether the interest on the sum of the fees and emoluments deposited by the clerk in bank was, in and of itself, an emolument for which he was liable to account. But that [205] question is virtually also foreclosed in view of what was held in the Mason Case, since the individual character of the bank deposit as there defined and the right to make it necessarily causes the increment of such deposit, that is, the interest, to partake of the character of the principal. And besides, aside from the ruling in the Mason Case, it had been previously held that a sum collected by a clerk for a service not pertaining to his office or provided for in the schedule of fees allowed him for official services was not a fee or emolument in the sense of the statute. United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510.

Although at the outset we eliminated from consideration liability for interest on money of litigants deposited with the clerk under the rules of court, because not embraced in the claim of money or property of the United States upon which all the government contentions here rest, in leaving the case we observe that the question of the liability of the clerk to pay interest to litigants on money deposited by them is, in a large degree, covered by the rules of court annexed to the plea, which permit, in the cases specified, an application of a litigant to the court to direct the allowance of such interest and to provide for

its payment by the clerk when the request is granted.

In conclusion we direct attention, as was done in the Mason Case and as did the trial court in this case, to the incompatibility which would result, on the one hand, from enforcing an absolute obligation on the part of the clerk to account for all the fees and emoluments of the clerk's office, whether collected or not, as well as his duty to defray the expenses of his office out of such revenue, and the upholding, on the other hand, of the conflicting theory that the fees and emoluments were public moneys, and the power of the clerk to deal with them accordingly limited.

Affirmed.

Mr. Justice **Pitney** and Mr. Justice **Clarke** dissent.

---

[206] FORT SMITH & WESTERN RAILROAD COMPANY and Superior Savings & Trust Company, Trustee, Appts.,

v.

ARTHUR L. MILLS, Receiver of the Fort Smith & Western Railroad Company, and J. Virgil Bourland, United States District Attorney.

(See S. C. Reporter's ed. 206-209.)

Master and servant — hours — wages — operation by receiver — agreement — Adamson Law.

Nothing in the provisions of the Adamson Act of September 3, 5, 1916, fixing a permanent eight-hour standard working day for employees engaged in the operation of trains upon interstate railway carriers, and temporarily regulating the wages of such employees, forbids the operation of an insolvent road under an agreement between receiver and employees for a lesser wage, which agreement the employees desire to keep.

[No. 42.]

Argued December 13, 1917. Decided June 1, 1920.

APPEAL from the District Court of the United States for the Western District of Arkansas to review a decree which dismissed the bill in a suit to enjoin the receiver of a railway from conforming to the Adamson Act in respect of hours of service and wages, and to enjoin the Federal district attorney from proceeding to enforce that act. Reversed.

The facts are stated in the opinion.

Mr. **A. C. Dustin** argued the cause, and, with Mr. James B. McDonough, filed a brief for appellants.

Assistant Attorney General **Frierson** argued the cause, and, with Messrs. S. Milton Simpson and Alex Koplin, filed a brief for appellees.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity, brought by the Fort Smith & Western Railroad Company and the trustee of a mortgage given to secure bonds of that road, to enjoin the receiver of the road from conforming to the Act of September 3, 5, 1916, chap. 436, 39 Stat. at L. 721, Comp. Stat. § 8680a, Fed. Stat. Anno. Supp. 1918, p. 754, in respect of hours of service and wages, and to enjoin the district attorney of the United States from proceeding to enforce the act. The bill alleges [207] that the physical property is worth over $7,000,000, but that no dividends ever have been paid upon the stock, that no interest has been paid upon the bonds since October 1, 1907, and that there is a yearly deficit in the earnings of the road. The receiver was appointed in proceedings to foreclose the mortgage. The bill further alleges that the railroad now (1917) is being carried on under an agreement with the men which the men desire to keep, but that the receiver, yielding to the threats of the district attorney to prosecute him unless he does so, purposes to substitute the much more onerous terms of the act. It is set up that the act, if construed to apply to this case, is void under the 5th Amendment to the Constitution. The bill was dismissed by the district court, on motion, for want of equity, and the plaintiffs appealed.

The act in question, known as the Adamson Law, was passed to meet the emergency created by the threat of a

---

Note.—On construction, applicability, and effect of hours of service laws—see notes to Great Northern R. Co. v. United States, L.R.A.1915D, 408; and Northern P. R. Co. v. United States, L.R.A.1917A, 1202.

On constitutionality of legislative limitations of hours of labor—see notes to Atkin v. Kansas, 48 L. ed. U. S. 148; Miller v. Wilson, L.R.A.1915F, 829; Ex parte Wong Wing, 51 L.R.A.(N.S.) 361; People v. Elerding, 40 L.R.A. (N.S.) 893; Withey v. Bloem, 35 L.R.A. (N.S.) 628; Ex parte Martin, 26 L.R.A. (N.S.) 242; and People v. Orange County Road Constr. Co. 65 L.R.A. 33.

general railroad strike. It fixed eight hours as a day's work, and provided that for some months, pending an investigation, the compensation of employees of railroads subject to the Act to Regulate Commerce should not be "reduced below the present standard day's wage," and that time in excess of eight hours should be paid for pro rata at the same rate. The time has expired long since, but the rights of the parties require a decision of the case.

In Wilson v. New, 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E, 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024, it was decided that the act was within the constitutional power of Congress to regulate commerce among the states; that since, by virtue of the organic interdependence of different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped, Congress could meet the danger of such a stoppage by legislation, and that, in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not, of itself alone, show a taking of property without due process of law. It was [208] held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature; and that the expenditure required was not necessarily unconstitutional because it took the form of requiring the railroads to pay more, as it might have required the men to take less, during the short time necessary for an investigation ordered by the law.

But the bill in Wilson v. New raised only the general objections to the act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss. See Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, ante, 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183. It was not decided that there might not be circumstances to which the act could not be applied consistently with the 5th Amendment, or that the act, in spite of its universal language, must be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees subject to this act. But the statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required, or to have been intended to make trouble rather than to allay it. We cannot suppose that it was meant to forbid work being done at a less price than the rates laid down, when both parties to the bargain wished to go on as before, and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads.

But that is the present case. An insolvent road had succeeded in making satisfactory terms with its men, [209] enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allegations of the bill, and must assume that the men were not merely negatively refraining from demands under the act, but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic, and not at all within the ends that the Adamson Law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which, the law was passed, import an exception in a case like this.

Decree reversed.

Mr. Justice **Day**, Mr. Justice **Van Devanter**, Mr. Justice **Pitney**, and Mr. Justice **McReynolds** agree with this decision limiting the effect of the Adamson Law as stated, but adhere to the views concerning the constitutionality of the act, expressed by them in Wilson v. New.

UNITED STATES OF AMERICA EX REL. JENNIE JOHNSON et al., Plffs. in Err.,
v.
JOHN BARTON PAYNE, Secretary of the Interior.

(See S. C. Reporter's ed. 209-211.)

Mandamus — to Secretary of Interior — Indian enrolment.

The Secretary of the Interior cannot be compelled by mandamus to place upon the rolls of the Creek Nation the names of certain persons who, on the last day

Note.—As to when mandamus is the proper remedy, generally—see notes to

fixed by statute for the final completion of the rolls, he decided, reversing his prior decision without notice to the Indians, should be excluded from the rolls, with a direction that if they were already on the rolls, which was not the case, they should be stricken off.

[For other cases, see Mandamus, II. d. 4, in Digest Sup. Ct. 1908.]

[No. 291.]

Argued April 29, 1920. Decided June 1, 1920.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing a petition for mandamus to compel the Secretary of the Interior to place certain names upon the rolls of the Creek Nation. Affirmed.

See same case below, 48 App. D. C. 169.

The facts are stated in the opinion.

Mr. **Charles H. Merillat** argued the cause, and, with Mr. W. C. Franklin, filed a brief for plaintiffs in error:

Has there been due process and equal protection of the laws where rights are upset without notice or hearing, and by an arbitrary blanket order?

United States ex rel. Lowe v. Fisher, 223 U. S. 95, 56 L. ed. 364, 32 Sup. Ct. Rep. 196; Garfield v. United States, 211 U. S. 249, 264, 53 L. ed. 168, 176, 29 Sup. Ct. Rep. 62, 67; United States v. Wildcat, 244 U. S. 115, 61 L. ed. 1031, 37 Sup. Ct. Rep. 561; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; Wulzen v. San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; Re Hatch, 11 Jones & S. 89; Zeigler v. South & North Ala. R. Co. 58 Ala. 594; Dreyfus v. Montgomery, 4 Ala. App. 270, 58 So. 731; Davis v. Florida Power Co. 64 Fla. 247, 60 So. 759, Ann. Cas. 1914B, 965, 5 N. C. C. A. 926; Wynehamer v. People, 2 Park. Crim. Rep. 421; Wright v. Cradlebaugh, 3 Nev. 341; Orchard v. Alexander, 157 U. S. 381–383, 39 L. ed. 740, 741, 15 Sup. Ct. Rep. 635; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; Knapp v. Alexander-Edgar Lumber Co. 237 U. S. 162, 59 L. ed. 894, 35 Sup. Ct. Rep. 515.

Plaintiffs in error are entitled to mandamus by reason of a clear error of law of the Secretary in hastily holding that, in the Creek Nation, applicants on the Creek rolls were estopped, if denied under the Act of 1896, to apply under the Curtis Act of 1898 and the later Creek agreement. The Curtis Act plainly superseded the earlier act, and opened up enrolments de novo.

United States v. Wildcat, 244 U. S. 115, 61 L. ed. 1031, 37 Sup. Ct. Rep. 561.

One of the chief purposes of mandamus is for the courts to correct abuses where there has been an arbitrary act or procedure by an administrative officer that results in a failure of equal administration of equal laws, rules, or practice.

United States v. Billings, 190 Fed. 363; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Sheldon v. Hoyne, 261 Ill. 225, 103 N. E. 1021; Illinois State Dental Examiners v. People, 123 Ill. 241, 13 N. E. 201.

Assistant Attorney General **Nebeker** argued the cause, and, with Special Assistant to the Attorney General Underwood, filed a brief for defendant in error:

The question of enrolment was one coming within the jurisdiction of the Secretary of the Interior. The plaintiffs in error invoked that jurisdiction, and their complaint at heart is of the finding that they should not be enrolled. Until enrolment, the proceedings were in fieri, and the matter was one calling for the exercise of judgment and discretion. That mandamus will not lie in such case is well settled.

United States ex rel. Ness v. Fisher, 223 U. S. 683, 691–694, 56 L. ed. 610, 612–614, 32 Sup. Ct. Rep. 356; Louisiana v. McAdoo, 234 U. S. 627, 633, 58 L. ed. 1506, 1509, 34 Sup. Ct. Rep. 938.

Mandamus confers no new authority; the party to be coerced must have power to perform the act.

United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

On the power of courts to enforce ministerial duties of heads of departments—see note to Cooke v. Iverson, 52 L.R.A.(N.S.) 415.

Reeside v. Walker, 11 How. 272, 288, 289, 13 L. ed. 693, 699, 700; Taxing Dist. v. Loague, 129 U. S. 493, 501, 32 L. ed. 780, 783, 9 Sup. Ct. Rep. 327; United States ex rel. Boynton v. Blaine, 139 U. S. 306, 319, 35 L. ed. 183, 187, 11 Sup. Ct. Rep. 607; Missouri ex rel. Laclede Gaslight Co. v. Murphy, 170 U. S. 78, 95, 42 L. ed. 955, 962, 18 Sup. Ct. Rep. 505; United States ex rel. Siegel v. Board of Liquidation, 20 C. C. A. 622, 41 U. S. App. 414, 74 Fed. 492.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a petition for a writ of mandamus to require the Secretary of the Interior to place the names of the petitioners upon the rolls of the members of the Creek Nation. The petition was dismissed by the supreme court of the District of Columbia, and the judgment was affirmed by the court of appeals. We are not called upon to consider the antecedent facts of the petitioners' case, as all that is material can be stated in a few words. Rights as a member of the Nation depend upon the approved rolls. March 4, 1907, was fixed by statute as the time when the rolls were to be completed by the Secretary of the Interior, and his previously existing jurisdiction to approve enrolment then ceased. Act of April 26, 1906, chap. 1876, § 2, 34 Stat. at L. 137, 138, 3 Fed. Stat. Anno. 2d ed. pp. 861, 862. Before that date the petitioners had on file an application for enrolment, hearings had been had before the proper tribunal, a favorable report had been made to the Secretary, and the Secretary had written a letter to the Commissioner to the Five Civilized Tribes, saying, "Your decision is hereby affirmed." But on the last day, March 4, 1907, the Secretary addressed another communication to the same official, rescinding the former letter to [211] him, and reversing his decision. It was ordered that if the petitioners' names were on the rolls they should be stricken off. The Secretary gave no reasons for his action, but it is suggested that he acted under mistakes of law and fact, and it is argued that when the first letter was written the petitioners' rights were fixed.

The last is the only point in the case, and with regard to that it is argued that this reversal of the first decision without a hearing was a denial of due process of law. It is not denied that the Secretary might have declined to affirm the decision below in the first instance, and that having been his power, the only question is when it came to an end. While the case was before him he was free to change his mind, and he might do so none the less that he had stated an opinion in favor of one side or the other. He did not lose his power to do the conclusive act, ordering and approving an enrolment (Garfield v. United States, 211 U. S. 249, 53 L. ed. 168, 29 Sup. Ct. Rep. 62), until the act was done (New Orleans v. Paine, 147 U. S. 261, 266, 37 L. ed. 162, 163, 13 Sup. Ct. Rep. 303; Kirk v. Olson, 245 U. S. 225, 228, 62 L. ed. 256, 259, 38 Sup. Ct. Rep. 114). The petitioners' names never were on the rolls. The Secretary was the final judge whether they should be, and they cannot be ordered to be put on now, upon a suggestion that the Secretary made a mistake, or that he came very near to giving the petitioners the rights they claim.

Judgment affirmed.

---

[212] FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased, Petitioner,

v.

DUBOIS ELECTRIC COMPANY.

(See S. C. Reporter's ed. 212-216.)

Jury — right to trial by — reversal without ordering a new trial.

1. A Federal circuit court of appeals may not reverse the judgment below, entered on a verdict for plaintiff in a personal-injury action, without ordering a new trial.

[For other cases, see Jury, I. d, in Digest Sup. Ct. 1908.]

Negligence — dangerous premises — absence of contract relation with injured person.

2. The absence of any contract relation between one who suspends a banner across a city street and travelers in the street below does not relieve him from the duty to use reasonable care to protect such travelers from injury resulting from his act.

[For other cases, see Negligence, II. c, 1, in Digest Sup. Ct. 1908.]

Negligence — dangerous premises — surrender of control.

3. When a dangerous condition has been called fully into existence by a per-

---

Note.—As to constitutional right of trial by jury—see notes to Thompson v. Utah, 42 L. ed. U. S. 1061; Perego v. Dodge, 41 L. ed. U. S. 113; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727; Eilenbecker v. District Ct. 33 L. ed. U. S. 801; and Justices of Supreme Ct. v. United States, 19 L. ed. U. S. 658.

son, he cannot escape liability for an injury, the result of such condition, which he alone knew, had created, and had arranged to have continue, merely by surrendering control shortly before the accident.

[For other cases, see Negligence, II. c, 1, in Digest Sup. Ct. 1908.]

Negligence — dangerous premises — surrender of control.

4. One who, at the request of a member of a political party, suspends a political banner across a city street, cannot be said, as matter of law, to have surrendered control so as to relieve him from liability for an injury to a person, due to the negligent way in which the banner was suspended, where there was evidence which, if believed, warranted the finding that he also undertook the care of the banner while it was up.

[For other cases, see Negligence, II. c, 1, in Digest Sup. Ct. 1908.]

Appeal — reversible error — allowance of amendment.

5. The allowance of an amendment to the declaration after the Statute of Limitations had run is not error, where the original declaration was sufficient, and the amendment plainly left the cause of action unchanged.

[For other cases, see Appeal and Error, VIII. m, 2, in Digest Sup. Ct. 1908.]

[No. 300.]

Argued March 25 and 26, 1920. Decided June 1, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which, on a second writ of error, reversed a judgment of the District Court for the Western District of Pennsylvania in favor of plaintiff in a negligence action. Reversed, and judgment of District Court affirmed.

See same case below, 165 C. C. A. 668, 253 Fed. 987.

The facts are stated in the opinion.

Mr. **Charles Alvin Jones** argued the cause, and, with Messrs. Allen J. Hastings, James R. Sterrett, and M. W. Acheson, Jr., filed a brief for petitioner:

The judgment of reversal without a direction for a new trial was error.

Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; Myers v. Pittsburgh Coal Co. 233 U. S. 184, 189, 58 L. ed. 906, 909, 34 Sup. Ct. Rep. 559; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 153, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.

The question of control was for the jury.

Philadelphia v. Stewart, 201 Pa. 526, 51 Atl. 348; M'Farland v. Newman, 9 Watts, 59, 34 Am. Dec. 497; Sidwell v. Evans, 1 Penr. & W. 386, 21 Am. Dec. 387; Sea Ins. Co. v. Johnston, 44 C. C. A. 477, 105 Fed. 292.

The parties' own interpretation of their contract is entitled to great, if not controlling, weight.

Topliff v. Topliff, 122 U. S. 121, 131, 30 L. ed. 1110, 1114, 7 Sup. Ct. Rep. 1057; Gillespie v. Iseman, 210 Pa. 5, 59 Atl. 266; Kendall v. Klapperthal Co. 202 Pa. 609, 52 Atl. 92.

The evidence fully justified the jury in finding the defendant still in control at the time plaintiff's decedent was hurt.

Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; Smith v. Elliott, 9 Pa. 347; Gray v. Boston Gaslight Co. 114 Mass. 149; Scullin v. Dolan, 4 Daly, 163.

To extend the rule relieving an independent contractor, as contended for by the defendant, where the contractor remains in a position to correct his wrong prior to an injury therefrom, would be to carry it to an unjustifiable limit.

Young v. Smith & K. Co. 124 Ga. 475, 110 Am. St. Rep. 186, 52 S. E. 765, 4 Ann. Cas. 226, 19 Am. Neg. Rep. 132; Pennsylvania Steel Co. v. Elmore & H. Contracting Co. 175 Fed. 180; Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 367, 94 C. C. A. 369, 169 Fed. 1, 21 Am. Neg. Rep. 311; Smith v. Elliott, 9 Pa. 346.

The character of the work undertaken by the defendant is immaterial. A corporation is liable for its ultra vires torts.

Chesapeake & O. R. Co. v. Howard, 178 U. S. 153, 44 L. ed. 1015, 20 Sup. Ct. Rep. 880; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588; Hannon v. Siegel-Cooper Co. 167 N. Y. 244, 52 L.R.A. 429, 60 N. E. 597, 5 Thomp. Corp. p. 225, § 5435.

The plaintiff's amendment did not change the cause of action, nor introduce a new one.

Stoner v. Erisman, 206 Pa. 600, 56 Atl. 77; Fricke v. Quinn, 188 Pa. 474, 41 Atl. 737; Rodrigue v. Curcier, 15 Serg. & R. 81; 1 Enc. Pl. & Pr. 563; Stewart v. Kelly, 16 Pa. 162, 55 Am. Dec. 487; Painter v. New River Mineral Co. 98 Fed. 548.

Mr. **W. C. Miller** argued the cause, and, with Mr. H. B. Hartswick, filed a brief for respondent:

Whether the action be in contract or in tort, and whether the evidence be writ-

ten or parol, it is the duty of the court to determine whether or not the evidence on the part of the plaintiff is sufficient, if believed by the jury, to establish the averments of fact.

Hyatt v. Johnston, 91 Pa. 200; McKnight v. Bell, 135 Pa. 372, 19 Atl. 1036; Burke v. Burke, 240 Pa. 387, 87 Atl. 960; Bannon v. Pennsylvania R. Co. 29 Pa. Super. Ct. 231; Howard Exp. Co. v. Wile, 64 Pa. 201; Lanning v. Pittsburg R. Co. 229 Pa. 575, 32 L.R.A. (N.S.) 1043, 79 Atl. 136; Codding v. Wood, 112 Pa. 371, 3 Atl. 455; Elliott v. Wanamaker, 155 Pa. 67, 25 Atl. 826; Peniston v. John Y. Huber Co. 196 Pa. 580, 46 Atl. 934; Erie Forge Co. v. Pennsylvania Iron Works Co. 22 Pa. Super. Ct. 550; Holmes v. Tyson, 147 Pa. 305, 15 L.R.A. 209, 23 Atl. 564; Wilkinson v. Stettler, 46 Pa. Super. Ct. 407; Maynes v. Atwater, 88 Pa. 496; 9 Cyc. 592, 786.

A party will not be permitted to shift his ground or enlarge his surface by introducing a new and different cause of action barred by the Statute of Limitations.

Philadelphia v. Hestonville, M. & F. Pass. R. Co. 203 Pa. 38, 52 Atl. 184; Mahoning v. Park Steel Co. 217 Pa. 20, 66 Atl. 90; Martin v. Pittsburg R. Co. 227 Pa. 18, 26 L.R.A.(N.S.) 1221, 75 Atl. 837, 19 Ann. Cas. 818; Lane v. Sayre Water Co. 220 Pa. 599, 69 Atl. 1126; Grier v. Northern Assur. Co. 183 Pa. 334, 39 Atl. 10; Card v. Stowers Pork Packing & Provision Co. 253 Pa. 575, 98 Atl. 728; Noonan v. Pardee, 200 Pa. 474, 55 L.R.A. 410, 86 Am. St. Rep. 722, 50 Atl. 255, 21 Mor. Min. Rep. 517; Bank of Mifflintown v. Bank of New Kensington, 247 Pa. 40, 92 Atl. 1076.

[213] Mr. Justice Holmes delivered the opinion of the court:

This is an action begun by Pancoast, to recover for personal injuries, and continued after his death by the petitioner as ancillary administrator. At a former trial the plaintiff had a verdict, but it was set aside and a new trial ordered by the circuit court of appeals. L.R.A. 1917C, 907, 151 C. C. A. 205, 238 Fed. 129, 132. At the new trial the plaintiff again got a verdict and judgment, but the circuit court of appeals set them aside, this time simply reversing the judgment without ordering a new trial. 165 C. C. A. 668, 253 Fed. 987. An opportunity was allowed to that court to correct the error, and as it was not corrected, the present writ of certiorari was granted. 249 U. S. 606, 597, 63 L. ed. 799, 795, 39 Sup. Ct. Rep. 290, 388. Of course, if the judgment of the circuit court of appeals was right on the merits, a new trial should have been ordered. Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; Myers v. Pittsburgh Coal Co. 233 U. S. 184, 189, 58 L. ed. 906, 909, 34 Sup. Ct. Rep. 559. But, as it has been necessary to direct the record to be certified up, it is necessary also to consider the merits of the case, and to determine whether the circuit court of appeals was right with regard to them.

Nothing turns upon the form of the pleadings. The evidence for the plaintiff was in conflict with that for the defendant upon important points, but we shall state the case as the jury might have found it to be if they believed the plaintiff's evidence, as the verdict shows they did. A member of a political party requested the defendant to suspend a political banner, which he furnished, across one of the principal streets in the borough of Dubois, between the Commercial Hotel and the Deposit National Bank. He asked the defendant to put it up, take it down after the election, and attend to it for him, saying that he did not want to have anything to do with it. The defendant put up the banner, at first suspending it by a [214] rope; but, the rope breaking, substituted for it a wire cable of the defendant's, and, the plaintiff says, did so without further orders. This cable was fastened on the hotel side by taking two turns round a chimney and clamping the end. The chimney stood 31 inches from the edge of the cornice over the street, was 21 inches square at the base, and had a tin flashing from the roof, inserted between the courses of brick two or three courses above the roof. According to the plaintiff's evidence the cable was attached above the flashing. The lower corners of the banner were attached to the buildings on their respective sides. Five days after the banner was suspended, the man who employed the defendant caused it to string electric lights along the wire, not otherwise interfering with the work. The same day, in the afternoon, the weather being stormy, the banner dragged the chimney over and a brick struck Pancoast on the head, making a comminuted fracture of the skull. The defendant put up the banner a third time after this fall, again, the plaintiff says, without further direction, and, when the election was over, took it down.

If these were the facts, and, except

with regard to the extent of the defendant's control, they could not be disputed, manifestly the verdict was warranted. It did not leave the defendant free from any duty to Pancoast and the other travelers in the street that they had no contract with it. An act of this kind, that reasonable care would have shown to endanger life, might have made the actor guilty of manslaughter, if not, in an extreme case, of murder. Rigmaidon's Case, 1 Lewin, C. C. 180. See Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; Com. v. Pierce, 138 Mass. 165, 178, 52 Am. Rep. 264, 5 Am. Crim. Rep. 291. The same considerations apply to civil liability for personal injuries from similar causes that would have been avoided by reasonable care. See Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. Rep. 324. A man is not free to introduce a danger [**215**] into public places, even if he be under no contract with the persons subjected to the risk.

It hardly is denied that there was evidence of negligence, but it was held by the circuit court of appeals that the defendant's relation to the work ceased when the banner was hung, that it had no further control over it, and was not liable for what happened thereafter. Of course, it is true that when the presence or absence of danger depends upon the subsequent conduct of the person to whom control is surrendered, the previous possessor may be exonerated when the control is changed. Curtin v. Somerset, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; Murphey v. Caralli, 3 Hurlst. & C. 462, 159 Eng. Reprint, 611, 34 L. J. Exch. N. S. 14, 10 Jur. N. S. 1207, 13 Week. Rep. 165; Thornton v. Dow, 60 Wash. 622, 32 L.R.A.(N.S.) 968, 111 Pac. 899; Glynn v. Central R. Co. 175 Mass. 510, 78 Am. St. Rep. 507, 56 N. E. 698, 7 Am. Neg. Rep. 442; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 48, 4 Am. St. Rep. 279, 15 N. E. 84. But how far this principle will be carried may be uncertain. Union Stock Yards Co. v. Chicago, B. & Q. R. Co. 196 U. S. 217, 223, 49 L. ed. 453, 455, 25 Sup. Ct. Rep. 226, 2 Ann. Cas. 525, 17 Am. Neg. Rep. 760. And when, as here, the danger had been called fully into existence by the defendant, it could not escape liability for the result of conditions that it alone knew, had created, and had arranged to have continue, by stepping out of the control a few days before the event came to pass. Harris v. James, 45 L. J. Q. B. N. S. 545, 35 L. T. N. S. 240; Todd v. Flight, 9 C. B. N. S. 377, 142 Eng. Reprint, 148, 30 L. J. C. P. N. S. 21, 7 Jur. N. S. 291, 3 L. T. N. S. 325, 9 Week. Rep. 145, 15 Eng. Rul. Cas. 329; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Godley v. Hagerty, 20 Pa. 387, 59 Am. Dec. 731; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620; Jackman v. Arlington Mills, 137 Mass. 277, 283; Daly v. Savage, 145 Mass. 38, 41, 1 Am. St. Rep. 429, 12 N. E. 841; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 49, 4 Am. St. Rep. 279, 15 N. E. 84.

But it could not be said, as matter of law, that the defendant had stepped out of control. The facts, in their legal aspect, probably were somewhat hazy. Presumably the tenant of the hotel simply permitted what was done, and had no other relation to it than such as might be imposed upon him by the law. Evidently the defendant handled the banner when it wanted to, and no one else [**216**] touched it. The defendant's employer, if he told the truth, not only did not intermeddle, but might be found to have expressly required the defendant to take the responsibility. All the probabilities are that such control as there was remained with the defendant. The defendant got more than it was entitled to when the jury were instructed that, even if the fall was due to negligence in putting up the banner, the defendant would not be liable unless, by arrangement, it had assumed a continuing duty to maintain the banner in a safe condition. The testimony on the two sides was contrasted, and it was left to the jury to say which they would believe.

As we have implied, we regard it as too plain for discussion that the plaintiff's evidence, if believed, warranted a finding that the defendant undertook the care of the banner while it was up. An effort is made to establish an error in allowing an amendment to the declaration after the Statute of Limitations had run. The declaration originally alleged negligence in the use of the chimney, and that the fall was due to the use of the chimney as alleged. The amendment alleged also that defendant maintained the banner. If any objection is open, it is enough to say that the original declaration was sufficient, and that the amendment plainly left the cause of action unchanged.

Judgment reversed.

Judgment of the District Court affirmed.

[217] JOHN W. LECRONE, Receiver of the Orinoco Company, Limited, Plff. in Err.,

v.

WILLIAM G. McADOO, Secretary of the Treasury.

(See S. C. Reporter's ed. 217-219.)

Abatement — by resignation of officer — substitution.

Mandamus proceedings against the Secretary of the Treasury abated when, that officer having resigned his office, his successor was not substituted as defendant within twelve months, which is the limit for substitution afforded by the Act of February 8, 1899, and the fact that the District of Columbia Code, § 1278, allows the petitioner to recover damages in the same proceeding, does not justify the retention of the petition to charge the Secretary personally, since the damages are only incident to the allowance of the writ.

[For other cases, see Abatement, II. d, in Digest Sup. Ct. 1908.]

[No. 304.]

Submitted April 26, 1920. Decided June 1, 1920.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing the petition in mandamus proceedings against the Secretary of the Treasury. Dismissed for want of jurisdiction.

See same case below, 48 App. D. C. 181.

The facts are stated in the opinion.

Mr. George N. Baxter submitted the cause for plaintiff in error.

Solicitor General **King** submitted the cause for defendant in error. Mr. W. Marvin Smith was on the brief.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a petition to the supreme court of the District of Columbia for mandamus to direct the Secretary of the Treasury to pay the amount of two certificates issued to the petitioner by the Secretary of State. The petitioner is receiver of the Orinoco Company, Limited. That company had claims for damages against the United States of Venezuela, which, with others, by agreement [218] between the two governments, the United States of America released upon receiving from the United States of Venezuela a certain sum in trust for the parties having the claims. By the Act of February 27, 1896, chap. 34, 29 Stat. at L. 32, Comp. Stat. § 6668, 2 Fed. Stat. Anno. 2d ed. p. 226, moneys so received are to be paid into the Treasury, and the Secretary of State is to "determine the amounts due claimants, respectively, . . . and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due." Each of such trust funds is declared to be "appropriated for the payment to the ascertained beneficiaries thereof of the certificates" provided for. The answer alleged that there were pending in the same supreme court two bills in equity, one by a private person and one by the Orinoco Company, Limited, asserting claims to the fund; that the respondent and petitioner both are parties to those proceedings, the petitioner having submitted to the jurisdiction; and that the petitioner should be limited to those proceedings and await the result of the decrees. The petitioner demurred. The demurrer was overruled and the petition was dismissed by the supreme court, and its judgment was affirmed by the court of appeals.

The theory of the answer seems to be that the purpose of the act of Congress was to appropriate a fund to the claim, and to transfer the claim to that fund, leaving the question of title open to litigation in the ordinary courts, as has been held in more or less similar cases. Butler v. Goreley, 146 U. S. 308-310, 36 L. ed. 984, 985, 13 Sup. Ct. Rep. 84, s. c. 147 Mass. 8, 12, 16 N. E. 734; United States v. Dalcour, 203 U. S. 408, 422, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58; Robertson v. Gordon, 226 U. S. 311, 317, 57 L. ed. 236, 239, 33 Sup. Ct. Rep. 105. See also Bayard v. United States, 127 U. S. 246, 32 L. ed. 116, 8 Sup. Ct. Rep. 1223. It is thought that Congress hardly can have sought to confer judicial powers upon the Secretary of State. United States v. Borcherling, 185 U. S. 223, 234, 46 L. ed. 884, 889, 22 Sup. Ct. Rep. 607. And as the certificates are not gifts, but are in recognition of outstanding claims (Williams v. Heard, 140 [219] U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885, reversing 146 Mass. 545, 16 N. E. 437), judicial action is supposed to be necessary for the final determination of the right. But we cannot consider that question or the other arguments upon the merits of the case, because, Mr. McAdoo having resigned the office of Secretary of the Treasury, his successor was not substituted within twelve months; which is the limit for such substitution fixed by the Act of February 8, 1899, chap.

121, 30 Stat. at L. 822, Comp. Stat. § 1594, 8 Fed. Stat. Anno. 2d ed. p. 953. It is said that the Code of the District of Columbia, § 1278, allows the petitioner to recover damages in the same proceeding, and that the petition should be retained to charge Mr. McAdoo personally. But, apart from other questions, the damages are only incident to the allowance of the writ of mandamus, and as that cannot be allowed, the whole proceeding is at an end. See Pullman Co. v. Knott, 243 U. S. 447, 451, 61 L. ed. 841, 843, 37 Sup. Ct. Rep. 428; Pullman Co. v. Croom, 231 U. S. 571, 577, 58 L. ed. 375, 377, 34 Sup. Ct. Rep. 182.

Writ of error dismissed.

CITY OF NEW YORK, Appt.,
v.
CONSOLIDATED GAS COMPANY OF NEW YORK et al.

(See S. C. Reporter's ed. 219-221.)

Appeal — final decree below.

1. An order of a Federal district court denying the application of a municipality to intervene in a suit by a gas company against the attorney general, the district attorney, and the state Public Service Commission, to enjoin the enforcement of state legislation fixing gas rates, is not of that final character which furnishes the basis for an appeal.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals — jurisdiction of trial court based on constitutional grounds.

2. An appeal having been taken to a circuit court of appeals in a case in which jurisdiction below was based upon constitutional grounds, and hence was not appealable to that court, and a final order having been made by the circuit court of appeals, the Federal Supreme Court has jurisdiction under the Judicial Code, § 241, to review the question of the jurisdiction of the circuit court of appeals.

[For other cases, see Appeal and Error, III. d, 2, in Digest Sup. Ct. 1908.]

Note.—As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302; Schlosser v. Hemphill, 49 L. ed. U. S. 1001; and Detroit & M. R. Co. v. Michigan R. Commission, 60 L. ed. U. S. 802.

On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605; and St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

Appeal — judgment — remanding for dismissal of appeal.

3. The proper course for the Federal Supreme Court on an appeal from a decree of affirmance made by a circuit court of appeals in a case wrongfully appealed to that court is to reverse the judgment of the circuit court of appeals and remand the case to that court, with directions to dismiss the appeal.

[For other cases, see Appeal and Error, 5481-5494, in Digest Sup. Ct. 1908.]

[No. 566.]

Argued April 22, 1920. Decided June 1, 1920.

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed an order of the District Court for the Southern District of New York, denying an application for leave to intervene. Reversed and remanded to the Circuit Court of Appeals with directions to dismiss the appeal to that court.

See same case below, 171 C. C. A. 669, 260 Fed. 1022.

Mr. **Vincent Victory** argued the cause, and, with Messrs. William P. Burr and John P. O'Brien, filed a brief for appellant:

The order of the district court denying as a matter of law, and not in the exercise of discretion, the motion of the city for intervention, is a final order.

Gumbel v. Pitkin, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. Rep. 616; Houghton v. Burden, 228 U. S. 161, 165, 57 L. ed. 780, 782, 33 Sup. Ct. Rep. 491; Minot v. Mastin, 37 C. C. A. 234, 95 Fed. 739; United States v. Philips, 46 C. C. A. 660, 107 Fed. 824; Central Trust Co. v. Chicago, R. I. & P. R. Co. 134 C. C. A. 144, 218 Fed. 336; Harry Bros. Co. v. Yaryan Naval Stores Co 135 C. C. A. 454, 219 Fed. 884.

Messrs. John P. O'Brien and Vincent Victory also filed a separate brief for appellant:

The making of this final order was a determination or adjudication of a substantial right against the appellant in such manner as to leave it no adequate relief except by recourse to an appeal.

Gay v. Hudson River Electric Power Co. 106 C. C. A. 643, 184 Fed. 689; Re Farmers' Loan & T. Co. 129 U. S. 206, 32 L. ed. 656, 9 Sup. Ct. Rep. 265; Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 373, 7 U. S. App. 266, 51 Fed. 561.

The right of the city to represent its inhabitants, and also its right to repre-

sent its own interest through its corporation counsel, is a substantial and constitutional right, entitled to the protection of the courts. The order appealed from impaired this substantial right of the city, and, therefore, it is a final order.

Central Trust Co. v. Chicago R. I. & P. R. Co. 134 C. C. A. 144, 218 Fed. 336; Odell v. H. Batterman Co. 138 C. C. A. 534, 223 Fed. 292; Gas & Electric Securities Co. v. Manhattan & Q. Traction Corp. 226 Fed. 625.

Mr. Charles D. Newton, Attorney General of New York, and Messrs. Wilber W. Chambers and Robert S. Conklin, filed a brief for Charles D. Newton as Attorney General.

Mr. John A. Garver argued the cause, and filed a brief for appellees:

The order appealed from is not subject to review.

Ex parte Cutting, 94 U. S. 14, 22, 24 L. ed. 49, 51; Credits Commutation Co. v. United States, 177 U. S. 311, 315, 44 L. ed. 782, 785, 20 Sup. Ct. Rep. 636; Re Leaf Tobacco Board of Trade, 222 U. S. 578, 581, 56 L. ed. 323, 32 Sup. Ct. Rep. 833; Re Engelhard & Sons Co. 231 U. S. 646, 58 L. ed. 416, 34 Sup. Ct. Rep. 258.

Memorandum opinion by direction of the court by Mr. Justice Day:

The Consolidated Gas Company of New York brought suit to enjoin the enforcement of the New York 80-cent gas law. The jurisdiction was invoked solely upon the ground that the rate was confiscatory, and hence violated constitutional rights of the company. The city of New York applied for leave to intervene as a party defendant in the action. The district judge denied the petition for intervention, stating that the Public Service Commission, the attorney general, and the district attorney properly represented private consumers; that the city had no interest in the litigation as a consumer; was not the governmental body which had fixed the rate, and was not charged with the duty of enforcing it. From the order denying the application to intervene, the city of New York prosecuted an appeal to the circuit court of [221] appeals; and the latter court affirmed the order of the district court.

The application was addressed to the discretion of the district court, and the order appealed from was not of that final character which furnished the basis for appeal. Ex parte Cutting, 94 U. S. 14, 22, 24 L. ed. 49, 51; Credits Commutation Co. v. United States, 177 U. S. 311, 315, 44 L. ed. 782, 785, 20 Sup. Ct. Rep. 636; Re Leaf Tobacco Board of Trade, 222 U. S. 578, 581, 56 L. ed. 323, 32 Sup. Ct. Rep. 833. As the jurisdiction of the district court was based upon constitutional grounds only, the case was not appealable to the circuit court of appeals. But, an appeal having been taken and a final order made in the circuit court of appeals, we have jurisdiction to review the question of jurisdiction of that court. Judicial Code, § 241 [36 Stat. at L. 1157, chap. 231, Comp. Stat. § 1218, 5 Fed. Stat. Anno. 2d ed. 877]; Union & Planters' Bank v. Memphis, 189 U. S. 71, 73, 47 L. ed. 712, 713, 23 Sup. Ct. Rep. 604.

The proper course is to reverse the judgment of the Circuit Court of Appeals, and remand the case to that court, with directions to dismiss the appeal. 443 Cans of Frozen Egg Product v. United States, 226 U. S. 172, 184, 57 L. ed. 174, 179, 33 Sup. Ct. Rep. 50; Carolina Glass Co. v. South Carolina, 240 U. S. 305, 318, 60 L. ed. 658, 664, 36 Sup. Ct. Rep. 293.

So ordered.

GEORGE S. HAWKE, Plff. in Err.,
v.
HARVEY C. SMITH, as Secretary of State of Ohio.

(See S. C. Reporter's ed. 221–231.)

Constitutional law — amendment of Federal Constitution — state referendum.

Referendum provisions of state Constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirement of article 5 of such Constitution, that such ratification shall be by the legislatures of the several states, or by

---

Note.—On initiative and referendum—see note to Hockett v. State Liquor Licensing Board, L.R.A.1917B, 15; and State ex rel. Davies v. White, 50 L.R.A. (N.S.) 195.

On ratification of amendments to Federal Constitution, or other acts of the state legislature, under provision of Federal Constitution, as subject to state referendum—see note to Re Opinion of Justices, 5 A.L.R. 1417.

conventions therein, as Congress shall decide.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

[No. 582.]

Argued April 23, 1920. Decided June 1, 1920.

IN ERROR to the Supreme Court of the State of Ohio to review a decree which affirmed a decree of the Court of Appeals of Franklin County, in that state, affirming a decree of the Court of Common Pleas of said county by which a demurrer was sustained to a petition seeking to enjoin the submission of a referendum to the electors on the question of the ratification which the general assembly had made of the proposed 18th Amendment to the Federal Constitution. Reversed and remanded for further proceedings.

See same case below, 100 Ohio St. 385, 126 N. E. 400.

The facts are stated in the opinion.

Mr. J. Frank Hanly argued the cause, and, with Messrs. George S. Hawke, Arthur Hellen, Charles B. Smith, James Bingham, and Remster A. Bingham, filed a brief for plaintiff in error:

The amendment of the Federal Constitution as to substance, form, and manner is exclusively a Federal question, and the right to participate therein is derived from and dependent upon the Federal Constitution.

Jameson, Const. Conventions, 4th ed. §§ 582, 583; Watson, Const. 1310; 33 Harvard L. Rev. 288.

The Constitution of the United States provides the manner of its own amendment, and the degree and manner in which the several states may participate therein.

Ibid.

The word "legislature," as used in article 5 of the Federal Constitution, means the general assembly of a state or representative lawmaking body chosen by the people.

Black, Interpretation of Laws, pp. 15, 16; Walker v. Cincinnati, 21 Ohio St. 53, 8 Am. Rep. 24; Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; Willoughby, Const. p. 20, § 20; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; The Federalist. 4 Elliot, Debates, 2d ed. 182, 183, 33 Harvard L. Rev. 288, 289.

The history of the Constitutional Convention and a study of its debates and those of the state conventions ratifying the Federal Constitution, and the general acceptance, use, and understanding of the word "legislature" at the time of the formulation and adoption of the Constitution, conclusively show that the makers of the Constitution intended to delegate the power of ratification to the general assemblies or representative lawmaking bodies of the several states, composed of members elected by the people of such states.

Adam's Works, vol. —, p. 508; Proceedings of Const. Convention, 1787; Madison's Journal, pp. 97, 111, 112, 199, 200, 365, 388, 410–416, 419, 421, 435, 542; McPherson v. Blacker, 146 U. S. 1, 28, 36 L. ed. 869, 874, 13 Sup. Ct. Rep. 3; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Journal, Const. Conventions, pp. 92, 190, 286, 288; 1 Elliot, Debates, pp. 156, 208, 211, 217, 262; 6 Am. & Eng. Enc. Law, 2d ed. 906, 6 (bb), note 3; Watson, Const. pp. 318–320; Chicago v. Reeves, 220 Ill. 288, 77 N. E. 237; State ex rel. Erkenbrecher v. Cox, 257 Fed. 334; Elliott's Journal, Const. Conventions, 145, 149, 182, 223, 230, 304, 317; 3 Elliot, Debates, pp. 49, 96, 97; 4 Elliot, Debates, 2d ed. 182, 183; 33 Harvard L. Rev. 288, 289; Weston v. Ryan, 70 Neb. 218, 97 N. W. 347, 6 Ann. Cas. 922.

Ratification of an amendment to the Federal Constitution is not a legislative act. The power of ratification is derived from Federal, and not from state, authority.

Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; 4 Elliot, Debates, 177, 404; Ohio Ops. Atty. Gen. 1917; Mathews' Legislative & Judicial History of 15th Amendment, p. 68; Jameson, Const. Conventions, 4th ed. § 583; 33 Harvard L. Rev. 288, 289; Re Opinion of Justices, 118 Me. 544, 5 A.L.R. 1412, 107 Atl. 673; State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 50 L.R.A. 568, 46 Atl. 505; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Willoughby, Const. 520, 521; 2 Watson, Const. 1318.

The people of a state cannot reserve the power to act in the matter of ratification of an amendment to the Federal Constitution because the states delegated all authority to amend the Federal Constitution to the Federal government, and now possess no power of ratification other than such as has

been redelegated to them by the Federal government, and are limited in the exercise of any such redelegated powers to the manner and form and the agencies designated by the Federal government in the national Constitution. The states cannot reserve what they do not possess.

Jameson, Const. Conventions, 4th ed. § 583; Harvard L. Rev. Dec. 1919; Re Opinion of Justices, 118 Me. 544, 5 A.L.R. 1412, 107 Atl. 673; State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 50 L.R.A. 568, 46 Atl. 505; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Willoughby, Const. 520, 521; 2 Watson, Const. 1318.

Under the Constitution, Congress alone may choose the mode of ratification, and is empowered to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

Thayer, Legal Essays, 7, 13; 33 Harvard L. Rev. 290.

Congress has acted in the matter of determining the manner of deciding the fact of ratification of amendments to the Constitution, and has designated the agency for such determination. Clothed with the sole power of such action, and having acted by the enactment of a statute providing the manner of ascertainment, and designating the authority for deciding the fact of ratification, its action is conclusive on the states and upon the courts.

Wambaugh, Cases on Const. Law, 26, notes 1, 2; 33 Harvard L. Rev. 290.

In the ratification of the amendment at bar, the authority designated by Congress, pursuing the manner of ascertainment of the fact of ratification provided for by Congress, has declared such fact, and, by proclamation duly made, included the state of Ohio in the list of ratifying states. And the Congress has not only acquiesced, but has approved the ascertainment of the fact of ratification and its proclamation, by affirmative action in the enactment of the Volstead Act for the amendment's enforcement, and its action is not the subject of judicial review.

Legal Tender Case, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122; Prize Cases, 2 Black. 635, 17 L. ed. 459; Oetjen v. Central Leather Co. 246 U. S. 297, 62 L. ed. 726, 38 Sup. Ct. Rep. 309; Ricaud v. American Metal Co. 246 U. S. 304, 62 L. ed. 733, 38 Sup. Ct. Rep. 312; Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Foster v. Neilson, 2 Pet. 253, 7 L. ed. 415; Re Cooper, 143 U. S. 472, 499, 36 L. ed. 232, 240, 12 Sup. Ct. Rep. 453; The James G. Swan, 50 Fed. 108; Miles v. Bradford, 22 Md. 170, 85 Am. Dec. 643; Lyons v. Woods, 153 U. S. 649, 38 L. ed. 854, 14 Sup. Ct. Rep. 959; State v. Septon, 3 R. I. 119; People v. Harlan, 133 Cal. 16, 65 Pac. 9; Cox v. Pitt County, 146 N. C. 584, 16 L.R.A.(N.S.) 253, 60 S. E. 516; 33 Harvard L. Rev. 291.

Executive and congressional construction covering a century and a third of history has conclusively established the meaning of the word "legislatures" in Article 5 of the Constitution to be the general assemblies of the several states, —the lawmaking bodies of such states, composed of individual members representative of, and elected by, the people of such respective states.

Jameson, Const. Conventions, 4th ed. §§ 582, 583; 2 Watson, Const. 1314, 1315; Wambaugh, Cases on Const. Law, 26, notes 1, 2.

The Federal Constitution is the supreme law of the land, and as such, the courts are bound to support it. Any provision in a state Constitution in conflict with or in contravention of the Federal Constitution is void.

Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Montgomery v. State, 55 Fla. 97, 45 So. 879; Jameson, Const. Conventions, 4th ed. § 583; State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848; State ex rel. Case v. Howell, 85 Wash. 281, 147 Pac. 1162; State ex rel. Case v. Howell, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440; State ex rel. Wineman v. Dahl, 6 N. D. 81, 34 L.R.A. 97, 68 N. W. 418; Martin v. Hunter, 1 Wheat. 304, 325, 4 L. ed. 97, 102; 4 Elliot, Debates, 176, 177; 2 Watson, Const. pp. 1310, 1315; Moulton v. Scully, 111 Me. 438, 89 Atl. 944; Herbring v. Brown, 92 Or. 176, 180 Pac. 328; Dodge v. Woolsey, 18 How. 331, 348, 15 L. ed. 401, 407.

Injunction against the calling of a referendum election on the act of the legislature of a state ratifying an amendment to the Federal Constitution is a proper remedy, and may be invoked

by a citizen who is a taxpayer and an elector.

State ex rel. Berry v. Superior Ct. 92 Wash. 16, 159 Pac. 92; State ex rel. McNary v. Olcott, 62 Or. 277, 125 Pac. 303; Rickey v. Williams, 8 Wash. 479, 36 Pac. 480; Krieschel v. Snohomish County, 12 Wash. 428, 41 Pac. 186; State ex rel. Halliburton v. Roach, 230 Mo. 408, 139 Am. St. Rep. 639, 130 S. W. 689; Crawford v. Gilchrist, 64 Fla. 41, 59 So. 964, Ann. Cas. 1914B, 916; State ex rel. Davies v. White, 36 Nev. 334, 50 L.R.A.(N.S.) 195, 136 Pac. 110; Speer v. People, 52 Colo. 325, 122 Pac. 768; Dodd, Revision & Amendment of State Const. p. 232; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281; Macon v. Hughes, 110 Ga. 804, 36 S. E. 247; De Kalb County v. Atlanta, 132 Ga. 727, 65 S. E. 72; Lynchburg & D. R. Co. v. Person County, 109 N. C. 159, 13 S. E. 783; Hood v. Sutton, 175 N. C. 98, 94 S. E. 686; Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136; Layton v. Monroe, 50 La. Ann. 121, 23 So. 99; Brown v. Trousdale, 138 U. S. 389, 34 L. ed. 987, 11 Sup. Ct. Rep. 308; Ellingham v. Dye, 178 Ind. 336, 99 N. E. 1; Tolbert v. Long, 134 Ga. 292, 137 Am. St. Rep. 222, 67 S. E. 826.

Messrs. Wayne B. Wheeler and James A. White filed a brief as amici curiæ:

There is no authority in the Federal Constitution for ratification of a Federal amendment except by the legislature of the state, or a convention chosen for that purpose, as one or the other method is designated by Congress.

Barlotti v. Lyons, — Cal. —, 189 Pac. 282; Decher v. Vaughan, — Mich. —, 177 N. W. 388; People ex rel. Bay City v. State Treasurer, 23 Mich. 506; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Herbring v. Brown, 92 Or. 176, 180 Pac. 328; Whittemore v. Terral, 140 Ark. 493, 215 S. W. 686; Prior v. Noland, — Colo. —, 188 Pac. 729; Re Opinion of Justices, 118 Me. 544, 5 A.L.R. 1412, 107 Atl. 673.

Mr. **Lawrence Maxwell** argued the cause, and, with Messrs. Judson Harmon and B. W. Gearheart, and Mr. John G. Price, Attorney General of Ohio, filed a brief for defendant in error:

The term "legislature" in art. 1, § 4, of the United States Constitution, comprehends the entire legislative power of the state; and, as so used, includes not only the two branches of the general assembly, but the popular will, as expressed in the referendum provided for in §§ 1 and 1a of art. 2 of the Ohio Constitution.

State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920.

Mr. Justice **Day** delivered the opinion of the court:

Plaintiff in error (plaintiff below) filed a petition for an injunction in the court of common pleas of Franklin county, Ohio, seeking to enjoin the secretary of state of Ohio from spending the public money in preparing and printing forms of ballot for submission of a referendum to the electors of that state on the question of the ratification which the general assembly had made of the proposed 18th Amendment to the Federal Constitution. A demurrer to the petition was sustained in the court of common pleas. Its judgment was affirmed by the court of appeals of Franklin county, which judgment was affirmed by the supreme court of Ohio, and the case was brought here.

A joint resolution proposing to the states this Amendment to the Constitution of the United States was adopted on the 3d day of December, 1917. The Amendment prohibits the manufacture, sale, or transportation of [225] intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes. The several states were given concurrent power to enforce the Amendment by appropriate legislation. The resolution provided that the Amendment should be inoperative unless ratified as an Amendment of the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission thereof to the states. The senate and house of representatives of the state of Ohio adopted a resolution ratifying the proposed Amendment by the general assembly of the state of Ohio, and ordered that certified copies of the joint resolution of ratification be forwarded by the governor to the Secretary of State at Washington and to the presiding officer of each House of Congress. This resolution was adopted on January 7, 1919; on January 27, 1919, the governor of Ohio complied with the resolution. On January 29, 1919, the Secretary of

State of the United States proclaimed the ratification of the Amendment, naming thirty-six states as having ratified the same, among them the state of Ohio.

The question for our consideration is: Whether the provision of the Ohio Constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the general assembly of proposed amendments to the Federal Constitution, is in conflict with article 5 of the Constitution of the United States. The Amendment of 1918 provides: "The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the Constitution of the United States." Article 5 of the Federal Constitution provides: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments [226] to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States. M'Culloch v. Maryland, 4 Wheat. 316, 402, 4 L. ed. 579, 600. The states surrendered to the general government the powers specifically conferred upon the nation, and the Constitution and the laws of the United States are the supreme law of the land.

The framers of the Constitution realized that it might, in the progress of time and the development of new conditions, require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the 5th article.

This article makes provision for the proposal of amendments either by two thirds of both Houses of Congress, or on application of the legislatures of two thirds of the states; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three fourths of the states, or by conventions in a like number of states. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for [227] action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

The 5th article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods: by action of the legislatures of three fourths of the states, or conventions in a like number of states. Dodge v. Woolsey, 18 How. 331, 348, 15 L. ed. 401, 407. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by *"legislatures?"* That was not a term 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 term is often used in the Constitution with this evident meaning. Article 1, § 2, prescribes the qualifications of electors of Congressmen as "those requisite for electors of the most numerous branch of the state legislature." Article 1, § 3, provided that Senators shall be chosen in each state by the legislature thereof, and this was the method of choosing Senators until the adoption of the 17th Amendment, which made [228] provision for the election of Senators by vote of the people, the electors to

have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the states understood that this election by the people was entirely distinct from legislative action is shown by the provision of the Amendment giving the legislature of any state the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the Amendment to accomplish the purpose of popular election is shown in the adoption of the Amendment. In article 4 the United States is required to protect every state against domestic violence upon application of the legislature, or of the executive when the legislature cannot be convened. Article 6 requires the members of the several legislatures to be bound by oath or affirmation, to support the Constitution of the United States. By article 1, § 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be. Article 4, § 3, provides that no new states shall be carved out of old states without the consent of the legislatures of the states concerned.

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states. Article 1, § 2.

The Constitution of Ohio in its present form, although [229] making provision for a referendum, vests the legislative power primarily in a general assembly consisting of a senate and house of representatives. Article 2, § 1, provides:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people reserve to themselves the power to propose to the general assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."

The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this,—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the 11th Amendment. Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval, in accordance with article 1, § 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing [230] the President with a qualified negative on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said: "There can surely be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution." The court by a unanimous judgment held that the amendment was constitutionally adopted.

It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented.

This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might lead

to endless confusion in the manner of ratification of Federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states.

But it is said this view runs counter to the decision of this court in Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708. But that case is inapposite. It dealt with article 1, § 4, of the Constitution, which provides that the times, places, and manners of holding elections for Senators and Representatives in each state shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. 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 [231] view to representation in Congress, was not unconstitutional. Article 1, § 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 follows that the court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state Constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

GEORGE S. HAWKE, Plff. in Err.,
v.
HARVEY C. SMITH, as Secretary of State of Ohio.

(See S. C. Reporter's ed. 231, 232.)

This case is governed by the decision in Hawke v. Smith, ante, 871.

[No. 601.]

Argued April 23, 1920. Decided June 1, 1920.

IN ERROR to the Supreme Court of the State of Ohio to review a decree which affirmed a decree of the Court of Appeals of Franklin County, in that state, affirming a decree of the Court of Common Pleas of said county by which a demurrer was sustained to a petition seeking to enjoin the submission of a referendum to the electors on the question of the ratification which the general assembly had made of the proposed 19th Amendment to the Federal Constitution. Reversed and remanded for further proceedings.

See same case below, — Ohio St. —, 127 N. E. 924.

The facts are stated in the opinion.

Mr. **J. Frank Hanly** argued the cause, and, with Messrs. George S. Hawke, Arthur Hellen, Charles B. Smith, James Bingham, and Remster A. Bingham, filed a brief for plaintiff in error:

The Ordinance of 1787 consists of three parts: First, the titles to estates; second, sections relating to temporary matters; third, six fundamental articles of compact expressly made permanent, to remain forever unalterable.

Hutchinson v. Thompson, 9 Ohio, 62.

That part of the Ordinance of 1787 containing the covenant or compact between the state of Virginia, the national government, and the people of the Northwest Territory, is still alive and binding upon the people inhabiting the states carved from such territory, and upon the states themselves; and any provision in the Constitution of any one of such states, in conflict with the provisions of the ordinance, is void.

Hogg v. Zanesville Canal & Mfg. Co. 5 Ohio, 416; Betts v. Wise, 11 Ohio, 219; Hutchinson v. Thompson, supra; Lyon v. Lyon, 1 Ohio C. C. N. S. 246; Cochran v. Loring, 17 Ohio, 425; State v. Boone, 84 Ohio St. 346, 39 L.R.A. (N.S.) 1015, 95 N. E. 924, Ann. Cas. 1912C, 683; Cox v. State, 3 Blackf. 193; Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245; Palmer v. Cuyahoga County, 3 McLean, 226, Fed. Cas. No. 10,688; Vaughan v. Williams, 3 McLean, 530, Fed. Cas. No. 16,903; Jolly v. Terre Haute Draw-Bridge Co. 6 McLean, 237, Fed. Cas. No. 7,441;

Note.—On initiative and referendum —see note to Hockett v. State Liquor Licensing Bd. L.R.A.1917B, 15; and State ex rel. Davies v. White, 50 L.R.A. (N.S.) 195.

On ratification of amendments to Federal Constitution, or other acts of the state legislature, under provision of Federal Constitution, as subject to state referendum—see note to Re Opinion of Justices, 5 A.L.R. 1417.

Williams v. Beardsley, 2 Ind. 596; Depew v. Wabash & E. Canal, 5 Ind. 8; Henthorn v. Doe, 1 Blackf. 157; Giddings v. Blacker, 93 Mich. 1, 16 L.R.A. 402, 52 N. W. 946; Phœbe v. Jay, Breese (Ill.) 208; Milwaukee Gaslight Co. v. The Gamecock, 23 Wis. 144, 99 Am. Dec. 138; Wisconsin River Improv. Co. v. Lyons, 30 Wis. 61; Atty. Gen. v. Eau Claire, 37 Wis. 400.

For other contentions of these counsel, see their brief as reported in Hawke v. Smith, ante, 871.

Messrs. Shippen Lewis, William Draper Lewis, and George Wharton Pepper filed a brief as amici curiæ:

"Legislatures" in article 5 means representative legislative assemblies.

Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

Ohio has a legislature within the accepted meaning of that word.

The state of Ohio cannot restrict the power of its legislature with respect to the ratification of Federal Amendments.

Ibid.; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

Messrs. Wayne B. Wheeler and James A. White also filed a brief as amici curiæ.

For their contentions, see their brief as reported in Hawke v. Smith ante, 871.

Mr. **Lawrence Maxwell** argued the cause, and, with Messrs. Judson Harmon and B. W. Gearheart, and Mr. John G. Price, Attorney General of Ohio, filed a brief for defendant in error.

For their contentions, see their brief as reported in Hawke v. Smith, ante, 871.

Mr. Justice **Day** delivered the opinion of the court:

This case presents the same question as that already decided in No. 582 [253 U. S. 221, ante, 871, — A.L.R. —, 40 Sup. Ct. Rep. 495], the only difference being that the amendment involved is the proposed 19th Amendment to the Constitution, extending the right of suffrage to women. The supreme court of Ohio, upon the authority of its decision in Hawke v. Smith (No. 582), held that the Constitution of the state, requiring such submission by a referendum to the people, did not violate article 5 of the Federal Constitution, and for that reason rendered a like judgment as in No. 582.

For the reasons stated in our opinion in No. 582, the judgment of the Supreme Court of Ohio must be reversed.

---

[233] E. A. GREEN, H. W. Voight, N. M. Christianson, and F. V. Woodworth, Plffs. in Err.,

v.

LYNN J. FRAZIER, Governor, William Langer, Attorney General, et al.

(See S. C. Reporter's ed. 233-243.)

Error to state court — scope of review — non-Federal question.

1. The validity of state statutes is a question, the decision of which by the highest state court is not open to review in the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2072-2226, in Digest Sup. Ct. 1908.]

Courts — relation to legislative department — taxing power.

2. When the constituted authority of the state undertakes to exert the taxing power, and the validity of its action is brought before the Federal Supreme Court, every presumption in its favor is indulged, and only clear and demonstrated usurpa-

---

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

tion of power will authorize judicial interference with legislative action.
[For other cases, see Courts, I. e, 3, c, in Digest Sup. Ct. 1908.]

Courts — relation to legislative department — taxing power.

3. Judicial interference with state tax legislation, the purpose of which has been declared by the people of the state, the legislature, and the highest state court to be of a public nature and within the taxing power of the state, cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated.
[For other cases, see Courts, I. e, 3, c, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — state taxation — public use.

4. State taxation to enable the state of North Dakota to carry out such enterprises as a state bank, a state warehouse, elevator, and flour mill system, and a state home building project, all of which have been sanctioned by united action of the people of the state, its legislature, and its courts, cannot be said to deny taxpayers the protection which the constitutional guaranty of due process of law affords against the taking of property for uses that are private.
[For other cases, see Constitutional Law, 445–449; Eminent Domain, 39–58, in Digest Sup. Ct. 1908.]

[No. 811.]

Argued April 19 and 20, 1920. Decided June 1, 1920.

IN ERROR to the Supreme Court of the State of North Dakota to review a decree which affirmed a decree of the District Court of Burleigh County, in that state, sustaining a demurrer to the complaint in a taxpayers' suit to enjoin enforcement of certain legislation. Affirmed.

See same case below, — N. D. —, 176 N. W. 11.

The facts are stated in the opinion.

Mr. **Thomas C. Daggett** argued the cause for plaintiffs in error.

Mr. **Frederick A. Pike** argued the cause for defendants in error.

Mr. Justice **Day** delivered the opinion of the court:

This is an action by taxpayers of the state of North Dakota against Lynn J. Frazier, governor, John N. [234] Hagan, commissioner of agriculture and labor, William Langer, attorney general, and Obert Olson, state treasurer, and the Industrial Commission of that state, to enjoin the enforcement of certain state legislation. The defendants Lynn J. Frazier, as governor, William Langer, as attorney general, and John Hagan, as commissioner of agriculture and labor, constitute the Industrial Commission, created by the Act of February 25, 1919, of the sixteenth legislative assembly of the state of North Dakota.

The laws involved were attacked on various grounds, state and Federal. The supreme court of North Dakota sustained the constitutionality of the legislation. So far as the decision rests on state grounds it is conclusive, and we need not stop to inquire concerning it. Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708. The only ground of attack involving the validity of the legislation which requires our consideration concerns the alleged deprivation of rights secured to the plaintiffs by the 14th Amendment to the Federal Constitution. It is contended that taxation under the laws in question has the effect of depriving plaintiffs of property without due process of law.

The legislation involved consists of a series of acts passed under the authority of the state Constitution, which are: (1) An act creating an Industrial Commission of North Dakota, which is authorized to conduct and manage, on behalf of that state, certain utilities, industries, enterprises, and business projects, to be established by law. The act gives authority to the Commission to manage, operate, control, and govern all utilities, enterprises, and business projects, owned, undertaken, administered, or operated by the state of North Dakota, except those carried on in penal, charitable, or educational institutions. To that end certain powers and authority are given to the Commission, among others: the right of eminent domain; to fix the buying price of things bought, [235] and the selling price of things sold incidental to the utilities, industries, enterprises, and business projects, and to fix rates and charges for services rendered, having in mind the accumulation of a fund with which to replace in the general funds of the state the amount received by the Commission under appropriations made by the act; to procure the necessary funds for such utilities, industries, enterprises, and business projects by negotiating the bonds of the state in such amounts and in such manner as may be provided by law. $200,000 of the funds of the state are appropriated to carry out the provisions of the act. (2) The Bank of North Dakota Act, which establishes a bank under the name of "The Bank of North Dakota," op-

erated by the state. The Industrial Commission is placed in control of the operation and management of the bank, and is given the right of eminent domain to acquire necessary property. Public funds are to be deposited in the bank, and the deposits are guaranteed by the state of North Dakota. Authority is given to transfer funds to other departments, institutions, utilities, industries, enterprises, or business projects, and to make loans to counties, cities, or political subdivisions of the state, or to state or national banks, on such terms as the Commission may provide. Loans to individuals, associations, and private corporations are authorized, when secured by duly recorded first mortgages on lands in the state of North Dakota. An appropriation of $100,000 is made immediately available to carry out the provisions of the act. (3) An act providing for the issuing of bonds of the state in the sum of $2,000,000, the proceeds of which are to constitute the capital of the Bank of North Dakota. The earnings of the bank are to be paid to the state treasurer. Tax levies are authorized sufficient to pay the interest on the bonds annually. The bonds shall mature in periods of five years, and the board of equalization is authorized to levy a tax in an amount [236] equal to one fifth of the amount of their principal. The state treasurer is required to establish a bank bond payment fund into which shall be paid moneys received from taxation, from appropriations, and from bank earnings. $10,000 is appropriated for the purpose of carrying the act into effect. (4) An act providing for the issuing of bonds in the sum of not exceeding $10,000,000, to be known as "Bonds of North Dakota, Real Estate Series." These bonds are to be issued for the purpose of raising money to procure funds for the Bank of North Dakota, to replace such funds as may have been employed by it from time to time in making loans upon first mortgages upon real estate. The faith and credit of the state of North Dakota are pledged for the payment of the bonds. Moneys derived from the sale of the bonds are to be placed by the Industrial Commission in the funds of the bank, and nothing in the act is to be construed to prevent the purchase of the bonds with any funds in the Bank of North Dakota. It is further provided that the state board of equalization shall, if it appears that the funds in the hands of the state treasurer are insufficient to pay either principal or interest accruing within a period of one year thereafter, make a necessary tax levy to meet the indicated deficiency. Provision is made for the repeated exercise of the powers granted by the act, for the purposes stated. An appropriation of $10,000 is made for carrying into effect the provisions of this act. (5) An act declaring the purpose of the state of North Dakota to engage in the business of manufacturing and marketing farm products, and to establish a warehouse, elevator, and flour mill system under the name of "North Dakota Mill & Elevator Association," to be operated by the state. The purpose is declared that the state shall engage in the business of manufacturing farm products, and for that purpose shall establish a system of warehouses, elevators, flour mills, factories, plants, machinery, [237] and equipment, owned, controlled, and operated by it under the name of the "North Dakota Mill & Elevator Association." The Industrial Commission is placed in control of the Association with full power, and it is authorized to acquire by purchase, lease, or right of eminent domain, all necessary property or properties, etc.; to buy, manufacture, store, mortgage, pledge, sell, and exchange all kinds of raw and manufactured farm food products, and by-products, and to operate exchanges, bureaus, markets, and agencies within and without the state, and in foreign countries. Provision is made for the bringing of a civil action against the state of North Dakota on account of causes of action arising out of the business. An appropriation is made out of state funds, together with the funds procured from the sale of state bonds, to be designated as the capital of the Association. (6) An act providing for the issuing of bonds of the state of North Dakota in a sum not exceeding $5,000,000, to be known as "Bonds of North Dakota Mill & Elevator Series," providing for a tax and making other provisions for the payment of the bonds, and appropriations for the payment of interest and principal thereof. The bonds are to be issued and sold for the purpose of carrying on the business of the Mill & Elevator Association. The faith and credit of the state of North Dakota are pledged for the payment of the bonds, both principal and interest. These bonds may be purchased with funds in the Bank of North Dakota. Taxes are provided for sufficient to pay the bonds, principal and interest, taking into account the earnings of the Association. The sum of $10,000 is ap-

propriated from the general funds of the state to carry the provisions of the act into effect. (7) The Home Building Act declares the purpose of the state to engage in the enterprise of providing homes for its residents, and to that end to establish a business system operated by it under the name of "The Home Building Association [238] of North Dakota;" and defines its duties and the extent of its powers. The Industrial Commission is placed in control of "The Home Building Association," and is given the power of eminent domain, and the right to purchase and lease the requisite property. Provision is made for the formation of home building unions. The price of town homes is placed at $5,000, and of farm homes at $10,000. A bond issue of $2,000,000, known as "Bonds of North Dakota Home Building Series," is provided for.

There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the Federal question herein involved. This legislation was adopted under the broad power of the state to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people. Before the adoption of the 14th Amendment this power of the state was unrestrained by any Federal authority. That Amendment introduced a new limitation upon state power into the Federal Constitution. The states were forbidden to deprive persons of life, liberty, or property without due process of law. What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise. Twining v. New Jersey, 211 U. S. 78, 100, 53 L. ed. 97, 106, 29 Sup. Ct. Rep. 14.

The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes. Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 155, 41 L. ed. 387, 17 Sup. Ct. Rep. 56. In that case the province of this court in reviewing the power of state taxation was thoroughly discussed by the late Mr. Justice Peckham, speaking [239] for the court. Concluding the discussion of that subject (p. 158), the justice said: "In the 14th Amendment, the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty, or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state instead of the Federal government." Accepting this as settled by the former adjudications of this court, the enforcement of the principle is attended with the application of certain rules equally well settled.

The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have intrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the state undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

In the present instance, under the authority of the Constitution and laws prevailing in North Dakota, the people, the legislature, and the highest court of the state have declared the purpose for which these several acts were passed to be of a public nature, and within the taxing authority of the state. With this united action of people, [240] legislature, and court, we are not at liberty to interfere unless it is clear, beyond reasonable controversy, that rights secured by the Federal Constitution have been violated. What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but have left each case to be determined by its own peculiar circumstances. Gray, Limitations of Taxing Power, § 176: "Necessity alone is not the test by which the limits of state authority in this di-

rection are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." Cooley, Justice, in People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400. 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. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

With the wisdom of such legislation, and the soundness of the economic policy involved, we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

We come now to examine the grounds upon which the supreme court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms be denominated the "banking legislation," that it was justified for the purpose of providing [241] banking facilities, and to enable the state to carry out the purposes of the other acts, of which the Mill & Elevator Association Act is the principal one. It justified the Mill & Elevator Association Act by the peculiar situation in the state of North Dakota, and particularly by the great agricultural industry of the state. It estimated from facts of which it was authorized to take judicial notice, that 90 per cent of the wealth produced by the state was from agriculture; and stated that upon the prosperity and welfare of that industry other business and pursuits carried on in the state were largely dependent; that the state produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the state) amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the state of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective.

As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants, moving from place to place. It was believed and affirmed by the supreme court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

As we have said, the question for us to consider and determine [242] is whether this system of legislation is violative of the Federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved, so far as we have been able to discover, has never been presented to this court. The nearest approach to it is found in Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, L.R.A. 1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660, in which we held that an act of the state of Maine, authorizing cities or towns to establish and maintain wood, coal, and fuel yards for the purpose of selling these necessaries to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the 14th Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly, that the judgment of the highest court of the state, declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. In that case the previous decisions of this court, sustaining this proposition, were cited with approval, and a quotation was made from the opinion of the supreme court of Maine, justifying the legislation un-

der the conditions prevailing in that state. We think the principle of that decision is applicable here.

This is not a case of undertaking to aid private institutions by public taxation, as was the fact in Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 665, 22 L. ed. 461. In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which, in the past, have been considered entirely within the domain of private enterprise.

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, [243] if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its legislature, and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the 14th Amendment, to set aside such action by judicial decision.

Affirmed.

JOHN W. SCOTT, William J. Howe, O. B. Severson, et al., Appts.,
v.
LYNN J. FRAZIER et al.

(See S. C. Reporter's ed. 243, 244.)

Courts — amount in controversy — uniting claims.

The amount in controversy in a suit in a Federal district court by taxpayers to enjoin, on constitutional grounds, the payment of public funds out of the state treasury, and the issuing of state bonds, must equal the jurisdictional amount as to each complainant.

[For other cases, see Courts, 908–911, in Digest Sup. Ct. 1908.]

[No. 508.]

Argued April 19 and 20, 1920. Decided June 1, 1920.

APPEAL from the District Court of the United States for the District of North Dakota to review a decree dismissing on the merits the bill in a suit by taxpayers to enjoin, on constitutional grounds, the payment of public funds out of the treasury and the issuing of state bonds. Reversed and remanded, with directions to dismiss the bill for want of jurisdiction.

See same case below, 258 Fed. 669.

The facts are stated in the opinion.

Messrs. N. C. Young, Tracy R. Bangs, and C. J. Murphy argued the cause and filed a brief for appellants:

The matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs.

Brown v. Trousdale, 138 U. S. 389, 34 L. ed. 987, 11 Sup. Ct. Rep. 308; Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 39, 165 Fed. 11; Risley v. Utica, 168 Fed. 737; Wheless v. St. Louis, 96 Fed. 869; Ottuma v. City Water Supply, 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315; Johnston v. Pittsburg, 106 Fed. 753; Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4; Troy Bank v. G. A. Whitehead & Co. 222 U. S. 39, 56 L. ed. 81, 32 Sup. Ct. Rep. 9; Berryman v. Whitman College, 222 U. S. 334, 56 L. ed. 225, 32 Sup. Ct. Rep. 147; Humes v. Ft. Smith, 93 Fed. 857; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Shields v. Thomas, 17 How. 3, 15 L. ed. 93; Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. ed. 782; The Connemara (Sinclair v. Cooper) 103 U. S. 754, 26 L. ed. 322; The Mamie (Parcher v. Cuddy) 105 U. S. 773, 26 L. ed. 937; Estes v. Gunter, 121 U. S. 183, 5 L. ed. 884, 7 Sup. Ct. Rep. 854.

The bill of complaint states a meritorious cause of action which, under the view most favorable to appellees, requires an answer and a trial upon the merits.

Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A. (N.S.) 638, 107 N. W. 405, 7 Ann. Cas. 1182; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, L.R.A.1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660; Fanning v. D. M. Osborne & Co. 102 N. Y. 441, 7 N. E. 307.

The question as to whether a given object is public or private is a judicial one. A legislature cannot make a private purpose a public one by its mere fiat.

Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

Public ownership does not change the character of a business.

Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244.

If, in determining the right of the

citizen, the act of the state legislature or the decision of the state supreme court is to govern, then the 14th Amendment becomes innocuous, and is but a "scrap of paper."

McCoy v. Union Elev. R. Co. 247 U. S. 354, 62 L. ed. 1156, 38 Sup. Ct. Rep. 504; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Scott v. Toledo, 1 L.R.A. 688, 36 Fed. 385; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; McElroy v. Kansas City, 21 Fed. 257; Laughlin v. Portland, 111 Me. 488, 51 L.R.A.(N.S.) 1143, 90 Atl. 318, Ann. Cas. 1916C, 734.

A careful review of the cases, and an earnest effort to determine a general rule that will protect the individual rights and at the same time have sufficient flexibility to enable the state or division thereof to properly discharge its duty, lead us to suggest that, in determining whether the purpose for which the tax is levied is public, the courts must consider:

(a) Whether it is one of those purposes that readily fall on the public side of the line, such as support of schools, relief of paupers, maintenance of highways, and other municipal acts that have, by a long course of conduct, become thoroughly recognized as public purposes, in which are included the furnishing of water, light, and heat, or

(b) Whether the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty or perhaps impossibility of making provision for them otherwise, are alike proper, useful, and needful for the government to provide. And in determining that question the court should be influenced by the need of the particular community for the proposed innovation; by the ability of private enterprise to supply the needs; by the availability of private capital; by the general condition of the community; and whether the service rendered is so rendered to the people as a relief measure, and will protect the public welfare in equal measure, and at cost, or approximately so; but

(c) If the benefits to the public are to be incidental, if the state or division thereof is entering into trade merely to try an experiment in practical economies, or to put into practice a theory, if the business enterprise is being entered upon simply that some commodity may be furnished to that portion of the community using that commodity at a cheaper price, or if the enterprise is being entered upon for the purpose of enhancing the value of some particular raw material,—then it is merely a trade,—a private business,—and cannot be supported by a public tax.

Opinion of Justices, 211 Mass. 625, 42 L.R.A.(N.S.) 221, 98 N. E. 611; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Opinion of Justices, 118 Me. 503, 106 Atl. 865; Northern Liberties v. St. John's Church, 13 Pa. 104; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400; Citizens Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142; Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 827; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 793; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Beach v. Bradstreet, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946; State ex rel. Toledo v. Lynch, 88 Ohio St. 31, 48 L.R.A.(N.S.) 720, 102 N. E. 670, Ann. Cas. 1914D, 949; Union Ice & Coal Co. v. Ruston, 135 La. 898, L.R.A.1915B, 859, 66 So. 262, Ann. Cas. 1916C, 1274; Laughlin v. Portland, 111 Me. 488, 51 L.R.A.(N.S.) 1143, 90 Atl. 318, Ann. Cas. 1916C, 734; Jones v. Portland, 245 U. S. 217, 223, 224, 62 L. ed. 252, 255, 256, L.R.A.1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660.

Neither the fact that a great many people benefit by an enterprise to be established, or that the enterprise is desired or voted for, or is approved by a great many people, can make the use of the money contributed to that particular enterprise by taxation a public use, for while a social compact is a covenant by which the whole people covenant with each citizen, and each citizen with the whole people, that all should be governed by certain laws for the common good, this does not confer power upon the people to control rights which are purely and exclusively private. These are reserved rights and are inalienable.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

Messrs. S. L. Nuchols and W. S. Lauder argued the cause, and, with Mr. William Langer, Attorney General of

North Dakota, filed a brief for appellees:

The bill of complaint fails to show upon its face that the amount in controversy exceeds three thousand ($3,000) dollars, and fails to allege a requisite jurisdictional element.

Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 56 L. ed. 1280, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88; Cowell v. City Water Supply Co. 57 C. C. A. 393, 121 Fed. 53; Risley v. Utica, 168 Fed. 737; Wheless v. St. Louis, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402; Rogers v. Hennepin County, 239 U. S. 621, 60 L. ed. 469, 36 Sup. Ct. Rep. 217.

Interests of complainants cannot be aggregated to make up the jurisdictional amount.

Clay v. Field, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; Walter v. Northeastern R. Co. 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; Wheless v. St. Louis, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402; Holt v. Bergevin, 60 Fed. 1; Jones v. Mutual Fidelity Co. 123 Fed. 506; Ex parte Baltimore & O. R. Co. 106 U. S. 5, 27 L. ed. 78, 1 Sup. Ct. Rep. 35; Rogers v. Hennepin County, 239 U. S. 621, 60 L. ed. 469, 36 Sup. Ct. Rep. 217.

A decision of the highest court of a state, declaring a use to be public in its nature, will be accepted unless clearly not well founded.

Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 56 L. ed. 924, 34 Sup. Ct. Rep. 522; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Clark v. Nash, 198 U. S. 361-369, 41 L. ed. 1085-1088, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372-377, 51 L. ed. 231-236, 27 Sup. Ct. Rep. 72; Hairston v. Danville & W. R. Co. 208 U. S. 598-607, 52 L. ed. 637-641, 28 Sup. Ct. Rep. 231, 13 Ann. Cas. 1008.

If the business in question is privately owned and carried on solely for the profit of the individuals owning it, it is, under all the authorities, private business, even though the public derives, incidentally, benefits therefrom. If, on the other hand, the business is publicly owned and carried on for the benefit and welfare of all the people, and is such a business as is calculated to promote the general welfare of the community, it is public business even though the same kind of business is carried on by private enterprise; and under all the authorities, it is not material that such public business is conducted in competition with privately owned business.

Holton v. Camilla, 134 Ga. 560, 31 L.R.A.(N.S.) 116, 68 S. E. 472, 20 Ann. Cas. 199; Sun Printing & Pub. Asso. v. New York, 8 App. Div. 230, 40 N. Y. Supp. 607, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499; Egan v. San Francisco, 165 Cal. 576, 133 Pac. 294, Ann. Cas. 1915A, 754; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Burlington Twp. v. Beasley, 94 U. S. 310, 23 L. ed. 161; Com. ex rel. Kelly v. Pittsburg, 183 Pa. 202, 63 Am. St. Rep. 752, 38 Atl. 628; Washington County v. Williams, 49 C. C. A. 621, 111 Fed. 801; Pine Grove Twp. v. Talcott, 19 Wall. 666, 667, 22 L. ed. 227; 2 Dill. Mun. Corp. 5th ed. §§ 884, et seq.; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Jarrott v. Moberly, 5 Dill. 253, Fed. Cas. No. 7,223; Turlock Irrig. Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Saunders v. Arlington, 147 Ga. 581, 94 S. E. 1022, Ann. Cas. 1918D, 907; Andrews v. South Haven, 187 Mich. 294, L.R.A. 1916A, 908, 153 N. W. 827, Ann. Cas. 1918B, 100; Spangler v. Mitchell, 35 S. D. 335, 152 N. W. 339, Ann. Cas. 1918A, 373.

Whether the laws are wise and expedient is a political, and not a judicial, question.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549-569, 55 L. ed. 328-339, 31 Sup. Ct. Rep. 259; Price v. Illinois, 238 U. S. 446, 451, 452, 59 L. ed. 1400, 1404, 1405, 35 Sup. Ct. Rep. 892; Rast v. Van Deman & L. Co. 240 U. S. 342-357, 60 L. ed. 679-687, L.R.A.1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; Merrick v. N. W. Halsey & Co. 242 U. S. 568, 586, 588, 61 L. ed. 498, 508, 509, 37 Sup. Ct. Rep. 227.

Mr. **Frederick A. Pike** argued the cause, and, with Mr. William Lemke, filed a brief for Lynn Frazier, Governor, John M. Hagan, and the Industrial Commission of North Dakota:

All original powers of government are in the people.

Slaughter House Cases, 16 Wall. 77,

21 L. ed. 409; Sharpless v. Philadelphia, 21 Pa. 159, 59 Am. Dec. 759; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 473, 4 Am. Rep. 400; 2 Curtis, Hist. of U. S. Const. p. 163.

Otherwise than as expressly limited by the Federal Constitution, the power of the people of the state to enact laws for such state, either directly or through the agency of a legislative body, continued the same as before the adoption of the Federal Constitution.

Pine Grove Twp. v. Talcott, 19 Wall. 666, 22 L. ed. 227; Sharpless v. Philadelphia, 21 Pa. 163, 59 Am. Dec. 759; American Law, 1 Enc. Britannica, 828; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; 2 Curtis, Hist. of U. S. Const. p. 163.

The respective powers of the states of the Union, and their relation to the other states in the Union and to the government, are precisely the same in the case of states admitted to the Union subsequently to the formation of the national Constitution as in the case of those states which existed at the beginning of American Independence.

M'Culloch v. Maryland, 4 Wheat. 410, 4 L. ed. 602.

It does not belong to the courts to interpolate constitutional restrictions.

Pine Grove Twp. v. Talcott, 19 Wall. 666, 22 L. ed. 227.

Laws will not be adjudged invalid for reasons based on general principles of public policy or legislative propriety.

United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

Laws are not to be set aside and held invalid merely because, in the opinion of the courts, they are disregardful of right and justice, or are impolitic or inexpedient; or are unwise or oppressive; or violative of the spirit of our institutions; or because they are unnecessary.

Pine Grove Twp. v. Talcott, 19 Wall. 666, 32 L. ed. 227; United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597; M'Cullough v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Calder v. Bull, 3 Dall. 386, 394, 1 L. ed. 648, 651; Sharpless v. Philadelphia, 21 Pa, 162, 59 Am. Dec. 759.

Laws will not be adjudged invalid to relieve against excessive taxation.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; United States v. Gettysburg Electric R. Co. 160 U. S. 680, 40 L. ed. 580, 16 Sup. Ct. Rep. 427; Sharpless v. Philadelphia, supra.

The possibility of the abuse of power does not justify judicial limitation of power.

Sharpless v. Philadelphia, supra; Pine Grove v. Talcott Twp. 19 Wall. 666, 22 L. ed. 227; Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Calder v. Bull, 3 Dall. 386, 1 L. ed. 648.

To determine whether a use is public or private, we have to determine not merely whether interests of individuals will be promoted, but whether interests of the greater part of the community will be.

Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382.

Neither the 14th Amendment, broad and comprehensive as it is, nor any other Amendment, was designed to interfere with the power of the state, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; O'Neil v. Leamer, 239 U. S. 244, 253, 60 L. ed. 249, 265, 36 Sup. Ct. Rep. 54.

When the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.

Madisonville Traction Co. v. Bernard Min. Co. 196 U. S. 252, 253, 49 L. ed. 467, 468, 25 Sup. Ct. Rep. 251; 2 Dill. Mun. Corp. 4th ed. § 600; United States v. Gettysburg Electric R. Co. 160 U. S. 680, 40 L. ed. 581, 16 Sup. Ct. Rep. 427; Clark v. Nash, 198 U. S. 367, 49 L. ed. 1087, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171.

There is little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the various necessities of society and new circumstances as they arise, calling for legislative intervention in the public interest.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; German Alliance Ins. Co. v. Kansas, 233 U. S.

S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

Taxation may, allowably, be used for destruction.

Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 329, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 833; St. Louis Poster Adv. Co. v. St. Louis, 249 U. S. 272, 274, 63 L. ed. 601, 602, 39 Sup. Ct. Rep. 274.

Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022, expounding the prohibition of a state's taxing the salaries of Federal officers, and Collector v. Day (Buffington v. Day) 11 Wall. 113, 127, 20 L. ed. 122, 126, expounding the prohibition of the Federal government's taxing the salaries of state judges, are conclusive on our contention, because they declared against the power to tax, on the ground that the authority would place one government in the power of the other, the power to tax being the power to destroy, and although the Federal government may tax its officers, generally, to destruction, its invasion of the judiciary is arrested by article 3, § 1, of the Constitution.

It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Fairbank v. United States, 181 U. S. 283, 291, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Re Debs, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900.

Assistant Attorney General **Frierson** argued the cause, and, with Attorney General Palmer, filed a brief for defendant in error:

The best discussion to be found of this question is in the Pennsylvania cases.

Northumberland County v. Chapman, 2 Rawle, 73; Com. ex rel. Hepburn v. Mann, 5 Watts & S. 403.

The principle controlling this case has been clearly settled by decisions of this court in cases involving similar questions.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 696, 39 L. ed. 311, 315, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432.

The mere fact that a part of a judge's salary must be used to pay a tax does not render the tax unconstitutional.

Com. ex rel. Hepburn v. Mann and William E. Peck & Co. v. Lowe, supra; United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is an action to recover money paid under protest as a tax alleged to be forbidden by the Constitution.

The plaintiff is the United States district judge for the western district of Kentucky, and holds that office under an appointment by the President made in 1899, with the advice and consent of the Senate. The tax which he calls in question was levied under the Act of February 24, 1919, chap. 18, 40 Stat. at L. 1062, on his net income for the year 1918, as computed under that act. His compensation or salary as district judge was included in the computation. Had it been excluded, he would not have been called on to pay any income tax for that year. The inclusion was in obedience to a provision in § 213, requiring the computation to embrace all gains, profits, income, and the like, "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, [and others] . . . the compensation received as such." Whether he could be subjected to such a tax in [247] respect of his salary, consistently with the Constitution, is the matter in issue. If it be resolved against the tax, he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the district court. 262 Fed. 550.

The Constitution establishes three great co-ordinate departments of the national government,—the legislative, the executive, and the judicial,—and distributes among them the powers confided to that government by the people. Each department is dealt with in a separate article, the legislative in the first, the executive in the second, and the judicial in the third. Our present concern is chiefly with the third article. It defines the judicial power, vests it in one supreme court and such inferior courts as Congress may from time to time ordain and establish, and declares: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated

during continuance in office is to be construed not as a private grant, but as a limitation imposed in the public interest.
[For other cases, see Judges, IV.; Officers, IV. in Digest Sup. Ct. 1908.]

Internal revenue — income tax — purpose of constitutional Amendment.

2. The income tax amendment to the Federal Constitution does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, from whatever source derived.
[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — salaries of Federal judges.

3. A Federal district judge could not, consistently with the provision of U. S. Const. art. 3, that all Federal judges shall, at stated times, receive for their services a compensation "which shall not be diminished during their continuance in office," be subjected to an income tax imposed under the 16th Amendment in respect of his salary as such judge.
[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

[No. 654.]

Argued March 5, 1920. Decided June 1, 1920.

IN ERROR to the District Court of the United States for the Western District of Kentucky to review a judgment for defendant in a suit to recover back a portion of the income tax paid by a Federal district judge. Reversed.

See same case below, 262 Fed. 550.

The facts are stated in the opinion.

Messrs. **William Marshall Bullitt** and **Edmund F. Trabue** argued the cause, and, with Messrs. Frank P. Straus, Howard B. Lee, Helm Bruce, and Mr. Walter Evans, in propria persona, filed a brief for plaintiff in error:

The taxation imposed on judicial salaries diminishes the compensation of the judges.

Atty. Gen. Hoar's Opinion, 13 Ops. Atty. Gen. 161; Re Taxation of Salaries of Judges, 131 N. C. 693, 42 S. E. 970; Chief Justice Taney's Letter, 157 U. S. 700; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; New Orleans v. Lea, 14 La. Ann. 194; Com. ex rel. Hepburn v. Mann, 5 Watts & S. 403; Com. ex rel. Atty. Gen. v. Mathues, 210 Pa. 394, 59 Atl. 961; The Federalist, No. 79; Story, Const. §§ 1629–1631; Kent, Com. pp. 293–295.

The power to tax implies the power to destroy.

M'Culloch v. Maryland, 4 Wheat. 316, 431, 4 L. ed. 579, 607; Collector v. Day (Buffington v. Day) 11 Wall. 113, 127, 20 L. ed. 122, 126.

The 16th Amendment can in no way justify or support that provision of the revenue act, the constitutionality of which is now in question.

Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Re Debs, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900; Prout v. Starr, 188 U. S. 543, 47 L. ed. 587, 23 Sup. Ct. Rep. 398; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

Article 3, § 1, of the Constitution, must control.

Weston v. Charleston, 2 Pet. 466, 7 L. ed. 487; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Minnesota v. Barber, 136 U. S. 319, 320, 34 L. ed. 457, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122.

Messrs. William Marshall Bullitt and Edmund F. Trabue also filed a separate brief for plaintiff in error:

United States Constitution, art. 3, § 1, forbids diminution of a judge's salary during his term of office, and the law forbids a thing done indirectly which is forbidden to be done directly.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Cummings v. Missouri, 4 Wall. 288, 18 L. ed. 356; 2 Co. Inst. 48, 202; Broom, Legal Maxims, 367; Burrill, Law Dict. 202; Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

The test of the constitutionality of a statute is not what has been done, but what, by its authority, may be done, under it.

Ames v. People, 26 Colo. 109, 56 Pac. 656; Eubank v. Richmond, 226 U. S. 137, 144, 57 L. ed. 156, 159, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192.

The power to tax is the power to destroy.

Brown v. Maryland, 12 Wheat. 419, 445, 6 L. ed. 678, 687; Austin v. Boston, 7 Wall. 694, 19 L. ed. 224; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; McCray v. United States, 195 U.

S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561.

Taxation may, allowably, be used for destruction.

Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 329, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 833; St. Louis Poster Adv. Co. v. St. Louis, 249 U. S. 272, 274, 63 L. ed. 601, 602, 39 Sup. Ct. Rep. 274.

Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022, expounding the prohibition of a state's taxing the salaries of Federal officers, and Collector v. Day (Buffington v. Day) 11 Wall. 113, 127, 20 L. ed. 122, 126, expounding the prohibition of the Federal government's taxing the salaries of state judges, are conclusive on our contention, because they declared against the power to tax, on the ground that the authority would place one government in the power of the other, the power to tax being the power to destroy, and although the Federal government may tax its officers, generally, to destruction, its invasion of the judiciary is arrested by article 3, § 1, of the Constitution.

It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Fairbank v. United States, 181 U. S. 283, 291, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Re Debs, 158 U. S. 594, 39 L. ed. 1106, 15 Sup. Ct. Rep. 900.

Assistant Attorney General **Frierson** argued the cause, and, with Attorney General Palmer, filed a brief for defendant in error:

The best discussion to be found of this question is in the Pennsylvania cases.

Northumberland County v. Chapman, 2 Rawle, 73; Com. ex rel. Hepburn v. Mann, 5 Watts & S. 403.

The principle controlling this case has been clearly settled by decisions of this court in cases involving similar questions.

Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 696, 39 L. ed. 311, 315, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817; William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 422.

The mere fact that a part of a judge's salary must be used to pay a tax does not render the tax unconstitutional.

Com. ex rel. Hepburn v. Mann and William E. Peck & Co. v. Lowe, supra; United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748.

Mr. Justice Van Devanter delivered the opinion of the court:

This is an action to recover money paid under protest as a tax alleged to be forbidden by the Constitution.

The plaintiff is the United States district judge for the western district of Kentucky, and holds that office under an appointment by the President made in 1899, with the advice and consent of the Senate. The tax which he calls in question was levied under the Act of February 24, 1919, chap. 18, 40 Stat. at L. 1062, on his net income for the year 1918, as computed under that act. His compensation or salary as district judge was included in the computation. Had it been excluded, he would not have been called on to pay any income tax for that year. The inclusion was in obedience to a provision in § 213, requiring the computation to embrace all gains, profits, income, and the like, "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, [and others] . . . the compensation received as such." Whether he could be subjected to such a tax in [247] respect of his salary, consistently with the Constitution, is the matter in issue. If it be resolved against the tax, he will be entitled to recover what he paid; otherwise his action must fail. It did fail in the district court. 262 Fed. 550.

The Constitution establishes three great co-ordinate departments of the national government,—the legislative, the executive, and the judicial,—and distributes among them the powers confided to that government by the people. Each department is dealt with in a separate article, the legislative in the first, the executive in the second, and the judicial in the third. Our present concern is chiefly with the third article. It defines the judicial power, vests it in one supreme court and such inferior courts as Congress may from time to time ordain and establish, and declares: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated

Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The plaintiff insists that the provision in § 213 which subjects him to a tax in respect of his compensation as a judge by its necessary operation and effect diminishes that compensation, and therefore is repugnant to the constitutional limitation just quoted.

Stated in its broadest aspect, the contention involves the power to tax the compensation of Federal judges in general,—and also the salary of the President, as to which the Constitution (art. 2, § 1, cl. 6) contains a similar limitation. Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our [248] decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which, under the law, he could go. He brought the case here in due course, the government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause, —a conclusion supported by precedents reaching back many years. Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality, and both contemplated and intended that the question should be settled by us in a case like this.[1]

With what purpose does the Constitution provide that the compensation of the judges "shall not be diminished during their continuance in office?" Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such [249] as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?

The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers —the legislative, the executive, and the judicial—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the Federalist, No. 78, from which we excerpt the following:

"The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules

[1] See House Report, No. 767, p. 20, 65th Cong. 2d Sess.; Senate Report, No. 617, p. 6, 65th Cong. 3d Sess. And see Cong. Record, vol. 56, p. 10,370, where the chairman of the House Committee, in asking the adoption of the provision, said: "I wish to say, Mr. Chairman, that while there is considerable doubt as to the constitutionality of taxing . . . Federal judges' or the President's salaries, . . . we cannot settle it; we have not the power to settle it. No power in the world can settle it except the Supreme Court of the United States. Let us raise it, as we have done, and let it be tested, and it can only be done by someone protesting his tax and taking an appeal to the Supreme Court." And again: "I think really that every man who has a doubt about this can very well vote for it and take the advice of the gentleman from Pennsylvania [Mr. Graham], which was sound then and is sound now, that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it."

by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. . . . This simple view of [250] the matter suggests several important consequences: It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a later period John Marshall, whose rich experience as lawyer, legislator, and chief justice enabled him to speak as no one else could, tersely said (Debates Va. Conv., 1829-1831, pp. 616, 619):

"Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the [251] greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

"It is also necessary that there should be a judiciary endowed with substantial and independent powers, and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.

"Indeed, there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual."

"Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some nonpolitical forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all [252] can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." Constitutional Government in the United States, pp. 17, 142.

Conscious of the nature and scope of

the power being vested in the national courts, recognizing that they would be charged with responsibilities more delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington,[2] "the keystone of our political fabric," the convention with unusual accord incorporated in the Constitution the provision that the judges "shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." Can there be any doubt that the two things thus coupled in place—the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation—were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task, and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist No. 79): "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* . . . The enlightened friends to good government in every state have seen cause to lament the want of precise and explicit precautions in [253] the state constitutions on this head. Some of these, indeed, have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. . . . This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states in regard to their own judges." The several commentators on the Constitution have adopted and reiterated this view,[3]—Judge Story adding: "Without this provision [as to an undiminishable compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery;" and Chancellor Kent observing: "It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station."

These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench, and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution, and to the administration of justice without respect to persons, and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in [254] accord with its spirit and the principle on which it proceeds.

Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive, as Mr. Hamilton suggested. But all which, by their necessary operation and effect, withhold or take from the judge a part of that which has been promised by law for his services, must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle. Here the plaintiff was paid the full compensation, but was subjected to an involuntary obligation to pay back a part, and the obligation was promptly enforced. Of what avail to him was the part which was paid with one hand and then taken back with the other? Was he not placed in practically the same situation as if it had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished. Of course, the conclusion that it was diminished is the natural one. This is illustrated in Dobbins v. Erie County, 16 Pet. 435, 450, 10 L. ed. 1022, 1027, which involved a tax charged under a law of Pennsylvania against a revenue officer of the United States who was a citizen and resident of that state. The tax was adjusted or proportioned to his compensation, and

[2] Sparks's Washington, vol. X. pp. 35, 36.

[3] 2 Story, § 1628; 1 Kent, Com. *294; 1 Wilson, Works, 410, 411; 2 Tucker, § 364; Miller, 340–343; 1 Carson, Sup. Ct. 6.

the state court sustained it. 7 Watts, 513. In reversing that decision, this court, after showing that the compensation had been fixed by a law of Congress, said: "Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional."

But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted of others engaged in private employment.

If the tax in respect of his compensation be prohibited, [255] it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.

The prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 585, 601, 652, 653, 39 L. ed. 759, 820, 826, 844, 15 Sup. Ct. Rep. 673, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in United States v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the states within their own spheres.

When we consider, as was done in those cases, what is comprehended in the congressional power to tax,—where its exertion is not directly or impliedly interdicted,—it becomes additionally manifest that the prohibition now [256] under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this court repeatedly has held, the power to tax carries with it "the power to embarrass and destroy;" may be applied to every object within its range "in such measure as Congress may determine;" enables that body "to select one calling and omit another, to tax one class of property and to forbear to tax another;" and may be applied in different ways to different objects so long as there is "geographical uniformity" in the duties, imposts, and excises imposed. M'Culloch v. Maryland, 4 Wheat. 316, 431, 4 L. ed. 579, 607; Pacific Ins. Co. v. Soule, 7 Wall. 433, 443, 19 L. ed. 95, 98; Austin v. Boston, 7 Wall. 694, 699, 19 L. ed. 224, 226; Veazie Bank v. Fenno, 8 Wall. 533, 541, 548, 19 L. ed. 482, 485, 487; Knowlton v. Moore, 178 U. S. 41, 92, 106, 44 L. ed. 969, 990, 995, 20 Sup. Ct. Rep. 747; Treat v. White, 181 U. S. 264, 268, 269, 45 L. ed. 853-855, 21 Sup. Ct. Rep. 611; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421; Brushaber v. Union P. R. Co. 240 U. S. 1, 24-26, 60 L. ed. 493, 504, 505, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713. Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it is directed against one legislative power and not another; and, in our opinion, due regard for its spirit and principle requires that it be taken as directed against them all.

This view finds support in rulings in Pennsylvania, Louisiana, and North Car-

olina, made under like constitutional restrictions (Com. ex rel. Hepburn v. Mann, 5 Watts & S. 403, 415, et seq.;[4] New Orleans v. Lea, 14 [257] La. Ann. 194; 48 N. C. Appx.; N. C. Public Documents 1899, Doc. No. 8, p. 95; Re Taxation of Salaries of Judges, 131 N. C. 692, 42 S. E. 970; Purnell v. Page, 133 N. C. 125, 45 S. E. 534), and has strong sanction in the actual practice of the government, to which we now advert.

No attempt was made to tax the compensation of Federal judges prior to 1862. A statute of that year, July 1, 1862, chap. 119, § 86, 12 Stat. at L. 472, with its amendments, subjected the salaries of all civil officers of the United States to an income tax of 3 per cent, and was construed by the revenue officers as including the compensation of the President and the judges. Chief Justice Taney, the head of the judiciary, wrote to the Secretary of the Treasury a letter of protest (157 U. S. 701, 39 L. ed. 1155, 15 Sup. Ct. Rep. ix.) based on the prohibition we are considering, and in the course of the letter said:

"The act in question, as you interpret it, diminishes the compensation of every judge 3 per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time, at the pleasure of the legislature.

"The judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

"Language could not be more plain than that used in [258] the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

"Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void."

The collection of the tax proceeded, and, at the suggestion of the Chief Justice, this court ordered his protest spread on its records. In 1869 the Secretary of the Treasury referred the question to the Attorney General (Judge Hoar) and that officer rendered an opinion in substantial accord with Chief Justice Taney's protest, and also advised that the tax on the President's compensation was likewise invalid. 13 Ops. Atty. Gen. 161. The tax on the compensation of the President and the judges was then discontinued, and the amounts theretofore collected were all refunded,—a part through administrative channels and a part through the action of the court of claims and ensuing appropriations by Congress. Wayne v. United States, 26 Ct. Cl. 274; Act of July 28, 1892, chap. 311, 27 Stat. at L. 306. Thus the Secretary of the Treasury, the accounting officers, the court of claims, and Congress accepted and gave effect to the view expressed by the Attorney General. In the Income Tax Act of August 27, 1894, chap. 349, §§ 27 et seq., 28 Stat. at L. 509, nothing was said about the compensation of the judges; but Mr. Justice Field regarded it as included, and gave that as one reason for joining in the decision holding the act unconstitutional. 157 U. S. 604-606. On the rehearing the Attorney General (Mr. Olney) frankly said in his brief: "There has never been a doubt since the opinion of Attorney General Hoar [259] that the salaries of the President and judges were exempt." The Income Tax Acts of October 3, 1913, September 8, 1916, and October 3, 1917 (chap. 16, 38 Stat. at L. 168; chap. 463, 39 Stat. at L. 758; chap. 63, 40 Stat. at L. 329), severally excepted the compensation of the judges then in office,—also that of the President for the then current term. In short, during a period of more than one hundred and twenty years there was but a single real attempt to tax the judges in respect of

[4] The tax condemned was levied under a provision in a general revenue law, charging a tax of 2 per cent "upon all salaries and emoluments of office, created or held by or under the Constitution or laws of this commonwealth, and by or under any incorporation, institution, or company incorporated by the said commonwealth, where such salaries or emoluments exceed $200." Act No. 232, § 2, Pa. Laws 1840, p. 613; Act No. 117, § 9, Pa. Laws 1841, p. 310.

their compensation, and that attempt soon was disapproved and pronounced untenable by the concurring action of judicial, executive, and legislative officers. And so it is apparent that in the actual practice of the government the prohibition has been construed as embracing and preventing diminution by taxation.

Does the 16th Amendment authorize and support this tax and the attendant diminution; that is to say, does it bring within the taxing power subjects theretofore excepted? The court below answered in the negative; and counsel for the government say: "It is not, in view of recent decisions, contended that this Amendment rendered anything taxable as income that was not so taxable before." We might rest the matter here, but it seems better that our view and the reasons therefor be stated in this opinion, even if there be some repetition of what recently has been said in other cases.

Preliminarily we observe that, unless there be some real conflict between the 16th Amendment and the prohibition in article 3, § 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed.

In Knowlton v. Moore, 178 U. S. 95, 44 L. ed. 991, 20 Sup. Ct. Rep. 747, this court said: "The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the [260] conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning." This sound rule is as applicable to the Amendments as to the provisions of the original Constitution.

Let us turn, then, to the circumstances in which this Amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (art. 1, § 2, cl. 3, and § 9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the members of the court,—five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the states were essential, the 16th [261] Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came, — a change in no wise affecting the power to tax, but only the mode of exercising it. The message of the President[5] recommending the adoption by Congress of a joint resolution proposing the Amendment, the debates[6] on the resolution by which it was proposed, and the public appeals,[7]—corresponding to those in the Federalist,—made to secure its ratification, leave no doubt on this point. And that the proponents of the Amendment, in drafting it, lucidly and aptly expressed this as its object, is shown by its words:

"The Congress shall have to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

True, Governor Hughes, of New York, in a message laying the Amendment be-

[5] Cong. Rec., vol. 44, p. 3344.

[6] Cong. Rec., vol. 44, pp. 1568-1570, 3377, 3900, 4067, 4105-4107, 4108-4121, 4389-4441.

[7] Cong. Rec., vol. 45, pp. 1694-1699, 2245-2247, 2539, 2540.

fore the legislature of that state for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose,[8] as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the Amendment unite in showing that it does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, whether derived from one [**262**] source or another.[9] And we have so held in other cases.

In Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713, where the purpose and effect of the Amendment were first drawn in question, the chief justice reviewed at length the legislative and judicial action which prompted its adoption, and then, referring to its text, and speaking for a unanimous court, said, pp. 17, 18:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense, —an authority already possessed and never questioned,—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the Pollock Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided; that is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source [**263**] the income may be derived, shall not be subject to the regulation of apportionment."

What was there said was reaffirmed and applied in Stanton v. Baltic Min. Co. 240 U. S. 103, 112, 113, 60 L. ed. 546, 553, 554, 36 Sup. Ct. Rep. 278, and William E. Peck & Co. v. Lowe, 247 U. S. 165, 172, 62 L. ed. 1049, 1050, 38 Sup. Ct. Rep. 432, and in Eisner v. Macomber, 252 U. S. 189, ante, 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189, decided at the present term, we again held, citing the prior cases, that the Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income."

After further consideration, we adhere to that view, and accordingly hold that the 16th Amendment does not authorize or support the tax in question.

Apart from his salary, a Federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed just as if it belonged to another. If he has an income other than his salary, it also may be taxed in the same way. And, speaking generally, his duties and obligations as a citizen are not different from those of his neighbors. But for the common good—to render him, in the words of John Marshall, "perfectly and completely independent, with nothing to influence or control him but God and his conscience"—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.

The court below concluded that the compensation was not diminished, and regarded this as inferable from our decisions in William E. Peck & Co. v. Lowe, 247 U. S. 165, 174, 175, 62 L. ed. 1049, 1051, 1052, 38 Sup. Ct. Rep. 432, and United States Glue Co. v. Oak Creek, 247 U. S. 321, 329, 62 L. ed. 1135, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748. We think neither case tends to support that view. Each re-

[8] Cong. Rec., vol. 45, pp. 1694–1699, 2245–2247, 2539, 2540.

[9] In passing the Income Tax Law of 1919 Congress refused to treat interest received from bonds issued by a state or any of its counties or municipalities as within the taxing power (Cong. Rec., vol. 57, pp. 553, 774–777, 2988; chap. 18, § 213, 40 Stat. at L. 1065, Comp. Stat. § 6336¼ ff); and in the regulations issued under that law the administrative officers recognize that the salaries and emoluments of the officers of a state and its political subdivisions are not taxable by the United States (Reg. 45, published 1920, pp. 47, 313).

lated to a business—one to exportation, the other to interstate commerce—which the taxing power—of Congress in one case, of a state in the other—was restrained from directly burdening; and the holding in both was [**264**] that an income tax laid, not on the gross receipts, but on the net proceeds remaining after all expenses were paid and losses adjusted, did not directly burden the business, but only indirectly and remotely affected it. Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing act directs that the compensation—the full sum, with no deduction for expenses—be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed.

We conclude that the tax was imposed contrary to the constitutional prohibition, and so must be adjudged invalid.

Judgment reversed.

Mr. Justice **Holmes**, dissenting:

This is an action brought by the plaintiff in error against an acting collector of internal revenue to recover a portion of the income tax paid by the former. The ground of the suit is that the plaintiff is entitled to deduct from the total of his net income $6,000, being the amount of his salary as a judge of the district court of the United States. The Act of February 24, 1919, chap. 18, § 210, 40 Stat. at L. 1057, 1062, Comp. Stat. §§ 6371¼a, 6336¼e, taxes the net income of every individual, and § 213, p. 1065, requires the compensation received by the judges of the United States to be included in the gross income from which the net income is to be computed. This was done by the plaintiff in error and the tax was paid under protest. He contends that the requirement mentioned and the tax, to the extent that it was enhanced by consideration of the plaintiff's salary, are [**265**] contrary to art. 3, § 1, of the Constitution, which provides that the compensation of the judges shall not be diminished during their continuance in office. Upon demurrer judgment was entered for the defendant, and the case comes here upon the single question of the validity of the above-mentioned provisions of the act.

The decision below seems to me to have been right for two distinct reasons: that this tax would have been valid under the original Constitution, and that, if not so, it was made lawful by the 16th Amendment. In the first place, I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist (No. 79), that "a power over a man's subsistence amounts to a power over his will." That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their life, depends.

I see equally little in the letter of the clause to indicate the intent supposed. The tax on net incomes is a tax on the balance of a mutual account in which there always are some and may be many items on both sides. It seems to me that it cannot be affected by an inquiry into the source from which the items more or less remotely are derived. Obviously there is some point at which the immunity of a judge's salary stops; or, to put it in the language of the clause, a point at which it could not be said that his compensation [**266**] was diminished by a charge. If he bought a house, the fact that a part or the whole of the price had been paid from his compensation as judge would not exempt the house. So, if he bought bonds. Yet in such cases the advantages of his salary would be diminished. Even if the house or bonds were bought with other money, the same would be true, since the money would not have been free for such an application if he had not used his salary to satisfy other more peremptory needs. At some point, I repeat, money received as salary loses its specific character as such. Money held in trust loses its identity by being mingled with the general funds of the owner. I see no rea-

son why the same should not be true of a salary. But I do not think that the result could be avoided by keeping the salary distinct. I think that the moment the salary is received, whether kept distinct or not, it becomes part of the general income of the owner, and is mingled with the rest, in theory of law, as an item in the mutual account with the United States. I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond.

The decisions heretofore reached by this court seem to me to justify my conclusion. In William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432, a tax was levied by Congress upon the income of the plaintiff corporation. More than two thirds of the income were derived from exports, and the Constitution in terms prohibits any tax on articles exported from any state. By construction it had been held to create "a freedom from any tax which directly burdens the exportation." Fairbank v. United States, 181 U. S. 283, 293, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135. The prohibition was unequivocal and express, not merely an inference, as in the present case. Yet it was held unanimously that the tax was valid. "It is not laid on income from exportation because of its source, in a discriminative way, but just as it is laid on other income. . . . There is no [267] discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied . . . after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins." 247 U. S. 174, 175. All this applies with even greater force when, as I have observed, the Constitution has no words that forbid a tax. In United States Glue Co. v. Oak Creek, 247 U. S. 321, 329, 62 L. ed. 1135, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748, the same principle was affirmed as to interstate commerce, and it was said that if there was no discrimination against such commerce the tax constituted one of the ordinary burdens of government, from which parties were not exempted because they happened to be engaged in commerce among the states.

A second and independent reason why this tax appears to me valid is that, even if I am wrong as to the scope of the original document, the 16th Amendment justifies the tax, whatever would have been the law before it was applied. By that Amendment Congress is given power to "collect taxes on incomes from whatever source derived." It is true that it goes on "without apportionment among the several states, and without regard to any census or enumeration," and this shows the particular difficulty that led to it. But the only cause of that difficulty was an attempt to trace income to its source, and it seems to me that the Amendment was intended to put an end to the cause, and not merely to obviate a single result. I do not see how judges can claim an abatement of their income tax on the ground that an item in their gross income is salary, when the power is given expressly to tax incomes from whatever source derived.

Mr. Justice **Brandeis** concurs in this opinion.

---

[268] LEO WEIDHORN, Petitioner.
v.
BENJAMIN A. LEVY, Trustee in Bankruptcy of the Estate of J. Herbert Weidhorn, Bankrupt.

(See S. C. Reporter's ed. 268-274.)

Bankruptcy — review of proceedings — petition to revise or appeal.

1. A decision of a bankruptcy court that the referee had no jurisdiction of a bill filed by the trustee to avoid certain transfers as in fraud of creditors is reviewable in the circuit court of appeals by petition to revise under the Bankruptcy Act, § 24b, although, had the district court sustained the jurisdiction and passed upon the merits, the exclusive remedy would have been by appeal under § 24a, as the court thereby would have determined a controversy arising in bankruptcy proceedings.

[For other cases, see Bankruptcy, XIII in Digest Sup. Ct. 1908.]

Bankruptcy — reference — powers.

2. A referee in bankruptcy is not in any sense a separate court nor endowed with any independent judicial authority. He is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference, read in the light of the Bankruptcy Act, and his judicial functions, however important, are subject always to the review of the bankruptcy court.

[For other cases, see Bankruptcy, V. in Digest Sup. Ct. 1908.]

Bankruptcy — jurisdiction of referee — suit to avoid transfers.

3. A referee in bankruptcy, by virtue of a general reference under General Orders in Bankruptcy No. 12, which provides

that "thereafter all the proceedings, except such as are required by the act or by these General Orders to be had before the judge, shall be had before the referee," has no jurisdiction of a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e of the Bankruptcy Act, and affecting property not in the custody or control of the court of bankruptcy.

[For other cases, see Bankruptcy, V. in Digest Sup. Ct. 1908.]

[No. 203.]

Argued January 28 and 29, 1920. Decided June 1, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review a decree which reversed a decree of the District Court of Massachusetts, vacating a decree made by the referee in bankruptcy on a bill to set aside transfers as in fraud of creditors. Decree of Circuit Court of Appeals reversed and that of District Court affirmed.

See same case below, 165 C. C. A. 48, 253 Fed. 28.

The facts are stated in the opinion.

Mr. **William M. Blatt** argued the cause, and, with Mr. Walter Hartstone, filed a brief for petitioner.

Mr. **Leo M. Friedman** argued the cause and filed a brief for respondent.

Mr. Justice **Pitney** delivered the opinion of the court:

Upon his voluntary petition, filed in February, 1916, J. Herbert Weidhorn was adjudged a bankrupt, and the [269] district court referred the case to a referee under General Order XII. (1). Thereafter the trustee in bankruptcy addressed to and filed with the referee a bill in equity against the bankrupt's brother, Leo Weidhorn (the present petitioner), and the Boston Storage Warehouse Company, alleging that certain chattel mortgages, or bills of sale in the nature of mortgages, made by the bankrupt to Leo more than four months before the filing of the petition in bankruptcy, and under which, prior to the filing of the petition, possession of the chattels had passed to the mortgagee and the Storage Warehouse Company, were invalid because made in fraud of creditors, and seeking to set them aside under the Statute of Elizabeth and the Bankruptcy Act, § 70e, and recover the chattels or the proceeds thereof for the bankrupt estate. Defendant Leo Weidhorn promptly objected to the jurisdiction of the referee, and afterwards answered to the merits. The referee overruled the jurisdictional objection, proceeded to hear the merits, and entered a final decree in favor of the trustee. On review the district court, considering the jurisdictional question only, vacated the decree and dismissed the bill upon the ground that the referee exceeded his powers under the order of reference. 243 Fed. 756. The trustee petitioned the circuit court of appeals to revise the decree under § 24b; and that court, deeming that the district court had erred in holding that the referee acted without jurisdiction, reversed its decree dismissing the bill and remanded the cause for further proceedings, including a review of the merits. 165 C. C. A. 48, 253 Fed. 28. A writ of certiorari brings the case here.

It is assigned for error that the circuit court of appeals ought not to have entertained the petition to revise under § 24b; the contention being that since the decree complained of was made in a plenary suit, the exclusive remedy was by appeal under § 24a. Had the district court sustained the jurisdiction and passed upon the merits, the [270] point would be well taken, as the court thereby would have determined a "controversy arising in bankruptcy proceedings." Hewit v. Berlin Mach. Works, 194 U. S. 296, 300, 48 L. ed. 986, 987, 24 Sup. Ct. Rep. 690. But since the decision turned upon a mere question of law as to whether the referee had authority to hear and determine the controversy,—in effect, a question of procedure,—it properly was reviewable by petition to revise under § 24b. Louisville Trust Co. v. Comingor, 184 U. S. 18, 26, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293; Schweer v. Brown, 195 U. S. 171, 172, 49 L. ed. 144, 145, 25 Sup. Ct. Rep. 15; First Nat. Bank v. Chicago, Title & T. Co. 198 U. S. 280, 288, 291, 49 L. ed. 1051, 1054, 1055, 25 Sup. Ct. Rep. 693; Re Loving, 224 U. S. 183, 188, 56 L. ed. 725, 726, 32 Sup. Ct. Rep. 446; Gibbons v. Goldsmith, 138 C. C. A. 252, 222 Fed. 826, 828.

Did the referee exceed the authority and jurisdiction conferred upon him by the Bankruptcy Act and the general order of reference?

The following provisions of the act are pertinent: By § 1 (7) "'court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee." By § 18g, "If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing,

the clerk shall forthwith refer the case to the referee." Section 22 provides that after a person has been adjudged a bankrupt, the judge may make a reference to the referee, either generally or specially, with limited authority to act or to consider and report, and "may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another." By § 36, "Referees shall take the same oath of office as that prescribed for judges of United States courts." And by § 38a, "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with 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, and [271] as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided." [July 1, 1898, 30 Stat. at L. 544, chap. 541, Comp. Stat. § 9585, 1 Fed. Stat. Anno. 2d ed. p. 509.]

These provisions make it clear that the referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference,—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the bankruptcy court.

In the General Orders established by this court pursuant to the act, under XII. (1) provision is made for an order referring a case to a referee: "And thereafter all the proceedings, except such as are required by the act or by these General Orders to be had before the judge, shall be had before the referee." 172 U. S. 657, 43 L. ed. 1190, 18 Sup. Ct. Rep. vi.

The question is whether the present suit, brought by the trustee in bankruptcy against petitioner, was a "proceeding" within the meaning of this provision. We cannot concur in the view of the district court that this question is governed by the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in bankruptcy proceedings," as these terms are employed in §§ 23, 24a, 24b, and 25a; there may be controversies arising in the course of bankruptcy proceedings that are so far connected with those proceedings as to be in effect a part of them and capable of summary disposition by the referee under the general order of reference, although, because of their nature, or because involving a distinct and separable issue, they may be reviewable, under the sections cited, by appeal rather than by petition to revise. Hewit v. Berlin Mach. Works, 194 U. S. 296, 300, 48 L. ed. 986, 987, 24 Sup. Ct. Rep. 690; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 553, 54 L. ed. 610, 613, 30 Sup. Ct. Rep. 412.

Thus, if the property were in the custody of the bankruptcy court or its officer, any controversy raised by an [272] adverse claimant setting up a title to or lien upon it might be determined on summary proceedings in the bankruptcy court, and would fall within the jurisdiction of the referee. White v. Schloerb, 178 U. S. 542, 546, 44 L. ed. 1183, 1186, 20 Sup. Ct. Rep. 1007; Mueller v. Nugent, 184 U. S. 1, 13, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269.

But in the present instance the controversy related to property not in the possession or control of the court or of the bankrupt, or anyone representing him at the time of petition filed, and not in the court's custody at the time of the controversy, but in the actual possession of the bankrupt's brother under an adverse claim of ownership based upon conveyances made more than four months before the institution of the proceedings in bankruptcy. In order to set aside these conveyances and subject the property to the administration of the court of bankruptcy a plenary suit was necessary (Babbitt v. Dutcher, 216 U. S. 102, 113, 54 L. ed. 402, 406, 30 Sup. Ct. Rep. 372), and such was the nature of the one that was instituted.

Under the Bankruptcy Act of 1898, as originally passed, an independent suit of this character could not be brought in the district court in bankruptcy "unless by consent of the proposed defendant." Act of July 1, 1898 (chap. 541, § 23b, 30 Stat. at L. 544, 552, Comp. Stat. §§ 9585, 9607, 1 Fed. Stat. Anno. 2d ed. pp. 509, 759); Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000. Whether, under the Act of February 5, 1903 (chap. 487, 32 Stat. at L. 797, 798, 800, Comp. Stat. §§ 9586, 9607, 9654, 1 Fed. Stat. Anno. 2d ed. pp. 528, 761, 1216), amending §§ 23b and 70e, a suit for the recovery of property fraudulently transferred by the bankrupt could be brought in a court of bankruptcy without the consent of de-

fendant, was a question left undetermined in Harris v. First Nat. Bank, 216 U. S. 382, 385, 54 L. ed. 528, 529, 30 Sup. Ct. Rep. 296, but answered in the negative in Wood v. A. Wilbert's Sons Shingle & Lumber Co. 226 U. S. 384, 389, 57 L. ed. 264, 267, 33 Sup. Ct. Rep. 125. By Act of June 25, 1910 (chap. 412, § 7, 36 Stat. at L. 838, 840, Comp. Stat. §§ 9586, 9607, 1 Fed. Stat. Anno. 2d ed. pp. 528, 761), § 23b was further amended so as to confer jurisdiction upon the courts of bankruptcy without consent of the proposed defendant in suits for the recovery of property under § 70e. The present suit, being of this nature, might have been brought in the district court; or [273] it might have been brought in a state court having concurrent jurisdiction under § 70e, as amended.

We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the referee under the general reference so as to include jurisdiction over an independent and plenary suit such as the one under consideration. The provisions of the act, as well as the title of his office, indicate that the referee is to exercise powers not equal to or co-ordinate with those of the court or judge, but subordinate thereto; and he becomes "the court" only by virtue of the order of reference. In the General Orders the word "proceedings" occurs frequently, but never in a sense to include a plenary suit. On the other hand, "proceedings in equity" and "proceedings at law" are specially dealt with in General Order XXXVII.

The practice is not uniform; we have found no decision by a circuit court of appeals upon the point; and the decisions of the district courts are conflicting. A referee's opinion in Re Murphy (1900) 3 Am. Bankr. Rep. 499, 505, upholds his jurisdiction over a plenary proceeding by the trustee to set aside a preferential transfer of property to a creditor. In Re Shults & Mark (referee's opinion) 11 Am. Bankr. Rep. 690, a special form of reference having been adopted by the district court, it was held that jurisdiction was conferred upon the referee over proceedings under § 60b to recover property preferentially transferred, and under § 67e to recover property fraudulently transferred. In Re Steuer (D. C. Mass.) 104 Fed. 976, 980, 3 N. B. N. Rep. 226, a plenary suit to avoid a preference was heard before the referee without objection, and upon petition to review his action the district court, with some hesitation, directed that a decree issue "as if made originally by the judge, and [274] not simply as an affirmance of the decree of the referee." In Re Scherber (D. C. Mass.) 131 Fed. 121, 124, it was found unnecessary to determine whether the referee could proceed over objection to take jurisdiction of a plenary suit to recover a preference. Views adverse to the jurisdiction of the referee in an independent proceeding to avoid a transfer were expressed in Re Walsh Bros. (D. C. Iowa) 163 Fed. 352; Re F. M. & S. Q. Carlile (D. C. N. C.) 199 Fed. 612, 615, 616; Re Ballou (D. C. Ky.) 215 Fed. 810, 813, 814; and Re Overholzer (referee's opinion) 23 Am. Bankr. Rep. 10.

The point appears to have been overlooked in Studley v. Boylston Nat. Bank, 118 C. C. A. 435, 200 Fed. 249; 229 U. S. 523, 525, 526, 57 L. ed. 1313, 1315, 1316, 33 Sup. Ct. Rep. 806. Other cases cited throw no useful light upon the question.

Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the General Orders in Bankruptcy a referee, by virtue of a general reference under Order XII. (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e, and affecting property not in the custody or control of the court of bankruptcy.

Decree of the Circuit Court of Appeals reversed, and decree of the District Court affirmed.

---

[275] UNITED STATES, Appt.,
v.
OMAHA TRIBE OF INDIANS. (No. 243.)

OMAHA TRIBE OF INDIANS, Appt.,
v.
UNITED STATES. (No. 244.)

(See S. C. Reporter's ed. 275–284.)

Claims — against United States — Indian claims.

1. No liability, legal or equitable, on the part of the United States to pay the value of horses belonging to Omaha Indians which were stolen in raids by the

Sioux Indians, can be asserted to arise under the obligation the United States assumed in the Treaty of March 16, 1854, with the Omaha Indians, to protect them from the Sioux and other hostile tribes "as long as the President may deem such protection necessary," unless there was a failure on the part of the government to provide the protection deemed by the President to be necessary.

[For other cases, see Claims, I. b, in Digest Sup. Ct. 1908.]

Claims — against United States — Indian claims.

2. Omaha Indians for whom the United States agreed, in the Treaty of March 6, 1865, by which the Indians ceded lands to the United States, to pay a specified sum to be expended for goods, provisions, cattle, horses, etc., for their benefit, are entitled to an allowance of the value of certain cattle delivered by the United States in pursuance of this agreement which the court of claims finds were in bad condition when they reached the reservation, and thereafter died, the necessary import of which finding is that the cattle either were in bad condition when purchased, or were badly cared for on the way to the reservation, and in either event, the fault lying with the agents of the United States, the Indians are entitled to credit.

[For other cases, see Claims, I. b, in Digest Sup. Ct. 1908.]

Appeal — from court of claims — scope of review — findings of fact.

3. A finding of the court of claims that an infirmary building constructed by the government for Indians was not used and was not such a building as was contemplated by treaties with such Indians means not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians, and, so construed, it is either a finding upon a mere question of fact, or, at most, is a finding of mixed fact and law, where the question of law is inseparable, and in either case the finding is not reviewable by the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, VIII. e; VIII. 1, 3, g, in Digest Sup. Ct. 1908.]

Claims — jurisdiction — misappropriation of Indian funds.

4. Expenditure by the United States of Indian moneys for a building not used by the Indians, and one which, because of its unfitness, they were not obliged to accept, is a misappropriation of funds of the tribe "for purposes not for its material benefit," within the meaning of the Act of June 22, 1910, conferring upon the court of claims jurisdiction to hear and determine claims which the Indians may have against the United States for such misappropriations.

[For other cases, see Claims, 145–163, in Digest Sup. Ct. 1908.]

Indians — tribal cessions — passing of title.

5. An intention to defer passing of title until payment of consideration is negatived, as to land north as well as south of a described line, by the provisions of the Treaty of March 16, 1854, with the Omaha Indians, by which they ceded in præsenti lands south of such line, with a proviso that if, upon exploration, the country north of the line did not prove to be a satisfactory and suitable location for them, the President might, with their consent, set apart and assign to them a suitable residence, in which case all of the country belonging to them north of the line "shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line," the consideration for the principal cession to be paid in the future, and either paid to the Indians direct or expended for their use and benefit, from time to time, in the discretion of the President, since by fair construction the money that the Indians were to receive for the additional cession of the land north of the line, in the event of such cession taking effect, was subject to the same terms as to payment, at least to the extent that it was for the President to determine, in his discretion, whether it should be paid in cash to the Indians, or expended for their benefit from time to time.

[For other cases, see Indians, V. in Digest Sup. Ct. 1908.]

Interest — on claims against the United States.

6. The provision of the Judicial Code, § 177, against the allowance of interest upon any claim against the United States up to the time of the rendition of judgment thereon by the court of claims unless upon a contract expressly stipulating for the payment of interest, is applicable to the unpaid consideration due to Indians under a treaty which made a present cession of their lands to the United States for a consideration to be paid thereafter, with no mention made of interest.

[For other cases, see Interest, I. b, 3, in Digest Sup. Ct. 1908.]

Interest — on claims against the United States.

7. Claims by Indians against the United States cannot be regarded as taken out of the rule against the allowance of interest, prescribed by the Judicial Code, § 177, on the theory that because the Act of June 22, 1910, conferring jurisdiction of such claims upon the court of claims, calls for the consideration of equitable as

---

Note.—On enforceability of rights of Indians in courts of justice—see note to Missouri P. R. Co. v. Cullers, 13 L.R.A. 542.

On rights and status of Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

On construction and operation of treaties—see note to United States v. The Amistad, 10 L. ed. U. S. 826.

well as legal claims, the ordinary rule of equity ought to be followed as to the allowance of interest.

[For other cases, see Interest, I. b, 3, in Digest Sup. Ct. 1908.]

Claims — against United States — Indian claims.

8. The United States was not obligated to pay for Omaha Indians killed in Sioux raids by its agreement in the Treaty of March 16, 1854, to protect them from the Sioux and other hostile tribes "as long as the President may deem such protection necessary," unless there was a failure by the government to provide the protection deemed by the President to be necessary.

[For other cases, see Claims, I. b, in Digest Sup. Ct. 1908.]

Appeal — from court of claims — scope of review.

9. The failure of the court of claims to find certain facts in accordance with claimant's contention may not be assigned as error on appeal to the Federal Supreme Court, since the review by the latter court is based upon the findings as made.

[For other cases, see Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

[Nos. 243 and 244.]

Argued March 18, 1920. Decided June 1, 1920.

CROSS APPEALS from the Court of Claims to review an award in favor of Indian claimants. Reversed in part and affirmed in part.

See same case below, 53 Ct. Cl. 549.

The facts are stated in the opinion.

Mr. **Charles H. Merillat** argued the cause, and, with Messrs. Charles J. Kappler and Hiram Chase, filed a brief for the Omaha Tribe of Indians:

Interest should be allowed on the land claim.

Himely v. Rose, 5 Cranch, 313, 319, 3 L. ed. 111, 113; United States v. McKee, 91 U. S. 442, 23 L. ed. 326; Crescent Min. Co. v. Wasatch Min. Co. 151 U. S. 317, 38 L. ed. 177, 14 Sup. Ct. Rep. 348; Spalding v. Mason, 161 U. S. 375, 396, 40 L. ed. 738, 746, 16 Sup. Ct. Rep. 592; United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; United States v. New York, 160 U. S. 598, 40 L. ed. 551, 16 Sup. Ct. Rep. 402.

A trust, in its technical sense, is an obligation on a person, arising out of the confidence reposed in him, to apply property faithfully and according to such confidence.

Weltner v. Thurmond, 17 Wyo. 268, 129 Am. St. Rep. 113, 98 Pac. 590, 99 Pac. 1128; Maxwell v. Wood, 133 Iowa, 721, 111 N. W. 203; First State Bank v. Sibley County Bank, 96 Minn. 456, 105 N. W. 485; Allen v. Rees, 136 Iowa, 423, 8 L.R.A.(N.S.) 1137, 110 N. W. 583.

The United States may be trustee; and, while it cannot be sued without its sovereign consent, that consent given causes application of the general principles of law and equity.

Perry, Trusts, § 41.

Reimbursement for worthless, dying cattle was allowable.

Chickasaw Nation v. United States, 22 Ct. Cl. 250.

Assistant Attorney General **Davis** argued the cause, and, with Mr. George T. Stormont, filed a brief for the United States:

Assuming that the furnishing of protection was not discretionary with the President, the government contends that there was no liability on its part, under the treaty, to respond in damages for the failure to protect the Omahas. If there was no liability under the treaty, the jurisdictional statute created none.

United States v. Mille Lac Band, 229 U. S. 498, 500, 57 L. ed. 1299, 1302, 33 Sup. Ct. Rep. 811.

Article 7 of the treaty, it is true, contains a promise from the United States to protect the Indians, but it is not a promise at the same time to pay for the damages which might result from failure to protect.

Leighton v. United States, 161 U. S. 291, 40 L. ed. 703, 16 Sup. Ct. Rep. 495.

No interest could be allowed.

United States v. North Carolina, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 Sup. Ct. Rep. 920; Harvey v. United States, 113 U. S. 243, 248, 28 L. ed. 987, 988, 5 Sup. Ct. Rep. 465.

Mr. Justice **Pitney** delivered the opinion of the court:

We have here an appeal and a cross appeal from a judgment of the court of claims in a suit brought under the Act of June 22, 1910 (36 Stat. at L. 580, chap. 313), which conferred upon that court jurisdiction to hear and determine "all claims of whatsoever nature which the Omaha Tribe of Indians may have or claim to have against the United States . . . under the treaty between the United States and the said tribe of Indians, ratified and affirmed March sixteenth, eighteen hundred and fifty-four [10 Stat. at L. 1043] or under [277] any other treaties or laws, or for the misappropriation of any funds of said tribe for purposes not for

its material benefit, or for failure of the United States to pay said tribe any money due;" with authority to hear and determine all legal and equitable claims of the tribe, and also any legal or equitable defense, set-off, or counterclaim, and to settle the rights, both legal and equitable, of the parties, notwithstanding lapse of time or statutes of limitation.

The court of claims, after hearing the case, made findings upon which it awarded judgment in favor of the Indians for various sums aggregating $122,295.31. 53 Ct. Cl. 549.

By article 1 of the Treaty of March 16, 1854 (10 Stat. at L. 1043), the Omaha Indians ceded to the United States all their lands west of the Missouri river and south of a line drawn due west from a point stated, reserving the country north of that line for their future home, with a proviso that if this country should not, on exploration, prove to be a satisfactory and suitable location for the Indians, the President might, with their consent, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them, not greater in extent than 300,000 acres, in which case all of the country belonging to said Indians north of the line specified should be ceded to the United States, and the Indians should receive the same rate per acre for it, less the number of acres assigned in lieu of it, as was agreed to be paid for the lands south of the line. By article 4, in consideration of and payment for the country thus ceded, and certain relinquishments made by the Indians, the United States agreed to pay to them certain sums of money aggregating $840,000, in specified annual instalments commencing on January 1, 1855; these sums to be paid to the Omahas or expended for their use and benefit under the direction of the President of the United States, who was from time to time to determine at his discretion what proportion of the annual payments should be paid in money and what proportion [278] applied to and expended for the moral improvement and education of the Indians; for such beneficial objects as, in his judgment, would be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, etc.; and for medical purposes. By article 5, in order to enable the Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and for certain other expenses, they were to receive from the United States the further sum of $41,000, to be paid out and expended under the direction of the President and in such manner as he should approve.

The court of claims found that the Omahas were not satisfied with the country to the north of the east-and-west line mentioned, and duly elected to take for their future home a tract of 300,000 acres south of the line; and this fact being reported to the President, by his direction a tract of 300,000 acres south of the line was set apart for them. The court found that the area of the land north of the line belonging to the Indians was 783,365 acres, and that after deducting from this the 300,000 acres set apart for them in accordance with the provisions of the treaty there was an excess of 483,365 acres, for which they had not been paid. The price for this was fixed by taking the aggregate of the treaty payments ($881,000) and dividing it by 4,500,000 acres, the area of the lands south of the line ceded by the Omahas to the United States, making the treaty price 19.6 cents per acre, at which rate the 483,365 acres for which the Indians were still to be paid amounted to $94,739.54. This was awarded to them.

The court found that of the $41,000 specified in article 5, the government expended $23,453.21 in carrying out the provisions of that article, and the balance, $17,546.79, remained in the hands of the Indian agents of the United States charged with the disbursement of the treaty funds, who were guilty of defalcations of this and other moneys to the aggregate amount of $18,202.19. This was allowed.

[279] By the 7th article of the treaty the United States agreed to protect the Omahas from the Sioux and all other hostile tribes as long as the President might deem such protection necessary. The court found that after the treaty the Sioux made repeated attacks upon the Omahas in the year of removal and subsequent years; that the United States was called upon by the Omahas to protect them, and such protection was necessary as soon as they removed to their new home and for several years thereafter, but no protection was afforded them by the United States. The Sioux killed 22 Omahas and stole 152 horses, the latter worth $30 per head. The court allowed $4,560 for the horses, but made no allowance for the Indians killed.

By a treaty concluded March 6, 1865 (14 Stat. at L. 667), the United States agreed to pay the Omahas for the cession of a part of their reservation the sum of $50,000, to be expended "for goods, provisions, cattle, horses," etc., for their benefit. Pursuant to this, as the court of claims found, 103 head of stock cattle were delivered in the year 1867, for which $3,432.99 was paid out of money belonging to the Omahas. "These cattle, when they reached the reservation, were in bad condition and 50 of them died," of an average value of $33.33 per head, the 50 being worth $1,666.50. This sum was allowed.

Under article 4 of the Treaty of 1854, and article 2 of the Treaty of 1865, certain moneys were to be or might be expended for the benefit of the Indians in the way of improvements upon their reservation, and in other ways. Under these provisions, in the year 1875 an infirmary was constructed upon the Omaha and Winnebago consolidated reservation. The court of claims found that this building was not used, and was not such a building as was contemplated by the treaties with the Omahas; and that of its cost, $3,127.08 was paid out of money belonging to them. This sum was allowed.

The principal reason for the government's appeal lay in [**280**] the award to the tribe of $94,739.54 for the excess land north of the dividing line mentioned in the treaty; it having been contended in the court below that the tribe owned none of that land. The court of claims having found to the contrary, the government moved this court, after taking appeal, for an order remanding the case, with directions for further findings on the question. This motion having been overruled, as well as a counter motion submitted by the claimant for a certification of the entire record to this court, the government concedes that it cannot contest the correctness of the judgment upon this item.

As to the item of $4,560 allowed as the value of horses killed by the Sioux Indians, we conclude that the objection of the government is well founded. The obligation of the treaty was to protect the Omahas from the Sioux and other hostile tribes "as long as the President may deem such protection necessary." The obligation depended upon an exercise of discretion by the President. There is no finding of a failure to provide any protection deemed by the President to be necessary; hence nothing to create a liability, legal or equitable, under the treaty clause.

The item of $18,202.19, allowed for defalcations of the Indian agents, is not disputed.

The government contests the allowance for the stock cattle upon the ground that the fact that they were in bad condition when they reached the reservation is not sufficient to show that they were in such condition when purchased; it being suggested that their defective condition upon reaching the reservation may have been due to the rigors and hardships of the drive from the market to the reservation. We cannot so interpret the finding; deeming its necessary import to be that the cattle either were in bad condition when purchased, or were badly cared for on the way to the reservation. In either event the fault lay with the agents of the United States, and the Indians were entitled to credit for the sum allowed on this account.

[**281**] The allowance for the infirmary is disputed upon the ground that the treaties, fairly construed, gave authority for expending moneys of the Omahas for this purpose, especially the very general language of article 4 of the Treaty of 1854, authorizing the President to expend a part of the fund "for such beneficial objects as, in his judgment, will be calculated to advance them in civilization" and "for medical purposes." We construe the finding, "This building was not used, and it was not such a building as was contemplated by the treaties," as meaning not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians. So construed, it is either a finding upon a mere question of fact, or at most a finding of mixed fact and law where the question of law is inseparable. In the latter case, as in the former, the finding, on familiar principles, is not reviewable. Ross v. Day, 232 U. S. 110, 116, 117, 58 L. ed. 528-530, 34 Sup. Ct. Rep. 233, and cases cited. The fact that the building was not used shows that the tribe did not accept it, and received no benefit from it. And since, because of its unfitness, they were not obliged to accept it, the expenditure of their money in its construction was a misappropriation of funds of the tribe "for purposes not for its material benefit," within the meaning of the jurisdictional act. We affirm the allowance of this item.

Upon the cross appeal, assignments of error are based upon the disallowance of interest. As to the $94,739.54 awarded for the land north of the dividing line in excess of 300,000 acres, it is contended that payment of this consideration was a concurrent condition of the passing of title to the United States, and as equity considers that as done which ought to be done, the purchase money was, potentially, in the Treasury of the United States as a trust fund, and ought to be treated as if invested for the benefit of the Indians at 5 per cent interest, under Rev. Stat. §§ 2095, 2096, [282] and 3659, Comp. Stat. §§ 4073, 4074, 6667, 3 Fed. Stat. Anno. 2d ed. p. 774, 8 Fed. Stat. Anno. 2d ed. p. 910; or, in the alternative, that the assumption by the United States of title to the land without compliance with the concurrent condition of payment to the Indians and its sale by the United States to settlers was a breach of trust requiring the United States to account to the Omahas for the minimum sale price of $1.25 per acre. But the provisions of articles 1 and 4 of the treaty show that the theory that the passing of title was conditioned upon the payment of the consideration money, or any part of it, is untenable; hence there was no such trust as is asserted; and the price of the land was fixed by the treaty itself. By article 1 there was a cession in præsenti of the land south of the described line, with a proviso that if, upon exploration, the country north of the line did not prove to be a satisfactory and suitable location for the Indians, the President might, with their consent, set apart and assign to them a suitable residence, in which case all of the country belonging to them north of the line "shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line." By article 4 the consideration money for the principal cession was to be paid in the future, and either paid to the Indians direct or expended for their use and benefit from time to time, in the discretion of the President; and by fair construction, the money that the Indians were to receive under article 1 for the additional cession of the land north of the line, in the event of such cession taking effect, was subject to the same terms as to payment, at least to the extent that it was for the President to determine in his discretion whether it should be paid in cash to the Omahas or expended for their benefit "from time to time." Clearly, an intent to defer passing of title until payment of consideration is negatived; and this as truly with respect to the land north of the line as to that south of it. In both cases there was [283] simply a present cession, with a covenant for payment of the consideration thereafter, no mention being made of interest. Clearly, the provision of § 177, Judicial Code [36 Stat. at L. 1141, chap. 231, Comp. Stat. § 1168, 5 Fed. Stat. Anno. 2d ed. p. 680], is applicable: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest."

It is contended, however, both as to the award for the excess land and as to another claim allowed, that as the jurisdictional act calls for the consideration of equitable as well as legal claims, the ordinary rule of equity ought to be followed as to the allowance of interest (Himely v. Rose, 5 Cranch, 313, 319, 3 L. ed. 111, 113, being cited). But the jurisdictional act cannot be regarded as taking the case out of the usual rule. Tillson v. United States, 100 U. S. 43, 46, 25 L. ed. 543, 544; Harvey v. United States, 113 U. S. 243, 249, 28 L. ed. 987, 989, 5 Sup. Ct. Rep. 465. Nor does United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650, support the claim for interest; for there the particular question was a subject of difference in the negotiation that preceded the treaty; a clause of the treaty itself provided that it should be submitted to the Senate of the United States for decision; the Senate allowed interest; and its determination was accepted by the United States as valid and binding. This court held that the decision of the Senate was controlling, and that therefore interest must be allowed upon that part of the claim to which it applied. See 148 U. S. 433, 449, 451, 452, 478.

The contention of claimant that the court of claims erred in not making a pecuniary award for the members of the Omaha Tribe killed by the Sioux is covered by what we have said to show that there was error in making an allowance for the horses stolen by the Sioux; the same treaty provision governing both claims.

Other assignments are based upon the failure of the court to find certain facts in accordance with claimant's contention.

These require no discussion, since our review is based upon the findings as made.

[284] The judgment will be reversed as to the sum of $4,560 awarded for horses killed by the Sioux Indians, and in other respects affirmed.

Reversed in part; affirmed in part.

Mr. Justice **McReynolds** took no part in the consideration or decision of this case.

PHILADELPHIA & READING RAILWAY COMPANY, Plff. in Err. and Petitioner,
v.
MARGARET L. HANCOCK.

(See S. C. Reporter's ed. 284-286.)

Master and servant — employers' liability — when employee is engaged in interstate commerce — state Workmen's Compensation Law.

A member of a train crew operating a train of loaded coal cars from colliery to freight yard, both within the state, is, although his duties never took him outside of the state, employed in interstate commerce within the meaning of the Federal Employers' Liability Act so as to exclude the operation of a state Workmen's Compensation Law, where the ultimate destination of some of the cars was a point outside the state, as appears from instruction cards or memoranda delivered to the conductor by the shipping clerk of the mine, each of which referred to a particular car by number, and contained certain code letters indicating that such car with its load would move beyond the state, the course followed being to haul the cars to the yard and place them upon appropriate tracks, when the duties of the train crew ended; then, having gathered them into a train, to move them with another crew some 10 miles to a place still within the state, where they were inspected, weighed, and billed to specifically designated consignees in another state, passing in due time to their final destinations over proper lines, freight charges being at through rates and paid for the entire distance, beginning at the mine.

[For other cases, see Master and Servant, II. a, 2, b; Commerce, I. c, 2, in Digest Sup. Ct. 1918 Supp.]

[No. 415.]

Argued March 2, 1920. Decided June 1, 1920.

IN ERROR and ON WRIT of Certiorari to the Supreme Court of the State of Pennsylvania to review a judgment which, dismissing an appeal from the Court of Common Pleas of Schuylkill County, in that state, affirmed an award of the state Workmen's Compensation Board. Writ of error dismissed; judgment reversed on writ of certiorari, and case remanded for further proceedings.

See same case below, 264 Pa. 220, 107 Atl. 735.

The facts are stated in the opinion.

Mr. George Gowen Parry argued the cause and filed a brief for petitioner:

The claimant's decedent was engaged in interstate commerce at the time of the accident which caused his death.

Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229.

Mr. Hannis Taylor argued the cause and filed a brief for respondent:

The question on which the jurisdiction depends is frivolous.

Pure Oil Co. v. Minnesota, 248 U. S. 158, 164, 63 L. ed. 180, 190, 39 Sup. Ct. Rep. 35; Chicago, R. I. & P. R. Co. v. Maucher, 248 U. S. 359, 63 L. ed. 294, 39 Sup. Ct. Rep. 108; Oelwerke Teutonia v. Erlanger, 248 U. S. 521, 524, 63 L. ed. 399, 401, 39 Sup. Ct. Rep. 180; Southern P. Co. v. Arizona, 249 U. S. 472, 477, 63 L. ed. 713, 716, P.U.R. 1919D, 462, 39 Sup. Ct. Rep. 313; United States Fidelity & G. Co. v. Oklahoma, 250 U. S. 111, 63 L. ed. 876, 39 Sup. Ct. Rep. 399; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 593, 59 L. ed. 735, 740, L.R.A.1917F, 1148,

---

Note.—On the constitutionality, application, and effect of the Federal Employers' Liability Act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

On Workmen's Compensation Statutes—see notes to Rayner v. Sligh Furniture Co. L.R.A.1916A, 23; Hunter v. Colfax Consol. Coal Co. L.R.A.1917D, 51; and Linnane v. Ætna Brewing Co. L.R.A.1917D, 80.

On limitation by Federal laws of the application of Workmen's Compensation Statutes—see note to Staley v. Illinois C. R. Co. L.R.A.1916A, 461.

On applicability of state Compensation Statutes to non-negligent injuries of railroad employees while engaged in interstate commerce—see note to New York C. R. Co. v. Winfield, L.R.A. 1918C, 450.

P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

[285] Mr. Justice **McReynolds** delivered the opinion of the court:

The judgment below affirmed an award for respondent under the Workmen's Compensation Act of Pennsylvania, granted because of the death of her husband from an accident while in the petitioner's employ as a trainman.

After a writ of error had been sued out we allowed a writ of certiorari. The former must be dismissed; the case is properly here upon the latter.

If, when the accident occurred, the husband was employed in commerce between states, the challenged judgment must be reversed. And he was so employed if any of the cars in his train contained interstate freight. Employers' Liability Act, April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 161, 57 L. ed. 1129, 1134, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; New York C. R. Co. v. Porter, 249 U. S. 168, 63 L. ed. 536, 39 Sup. Ct. Rep. 188; Southern P. Co. v. Industrial Acci. Commission (Jan. 5, 1920) 251 U. S. 259, ante, 258, 10 A.L.R. 1181, 40 Sup. Ct. Rep. 130.

The essential facts are not in controversy; the nature of the employment, therefore, is a question of law.

The duties of the deceased never took him out of Pennsylvania; they related solely to transporting coal from the mines. When injured he belonged to a crew operating a train of loaded cars from Locust Gap Colliery to Locust Summit Yard, 2 miles away. The ultimate destination of some of these cars was outside of Pennsylvania. This appeared from instruction cards or memoranda delivered to the conductor by the shipping clerk at the mine. Each of these referred to a particular car by number, and contained certain code letters indicating that such car with its load would move beyond the state.

Pursuing the ordinary course, these cars were hauled to [286] Locust Summit Yard and placed upon appropriate tracks; there the duties of the first crew in respect of them terminated. Later, having gathered them into a train, another crew moved them some 10 miles to Shamokin Scales, where they were inspected, weighed, and billed to specifically designated consignees in another state. In due time they passed to their final destinations over proper lines. Freight charges at through rates were assessed and paid for the entire distance, beginning at the mine.

Respondent maintains that the coal in cars ticketed for transportation as above described did not become part of interstate commerce until such cars reached Shamokin Scales and were there weighed and billed. But we think former opinions of this court require the contrary conclusion. The coal was in the course of transportation to another state when the cars left the mine. There was no interruption of the movement; it always continued towards points as originally intended. The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations in another state. Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; Railroad Commission v. Worthington, 225 U. S. 101, 108, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 124, 126, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 341, 57 L. ed. 1215, 1218, 33 Sup. Ct. Rep. 837; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641.

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

Mr. Justice **Clarke** dissents.

---

[287] OHIO VALLEY WATER COMPANY, Plff. in Err.,
v.
BEN AVON BOROUGH, McKees Rocks Borough, Avalon Borough, et al.

(See S. C. Reporter's ed. 287-299.)

Constitutional law — due process of law — rate regulation — judicial review.

Withholding from the courts power to determine the question of confiscation ac-

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz

cording to their own independent judgment, when the act of a state public service commission in fixing the value of a water company's property for rate-making purposes comes to be considered on appeal, as is done by the Pennsylvania Public Service Company Law of July 26, 1913, as construed by the highest state court, must be deemed to deny due process of law, in the absence of a ruling by that court that the remedy by injunction provided for by § 31 of that act affords adequate opportunity for testing judicially an order of the commission, alleged to be confiscatory.

[For other cases, see Constitutional Law, IV. b, 7, c, in Digest Sup. Ct. 1908.]

[No. 128.]

Argued October 15, 1919. Restored to docket for reargument January 12, 1920. Reargued March 5 and 8, 1920. Decided June 1, 1920.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which, reversing a decree of the Superior Court, reinstated a rate-making order of the state Public Service Commission. Reversed and remanded for further proceedings.

See same case below, 260 Pa. 289, P.U.R.1918D, 49, 103 Atl. 744.

The facts are stated in the opinion.

Messrs. **William Watson Smith** and George B. Gordon argued the cause, and, with Mr. John G. Buchanan, filed a brief on original argument:

That the Pennsylvania supreme court considered that the case presented a mere legislative or administrative question (although the question of confiscation was involved) is shown to a demonstration by the decisions cited and the language quoted therefrom in support of its ruling.

Baltimore & O. R. Co. v. Public Service Commission, 66 Pa. Super. Ct. 403; State v. Great Northern R. Co. 130 Minn. 57, P.U.R.1915D, 467, 153 N. W. 247, Ann. Cas. 1917B, 1201; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; People ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122.

Where only a part of the revenue is affected, it is, except in rare cases, impossible to show, as a practical proposition, that there has been confiscation; whereas, where the entire revenue, or the revenue from an entire branch of the business, has been fixed, this difficulty in offering the necessary proof of confiscation disappears.

New York ex rel. New York & Q. Gas Co. v. McCall, supra; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 599, 59 L. ed. 735, 743, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 549, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108.

The water company has been denied a judicial investigation of the question as to the confiscation of its property.

Bellevue v. Ohio Valley Water Co. 245 Pa. 114, 91 Atl. 236; York Water Co. v. York, 250 Pa. 118, 95 Atl. 396; St. Clair v. Tamaqua & P. Electric R. Co. 259 Pa. 462, 5 A.L.R. 20, P.U.R. 1918D, 229, 103 Atl. 287.

The order of the Public Service Commission in this case was a legislative act.

Williams v. Bruffy, 96 U. S. 176, 24 L. ed. 716; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 499, 505, 42 L. ed. 243, 253, 255, 17 Sup. Ct. Rep. 896; Steenerson v. Great Northern R. Co. 69 Minn. 353, 72 N. W. 713; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441, 47 L. ed. 892-894, 23

---

v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to what constitutes the return of a public service corporation for rate-making purposes—see notes to Kansas City Southern R. Co. v. United States, 52 L.R.A.(N.S.) 15; and Bellamy v. Missouri & N. A. R. Co. L.R.A.1915A, 5.

On fundamental principles of valuation of public service property—see note to Oshkosh Waterworks Co. v. Railroad Commission, L.R.A.1916F, 599.

On reasonableness of governmental regulation of water rates—see note to Knoxville v. Knoxville Water Co. 53 L. ed. U. S. 371.

On legislative power to fix tolls, rates, or prices—see notes to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592; and Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 181.

Sup. Ct. Rep. 571; Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 282, 290, 53 L. ed. 186, 188, 29 Sup. Ct. Rep. 55; Knoxville v. Knoxville Water Co. 212 U. S. 1, 8, 53 L. ed. 371, 378, 29 Sup. Ct. Rep. 148; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Grand Trunk Western R. Co. v. Railroad Commission, 221 U. S. 400, 403, 55 L. ed. 786, 787, 31 Sup. Ct. Rep. 537; Bellevue v. Ohio Valley Water Co. 245 Pa. 114, 91 Atl. 236; Lusk v. Atkinson, 268 Mo. 109, 186 S. W. 703; Arkadelphia Mill. Co. v. St. Louis Southwestern R. Co. 249 U. S. 134, 63 L. ed. 517, P.U.R.1919C, 710, 39 Sup. Ct. Rep. 237; State ex rel. Missouri, K. & T. R. Co. v. Public Service Commission, 277 Mo. 175, P.U.R.1919D, 622, 210 S. W. 386; Lake Erie & W. R. Co. v. State Public Utilities Commission, 249 U. S. 422, 424, 63 L. ed. 684, 687, P.U.R.1919D, 459, 39 Sup. Ct. Rep. 345; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 459, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmer's Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Saratoga Springs v. Saratoga Gas, E. L. & P. Co. 191 N. Y. 123, 18 L.R.A. (N.S.) 713, 83 N. E. 693, 14 Ann. Cas. 606; Railroad Commission v. Central of Georgia R. Co. 95 C. C. A. 117, 170 Fed. 225; Wilmington City R. Co. v. Taylor, 198 Fed. 159; Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 321; Ross v. Oregon, 227 U. S. 150, 162, 163, 57 L. ed. 458, 463, 464, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Seward v. Denver & R. G. R. Co. 17 N. M. 557, 46 L.R.A.(N.S.) 242, 131 Pac. 980; Public Service Gas Co. v. Public Utility Comrs. 84 N. J. L. 463, 87 Atl. 651, 87 N. J. L. 581, L.R.A.1918A, 421, P.U.R. 1915E, 251, 92 Atl. 606, 94 Atl. 634, 95 Atl. 1079; State ex rel. Railroad & Warehouse Commission v. Great Northern R. Co. 123 Minn. 463, 144 N. W. 155; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 313, 314, 58 L. ed. 229, 242, 243, 34 Sup. Ct. Rep. 48; Bacon v. Rutland R. Co. 232 U. S. 134, 137, 138, 58 L. ed. 538, 539, 34 Sup. Ct. Rep. 283; Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411, 412, P.U.R. 1915A, 106, 35 Sup. Ct. Rep. 214; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 599, 604, 59 L. ed. 735, 743, 745, L.R.A.1917F, 1148, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; State v. Great Northern R. Co. 130 Minn. 57, P.U.R.1915D, 467, 153 N. W. 247, Ann. Cas. 1917B, 1201; Public Service Commission v. Cleveland, C. C. & St. L. R. Co. — Ind. —, P.U.R.1919B, 837, 121 N. E. 116.

The question as to confiscation of the property of the plaintiff in error, under the 14th Amendment, is a judicial question, and could not be finally determined in this case by the Public Service Commission.

Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456–458, 33 L. ed. 970, 980, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 399, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 657, 658, 39 L. ed. 567, 570, 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 466, 526, 527, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; Ex parte Young, 209 U. S. 123, 144, 52 L. ed. 714, 722, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Love v. Atchison, T. & S. F. R. Co. 107 C. C. A. 403, 185 Fed. 321; Sabre v. Rutland R. Co. 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269; Seward v. Denver & R. G. R. Co. 17 N. M. 557, 46 L.R.A.(N.S.) 242, 131 Pac. 980; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214; State v. Great Northern R. Co. 130 Minn. 57, P.U.R. 1915D, 467, 153 N. W. 247, Ann. Cas. 1917B, 1201; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 338, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 344, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; Interstate Commerce Commission

v. Brimson, 154 U. S. 447, 485, 38 L. ed. 1047, 1060, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; Atlantic Coast Line R. Co. v. Com. 102 Va. 621, 46 S. E. 911; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 493, 54 L. ed. 292, 297, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651; Procter & G. Co. v. United States, 225 U. S. 282, 297, 56 L. ed. 1091, 1096, 32 Sup. Ct. Rep. 761; Louisville & N. R. Co. v. Railroad Comrs. (Louisville & N. R. Co. v. Burr) 63 Fla. 491, 44 L.R.A.(N.S.) 189, 58 So. 543; Rowand v. Little Vermilion Special Drainage Dist. 254 Ill. 543, 98 N. E. 969; State ex rel. Railroad & Warehouse Commission v. Great Northern R. Co. 123 Minn. 463, 144 N. W. 155; Bacon v. Rutland R. Co. 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359; Pacific Live Stock Co. v. Lewis, 217 Fed. 95, 241 U. S. 440, 60 L. ed. 1084, 36 Sup. Ct. Rep. 637; People ex rel. New York & Q. Gas Co. v. McCall, 219 N. Y. 84, P.U.R.1917A, 553, 113 N. E. 795, Ann. Cas. 1916E, 1042, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122; Detroit & M. R. Co. v. Fletcher Paper Co. 248 U. S. 30–32, 63 L. ed. 107, 108, P.U.R.1919A, 787, 39 Sup. Ct. Rep. 13; Public Service Commission v. Cleveland, C. C. & St. L. R. Co. — Ind. —, P.U.R.1919B, 837, 121 N. E. 116.

The interpretation of the Public Service Company Law by the Pennsylvania supreme court, requiring the superior court to sustain the order of the Commission if there was any substantial evidence to support it, deprived the water company of its constitutional right to a judicial review of the Commission's action.

Bronson v. Kinzie, 1 How. 311, 316–318, 11 L. ed. 143, 145, 146; State v. Morrill, 16 Ark. 384; Edwards v. Kearzey, 96 U. S. 595, 600, 602, 24 L. ed. 793, 796, 797; Louisiana v. New Orleans, 102 U. S. 203, 206, 207, 26 L. ed. 132, 133; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 295, 30 L. ed. 1161, 1165, 7 Sup. Ct. Rep. 1190; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 456, 457, 33 L. ed. 970, 980, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; McGahey v. Virginia, 135 U. S. 662, 694, 34 L. ed. 304, 314, 10 Sup. Ct. Rep. 972; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 527, 528, 42 L. ed. 819, 843, 18 Sup. Ct. Rep. 418; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; San Jose Ranch Co. v. San Jose Land & Water Co. 126 Cal. 325, 58 Pac. 824; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 179, 44 L. ed. 417, 420, 422, 20 Sup. Ct. Rep. 336; Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 278, 53 L. ed. 176, 184, 29 Sup. Ct. Rep. 50; Com. v. Emmers, 221 Pa. 298, 70 Atl. 762; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 526, 527, 56 L. ed. 863, 866, 868, 32 Sup. Ct. Rep. 535; Wilmington City R. Co. v. Taylor, 198 Fed. 159; Seward v. Denver & R. G. R. Co. 17 N. M. 583, 46 L.R.A.(N.S.) 242, 131 Pac. 980; Public Service Gas Co. v. Public Utility Comrs. 84 N. J. L. 463, 87 Atl. 651; Ormsby County v. Kearney, 37 Nev. 314, 142 Pac. 803; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 661, 59 L. ed. 405, 411, P.U.R. 1915A, 106, 35 Sup. Ct. Rep. 214; Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691; Chicago, B. & Q. R. Co. v. Public Service Commission, 263 Mo. 333, P.U.R.1916B, 367, 181 S. W. 61; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 451, 452, 60 L. ed. 1084, 1097, 1098, 36 Sup. Ct. Rep. 637; Lusk v. Atkinson, 268 Mo. 109, 186 S. W. 703; Oregon Lumber Co. v. East Fork Irrig. Dist. 80 Or. 568, 157 Pac. 963; Public Service Commission v. Cleveland, C. C. & St. L. R. Co. — Ind. —, P.U.R.1919B, 837, 121 N. E. 116; Donham v. Public Service Comrs. 232 Mass. 309, P.U.R.1919C, 880, 122 N. E. 397.

The case is not altered by the possibility of relief in the Federal courts.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 547; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; Scott v. McNeal,

154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Gibson v. Mississippi, 162 U. S. 565, 591, 40 L. ed. 1075, 1081, 16 Sup. Ct. Rep. 904; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581; Smyth v. Ames, 169 U. S. 466, 527, 528, 42 L. ed. 819, 842, 843, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 35, 36, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Ross v. Oregon, 227 U. S. 150, 152, 153, 57 L. ed. 458, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312.

The Pennsylvania supreme court stands absolutely alone in its position in this case. In a case involving the entire revenue of a public service corporation no court in this country has ever adopted a similar view as to the powers of a court reviewing an order of a commission. On the contrary, there is a great weight of authority diametrically opposed to the decision of the Pennsylvania supreme court.

Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R. 1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691; Murray v. Public Utilities Commission, 27 Idaho, 603, L.R.A. 1916F, 756, P.U.R.1915F, 436, 150 Pac. 47; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 127 La. 636, 53 So. 890; People ex rel. Hillel Lodge v. Rose, 207 Ill. 352, 69 N. E. 762; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Louisville & N. R. Co. v. Railroad Commission (Louisville & N. R. Co. v. Burr) 63 Fla. 491, 44 L.R.A.(N.S.) 189, 58 So. 543; State ex rel. Railroad Comrs. v. Florida East Coast R. Co. 69 Fla. 165, P.U.R.1915C, 207, 67 So. 906; Donham v. Public Service Commission, 232 Mass. 309, P.U.R. 1919C, 880, 122 N. E. 397; Grafton County Electric Light & P. Co. v. State, 77 N. H. 490, 93 Atl. 1028, 78 N. H. 330, P.U.R.1917E, 345, 100 Atl. 668; Public Service Gas Co. v. Public Utility Comrs. 84 N. J. L. 463, 87 Atl. 651, 87 N. J. L. 581, L.R.A.1918A, 421, P.U.R. 1915E, 251, 92 Atl. 606, 94 Atl. 634, 95 Atl. 1079; Public Service Gas Co. v. Public Utilities Comrs. 242 U. S. 666, 61 L. ed. 552, 37 Sup. Ct. Rep. 243; Erie R. Co. v. Public Utility Comrs. 85 N. J. L. 420, 89 Atl. 1001; People ex rel. Kings County Lighting Co. v. Willcox, 210 N. Y. 479, 51 L.R.A.(N.S.) 1, 104 N. E. 911, 156 App. Div. 603, 141 N. Y. Supp. 677; Pioneer Teleph. & Teleg. Co. v. Westenhaver, 29 Okla. 429, 38 L.R.A. (N.S.) 1209, 118 Pac. 354; Western U. Teleg. Co. v. State, 31 Okla. 415, 121 Pac. 1069; Atchison, T. & S. F. R. Co. v. State, 23 Okla. 210, 21 L.R.A.(N.S.) 908, 100 Pac. 11.

Messrs. **William Watson Smith** and **John G. Buchanan** argued the cause on reargument.

Mr. **Berne H. Evans** argued the cause and filed a brief for the Public Service Commission of Pennsylvania:

In determining the fair value, gross and net annual return, and rate of return to which the company was entitled, the Commission was performing a judicial function.

Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Brymer v. Butler Water Co. 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249; Turtle Creek v. Pennsylvania Water Co. 243 Pa. 401, 90 Atl. 194; Bellevue v. Ohio Valley Water Co. 245 Pa. 114, 91 Atl. 236; St. Clair v. Tamaqua & P. Electric R. Co. 259 Pa. 462, 5 A.L.R. 20, P.U.R.1918D, 229, 103 Atl. 287; New Brighton v. New Brighton Water Co. 247 Pa. 232, 93 Atl. 327; Baltimore & O. R. Co. v. Public Service Commission, 66 Pa. Super. Ct. 403; McCrady Bros. Co. v. Pittsburgh & L. E. R. Co. 66 Pa. Super. Ct. 307.

The supreme court of Pennsylvania has judicially reviewed the findings of auditors and masters, conclusions of fact by chancellors, verdicts by juries, and awards by compensation boards; but where it found a fact determined after due process by those authorized by law to make such determination, it has refused to reverse the determination unless there was manifest error. If the testimony is ample to sustain the conclusion reached, the court will not reverse.

Cauffman v. Long, 82 Pa. 72; Re Keller's Private Road, 154 Pa. 547, 25 Atl. 814; Leonard v. Smith, 162 Pa. 284, 29 Atl. 915; Bugbee's Appeal, 110 Pa. 331, 1 Atl. 273; Barnes's Estate, 221 Pa. 399, 70 Atl. 790; McCarl v. Houston, 263 Pa. 1, 106 Atl. 104.

The supreme court of Pennsylvania reviewed the finding of fact judicially in the manner approved by many decisions.

New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122, 219 N. Y. 84, P.U.R.1917A, 553, 113 N. E. 793, Ann. Cas. 1916E, 1042; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. Rep. 291; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 183; Public Service Commission v. Northern C. R. Co. 122 Md. 388, 90 Atl. 105; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905; Grand Rapids & I. R. Co. v. Michigan R. Commission, 108 Mich. 108, P.U.R.1915F, 805, 154 N. W. 16; State v. Great Northern R. Co. 130 Minn. 57, P.U.R.1915D, 467, 153 N. W. 247, Ann. Cas. 1917B, 1201; West Jersey & S. S. R. Co. v. Public Utility Comrs. 87 N. J. L. 170, P.U.R. 1915D, 847, 94 Atl. 57; Turtle Creek v. Pennsylvania Water Co. 243 Pa. 401, 90 Atl. 194.

The determination of the fair value of the plaintiff's property was reached by due process of law.

Reetz v. Michigan, 188 U. S. 507, 47 L. ed. 565, 23 Sup. Ct. Rep. 390; Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; Dreyer v. Illinois, 187 U. S. 84, 47 L. ed. 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; A. Backus Jr. & Sons v. Ft. Street Union Depot Co. 169 U. S. 567, 42 L. ed. 858, 18 Sup. Ct. Rep. 445; United States v. Jones, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; New York ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

This court, on writ of error, will not examine into the facts.

Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Quimby v. Boyd, 128 U. S. 489, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. ed. 594, 32 Sup. Ct. Rep. 389.

Mr. **Leonard K. Guiler** also argued the cause, and, with Messrs. Albert G. Liddell and David L. Starr, filed a brief for defendants in error:

The plaintiff in error had a judicial investigation of its case in the supreme court of Pennsylvania.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

This court will only enter upon such an examination of the record as may be necessary to determine whether the Federal constitutional right claimed has been denied,—whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution.

People ex rel. New York & Q. Gas Co. v. McCall, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122.

[**288**] Mr. Justice **McReynolds** delivered the opinion of the court:

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be $924,744, and ordered establishment of a new and lower schedule which would yield 7 per centum thereon over and above operating expenses and depreciation.

Claiming the Commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the superior court. The latter reviewed the certified record, appraised the property at $1,324,621.80, reversed the order, and remanded the proceeding with directions to authorize rates sufficient to yield 7 per centum of such sum.

The supreme court of the state reversed the decree and reinstated the order, saying: "The appeal [to the superior court] presented for determination the question whether the order appealed from was reasonable and in conformity with law; and in this inquiry was involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount

of revenue which appellant was entitled to collect. In its decision upon the appeal, the superior court differed from the Commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate-making purposes." It considered those items and held that, as there was competent evidence tending to sustain the Commission's conclusion, and no abuse of discretion appeared, the superior court should not have interfered therewith. "A careful examination of the voluminous record in this case has led us to the [289] conclusion that in the items wherein the superior court differed from the Commission upon the question of values, there was merely the substitution of the former's judgment for that of the Commission, in determining that the order of the latter was unreasonable." [260 Pa. 289, P.U.R. 1918D, 49, 103 Atl. 744.]

Looking at the entire opinion we are compelled to conclude that the supreme court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal.

The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Lake Erie & W. R. Co. v. State Public Utility Commission, 249 U. S. 422, 424, 63 L. ed. 684, 687, P.U.R.1919D, 459, 39 Sup. Ct. Rep. 345. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment. Missouri P. R. Co. v. Tucker, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214; Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533, 538, 60 L. ed. 1148, 1154, 36 Sup. Ct. Rep. 715; Oklahoma Operating Co. v. Love (March 22, 1920) 252 U. S. 331, ante, 596, 40 Sup. Ct. Rep. 338.

Here the insistence is that the Public Service Company Law, as construed and applied by the supreme court, has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the Commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the 14th Amendment requires the state to provide.

[290] Article 6, Public Service Company Law of Pennsylvania:

"Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the Commission, or of a commissioner, except upon notice to the Commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the supreme court, as aforesaid. Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act." [Laws 1913, p. 1429.]

It is argued that this section makes adequate provision for testing judicially any order by the Commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The supreme court of Pennsylvania has not ruled upon effect or meaning of § 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled, "Practice and Procedure Before the Commission and Upon Appeal." Certain opinions by the supreme court seem to indicate that all objections to the Commission's orders must be determined upon appeal (St. Clair v. Tamaqua & P. Electric R. Co. 259 Pa. 462, 5 A.L.R. 20, P.U.R.1918D, 229, 103 Atl. 287; Pittsburgh R. Co. v. Pittsburgh, 260 Pa. 424, P.U.R.1918F, 301, 103 Atl. 959), but they do not definitely decide the point.

Taking into consideration the whole act, statements by [291] the state supreme court concerning the general plan of regulation, and admitted local practice, we are unable to say

that § 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the Federal Constitution. On the contrary, after specifying that within thirty days an appeal may be taken to the superior court (§ 17), the act provides (§ 22): "At the hearing of the appeal the said court shall, upon the record certified to it by the Commission, determine whether or not the order appealed from is reasonable and in conformity with law." But for the opinion of the supreme court in the present cause, this would seem to empower the superior court judicially to hear and determine all objections to an order on appeal, and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to § 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character,—not legislative, as in Prentis v. Atlantic Coast Line R. Co. supra. This is not disputed; but their jurisdiction, as ruled by the supreme court, stopped short of what must be plainly intrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including, of course, § 31), the challenged order is invalid.

The judgment of the Supreme Court of Pennsylvania must be reversed and the cause remanded there, with instructions to take further action not inconsistent with this opinion.

Reversed.

[**292**] Mr. Justice **Brandeis**, dissenting:

The Public Service Commission of Pennsylvania, acting upon complaint of Ben Avon borough and others, found, after due notice and hearing, that increased rates adopted by the Ohio Valley Water Company were unreasonable: and it prescribed a schedule of lower rates which it estimated would yield 7 per cent net upon the value of the property used and useful in the service. The company appealed to the superior court, contending that the property had been undervalued and that the rates were, therefore, confiscatory, in violation of the 14th Amendment. That court, passing upon the weight of the evidence introduced before the Commission, found that larger amounts should have been allowed for several items which entered into the valuation, reversed the order on that ground, and directed the Commission to reform its valuation accordingly, and upon such revised valuation to fix a schedule of rates which would yield the net return which it had found to be fair. From the decision of the superior court the Commission appealed to the supreme court of the state, contending that the superior court had, in passing upon the weight of the evidence, exceeded its jurisdiction. The supreme court sustained this contention; and holding, upon a careful review of the evidence and of the opinions below, that the Commission had been justified in its findings by "ample testimony" or "competent evidence," and that they were not unreasonable, reversed the decree of the superior court and reinstated the order of the Commission. 260 Pa. 289, P.U.R. 1918D, 49, 103 Atl. 744. The case comes here on writ of error under § 237 of the Judicial Code, as amended, the company claiming that its rights guaranteed by the 14th Amendment have been violated: (1) because the Public Service Company Law, as construed by the supreme court of the state, denies the opportunity of a judicial review of the Commission's [**293**] order; and (2) that the order, which was reinstated by the supreme court, confiscates its property.

First: The Commission's order, although entered in a proceeding commenced upon due notice, conducted according to judicial practice, and participated in throughout by the company, was a legislative order; and, being such, the company was entitled to a judicial review. Prentis v. Atlantic Coast Line R. Co. 211 U. S. 210, 228, 53 L. ed. 150, 159, 29 Sup. Ct. Rep. 67. The method of review invoked by the company under specific provisions of the statute was this: A stenographic report is made of all the evidence introduced before the Commission. On a record consisting of such evidence, the opinion and the orders, the case is appealed to the superior court, which is given power, if it finds that the order appealed from "is unreasonable or based upon incompetent evidence materially affecting the determina-

tion of the Commission, or is otherwise not in conformity with law," either to reverse the order or to remand the record to the Commission with direction to reconsider the matter and make such order as shall be reasonable and in conformity with law. No additional evidence may be introduced in the superior court; but it may remand the case to the Commission, with directions to hear newly discovered evidence, and upon the record thus supplemented to enter such order as may be reasonable and in conformity with law. From such new order a like appeal lies to that court. Act of July 26, 1913, No. 854, §§ 21-25, P. L. 1913, pp. 1427, 1428; Act of July 3, 1915, No. 345, P. L. 1915, p. 779. The supreme court construed this act as denying to the superior court the power to pass upon the weight of evidence; and the company contends that, for this reason, the review had does not satisfy the constitutional requirements of a judicial review.[1]

[**294**] Whether the appeal to the superior court fails, for the reason assigned or for some other reason, to satisfy the constitutional requirements of a judicial review, we need not determine; because the statute left open to the company, besides this limited review, the right to resort in the state courts, as well as in the Federal court, to another and unrestricted remedy,—the one commonly pursued when challenging the validity of a legislative order of this nature,—namely, a suit in equity to enjoin its enforcement. See Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 311, 58 L. ed. 229, 241, 34 Sup. Ct. Rep. 48; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 661, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214. For § 31 (P. L. 1913, p. 1429) provides:

"No injunction shall issue modifying, suspending, staying or annulling any order of the Commission, or of a commissioner, except upon notice to the Commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the supreme court as aforesaid. Whenever the Commission shall make any rule, regulation, finding, determination, or order, under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

Resort to suit for injunction is made easy in rate controversies like the present by § 41, p. 1432, in which it is provided that the penalties for failure to obey the Commission's orders imposed by §§ 35, 39, and 59, pp. 1430, 1431, shall not apply to an order declaring a rate unreasonable, if the tariff of rates actually charged is filed [**295**] with the Commission. The appeal provided for in §§ 22-25 was, under the original act, also to the court of common pleas, but was changed to the superior court by the act of July 3, 1915.

No decisions of the supreme court of Pennsylvania construing § 31 of this act have been brought to our attention. The company contends, however, that the construction here suggested has been inferentially made untenable by dicta in St. Clair v. Tamaqua & P. Electric R. Co. 259 Pa. 462, 5 A.L.R. 20, P.U.R. 1918D, 229, 103 Atl. 287; Pittsburgh R. Co. v. Pittsburgh, 260 Pa. 424, P.U.R. 1918F, 301, 103 Atl. 959; Klein-Logan Co. v. Duquesne Light Co. 261 Pa. 526, P.U.R.1919A, 524, 104 Atl. 763. But the language relied upon was in each instance used by the court in making the point, not that the sole method of review was by appeal, as distinguished from a bill in equity, but that the function of the courts was to review only after the Commission had, in the first instance, passed upon the case.

Where a state offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other, which the litigant elects, is limited, does not amount to a denial of the constitutional right to a judicial review. The alternative or additional remedy in the present case was, in effect, an appeal on the law applicable to facts found below. It is in substantial accord with the practice pursued in other appellate courts and approved in New York ex rel. New York & Q. Gas Co. v. McCall, 245 U.

[1] In Napa Valley Electric Co. v. Railway Commissioners, 251 U. S. 366, ante, 202, P.U.R.1920C, 849, 40 Sup. Ct. Rep. 176, this court had before it in § 67 of the Public Utilities Act of California a procedure substantially similar to that provided by §§ 21-25 of the Pennsylvania act set forth above. The court strongly intimated, if it did not decide, that, under the provisions of the act, the mere denial of a petition to the supreme court of the state for a writ of certiorari amounted to an adequate judicial determination of the petitioner's rights.

S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122. It is true, however, that an additional or alternative remedy may deny the constitutional right to due process of law because of its nature or the course of the proceeding. See Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344. And it is the contention of the plaintiff that because the supreme court did not weigh the evidence, but reinstated the order of the Commission on account of there being substantial evidence to support it, the procedure was not a judicial review and denied it due process of law. The defendants, on the other hand, [296] insist that the action of the supreme court, in reinstating the order, found not merely that there was substantial evidence, but, upon a full review, that there was ample evidence to support the findings, and that the order was reasonable. They contend that the course pursued by the supreme court in making such review was that customarily followed in Pennsylvania, both by appellate courts on appeals from chancellors and by trial courts on exceptions to reports of auditors, masters, or referees (Barnes's Estate, 221 Pa. 399, 70 Atl. 790); and they point out that the same method was pursued on appeal to the supreme court prior to the enactment of the Public Service Company Law, at a time when proceedings by consumers to secure reduction of water rates alleged to be unreasonably high were brought in the court of common pleas, subject to appeal to the supreme court. Turtle Creek v. Pennsylvania Water Co. 243 Pa. 401, 90 Atl. 194.

The contention of neither party is, in my opinion, wholly correct. Both overlook the nature of the question of law which was under review by the supreme court. It is true that there was no statutory limitation upon the scope of its review; but it does not follow either that the supreme court weighed the evidence and found that the preponderance supported the findings, or that, because it failed to weigh the evidence, there was either a denial of due process or even a mistake of law. The questions of law before the supreme court were, first, whether the superior court had jurisdiction to weigh the evidence; second, whether, in rendering its decision, it weighed the evidence; and third, whether the valuation of the plaintiff's property was so low that a rate based upon it would operate to deprive the plaintiff of property without due process of law, —would confiscate its property. On each of these questions the supreme court found against the contentions of the plaintiff. It held that the superior court did not have revisory legislative powers, but only the power to [297] review questions of law,—in the present case, whether there was evidence on which the valuation adopted could reasonably have been found; and in so holding it acted upon the established principle applied in reviewing the findings of administrative boards, that "courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 548, 56 L. ed. 308, 311, 312, 32 Sup. Ct. Rep. 108. It, therefore, reinstated the order of the Commission. But it did not do so as an appellate court, reviewing, on the weight of the evidence, findings of fact made by the superior court. It did so solely because the only question before it was whether there was substantial evidence to support the finding of value; for if the valuation was legally arrived at, the order was confessedly reasonable. Ibid.; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441, 442, 47 L. ed. 892, 894, 895, 23 Sup. Ct. Rep. 571. The presumption created by § 23, P. L., p. 1427, by which an order of the Commission is made prima facie evidence of its reasonableness, is in no sense a limitation upon the scope of the review. It is in effect the presumption which this court has declared to exist in rate cases, independently of statute, in favor of the conclusion of an experienced administrative body, reached after a full hearing. Darnell v. Edwards, 244 U. S. 564, 569, 61 L. ed. 1317, 1321, P.U.R. 1917F, 64, 37 Sup. Ct. Rep. 701.

Second: As the company had the opportunity for a full judicial review through a suit in equity for an injunction, as it was not denied due process by disregard in the proceedings actually taken of the essentials of judicial process, and since it is clear that the findings of the Commission were supported by substantial evidence, the judgment of the supreme court of Pennsylvania must be affirmed, unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence, whether or not its property has been undervalued, or unless some error in law is shown.

[298] The case is here on writ of error to a state court. It is settled that in such cases we accept the facts as there found, not only in actions at law (Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704), but also, where, as in chancery, the record contains all the evidence, and it was open for consideration by, and actually passed upon by, the highest court of the state (Eagan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 53 L. ed. 417, 29 Sup. Ct. Rep. 220). And this is true, although the existence of a Federal question depends upon the determination of the issue of fact, and although the finding of fact will determine whether or not there has been a taking of property in violation of the 14th Amendment. Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 65, 48 L. ed. 614, 619, 24 Sup. Ct. Rep. 396. This court may, of course, upon writ of error to a state court, "examine the entire record, including the evidence, . . . to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions" of Federal law as to be really a decision of the latter. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591–593, 56 L. ed. 556, 565–567, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 658, 56 L. ed. 594, 32 Sup. Ct. Rep. 389; Graham v. Gill, 223 U. S. 643, 645, 56 L. ed. 586, 588, 32 Sup. Ct. Rep. 396. But in order that such examination may be required or be permissible, its purpose must not be to pass upon the relative weight of conflicting evidence (Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535), and to substitute the judgment therein of this court for that of the lower court; but to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction of this court (Northern P. R. Co. v. North Dakota, 236 U. S. 585, 593, 59 L. ed. 735, 740, L.R.A.1917F, 1148, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437).

Here, it is clear, there was substantial evidence to support the findings of the Commission; and no adequate reason is shown for declining to accept as conclusive the [299] facts found by the state tribunals. See Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 57 L. ed. 1248, 33 Sup. Ct. Rep. 820; Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 Sup. Ct. Rep. 309. The rates are predicated on the company's earning 7 per cent net on the value of its property used and useful in the service, after deducting from the income all expenses and charges for depreciation. It is conceded that 7 per cent is a fair return upon the investment, and it is not contended that any erroneous rule has been applied in ascertaining the expenses of operation or the depreciation charges. The claim that the rates are confiscatory rested wholly on the contention that the property was undervalued; and on that question the contention is that the court failed to give due weight to the evidence adduced by the company, and that the processes by which the Commission arrived at the value it fixed differed from that often pursued by courts and administrative bodies. To this the supreme court of Pennsylvania said: "The ascertainment of the fair value of the property, for rate-making purposes, is not a matter of formulas, but it is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts." [260 Pa. 308, P.U.R.1918D, 49, 103 Atl. 744.] The objections to the valuation made by the company raise no question of law, but concern pure matters of fact; and the finding of the Commission, affirmed by the highest court of the state, is conclusive upon this court. The case at bar is wholly unlike Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753, and Union P. R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131, P.U.R.1919B, 315, 39 Sup. Ct. Rep. 24, where this court reversed the judgments as matter of law upon the facts found by the Commission.

In my opinion the judgment of the Supreme Court of Pennsylvania should be affirmed.

Mr. Justice **Holmes** and Mr. Justice **Clarke** concur in this dissent.

[300] IN THE MATTER OF WALTER PETERSON, as Receiver of the Interstate Coal Company, Inc., Petitioner.

(See S. C. Reporter's ed. 300–319.)

Mandamus — prohibition — other remedy.

1. The Federal Supreme Court has jurisdiction of a petition for writs of mandamus or prohibition directed to a district court judge, by which relief is sought against the appointment of an auditor to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury, where the petitioner asserts that, by the appointment of such auditor and proceedings thereunder, his constitutional right to trial by jury would be violated.

[For other cases, see Mandamus, II. b; Prohibition, II. in Digest Sup. Ct. 1908.]

Jury — right to jury trial — appointment of auditor.

2. The constitutional right to trial by jury is not infringed by the compulsory appointment of an auditor, in an action at law involving long accounts with many disputed items, to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury, where the order of appointment, though directing the auditor to form and express an opinion upon facts and items in dispute, declares that he shall not finally determine any of the issues, and that the final determination of all issues of fact is to be made by the jury at the trial.

[For other cases, see Jury, I. d, 1, in Digest Sup. Ct. 1908.]

Reference — power of court — action at law — appointment of auditor.

3. A compulsory reference to an auditor to simplify and clarify the issues, in an action at law involving long accounts with many disputed items, and to make tentative findings of fact, is within the inherent power of a Federal district court as a trial court.

[For other cases, see Reference, II. in Digest Sup. Ct. 1908.]

Costs — of reference to auditor — apportionment between parties.

4. While the compensation of auditor and stenographer, in a reference of an action at law involving complicated issues of fact to such auditor to simplify and clarify the issues and make tentative findings of fact, may be taxed as costs, in the absence of any statute, Federal or state, or rule of court to the contrary, such costs must, in view of U. S. Rev. Stat. § 983, be taxed to the prevailing party, and may not be taxed in whole or in part against the prevailing party, in the discretion of the trial court.

[For other cases, see Costs, I. a; I. b, in Digest Sup. Ct. 1908.]

Mandamus — prohibition — other remedies.

5. Error in providing, in an order for the appointment of an auditor in an action at law, that the expense be paid by one or both of the parties, in accordance with the discretion of the trial court, does not require that the extraordinary remedies of mandamus or prohibition be granted, but, if petitioner deems himself prejudiced by the error, he may seek redress through application to the district court for a modification of the order, or, after final judgment, by writ of error from the circuit court of appeals.

[For other cases, see Mandamus, II. b; Prohibition, II. in Digest Sup. Ct. 1908.]

[No. 28, Original.]

Argued March 15, 1920. Decided June 1, 1920.

ON PETITION for Writ of Mandamus and/or Writ of Prohibition directed to the judge of the District Court of the United States for the Southern District of New York by which relief was sought against the appointment of an auditor in an action at law, to simplify and clarify the issues and make tentative findings of fact. Denied.

The facts are stated in the opinion.

Mr. **Abram J. Rose** argued the cause, and, with Mr. Anthony L. Williams, filed a brief for petitioner:

The order appointing the auditor is in direct conflict with the 7th Amendment to the Constitution and the Acts of Congress regulating trials of actions

Note.—As to when mandamus is the proper remedy, generally—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnp. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. Whitesides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

As to constitutional right of trial by jury—see notes to Thompson v. Utah, 42 L. ed. U. S. 1061; Perego v. Dodge, 41 L. ed. U. S. 113; Gulf, C. & S. F. R. Co. v. Shane, 39 L. ed. U. S. 727; and Justices of Supreme Ct. v. United States, 19 L. ed. U. S. 658.

On denial of jury trial simply because matters in issue are complicated—see note to Daley v. Kennett, 39 L.R.A.(N.S.) 46.

On constitutionality of compulsory reference in actions at law—see notes to Russell v. Alt, 13 L.R.A.(N.S.) 146; and Steck v. Colorado Fuel & Iron Co. 25 L.R.A. 67.

at law in the Federal courts, and is altogether without power and void.

Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307; Baylis v. Travellers Ins. Co. 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Howe Mach. Co. v. Edwards, 15 Blatchf. 402, Fed. Cas. No. 6,784; Sulzer v. Watson, 39 Fed. 414; Swift & Co. v. Jones, 76 C. C. A. 253, 145 Fed. 489; Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

The whole line of cases cited and relied upon by the court below, with the exception of one (Davis v. St. Louis & S. F. R. Co. 25 Fed. 786), rests upon the decision by the circuit court of appeals for the first circuit in Fenno v. Primrose, 56 C. C. A. 313, 119 Fed. 801, sitting in a state where it is the usual and common practice to appoint an auditor to hear the evidence and make a report thereon prior to the trial, and which decision, we submit, is in direct conflict with the 7th Amendment to the Constitution of the United States and the acts of Congress regulating jury trials in actions at law, and should be disapproved and overruled.

St. Anthony v. Houlihan, 106 C. C. A. 394, 184 Fed. 252; Craven v. Clark, 186 Fed. 959; Vermeule v. Reilly, 196 Fed. 226; United States use of Brading-Marshal Lumber Co. v. Wells, 203 Fed. 146.

A writ of mandamus or of prohibition is the proper remedy.

Re Simons, 247 U. S. 231, 62 L. ed. 1094, 38 Sup. Ct. Rep. 497; McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; Ex parte Metropolitan Water Co. 220 U. S. 539, 55 L. ed. 575, 31 Sup. Ct. Rep. 600; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

Mr. **George Zabriskie** argued the cause and filed a brief for respondent:

As the action is pending in the district court, and is not within the original jurisdiction of this court, the inquiry is narrowed to the question whether the writs are necessary for the exercise of its appellate jurisdiction.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.

Where no appeal is pending, the power of this court to issue a writ of mandamus in aid of its appellate jurisdiction appears to be confined to cases where such jurisdiction might otherwise be defeated by the unauthorized action of the court below.

McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501.

Neither mandamus nor prohibition can be employed as a substitute for error; which is the case here.

Re Pollitz, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; Re Atlantic City R. Co. 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; Ex parte Gordon, 2 Hill, 363.

It is not disputed that the district court has jurisdiction of the parties and of their controversy. If the court below has jurisdiction to determine the question presented, mandamus will not lie.

Re Gruetter, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A.(N.S.) 392, 31 Sup. Ct. Rep. 324.

Nevertheless, this court may review an extraordinary abuse of discretion where there is no other remedy (Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536), or where the parties or the subject-matter are clearly not within the jurisdiction of the inferior court (Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; Re Winn, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515).

The plaintiff has an adequate remedy if, in the end, he deem himself aggrieved by the judgment which may be rendered after a trial of the facts by a jury.

Re Garrosi, 143 C. C. A. 483, 229 Fed. 363.

The meaning of the constitutional guaranty is, that the 7th Amendment does not attempt to regulate matters of pleading or practice, or to determine in what way issues of fact are to be submitted to a jury; and its aim is to preserve, not mere matters of form or procedure, but matters of substance and right.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

The order is justified by its approximation to the New York practice.

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 301, 23 L. ed. 898, 901, 7 Am. Neg. Cas. 331; Welsh v. Darragh,

52 N. Y. 590; Sage v. Shepard & M. Lumber Co. 76 Hun, 134, 27 N. Y. Supp. 559; Cochrane Carpet Co. v. Howells, 86 Hun, 243, 33 N. Y. Supp. 1126; Ellsworth Collieries Co. v. Pennsylvania R. Co. 94 Misc. 659, 159 N. Y. Supp. 1020; Vega Co-op. Creamery Asso. v. Craft, 180 App. Div. 267, 167 N. Y. Supp. 481; Irving v. Irving, 90 Hun, 422, 35 N. Y. Supp. 744, 149 N. Y. 573, 43 N. E. 987; Steck v. Colorado Fuel & Iron Co. 142 N. Y. 236, 25 L.R.A. 67, 37 N. E. 1.

In at least three other circuits, the courts of the United States have followed the state practice of appointing referees to examine accounts, reserving the issues of fact for trial by jury, as the opinion of the learned judge who made the order here in question fully exhibits.

Fenno v. Primrose, 56 C. C. A. 313, 119 Fed. 801; Craven v. Clark, 186 Fed. 959; United States use of Brading-Marshal Lumber Co. v. Wells, 203 Fed. 146.

The same practice has also been followed in an earlier case in New York.

Vermeule v. Reilly, 196 Fed. 226.

In the District of Columbia the same practice prevails, based upon a Maryland statute of 1785 (chap. 80, § 12), and formulated in a careful rule of court which makes the auditor's report final unless excepted to, and provides for trial by jury of the issues of fact presented by the exceptions.

Simmons v. Morrison, 13 App. D. C. 161.

The examination of accounts by auditors is no encroachment upon the right of trial by jury.

1 Stubbs, Const. Hist. of England, 164, 4th ed. 659; Malone v. St. Peter & Paul's Church, 172 N. Y. 269, 64 N. E. 961; McMurray v. Rawson, 3 Hill. 59; Locke v. Bennett, 7 Cush. 445; Field v. Holland, 6 Cranch, 8, 3 L. ed. 136, Vin. Abr. Account, R. 167, 168, note; 2 Inst. 381; People ex rel. Brown v. Green, 5 Daly, 194, 200; Dialogus de Scaccario, Oxford ed. 1902; 2 Harvard L. Rev. 243, 257; 2 Madox, Hist. of Exchequer, chap. 24, § 7, 2d ed. London, 1769, p. 292; Re Steinway, 159 N. Y. 250, 45 L.R.A. 461, 53 N. E. 1103; Kanouse v. Martin, 3 Sandf. 653; Re Lawson, 109 App. Div. 195, 96 N. Y. Supp. 33; Dwight v. St. John, 25 N. Y. 203.

Mr. Justice **Brandeis** delivered the opinion of the court:

This is a petition for a writ of mandamus and/or prohibition, brought by Walter Peterson, receiver of the Interstate Coal Company, against the Honorable Augustus N. Hand, judge of the district court of the United States for the southern district of New York. The facts and the specific relief sought are these:

[**304**] Peterson had brought an action at law in that court against Arthur Sidney Davison to recover a balance of $21,014.43, alleged to be due for coal sold and delivered as shown by a long schedule annexed. The answer substantially admitted the items set forth in the schedule filed by plaintiff, but denied that it presented a full account of the transactions between the parties, and alleged that there were other deliveries of coal and other payments which the defendant had made, and also that he was entitled to additional allowances. It further alleged, by way of counterclaim, that the plaintiff was indebted to him for failure to perform its contracts for coal in the sum of $9,999.10. In response to a demand for a bill of particulars, defendant filed schedules containing more than two hundred items which he proposed to establish by way of defense.

Upon motion of defendant, and against the objection of plaintiff, Judge Hand appointed an auditor (254 Fed. 625):

With instructions "to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the office of the clerk of this court with a view to simplifying the issues for the jury; but not finally to determine any of the issues in the action, the final determination of all issues of fact to be made by the jury on the trial; and the auditor to have power to compel the attendance of, and administer the oaths to, witnesses; the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge."

The auditor was further ordered to report on certain facts under ten classifications. The design of this was largely to separate items in dispute from those as to which there was no real dispute, and, also, to set forth the detailed facts on which the specific claims made were rested; [**305**] but the auditor was also thereby required to express his opinion on disputed issues, thus:

"6. The various penalties, commissions, cash discounts, and other deductions which defendant claims to be en-

titled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.

"7. His opinion as to the net amount due on each invoice of coal sold and delivered to defendant."

Thereupon, application was made here for leave to file this petition. It prays that Judge Hand and the auditor named be prohibited from proceeding under the order appointing him; and it prays also, that Judge Hand, or such other judge who may at the time hold the trial term of that court, be commanded to restore the case to the trial calendar, and that the same be tried in the regular and usual way. Leave to file the petition was granted (January 12, 1920, post, 1032, 40 Sup. Ct. Rep. 178), and an order to show cause issued. The petitioner insists that the district court is without power to make the order appointing the auditor, and that proceedings thereunder would violate the 7th Amendment to the Federal Constitution.

First: Objection is made by respondent to the jurisdiction of this court. It is insisted that the district court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him, and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the circuit court of appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in Ex parte Simons, 247 U. S. 231, 239, 62 L. ed. 1094, 1096, 38 Sup. Ct. Rep. 497, "be dealt with now, before the plaintiff is put to the difficulties [306] and the courts to the inconvenience that would be raised by" a proceeding "that ultimately must be held to have been required under a mistake." The objection to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition.

Second: The question presented is one of power in the district court. If, under any circumstances, it could appoint an auditor with the duties here prescribed without the consent of the parties, the facts clearly warranted such action in this instance. The plaintiff sued for a balance alleged to be due on an account annexed containing 298 items. The defendant set up another account containing 402 items. Included in the latter, besides certain charges against defendant for additional deliveries, were over 30 cash items of credit not allowed for in the plaintiff's account. These 402 items were alleged to arise out of 123 different deliveries of cargoes (or partial cargoes) of coal made on ninety-one different days during a period of eleven months. The coal delivered was of various kinds and the invoice prices for the same kind differed from time to time. In respect to most of these deliveries, there were claims for allowances by way of penalties, commissions, and cash discounts; and, as to some, there were claims for allowances on account of freight.

The district court found that, in order to render possible an intelligent consideration of the case by court and jury, it was necessary to appoint an auditor and confer upon him two functions. The first was to segregate those items upon which the parties agreed and to classify those actually in controversy; and thus, having defined the issues, to aid court and jury by directing their attention to the matters in dispute. The second function of the auditor was to form a judgment and express an opinion upon such of the items as he found to be in dispute. In order to perform these functions the auditor would be required not merely to examine books, vouchers, and [307] other papers, and to make computations, but to hear and pass upon conflicting testimony of the parties and of other witnesses. This full hearing, while obviously necessary to enable the auditor to form a trustworthy judgment on the disputed items, would serve also to narrow the field of controversy. For such a tentative trial acts as a sifting process by which misunderstandings and misconceptions as to facts are frequently removed. In the course of it many contentions or assumptions made by one party or the other are abandoned. Agreement is thus reached as to some of the facts out of which liability is alleged to arise, even when the items to which they relate remain in dispute. See Fair v. Manhattan Ins. Co. 112 Mass. 329.

The order expressly declared that the auditor should not "finally determine any of the issues in this action; the final determination of all issues of fact to be made by the jury at the trial;" but it did not provide affirmatively what

use should be made of the report at the trial. It may be assumed that, if accepted by the court, the report would be admitted at the trial before the jury as prima facie evidence both of the evidentiary facts and of the conclusions of fact therein set forth. The report, being evidence sufficient to satisfy the burden of proof (Wyman v. Whicher, 179 Mass. 276, 60 N. E. 612), would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial, by reducing both the number of facts to be established by evidence and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result.

Third: Prior to the adoption of the Federal Constitution there did not exist in England, or, so far as appears, in any of the colonies, any officer, permanent or temporary, [**308**] who, in connection with trials by jury, exercised the powers of an auditor above described. An official called "auditor" had long been known as part of the judicial machinery in certain cases brought in the common-law courts both of England and of the colonies; but the functions of the auditor in those cases were different. In the common-law action of account auditors were appointed in England, from the earliest times, to take the account, after the interlocutory judgment quod computet has been entered. But the parties were entitled to a jury trial before the interlocutory judgment was rendered; and further issues of fact arising before the auditor were not passed upon by him, but were certified to the court for trial by a jury. The use of this form of action was limited to cases where the defendant was under obligation to account to the plaintiff as guardian, bailiff, or receiver of his property.[1] In Maryland, by Act of 1785, chap. 80, § 12, the power of the court to appoint auditors was extended to all cases in which it might be necessary to examine and determine accounts; but the jury trial was not affected thereby, for the proceedings thereon were to be "as in cases of account."[2] In Connecticut auditors were appointed by the court in actions of "book debt," and the same practice was early introduced in Vermont and other states; but in this action the report of the auditor, if accepted by the court, is a substitute for the jury, and operates to determine the issues of fact.[3] In New York [**309**] actions on long accounts are determined now, as in colonial days, by referees instead of by a jury.[4]

The office of auditor, with functions and powers like those here in question, was apparently invented in Massachusetts. It was introduced there by chapter 142 of the acts of the legislature of the year 1818; and as a part of the judicial machinery it has received the fullest development in that state. No act of Congress has specifically authorized the adoption of the practice in the Federal courts. We have therefore to decide, not only whether such appointment of auditors is consistent with the constitutional right of trial by jury, but also whether it is a power inherent in the district court as a trial court.

Fourth: The command of the 7th

[1] See Prof. Langdell, 2 Harvard L. Rev. 241, 251-255; Holmes v. Hunt, 122 Mass. 505, 512, 23 Am. Rep. 381.

[2] See United States v. Rose, 2 Cranch, C. C. 567, Fed. Cas. No. 16,193; Barry v. Barry, 3 Cranch, C. C. 120, Fed. Cas. No. 1,060; Bank of United States v. Johnson, 3 Cranch, C. C. 228, Fed. Cas. No. 919. The report was not admitted before the jury as prima facie evidence of the truth of the statements or conclusions of the auditor. McCullough v. Groff, 2 Mackey, 361, 366.

[3] Sulzer v. Watson, 39 Fed. 414; Conn. Gen. Stat. 1918, § 5752; Act of Vermont, October 21, 1782, Slade's Vermont State Papers, 456; Hall v. Armstrong, 65 Vt. 421, 20 L.R.A. 366, 26 Atl. 592; Wagner's Stat. (Mo.) 1041, § 18; Edwardson v. Garnhart, 56 Mo. 81.

[4] Steck v. Colorado Fuel & I. Co. 142 N. Y. 236, 25 L.R.A. 67, 37 N. E. 1. This fact has no bearing on the constitutional question involved here. The right to a jury trial guaranteed in the Federal courts is that known to the law of England, not the jury trial as modified by local usage or statute. United States v. Wonson, 1 Gall. 5, 20, Fed. Cas. No. 16,750; Capital Traction Co. v. Hof, 174 U. S. 1, 8, 43 L. ed. 873, 875, 19 Sup. Ct. Rep. 580; see also United States v. Rathbone, 2 Paine, 578, Fed. Cas. No. 16,121; Howe Mach. Co. v. Edwards, 15 Blatchf. 402, Fed. Cas. No. 6,784; Sulzer v. Watson, 39 Fed. 414; United States use of Brading-Marshal Lumber Co. v. Wells, 203 Fed. 146, 149.

In Davis v. St. Louis & S. F. R. Co. 25 Fed. 786, a case involving a long account, a referee was appointed to report; apparently to determine the facts in accordance with the practice prevailing in Kansas, where the court was sitting.

Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768. Compare Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices [310] may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.[5] Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. United States v. Gilmore, 7 Wall. 491, 494, 19 L. ed. 282, 283; Tucker v. United States, 151 U. S. 164, 168, 38 L. ed. 112, 114, 14 Sup. Ct. Rep. 299. No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon. Fidelity & D. Co. v. United States, 187 U. S. 315, 47 L. ed. 194, 23 Sup. Ct. Rep. 120. Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. Capital Traction Co. v. Hof. 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580. In view of these decisions it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor.

Nor can the order be held unconstitutional as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as [311] evidence of facts and findings embodied therein; but it will be treated, at most, as prima facie evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor, or by the use to which his report may be put. An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. Marx v. Hanthorn, 148 U. S. 172, 182, 37 L. ed. 410, 413, 13 Sup. Ct. Rep. 508; Turpin v. Lemon, 187 U. S. 51, 59, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Reitler v. Harris, 223 U. S. 437, 56 L. ed. 497, 32 Sup. Ct. Rep. 248. In Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691, it was held that the provision in § 16 of the Interstate Commerce Act, making the findings and order of the Commission prima facie evidence of the facts therein stated in suits brought to enforce reparation awards, does not infringe upon the right of trial by jury. See also Mills v. Lehigh Valley R. Co. 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 382, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247. In the Meeker Case this court relied especially upon Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381, and called attention to the fact that there the statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in no wise inconsistent with the constitutional right of trial by jury.[6] The reasons for holding an auditor's

[5] See "Trial by Jury and the Reform of Civil Procedure," by Prof. A. W. Scott, 31 Harvard L. Rev. 669.

[6] Acts making findings in the tentative hearing before an auditor prima facie evidence were held not to infringe the right of trial by jury in Maine (Howard v. Kimball, 65 Me. 308, 327); and in New Hampshire (Doyle v. Doyle, 56 N. H. 567; Perkins v. Scott, 57 N. H. 55). A different conclusion was reached in Francis v. Baker, 11 R. I. 103, 23 Am. Rep. 424, and Plimpton v. Somerset, 33 Vt. 283.

report admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the Interstate Commerce [312] Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court.

That neither the hearing before the auditor, nor the introduction of his report in evidence, abridges in any way the right of trial by jury, was the conclusion reached in 1902 in the district of Massachusetts in Primrose v. Fenno, 113 Fed. 375, 56 C. C. A. 313, 119 Fed. 801, the first reported case in which an auditor was appointed with the powers here conferred. The practice there established has been followed in the southern district of New York (Vermeule v. Reilly, 196 Fed. 226); and in the eastern district of Tennessee (United States use of Brading-Marshal Lumber Co. v. Wells, 203 Fed. 146).

Fifth: There being no constitutional obstacle to the appointment of an auditor in aid of jury trials, it remains to consider whether Congress has conferred upon district courts power to make the order. There is here, unlike Ex parte Fiske, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724, no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it. The question presented is, therefore, whether the court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.

Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 87–90, 6 Mor. Min. Rep. 317. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government, it has been exercised by the Federal courts, when sitting in equity, by [313] appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners, to take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon; these are among the purposes for which such aids to the judges have been appointed. Kimberly v. Arms, 129 U. S. 512, 523, 32 L. ed. 764, 768, 9 Sup. Ct. Rep. 355. Whether such aid shall be sought is ordinarily within the discretion of the trial judge; but this court has indicated that where accounts are complex and intricate, or the documents and other evidence voluminous, or where extensive computations are to be made, it is the better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself. Dubourg de St. Colombe v. United States, 7 Pet. 625, 8 L. ed. 807; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 180, 44 L. ed. 417, 423, 20 Sup. Ct. Rep. 336. Of the appointment made in Field v. Holland, 6 Cranch, 8, 21, 3 L. ed. 136, 140, Mr. Chief Justice Marshall said: "It is a reference to 'auditors,'—a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made." And in North Carolina R. Co. v. Swasey, 23 Wall. 405, 410, 23 L. ed. 136, 137, Mr. Chief Justice Waite said of the master's report: "Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties."

What the district judge was seeking when he appointed the auditor in the case at bar was just such aid. He required it himself; because, without the aid to be rendered through the preliminary hearing and report, the trial judge would be unable to perform his duty of defining to the jury the issues submitted for their determination, and [314] of directing their attention to the matters actually in issue. United States v. Philadelphia & R. R. Co. 123 U. S. 113, 114, 31 L. ed. 138, 139, 8 Sup. Ct. Rep. 77. The hearing and report were also essential, as shown above, to enable the jury to perform their specific duty. Owing to the difference in the character of the proceedings and of the questions ordinarily involved, the occasion for seeking such aid as is afforded to a judge by special masters, auditors, or examiners arises less frequently at law than in equity. A compulsory reference with

power to determine issues is impossible in the Federal courts because of the 7th Amendment (United States v. Rathbone, 2 Paine, 578, Fed. Cas. No. 16,121); but no reason exists why a compulsory reference to an auditor to simplify and clarify the issues and to make tentative findings may not be made at law, when occasion arises, as freely as compulsory references to special masters are made in equity. Reference of complicated questions of fact to a person specially appointed to hear the evidence and make findings thereon has long been recognized as an appropriate proceeding in an action at law. Hecker v. Fowler, 2 Wall. 123, 17 L. ed. 759. The inherent power of a Federal court to invoke such aid is the same whether the court sits in equity or at law. We conclude, therefore, that the order, in so far as it appointed the auditor and prescribed his duties, was within the power of the court.

Sixth: The clause in the order which provides that "the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge," requires special consideration. As Congress[7] has made [315] no provision for paying from public funds either the fees of auditors or the expense of the stenographer, the power to make the appointment without consent of the parties is practically dependent upon the power to tax the expense as costs. May the compensation of auditor and stenographer be taxed as costs and, if so, may the expense be imposed, in the discretion of the trial court, upon either party?

Federal trial courts have, sometimes by general rule, sometimes by decision upon the facts of a particular case, included in the taxable costs expenditures incident to the litigation which were ordered by the court because deemed essential to a proper consideration of the case by the court or the jury. Equity rule 68 provides for taxing the fees of masters, and rule 50 for the expense of a stenographer. Both rules embody substantially the practice which had theretofore prevailed generally in equity proceedings, and which, in the southern district of New York, had been followed not only in equity (American Diamond Drill Co. v. Sullivan Mach. Co. 32 Fed. 552, 131 U. S. 428, 33 L. ed. 217, 9 Sup. Ct. Rep. 794; Brickill v. New York, 55 Fed. 565; Hohorst v. Hamburg-American Packet Co. 76 Fed. 472), but also in admiralty (The E. Luckenback, 19 Fed. 847; Rogers v. Brown, 136 Fed. 813). The expense of printing the records and briefs in the trial court has been made by rule of court in [316] several of the circuits taxable as costs against the defeated party (Hake v. Brown, 44 Fed. 734). Compare Kelly v. Springfield R. Co. 83 Fed. 183; Tesla Electric Co. v. Scott, 101 Fed. 524. As early as 1844 Mr. Justice Story, sitting at circuit in Whipple v. Cumberland Cotton Mfg. Co. 3 Story, 84, Fed. Cas. No. 17,515, approved, in an action at law for damages, although not specially authorized by any rule, the order of a survey, as "necessary for the true understanding of the cause on both sides;" and ordered the expense paid by them. In cases in which courts have refused to tax as costs copies of stenographer's minutes and other expenditures incident to the litigation, attention has been called to the fact that they were made for the benefit of the party, as distinguished from expenditures incurred under order of the court to make possible or to facilitate its consideration of the case. Stallo v. Wagner, 158 C. C. A. 64, 245 Fed. 636; New Hampshire Land Co. v. Tilton, 29 Fed. 764. But see Bridges v. Sheldon, 18 Blatchf. 295, 507, 7 Fed. 17, 42.

The allowance of costs in the Federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. Mr. Justice Woodbury in Hathaway v.

[7] In Massachusetts the expense of the auditor was, prior to 1878, taxed in all cases as costs to be paid by the defeated party. See Acts of 1818, chap. 142; Rev. Stat. 1836, chap. 96, § 31; Gen. Stat. 1860, chap. 121, § 50; Act of March 16, 1867, chap. 67; Act of June 6, 1873, chap. 342. By Act of April 23, 1878, chap. 173, the expense of the auditor in cases tried in the superior or in the supreme judicial court was made payable by the county. See also Rev. Laws 1902, chap. 165, § 60; Act of June 5, 1911, chap. 237; Act of 1914, chap. 576.

In Maine the fees of the auditor were, prior to 1897, taxed as costs in favor of the prevailing party. Laws 1821, chap. 59, § 25; Acts of 1826, chap. 347, § 1; Rev. Stat. 1883, chap. 82, § 70. Since the Act of March 12, 1897, chap. 224, the fees and necessary expenses of the auditors are paid by the county.

In New Hampshire the fees of the auditor are also taxable as costs in favor of the prevailing party; but the court may now, in its discretion, order them paid by the county. Act of June 23, 1823, chap. 19, § 1; Act of July 20, 1876, chap. 35, § 4; Pub. Stat. 1901, chap. 227, § 7.

Roach, 2 Woodb. & M. 63, Fed. Cas. No. 6,213; Mr. Justice Nelson in Re Costs in Civil Cases, 1 Blatchf. 652; The Baltimore, 8 Wall. 377, 19 L. ed. 463. In Hathaway v. Roach, supra, p. 67, it is said to have been the usage of the Federal courts "to conform to the state laws as to costs when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject." And in The Baltimore, supra, pp. 390, 391, this court stated that "the costs taxed in the circuit and district courts were the same as were allowed at that time in the courts of the state, including such matters as the travel and attendance of the parties, fees for copies of the case, and abstracts for the hearing, compensation for the [317] services of referees, auditors, masters, and assessors, and many other matters, not embraced in the fee bills since passed by Congress."[8] Neither the Act of February 26, 1853, chap. 80, 10 Stat. at L. 161, Rev. Stat. § 983, Comp. Stat. § 1624, 2 Fed. Stat. Anno. 2d ed. p. 644, nor any later act of Congress or rule of court, deals expressly or by implication with the subject of taxing as costs the expense of an auditor. The practice, if any, governing in this respect the courts of New York, would, therefore, be followed in the Federal courts. See Huntress v. Epsom, 15 Fed. 732. But, so far as appears, the preliminary hearing before an auditor in aid of jury trials is not a part of the judicial machinery of that state. The nearest analogy to it is the reference had in actions at law on long accounts as a substitute for a jury trial. The expense of the compulsory reference in such actions is so taxable. Code Civ. Proc. § 3256. As there is no statute, Federal or state, and no rule of court excluding auditor's fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case.

Seventh: The further question is whether the district court had power to make the expense of the auditor taxable in whole or in part against the prevailing party, if the trial judge should so determine. The advantages of such a flexible rule are obvious. But general principles governing the taxation of costs in actions at law, followed by the Federal courts since their organization, preclude its adoption.

While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held [318] that in actions at law the prevailing party is entitled to costs as of right (compare United States v. Schurz, 102 U. S. 378, 407, 26 L. ed. 167, 175), except in those few cases where, by express statutory provision or by established principles, costs are denied.[9] It has also been generally held that this right to costs of the prevailing party in actions at law extends to the *entire* costs in the trial court, and that the court is without power to make an apportionment based upon the fact that the prevailing party has failed in a part of his claims, or that, for other reasons, only a part or none of the costs should in fairness be allowed.[10] This rule of practice, established by long usage, is confirmed by the language of § 983 of the Revised Statutes. It would, therefore, be held to prevail over a rule, if any, to the contrary, established in the courts of the state. But the practice in the courts of New York appears to be in this respect in entire harmony with that of the Federal courts.[11] In Whipple v. Cumberland Cotton Mfg. Co. supra, the expense of the survey ordered by the court was imposed by it equally on the two parties; and the same disposition

[8] Shreve v. Cheesman, 16 C. C. A. 413, 32 U. S. App. 676, 69 Fed. 785, 789; see also Scatcherd v. Love, 91 C. C. A. 639, 166 Fed. 53; Michigan Aluminum Foundry Co. v. Aluminum Co. of America, 190 Fed. 903, 904.

[9] For instance, Rev. Stat. § 968, Comp. Stat. § 1609, 2 Fed. Stat. Anno. 2d ed. p. 636, denying costs to a plaintiff or petitioner who recovers less than $500.

[10] Crabtree v. Neff, 1 Bond, 554, Fed. Cas. No. 3,315; Hooe v. Alexandria, 1 Cranch, C. C. 98, Fed. Cas. No. 6,667; Bartels v. Redfield, 47 Fed. 708; Trinidad Asphalt Paving Co. v. Robinson, 52 Fed. 347; United States v. Minneapolis, St. P. & S. Ste. M. R. Co. 235 Fed. 951, 953; West End Street R. Co. v. Malley, 158 C. C. A. 581, 246 Fed. 625, 627; Sears, R. & Co. v. Pearce, 165 C. C. A. 402, 253 Fed. 960, 962; Wheeler v. Taft, — C. C. A. —, 261 Fed. 978.

[11] The general rule that, in actions at law, the prevailing party is entitled as of right to the taxable costs, prevails in New York; and there is a further provision that when plaintiff demands a judgment for a sum of money only, the plaintiff, if prevailing, is entitled to the costs whether the suit be one at law or in equity. Murtha v. Curley, 92 N. Y. 359; Norton v. Fancher, 92 Hun, 463, 36 N. Y. Supp. 1032.

was made in Primrose v. Fenno, 113 Fed. 375, 56 C. C. A. 313, 119 Fed. 801, where the auditor had been appointed at the instance of the court without objection by either party. But in Houlihan v. [**319**] St. Anthony, 173 Fed. 496, 106 C. C. A. 394, 184 Fed. 252, where the auditor was appointed by consent of the parties, the same court taxed both the auditor's and the stenographer's fees against the losing party, holding that it had discretion, if it was not obliged to do so; and a petition for writ of certiorari was denied by this court (220 U. S. 613, 55 L. ed. 609, 31 Sup. Ct. Rep. 717).

Although the order was erroneous in declaring that the expense of the auditor shall, instead of abiding the result of the action, be paid by one or both of the parties, in accordance with the determination of the trial judge, the error does not require that either of the extraordinary remedies applied for here be granted. If the petitioner deems himself prejudiced by the error, he may get redress through application to the district court for a modification of the order; or after final judgment, on writ of error, from the circuit court of appeals. Re Morrison, 147 U. S. 14, 26, 37 L. ed. 60, 65, 13 Sup. Ct. Rep. 246. The petition for writs of mandamus and or prohibition is denied.

Mr. Justice **McKenna**, Mr. Justice **Pitney**, and Mr. Justice **McReynolds** dissent.

PENNSYLVANIA RAILROAD COMPANY, Petitioner,
v.
KITTANING IRON & STEEL MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 319–325.)

Carriers — demurrage — frozen shipments.

No departure from the established policy manifested in the Uniform Demurrage Code to treat the single car as the unit in applying the allowance of free time and the charges for demurrage, just as in the making of carload freight rates, can be inferred from the declaration in such Code that no demurrage charges shall be collected when shipments are frozen while in transit so as to prevent unloading during the prescribed free time, provided a diligent effort to unload is made. If each car containing frozen shipments could have been unloaded, considered separately, within the free time, any relief from the hardship resulting from excessive receipts of such cars on the same day must be found, either under the so-called bunching rule, under which the shipper is relieved from demurrage charges if, by reason of the carrier's fault, the goods are accumulated and detention results, or under the average-agreement rule, under which a monthly debit and credit account is kept of detention, and the shipper is relieved of charges for detaining cars more than forty-eight hours by credit for other cars released within twenty-four hours.

[No. 301.]

Argued March 26, 1920. Decided June 1, 1920.

ON WRIT of Certiorari to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Allegheny County, in that state, in favor of a carrier for a portion only of certain demurrage charges claimed by it under the Uniform Demurrage Code. Reversed.

See same case below, 263 Pa. 205, 106 Atl. 207.

The facts are stated in the opinion.

Messrs. **Henry Wolf Bikle** and **Frederic D. McKenney** argued the cause and filed a brief for petitioner:

The demurrage rules contemplate an individual application thereof in determining the free time to be accorded for unloading.

American Radiator Co. v. Lehigh Valley R. Co. 44 Inters. Com. Rep. 361; Pittsburgh Crucible Steel Co. v. Pennsylvania Co. 41 Inters. Com. Rep. 700; Scudder v. Texas & P. R. Co. 21 Inters. Com. Rep. 60; W. O. Kay Co. v. Denver & R. G. R. Co. 21 Inters. Com. Rep. 239; Roy & R. Mill Co. v. Boston & M. R. Co. 44 Inters. Com. Rep. 523; Central Pennsylvania Lumber Co. v. Director General, 53 Inters. Com. Rep. 523.

The rules should be interpreted in accordance with the views of the Interstate Commerce Commission, just as the views of a commission charged with the enforcement of a statute are regarded as entitled to special weight with respect to its proper interpretation.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup.

Note.—On the right of a railway company to charge for detention of its cars by consignees—see note to Norfolk & W. R. Co. v. Adams, C. & Co. 22 L.R.A. 530.

Ct. Rep. 272; Texas & P. R. Co. v. American Tie & Timber Co. 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct. Rep. 885; Logan v. Davis, 233 U. S. 613, 58 L. ed. 1121, 34 Sup. Ct. Rep. 685.

No hardship results to the consignee from this construction of the rules.

Baltimore & O. R. Co. v. Gray's Ferry Abattoir Co. 27 Pa. Super. Ct. 511; Alan Wood Iron & Steel Co. v. Pennsylvania R. Co. 24 Inters. Com. Rep. 27; Michigan Mfrs. Asso. v. Pere Marquette R. Co. 31 Inters. Com. Rep. 329; Castner, Curran & Bullitt v. Pennsylvania Co. 42 Inters. Com. Rep. 3; Davis Sewing Mach. Co. v. Pittsburgh, C. C. & St. L. R. Co. 51 Inters. Com. Rep. 191.

Mr. R. L. Ralston argued the cause, and, with Mr. H. V. Blaxter, filed a brief for respondent:

This rule has to do with shipments, and not with cars or carloads. The car is made the unit only for the computation of the demurrage, and such is the use made of it in the demurrage rules.

Darling & Co. v. Pittsburgh, C. C. & St. L. R. Co. 37 Inters. Com. Rep. 401.

Mr. Justice **Brandeis** delivered the opinion of the court:

The Uniform Demurrage Code discussed in Swift & Co. v. Hocking Valley R. Co. 243 U. S. 281, 283, 61 L. ed. 722, 723, 37 Sup. Ct. Rep. 287, was duly published as a part of the freight tariffs of the Pennsylvania Railroad prior to November 1, 1912. From time to time during the months of December, 1912, and February and March, 1913, the Kittaning Iron & Steel Manufacturing Company received from the railroad an aggregate of 227 cars of iron ore, all interstate shipments; and on account of them the railroad claimed $1,209 for demurrage. [321] The company refused to pay these, among other, demurrage charges, whereupon this action was brought in a state court of Pennsylvania to recover the amount. The trial court disallowed the claim. The judgment there entered was affirmed by the supreme court of the state; and a petition by the railroad for a writ of certiorari was granted (249 U. S. 595, 63 L. ed. 794, 39 Sup. Ct. Rep. 260).

Before receipt of any of the cars the Kittaning Company had entered into an average agreement with the railroad, as provided in rule 9.[1] The aggregate number of days' detention of these cars after they reached the company's interchange tracks (in excess of the free time under the average agreement) was 1,209; and the demurrage [322] charge fixed by rule 7 was $1 for each day, or fraction thereof, that a car is detained after the expiration of the free time. The ore in these cars was frozen in transit; and the company insisted that this detention of the cars beyond the "free time" had resulted from this fact, and claimed exemption from demurrage charges under rule 8, § A, subdivision 2, which declares that none shall be collected.

"When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent efforts to unload such shipments."

The Kittaning Company had at its plant a device for thawing cars of frozen

[1] Rule 9. Average agreement. When a shipper or receiver enters into the following agreement, the charge for detention to cars, provided for by rule 7, on all cars held for loading or unloading by such shipper or receiver, shall be computed on the basis of the average time of detention to all such cars released during each calendar month, such average detention to be computed as follows:

Section A. A credit of one day will be allowed for each car released within the first twenty-four hours of free time. A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the first forty-eight hours of free time. In no case shall more than one day's credit be allowed on any one car, and in no case shall more than five (5) days' credit be applied in cancelation of debits accruing on any car, making a maximum of seven (7) days that any car may be held free; this to include Sundays and holidays.

Section B. At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and $1 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of the cars, and no payment will be made to shippers or receivers on account of such excess, nor shall the credits in excess of the debits of any one calendar month be considered in computing the average detention for another month.

Section C. A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancelation or refund of demurrage charges under § A, ¶¶ 1 and 3, or § B of rule 8.

ore through "steaming." By this means it was able to unload as much as five cars of frozen ore a day. The daily average number of cars of frozen ore received during the three months was far less than five cars; but the number received on single days varied greatly. On many days none were received; on some only one or two; and on some, as many as thirty-five. The railroad contended that the standard to be applied for determining, under the rule here in question, whether unloading within the prescribed free time was prevented by the shipments being frozen, was, as in other cases under the Code, the conditions applied to the car treated as a unit. It insisted, therefore, that the determination in any case whether a detention was due to the fact that the contents of a car was frozen could not be affected by the circumstance that a large number of such cars happened to have been "bunched;" and that, as each car, considered separately, could have been unloaded within the free time, the consignee must bear whatever hardship might result from many having arrived on the same day, unless relief were available to him either under the "bunching [323] rule"[2] or under the "average agreement." The question presented is that of construing and applying the frozen-shipments clause. But in order to determine the meaning or effect of that clause, it is necessary that it be read in connection with others.

The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate. The aim of the Code was to prescribe rules, to be applied uniformly throughout the country, by which it might be determined what detention is to be deemed reasonable. In fixing the free time the framers of the Code adopted an external standard; that is, they refused to allow the circumstances of the particular shipper to be considered.

When they prescribed forty-eight hours as the free time, they fixed the period which, in their opinion, was reasonably required by the average shipper to avail himself of the carrier's service under ordinary circumstances. The framers of the Code made no attempt to equalize conditions among shippers. It was obvious that the period fixed was more than would be required by many shippers most of the time; at least, for certain classes of traffic; and that it was less than would be required by some shippers, most of the time, for any kind of traffic. Among the reasons urged for rejecting consideration of the needs or [324] merits of the individual shipper was the fear that, under the guise of exempting shippers from demurrage charges because of conditions peculiar to them, unjust discrimination and rebates to favored shippers might result.

In applying the allowance of free time and the charges for demurrage, the single car was treated throughout as the unit, just as it is in the making of carload freight rates. Compare Darling & Co. v. Pittsburgh, C. C. & St. L. R. Co. 37 Inters. Com. Rep. 401. The effect on the charges of there being several cars involved was, however, provided for by two rules: (1) The bunching rule, under which the shipper is relieved from charges if, by reason of the carrier's fault, the cars are accumulated and detention results. (2) The average agreement rule, under which a monthly debit and credit account is kept of detention, and the shipper is relieved of charges for detaining cars more than forty-eight hours by credit for other cars released within twenty-four hours.

It was urged that the use in this rule of the word "shipment," and not "car," implies that the whole consignment is to be considered in determining whether the delay was caused by the ore being frozen. Obviously the word "shipment" was used because it is not the car, but that shipped in it, which is frozen. Furthermore, the agreed facts do not state whether the cars, which, by their number, prevented unloading within the forty-eight hours, came in one consignment or in many.

Excessive receipts of cars are a frequent cause of detention beyond the free time even where shipments are not frozen. From the resulting hardship either the bunching rule or the average agreement ordinarily furnishes relief. If

[2] Rule 8, § B. Bunching. 2. When, as the result of the act or neglect of any carrier, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the railroad company in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claims to be presented to railroad company's agent within fifteen (15) days.

the company had not elected to enter into the average agreement, the bunching rule might have afforded relief under the circumstances which attended the deliveries here in question. Since any one of the 227 cars on which demurrage was assessed might have been unloaded within [325] the forty-eight hours' free time, the undue detention was not the necessary result of the ore therein being frozen, but was the result of there being an accumulation of cars so great as to exceed the unloading capacity. Compare Riverside Mills v. Charleston & W. C. R. Co. 20 Inters. Com. Rep. 153, 155; Central Pennsylvania Lumber Co. v. Director General, 53 Inters. Com. Rep. 523. It does not seem probable that those who framed and adopted the frozen-shipment rule, and the Interstate Commerce Commission, which approved it, intended therein to depart from the established policy of treating the single car as the unit in applying demurrage charges as well as in applying carload freight rates. Such was the conclusion reached in the informal ruling of the Commission to which counsel called attention.

The judgment of the Supreme Court of Pennsylvania is reversed.

CREAM OF WHEAT COMPANY, Plff. in Err.,
v.
COUNTY OF GRAND FORKS in the State of North Dakota.

(See S. C. Reporter's ed. 325-330.)

Constitutional law — due process of law — equal protection of the laws — corporate taxation.

1. A state may, consistently with U. S. Const., 14th Amend., tax a corporation organized under its laws upon the value of its outstanding capital stock, although the corporation's property and business are entirely in another state.

[For other cases, see Constitutional Law, IV a, 4; IV. b, 6, a, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — equal protection of the laws — double taxation.

2. Nothing in U. S. Const., 14th Amend., prohibits a state from imposing double taxation.

[For other cases, see Constitutional Law, IV a, 4; IV. b, 6, a, in Digest Sup. Ct. 1908.]

[No. 302.]

Argued April 29, 1920. Decided June 1, 1920.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment which, reversing the judgment of the District Court of Grand Forks County, in that state, directed the entry of a judgment in favor of such county in a suit to recover delinquent corporation taxes. Affirmed.

See same case below, 41 N. D. —, 170 N. W. 863.

The facts are stated in the opinion.

Messrs. **Rome G. Brown** and **Harry S. Carson** argued the cause, and, with Messrs. Arnold L. Guesmer and Edwin C. Brown, filed a brief for plaintiff in error:

The tax attempted to be levied by § 2110, Compiled Laws of North Dakota for 1913, is a property tax, and not a franchise tax.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342; State v. Duluth Gas & Water Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032; Beale, Taxn. of Corp. Both Foreign & Domestic, § 546; Joyce, Franchises, §§ 424, 752; State ex rel. Bain v. Seaboard & R. R. Co. 52 Fed. 450; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; New York ex rel. Bank of Commerce v. Tax Comrs. 2 Black, 620, 17 L. ed. 451; The Banks v. New York, 7 Wall. 16, 19 L. ed. 57; Bank Tax Case

---

Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

On the taxation of corporate capital stock, generally—see notes to State Bd. of Equalization v. People, 58 L.R.A. 513; and East Livermore v. Livermore Falls Trust & Bkg. Co. 15 L.R.A.(N.S.) 952.

On taxation of property in different states as double taxation—see note to Judy v. Beckwith, 15 L.R.A.(N.S.) 142.

(New York ex rel. Bank of Commonwealth v. Tax & A. Comrs.) 2 Wall. 200, 17 L. ed. 793; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Home Sav. Bank v. Des Moines, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571; First Nat. Bank v. Lucas County, 25 Fed. 749; Com. v. Standard Oil Co. 101 Pa. 119; Merchants' Ins. Co. v. Newark, 54 N. J. L. 138, 23 Atl. 305; Nichols v. New Haven & N. Co. 42 Conn. 103; State v. Stonewall Ins. Co. 89 Ala. 335, 7 So. 753; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Kansas City, Ft. S. & M. R. Co. v. Kansas, 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 61 L. ed. 176, 37 Sup. Ct. Rep. 58; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Com. v. Hamilton Mfg. Co. 12 Allen, 298.

On the facts in this case the situs of the Cream of Wheat Company's intangible property is only where its tangible property is located and its business conducted; namely, beyond the borders of North Dakota; and, on the facts in this case, North Dakota is as powerless to tax intangible property, the situs of which is beyond its borders, as it is to tax tangible property beyond its borders.

Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Atty. Gen. v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 163; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Louisville & I. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A.(N.S.) 295, 129 S. W. 301.

Messrs. **Albert E. Sheets, Jr.**, and **George E. Wallace**, argued the cause, and, with Mr. William Langer, Attorney General of North Dakota, filed a brief for defendant in error:

The statute is invalid only to the extent that it is too favorable to the plaintiff in error.

State v. Duluth Gas & Water Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032.

The tax, howsoever designated, is one falling within the taxing jurisdiction of the state.

Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U. S. 227, 230, 233, 60 L. ed. 617–619, 36 Sup. Ct. Rep. 262; 1 Cooley, Taxn. 3d ed. pp. 402, 676, 677; Delaware R. Tax, 18 Wall. 206, 231, 21 L. ed. 888, 896; Rogers v. Hennepin County, 240 U. S. 184, 60 L. ed. 594, 36 Sup. Ct. Rep. 265.

The power of a sovereign state to create a corporation has always been held to imply and embrace certain jurisdiction for tax purposes, and this jurisdiction may be exercised in a variety of ways.

Gray, Limitations of Taxing Power, § 48; Judson, Taxn. § 403; 1 Cooley, Taxn. 3d ed. pp. 26, 27; Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

As a tax upon a species of intangible property, it is within the jurisdiction of the state.

Hawley v. Malden, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Rogers v. Hennepin County, 240 U. S. 184, 191, 60 L. ed. 594, 599, 36 Sup. Ct. Rep. 265.

While the state may be without authority to impose a property tax upon the corporation without first deducting property owned by the corporation in a foreign jurisdiction, nevertheless it has the power, under the Constitution, to establish within its own jurisdiction the situs of the stock for the purpose of taxation, without regard to the location of the property of the corporation issuing the stock.

Corry v. Baltimore, 196 U. S. 466, 476, 49 L. ed. 556, 561, 25 Sup. Ct. Rep. 297; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477;

Platt v. Wilmot, 193 U. S. 602, 612, 48 L. ed. 809, 813, 24 Sup. Ct. Rep. 542.

The state may tax the shares in domestic corporations at their source.

Harvester Bldg. Co. v. Hartley, 98 Kan. 732, 160 Pac. 971, 99 Kan. 73, 160 Pac. 973; Durham County v. Blackwell Durham Tobacco Co. 116 N. C. 441, 21 S. E. 423; State ex rel. Atty. Gen. v. Bodcaw Lumber Co. 128 Ark. 505, 194 S. W. 692.

Mr. Justice **Brandeis** delivered the opinion of the court:

By the statutes of North Dakota, as construed by the supreme court of the state, a manufacturing corporation organized under its laws is taxed in the following manner: Its real and personal property within the state is assessed like that of an individual. In addition there is assessed against it an amount equal to the aggregate market value of its outstanding stock, less the value of its real and personal property and certain indebtedness. The corporation, in submitting its list of property for purposes of taxation, is required to enter this additional amount as "bonds and stocks" under item 23 in the prescribed statutory schedule. On this additional amount, as upon the value of its real and personal property, the corporation is taxed at the same rate and in the same manner as individuals are upon their property. The statute does not in terms impose a franchise tax as distinguished, or separated, from a tax on personal property, but the supreme court of [**327**] the state construes the tax upon this additional amount as a tax, "in substance or effect, to some degree, at least, upon the privilege of being a corporation;" or, in other words, a tax upon corporate franchise granted it by the state. Individuals are not required to include in their lists of taxable property any share or portion of the capital stock or property of any corporation which such corporation is required to list. Compiled Laws of North Dakota for 1913, §§ 2110, 2103, 2102, 2077. Grand Forks County v. Cream of Wheat Co. 41 N. D. 330, 170 N. W. 863.

The Cream of Wheat Company was incorporated under the laws of North Dakota after the enactment of the tax legislation above described, and it maintained throughout the years 1908 to 1914, both inclusive, a public office in the city of Grand Forks, in said state, for the transaction of its usual and corporate business. Its manufacturing, commercial, and financial business was conducted wholly without the state; and it had not at any time during any of those years within the state either any tangible property, real or personal, or any papers by which intangible property is customarily evidenced. Its property, as distinguished from its franchise, is alleged to have been taxed in states other than North Dakota. In 1914 the officials of North Dakota assessed against the company in the manner prescribed by law for each year from 1908 to 1913, both inclusive, a tax at the uniform rate on the sum of $50,000, as representing personal property, to wit, "bonds and stocks" which had escaped taxation. They also assessed a similar tax for the then current year. The taxes not being paid, this action was brought in a state court for the amount; and the facts above stated were proved. The trial court entered judgment for the defendant; but its judgment was reversed by the supreme court of the state, which entered judgment for the county for the full amount of the taxes. The case is here on writ of error under § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. § 1214, 5 Fed. Stat. Anno. 2d ed. p. 723].

[**328**] The company concedes that the state of North Dakota might constitutionally have imposed a franchise tax upon a corporation organized under its laws, even though it had no property within the state. The contentions are that the supreme court of North Dakota erred in holding that the tax here in question was a franchise tax; that it was in reality a property tax upon intangible property; that the company's intangible property must be deemed to have been located where its tangible property was; and that in taxing property beyond its limits North Dakota violated rights guaranteed by the 14th Amendment. The view which we take of the matter renders it unnecessary to consider the question whether or not the law under discussion imposed a franchise tax or a property tax. Compare Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Com. v. Hamilton Mfg. Co. 12 Allen, 298. The view also renders it unnecessary to consider whether the company, having been incorporated in North

Dakota after the enactment of the law in question, is in a position to complain. Compare Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 84, 52 L. ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; International & G. N. R. Co. v. Anderson County, 246 U. S. 424, 433, 62 L. ed. 807, 816, 38 Sup. Ct. Rep. 370; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297.

The company was confessedly domiciled in North Dakota, for it was incorporated under the laws of that state. As said by Mr. Chief Justice Taney: "It must dwell in the place of its creation, and cannot migrate to another sovereignty." Bank of Augusta v. Earle, 13 Pet. 519, 588, 10 L. ed. 274, 307. The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicil. The limitation imposed by the 14th Amendment is merely that a state may not tax a resident for property which has acquired a permanent situs beyond its boundaries. This is the ground on which the ferry franchise involved in Louisville & J. Ferry Co. v. Kentucky, 188 [329] U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463 (an incorporeal hereditament partaking of the nature of real property),[1] and the tangible personal property permanently outside the state, involved in Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669, and Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, were held immune from taxation by the states in which the companies were incorporated. The limitation upon the power of taxation does not apply even to tangible personal property without the state of the corporation's domicil, if, like a sea-going vessel, the property has no permanent situs anywhere. Southern P. Co. v. Kentucky, 222 U. S. 63, 68, 56 L. ed. 96, 32 Sup. Ct. Rep. 13. Nor has it any application to intangible property (Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 205, 50 L. ed. 154, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Hawley v. Malden, 232 U. S. 1, 11, 58 L. ed. 477, 482, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842), even though the property is also taxable in another state by virtue of having acquired a "business situs" there (Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 59, 62 L. ed. 145, 148, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40). As stated in that case: "It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. Flint v. Stone-Tracy Co. 220 U. S. 107, 146, 162, et seq., 55 L. ed. 389, 411, 417, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. Whichever this tax technically may be, the authorities show that it must be sustained."

Counsel for the company direct our attention to cases like Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 227, 41 L. ed. 683, 697, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, which hold that a state may tax a foreign corporation not only on the value of its tangible property within the state, but also on that proportion of its entire [330] intangible property which is fairly represented by and must be included, in order to place a just value on the tangible property located and the business transacted there. The conclusion drawn by them is that the situs of the intangible property must be with the tangible; otherwise, they say, we must hold that it is in two places at once, and that it may be subjected to double taxation. To this it is sufficient to say that the 14th Amendment does not prohibit double taxation. Coe v. Errol, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475; Kidd v. Alabama, 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Fidelity & C. Trust Co. v. Louisville, supra.

Affirmed.

[1] See Hawley v. Malden, 232 U. S. 1, 12, 58 L. ed. 477, 482, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740; Lewis v. Gainesville, 7 Ala. 85; Dundy v. Chambers, 23 Ill. 369; Reg. v. Cambrian R. Co. L. R. 6 Q. B. 422, 40 L. J. Q. B. N. S. 169, 25 L. T. N. S. 84, 19 Week. Rep. 1138. Compare Thompson v. Schenectady R. Co. 124 Fed. 274. The "franchise" referred to in Home Ins. Co. v. New York, 134 U. S. 594, 601, 33 L. ed. 1025, 1030, 10 Sup. Ct. Rep. 593, as personal property, consisted in the right to do business as a corporation; see p. 509.

UNITED STATES, Appt.,
v.
NORTH AMERICAN TRANSPORTATION & TRADING COMPANY. (No. 319.)

NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, Appt.,
v.
UNITED STATES. (No. 320.)[1]

(See S. C. Reporter's ed. 330-338.)

United States — implied contracts — compensation for taking private property.

1. When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor.

[For other cases, see United States, VI. c, in Digest Sup. Ct. 1908.]

Limitation of actions — suit against United States — compensation for taking property.

2. The taking of a placer mining claim as part of a site for an army post must, for the purpose of applying the Statute of Limitations to a suit against the government for compensation, be deemed to have been on the date of the approval or ratification by the Secretary of War of the unauthorized action of a military commander in taking possession, and not on the date of the latter's action, in view of the fact that the Secretary of War alone possessed the requisite authorization from Congress to determine whether the army post should be established and what land should be taken therefor, and the Secretary's action was none the less a taking of the mining claim because the President, when reserving the tract from sale and setting it aside for military purposes, had done so "subject to any legal rights which may exist to any land within its limits."

[For other cases, see Limitation of Actions, II. m, in Digest Sup. Ct. 1908.]

United States — implied contracts — compensation for taking private property.

3. The continued holding possession of a placer mining claim as part of an army post after the announcement by the Secretary of War that the tract of which it formed a part was a public reservation under control of the War Department, and the erection of buildings thereon by his authority, is such an appropriation as gives a right of action to the owner against the United States to recover compensation as upon implied contract.

[For other cases, see United States, VI. c, in Digest Sup. Ct. 1908.]

Damages — compensation for property taken by United States — interest — use and occupation.

4. The compensation recoverable in the court of claims for the taking by the government of private property in Alaska for a public use is the value of the property as of the date of the taking. It cannot include any amount for use and occupation between the time of the taking and the entry of judgment, where, except for an allegation in the petition that the United States is indebted in a specified amount for use and occupation, there was no request in the court of claims of any kind in respect to such allowance, and that court did not mention the subject in its opinion, and it is not referred to in the application for an appeal, since, if it is interest that the owner seeks, its allowance is forbidden by the Judicial Code, § 177, and, if it is not interest, the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest.

[For other cases, see Damages, VI. a, in Digest Sup. Ct. 1908.]

[Nos. 319 and 320.]

Argued April 30, 1920. Decided June 1, 1920.

CROSS APPEALS from the Court of Claims to review an award of compensation for a placer mining claim taken as part of a site for an army post. Affirmed.

See same case below, 53 Ct. Cl. 424.

The facts are stated in the opinion.

Assistant Attorney General **Davis** argued the cause, and, with Solicitor General King and Mr. R. P. Whiteley, filed a brief for the United States:

The taking by the government was on July 1, 1900, and the action in the court of claims was barred by the statute.

Meigs v. M'Clung, 9 Cranch. 11, 3 L. ed. 639; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Brown v. Huger, 21 How. 305, 16 L. ed. 125; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; United States v. Great Falls Mfg. Co. 112 U. S. 645, 656, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306; United States v. Lynah, 188 U. S. 445, 470, 47 L. ed. 539, 548, 23 Sup. Ct. Rep. 349; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 76, 57 L. ed. 1063, 1080, 33 Sup. Ct. Rep. 667; United States v. Cress, 243 U. S. 316, 61 L. ed. 746, 37 Sup. Ct. Rep. 380.

[1] Leave granted June 7, 1920, to present a petition for rehearing within sixty days, on motion of counsel for the appellant.

Note.—As to payment for private property taken for public use—see note to Withers v. Buckley, 15 L. ed. U. S. 816.

If the possession taken by General Randall was unlawful, that taken by the Executive was equally so, and the taking being tortious, the petition in the court of claims must be dismissed.

United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

In no case where private property has been appropriated by the construction of public works upon it, where the appropriation has been found to be a complete and permanent one, has there been any award or allowance or judgment for the use and occupation of the property by the government pending the payment of just compensation. This is so, because the ownership, if the taking is lawful, vests in the government as soon as physical possession is had, although the title may not be complete until compensation is paid the owner. Any additional allowance for use and occupation until the money awarded be actually paid over would be in the nature of interest, which the court of claims is forbidden by law to allow unless it be stipulated for by contract, or authorized by statute.

United States v. North Carolina, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 Sup. Ct. Rep. 920; Sweet v. Rechel, 159 U. S. 380, 407, 40 L. ed. 188, 198, 16 Sup. Ct. Rep. 43; Bauman v. Ross, 167 U. S. 548, 598, 42 L. ed. 270, 291, 17 Sup. Ct. Rep. 966; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

Mr. Burt E. Barlow argued the cause, and, with Mr. Abram R. Serven, filed a brief for the North American Transportation & Trading Company:

The property of cross appellant could not be taken for public use without payment of just compensation under the 5th Amendment of the Constitution of the United States, and, on failure upon the part of defendants to condemn the land so taken, the cross appellant could (if public policy did not prevent) bring an action of ejectment against the agents of the government, or could waive its right to condemnation proceedings and sue upon the implied promise of the defendants to pay just compensation.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; United States v. Archer, 241 U. S. 119, 60 L. ed. 918, 36 Sup. Ct. Rep. 521; United States v. Lynah, 188 U. S. 445–474, 47 L. ed. 539–550, 23 Sup. Ct. Rep. 349.

Just compensation includes damages for the value of the property at the time of the taking, and also, when the owner of the property is deprived of the use and occupation thereof, damages for such deprivation.

Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 35, 31 Am. Dec. 313; Shoemaker v. United States, 147 U. S. 282, 320, 321, 37 L. ed. 170, 188, 13 Sup. Ct. Rep. 361; Phillips v. South Park, 119 Ill. 645, 10 N. E. 230; Cohen v. St. Louis, Ft. S. & W. R. Co. 34 Kan. 168, 55 Am. Rep. 242, 8 Pac. 138; Lake Koew Nav. Reservoir & Irrig. Co. v. McLain Land & Invest. Co. 69 Kan. 341, 76 Pac. 853; Moll v. Sanitary Dist. 131 Ill. App. 160, 228 Ill. 636, 81 N. E. 1147; Atlantic & G. W. R. Co. v. Koblentz, 21 Ohio St. 338; Sioux City, etc., R. Co. v. Brown, 13 Neb. 319, 14 N. W. 407.

The sum allowed for the use and occupation is not interest.

Klages v. Philadelphia & R. Terminal Co. 160 Pa. 389, 28 Atl. 862.

The title to the property taken for the use of the public does not pass to the public until the amount determined to be the just compensation is paid.

United States v. Lynah, 188 U. S. 470, 47 L. ed. 548, 23 Sup. Ct. Rep. 349.

The United States government is not responsible for the tortious acts of its officers, and the tortious acts of its officers cannot be waived by other officers, but can only be waived by direct and explicit action of Congress.

Belknap v. Schild, 161 U. S. 10, 17, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443; Stanley v. Schwalby, 162 U. S. 255, 270, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754.

Mr. Justice **Brandeis** delivered the opinion of the court:

This suit was brought by the North American Transportation & Trading Company in the court of claims on December 7, 1906. The petitioner seeks to recover the [332] value of a placer mining claim situated on the public land near Nome, Alaska, which is alleged to have been taken by the government on December 8, 1900, and also compensation for use and occupation thereof after that date. Ownership of the property by the company and the physical taking and continued possession of it by the government were not controverted. The lower court found, also, that about July 1, 1900, General Randall, United States Army, commanding the Department of Alaska, took possession, as a site for an army post, of a large tract of public land which included the mining claim. The company yielded possession of the part occupied by it, being unable to withstand

his authority; but at the same time it demanded compensation which General Randall promised would be paid. Use of the site for an army post was thereafter recommended by him to the Secretary of War. Pursuant to this recommendation, the President issued on December 8, 1908, an order by which the tract was reserved from sale and set aside for military purposes; and on December 20, 1908, the Secretary of War announced it as a public reservation, for the present under the control of the War Department. The tract has been used as an army post continuously since possession was first taken by General Randall. The buildings erected thereon are situated on that portion of the land which had been the company's placer claim; so that at no time since General Randall took possession of the land has the company been able to operate its claim or do any further mining work thereon.

The government contended that, if, on the facts, there was a legal taking or other act entitling petitioner to recover compensation, the cause of action had accrued more than six years prior to the commencement of this suit; and that therefore, under § 156 of the Judicial Code [36 Stat. at L. 1139, chap. 231, Comp. Stat. § 1147, 5 Fed. Stat. Anno. 2d ed. p. 668], the petition should be dismissed. The court of claims found that the company's property was taken within the [333] six years; that is, on December 8, 1900; and that its then reasonable value was $23,800. It entered judgment for that amount (53 Ct. Cl. 424). Both parties appealed. The government, on the ground that the right of recovery, if any, was barred; the company, on the ground that no compensation was allowed for the use and occupation between the date of the taking and the date of entry of judgment.

First. When the government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, it impliedly promises to pay therefor. United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; United States v. Lynah, 188 U. S. 445, 462, 465, 47 L. ed. 539, 545, 546, 23 Sup. Ct. Rep. 349; United States v. Cress, 243 U. S. 316, 329, 61 L. ed. 746, 753, 37 Sup. Ct. Rep. 380. But although Congress may have conferred upon the Executive Department power to take land for a given purpose, the government will not be deemed to have so appropriated private property, merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress. See Ball Engineering Co. v. J. G. White & Co. 250 U. S. 46, 54–57, 63 L. ed. 835, 839, 840, 39 Sup. Ct. Rep. 393. In order that the government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

The Acts of March 3, 1899, chap. 423, 30 Stat. at L. 1064, 1070, and May 26, 1900, chap. 586, 31 Stat. at L. 205, 213, making appropriations for barracks and quarters for troops, furnish sufficient authorization from Congress to take land for such purposes, so that the difficulty encountered by the claimant in Hooe v. United States, 218 U. S. 322, 54 L. ed. 1055, 31 Sup. Ct. Rep. 85, does not exist here. But the power granted by these acts was conferred upon the Secretary of War. Act of August 1, 1888, chap. 728, § 1, 25 Stat. at L. 357, Comp. Stat. § 6909, 8 Fed. Stat. Anno. 2d ed. p. 1111; Act of August 18, 1890, chap. 797, § 1, 26 Stat. at L. 316, Comp. Stat. § 6911, 8 Fed. Stat. Anno. 2d ed. p. 1116. It was for him to determine whether [334] the army post should be established and what land should be taken therefor. Compare Nahant v. United States, 69 L.R.A. 723, 70 C. C. A. 641, 136 Fed. 273, 82 C. C. A. 470, 153 Fed. 520; United States v. Certain Lands, 145 Fed. 654. Power to take possession of the company's mining claim was not vested by law in General Randall; and the Secretary of War had not, so far as appears, either authorized it or approved it before December 8, 1900. It was only after the President reserved from sale and set aside for military purposes the large tract of land in which the company's mining claim was included that the Secretary of War took action which may be deemed an approval or ratification of what General Randall had done. What he had done before that date having been without authority, and hence tortious, created no liability on the part of the government. J. Ribas y Hijo v. United States, 194 U. S. 315, 323, 48 L. ed. 994, 996, 24 Sup. Ct. Rep. 727. Since the cause of action arose after December 7, 1900, this suit was not barred by § 156 of the Judicial Code.

The suggestion is made that, as the President's order reserved the land "subject to any legal rights which may exist to any land within its limits," the

Secretary's action thereafter was not a taking of the mining claim. But this clause and the reference to it in the announcement made by the Secretary must, in view of the circumstances, have meant merely that the right to compensation of the company and of any others was preserved. Furthermore, the suggestion, if sound, would not aid the government; it would result, at most, in slightly postponing the date of the legal taking. For the continued holding possession of the land after the announcement of the Secretary of War, and the erection of buildings thereon by his authority, was such an appropriation as would, in any event, give the right of action against the government.

Second. The company contends that it should receive, in addition to the value of the property at the time of the taking, compensation for the occupation and use [335] thereof from that date to the date of the judgment,—a period of nearly twenty years, during which the company was deprived of the use of its property. This contention is based upon the decisions of many state courts that, upon the taking of private property for public uses, the owner is entitled to recover, besides its value at the time of the taking, interest thereon from the date on which he was deprived of its use to the date of payment.[1] In a number of cases in the lower Federal courts also the landowner has been permitted to recover interest from the time of the taking; but in each such case a statute had provided in some form that the condemnation should be conducted according to the laws of the state in which the land was situated; and under the law of the state interest was recoverable. United States v. Engeman, 46 Fed. 898; Hingham v. United States, 88 C. C. A. 341, 161 Fed. 295, 300, 15 Ann. Cas. 105; United States v. Sargent, 89 C. C. A. 81, 162 Fed. 81; United States v. First Nat. Bank, 250 Fed. 299, Ann. Cas. 1918E, 36; United States v. Rogers, 168 C. C. A. 437, 257 Fed. 397; United States v. Highsmith, 168 C. C. A. 441, 257 Fed. 401. These conformity provisions which relate only to the laws of states can have no application to lands in Alaska; nor can they affect proceedings brought in the court of claims.

The right to bring this suit against the United States in the court of claims is not founded upon the 5th Amendment (Schillinger v. United States, 155 U. S. 163, 168, 39 L. ed. 108, 110, 15 Sup. Ct. Rep. 85; Basso v. United States, 239 U. S. 602, 60 L. ed. 462, 36 Sup. Ct. Rep. 226), but upon the existence of an implied contract entered into by the United States (Langford v. United States, 101 U. S. 341, 25 L. ed. 1010; Bigby v. United States, 188 U. S. 400, 47 L. ed. 519, 23 Sup. Ct. Rep. 468; Temple v. United States, 248 U. S. 121, 129, 63 L. ed. 162, 164, 39 Sup. Ct. Rep. 56; United States v. Great Falls Mfg. Co. and United States v. Lynah, supra). And the contract which is implied is to pay the value of property as of the date of the taking. Bauman v. Ross, 167 [336] U. S. 548, 587, 42 L. ed. 270, 287, 17 Sup. Ct. Rep. 966; United States v. Honolulu Plantation Co. 58 C. C. A. 279, 122 Fed. 581, 585; Burt v. Merchants' Ins. Co. 115 Mass. 1, 14. Interest may not be added because § 177 of the Judicial Code, re-enacting § 1061 of the Revised Statutes, declares that "no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest." Tillson v. United States, 100 U. S. 43, 25 L. ed. 543. Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests) cannot be attributed to the sovereign. United States v. North Carolina, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 Sup. Ct. Rep. 920. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. United States v. Sherman, 98 U. S. 565, 567, 568, 25 L. ed. 235-237. So rigorously is the rule applied, that in the adjustment of mutual claims between an individual and the government, the latter has been held entitled to interest on its credits, although relieved from the payment of interest on the charges against it. United States v. Verdier, 164 U. S. 213, 218, 219, 41 L. ed. 407, 409, 410, 17 Sup. Ct. Rep. 42. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party (Stanley v. Schwalby, 162 U. S. 255, 272, 40 L. ed. 960, 966, 16 Sup. Ct. Rep. 754; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 296, 46 L. ed. 1164, 1172, 22 Sup. Ct. Rep. 920), and the refusal to hold the United States liable for torts committed by its offi-

[1] See cases collected in 15 Cyc. 930, 931, and in 10 R. C. L. p. 163.

cers and agents in the ordinary course of business (Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771, 32 Sup. Ct. Rep. 488), are hardships from which, with rare exceptions (William Cramp Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co. 246 U. S. 28, 40, 41, 62 L. ed. 560, 565, 566, 38 Sup. Ct. Rep. 271), Congress has been unwilling to relieve those who either voluntarily deal with the government or are otherwise affected by its acts.

The company argues that interest is allowed in condemnation proceedings, not qua interest for default or [337] delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title (see Klages v. Philadelphia & R. Terminal Co. 160 Pa. 386, 28 Atl. 862); and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the court of claims or by the common-law rule which exempts the sovereign from liability to pay interest (United States v. New York, 160 U. S. 598, 622, 40 L. ed. 551, 559, 16 Sup. Ct. Rep. 402). This may be the theory on which interest should be allowed in compensation proceedings;[2] and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the government. For, as suggested in United States v. Sargent, 89 C. C. A. 81, 162 Fed. 81, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land. Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. ed. 629, 27 Sup. Ct. Rep. 321. On the other hand, this suit, brought in the court of claims, is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts,—one for the value of the mining claim, the other for use and occupation after December 8, 1900, at the rate of $7,500 per year. If the company had brought the suit immediately after the taking it clearly could not have recovered any amount for use and occupation; for a plaintiff suing in contract [338] can recover only on a cause of action existing at the time the suit was brought. The loss to the company of the use of $23,800, which is found to be the value of the mining claim when it was taken, nearly twenty years ago, must be deemed to be due, in part, to its delay in instituting the suit, and, in part, to the delays of litigation for which it may have been largely responsible. But as, in either event, the loss of the use of the money results from the failure to collect sooner a claim held to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the court of claims power to allow.

Furthermore, if it is not interest which the company seeks, the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. The petition states that the United States is indebted to claimant in addition to the $100,000, alleged to be the value of the property, the further sum of $7,500 per annum for the use and occupancy thereof from December 8, 1900. Except for this allegation the company did not, so far as appears, make any request of any kind in the court below in respect to an allowance for use and occupation. The court does not mention the subject in the opinion; and it is not referred to in the application for an appeal.

In Shoemaker v. United States, 147 U. S. 282, 321, 37 L. ed. 170, 188, 13 Sup. Ct. Rep. 361, and Bauman v. Ross, 167 U. S. 548, 598, 42 L. ed. 270, 291, 17 Sup. Ct. Rep. 966, to which both counsel refer, the point here decided was not involved, since the court held that under the express terms of the acts there in question the United States were not entitled to possession of the land until the damages had been assessed and actually paid.

The judgment below is affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

[2] Compare Moll v. Sanitary Dist. 228 Ill. 633, 636, 81 N. E. 1147; Lake Koen Nav. Reservoir & Irrig. Co. v. McLain Land & Invest. Co. 69 Kan. 334, 341, 342, 76 Pac. 853; Kidder v. Oxford, 116 Mass. 165; Hammersley v. New York, 56 N. Y. 533, 537; Sioux City, etc., R. Co. v. Brown, 13 Neb. 317, 319, 14 N. W. 407; Atlantic & G. W. R. Co. v. Koblentz, 21 Ohio St. 334.

[339] LESLIE C. STALLINGS, Appt.,
v.
MAURICE SPLAIN, United States Marshal in and for the District of Columbia.

(See S. C. Reporter's ed. 339–345.)

Arrest — without warrant — fugitive from another Federal district.

1. A person charged with a felony by an indictment found in one Federal district, who has fled to another district, may be arrested without warrant by a peace officer in the latter district, and be detained a reasonable time to await the institution of proceedings for his removal to the district where the indictment was found. The arrest being lawful without warrant was none the less so because the peace officer was possessed of a bench warrant issued in the Federal district where the indictment was found.

[For other cases, see Arrest, I. in Digest Sup. Ct. 1908.]

Criminal law — removal to another district for trial — jurisdiction — pendency of habeas corpus.

2. The pendency of a habeas corpus proceeding raising the question of the legality of an arrest and detention to await proceedings for the removal to another Federal district of a person there charged with an offense against the United States did not deprive a United States commissioner of jurisdiction to entertain a subsequent application for the arrest of the accused on an affidavit of complaint setting forth the same offenses charged in the indictment.

[For other cases, see Criminal Law, VII. in Digest Sup. Ct. 1908.]

Habeas corpus — in proceedings for removal to another district for trial.

3. A person arrested in one Federal district charged with the commission of an offense in another district, who, upon his own request upon advice of counsel, is admitted to bail by a United States commissioner to answer the indictment before application had been made to the court for his removal, and before there had even been an order of the commissioner that he be held to await such application, is not entitled to his discharge on habeas corpus. He was no longer under actual restraint in the district of his arrest, and all questions in controversy in the habeas corpus and removal proceedings had terminated, including the question whether his arrest and detention had originally been valid, and whether there was a right then to remove him.

[For other cases, see Habeas Corpus, I. b, 1; II. b, in Digest Sup. Ct. 1908.]

Indictment — validity — embezzlement by United States commissioner.

4. An indictment charging a United States commissioner with having received as commissioner divers sums of money from persons named, to be paid over to the receiver of the land office, and with embezzling the same, must be deemed to charge an offense against the United States in view of the provision of U. S. Rev. Stat. § 2294, as amended by the Act of March 4, 1904, that where applicants for the benefit of the Homestead and other Land Laws make the required affidavits before commissioners of the United States, the proof so made shall have the same effect as if made before the register and receiver "when transmitted to them with the fees and commissions allowed and required by law," and of the directions in circulars issued by the Land Office, containing suggestions to the United States commissioners that the proofs so taken shall be "transmitted to the register and receiver with the necessary fees and commissions," and that in "no case should the transmittal thereof be left to the claimant."

[For other cases, see Indictment, 118–122, in Digest Sup. Ct. 1908.]

Criminal law — removal to other district for trial — sufficiency of indictment.

5. Any reasonable doubt as to the validity of an indictment charging the commission of an offense against the United States is to be resolved, not by the committing magistrate in another Federal district, but by the court which found the indictment after the accused had been removed to that district for trial.

[For other cases, see Criminal Law, 249–254, in Digest Sup. Ct. 1908.]

[No. 534.]

Argued April 23, 1920. Decided June 1, 1920.

APPEAL from the Court of Appeals of the District of Columbia to review an order of the Supreme Court of the District, discharging a writ of habeas corpus. Affirmed.

See same case below, — App. D. C. —, 258 Fed. 510.

The facts are stated in the opinion.

Mr. William B. Jaynes argued the cause and filed a brief for appellant:

The District of Columbia is a district of the United States within the meaning of U. S. Rev. Stat. § 1014, Comp Stat. § 1674, 2 Fed. Stat. Anno. 2d ed. p. 654, authorizing the removal for

---

Note.—On right to detain fugitive to await arrival of extradition papers; arrest without warrant—see note to Simmons v. Van Dyke, 26 L.R.A. 33.

On removal to another Federal district for trial of person there charged with an offense against the United States—see notes to Greene v. Henkel, 46 L. ed. U. S. 177; and Jewett v. United States, 53 L.R.A. 568.

On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

trial of a person charged with an offense against the United States to the Federal district where the trial is to be had.

Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569; Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760.

The United States commissioner was wholly without jurisdiction to act in the cause during the pendency of an application for discharge on habeas corpus in the supreme court of the District of Columbia, which in no manner had been heard on its merits.

Barth v. Clise, 12 Wall. 400, 20 L. ed. 393; Re Farez, 7 Blatchf. 34, Fed. Cas. No. 4,644.

Where, upon a broad, liberal, and inartificial construction of the language of the indictment, it does not appear that any offense against the laws of the United States has been committed, § 1014 of the Revised Statutes does not apply, and the prisoner should not be held for removal.

Re Benson, 131 Fed. 969; Tinsley v. Treat, 205 U. S. 20, 51 L. ed. 689, 27 Sup. Ct. Rep. 430; Hard v. Splain, 45 App. D. C. 1.

There is nothing contained in the allegations of any of the counts of the indictment contained within this record which shows any crime to have been committed. When an indictment found in the trial district charges no offense against the laws of the United States, the court is not justified in ordering removal (Greene v. Henkel, 183 U. S. 249, 46 L. ed. 177, 22 Sup. Ct. Rep. 218; Re Wolf, 27 Fed. 606; Re Corning, 51 Fed. 205; Re Terrell, 51 Fed. 213; Re Greene, 52 Fed. 104; Re Doig, 4 Fed. 193; Re Buell, 3 Dill. 116, Fed. Cas. No. 2,102), and all such matters may be inquired into and determined by a district judge on an application for removal, either when the motion for a writ of removal is pending, and on such motion, or by habeas corpus (United States v. Rogers, 23 Fed. 658).

A similar question to the one at bar arose in the case of Re James, 195 Fed. 981, under proceedings for revocation of the appointment of a United States commissioner, and the cause was dismissed on the ground that services similar to the ones rendered as set out in this indictment, if they were so rendered or undertaken to be rendered, were rendered as an employee, and not as an officer, and it was therein held that the commissioner had the right under the statute to charge and be compensated for services done under precisely the same act as it is surmised forms the basis for the charge set forth in this indictment.

In any indictment for embezzlement, the allegation of ownership of the property alleged to have been embezzled must be averred with the same precision as in an indictment for larceny.

3 Bishop, New Crim. Proc. 2d ed. § 320; 9 R. C. L. 1291; 15 Cyc. 517; Clark, Crim. Proc. 2d ed. 267.

Solicitor General King argued the cause and filed a brief for appellee:

The arrest under the bench warrant was legal and proper. The warrant ran through the United States, so as to permit an arrest.

2 Moore, Extr. § 540.

That defendant was on bail pending a hearing on habeas corpus would not prevent the adoption of a proceeding as though no attempt to proceed on the bench warrant had been made. It, at most, could only amount to an abandonment of the arrest on the bench warrant, and did not prevent the commissioner from hearing the question of removal and ordering the same.

Peckham v. Henkel, 216 U. S. 483, 54 L. ed. 579, 30 Sup. Ct. Rep. 255.

In the hearing on the whole matter it was shown—

(a) That an indictment had been duly found, and a copy was introduced in evidence.

(b) The identity of the party arrested with the person indicted, and his former official character, were admitted. The accused introduced no evidence, but insisted that the indictment did not charge an offense against the United States. Such a showing required the grant of the order for removal.

Rumely v. McCarthy, 250 U. S. 283, 288, 63 L. ed. 983, 986, 39 Sup. Ct. Rep. 483; Hyde v. Shine, 199 U. S. 62, 84, 50 L. ed. 90, 97, 25 Sup. Ct. Rep. 760; Haas v. Henkel, 216 U. S. 462, 54 L. ed. 569, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112.

The objections here urged to the indictment were properly left to be ruled on by the court in which it was pending.

Beavers v. Henkel, 194 U. S. 73, 48 L. ed. 882, 24 Sup. Ct. Rep. 605; Benson v. Henkel, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569.

Mr. Justice **Brandeis** delivered the opinion of the court:

Stallings was indicted in the district court of the United States for the district of Wyoming for embezzling moneys intrusted to him as United States commissioner. Being in the District of Columbia, he was arrested there by Splain, marshal for the District, and was detained to await the institution of proceedings for his removal. In making the arrest Splain had relied, not upon a warrant issued by a commissioner for the District, but upon a bench warrant issued to the marshal for the district of Wyoming on the indictment. Stallings filed immediately in the supreme court of the District of Columbia a petition for writ of habeas corpus, contending, for this reason, apparently, that the arrest and detention were illegal. The writ issued; Splain produced the body; the hearing on the writ was postponed; and Stallings was admitted to bail.

While he was at large on bail, awaiting a hearing in the habeas corpus proceedings, an affidavit of complaint was filed before a United States commissioner for the District, setting forth the same offenses charged in the indictment. A warrant issued thereon, but Stallings was not arrested. He appeared voluntarily before the commissioner; admitted his identity and that he held the office named at the times the offenses were charged to have been committed; declined to offer any evidence; and moved that he be discharged. The commissioner denied the motion. Then, certified copies of the indictment and other papers having been introduced, he found probable cause. No order was made that Stallings be held to await an application for his removal. He requested that he be admitted to bail for his appearance in Wyoming to answer the charges [341] against him. The bail was fixed at $2,000 and was furnished.

After this, Splain filed a return to the petition for writ of habeas corpus, setting up the above facts, and Stallings demurred. He also secured, in aid of the habeas corpus proceeding, a writ of certiorari by which all proceedings before the United States commissioner were certified to the supreme court of the District. The case was then heard both upon the demurrer to the petition for writ of habeas corpus and upon the return to the writ of certiorari. The demurrer was overruled; and, Stallings electing to stand thereon, the court dismissed the petition for a writ of habeas corpus and discharged the writ issued thereon. The petition for a writ of certiorari and the writ issued thereon were also dismissed, and the proceedings were remanded to the commissioner for further action. Stallings appealed to the court of appeals for the District, which affirmed the final order below. (— App. D. C. —, 258 Fed. 510.) It is contended here that Stallings should be discharged: (a) because the original arrest and detention on the bench warrant were illegal and the later proceedings before the commissioner were without jurisdiction, since he could not legally be rearrested for the same offense until the habeas corpus proceeding had been disposed of; (b) because the affidavit and the indictment fail to charge a crime against the United States.

First. The original arrest and detention were lawful. A person duly charged with a felony in one state may, if he flees to another, be arrested, without a warrant, by a peace officer in the state in which he is found, and be detained for the reasonable time necessary to enable a requisition to be made. Burton v. New York C. & H. R. R. Co. 245 U. S. 315, 318, 62 L. ed. 314, 320, 38 Sup. Ct. Rep. 108. See Kurtz v. Moffitt, 115 U. S. 487, 504, 29 L. ed. 458, 462, 6 Sup. Ct. Rep. 148. The rule is not less liberal where the fugitive stands charged by an indictment found in one Federal district and flees to another. See 2 [342] Moore, Extradition, § 540. If the bench warrant issued in Wyoming was not effective as a warrant within the District of Columbia, the possession of it did not render illegal an arrest which could lawfully have been made without it. It would, at least, serve as evidence that Splain had reasonable cause to believe that a felony had been committed by Stallings. Com. v. Phelps, 209 Mass. 396, 404, 95 N. E. 868, Ann. Cas. 1912B, 566.

Second. The pendency of the habeas corpus proceeding did not deprive the commissioner of jurisdiction to entertain the application for arrest on the affidavit of complaint. When Splain, in obedience to the writ, brought Stallings before the court, he passed from the custody of the marshal into that of the court, and he remained under its protection and control although enlarged on bail. Barth v. Clise, 12 Wall. 400, 20 L. ed. 393. But he did not thereby become immune from all other process until the habeas corpus proceedings should have been finally disposed of. Com

Hall, 9 Gray, 262, 69 Am. Dec. 285. Lack of jurisdiction in the commissioner did not follow from the fact that the court had acquired, by virtue of the habeas corpus proceedings, the custody of and control over Stallings. Even if the affidavit of complaint had related to another indictment brought in a different district, the commissioner would have had jurisdiction to entertain it. The question would merely have been whether a second arrest could properly be made where it conflicted with the first. Peckham v. Henkel, 216 U. S. 483, 54 L. ed. 579, 30 Sup. Ct. Rep. 255; Re Beavers, 125 Fed. 988, 131 Fed. 366. Here there could be no conflict; for the second arrest, if it had been made, would have been merely for the purpose of carrying out the first. The government was not precluded from taking such additional proceedings as it might deem necessary or advisable to supplement or perfect those originally instituted. If the original arrest was lawful, the detention would remain legal only for the reasonable time required to enable [343] appropriate removal proceedings to be instituted. Unless the lawful arrest was promptly followed by such proceedings the prisoner would be entitled to his discharge. Re Fetter, 23 N. J. L. 311, 321, 57 Am. Dec. 382. On the other hand, if the original arrest and detention had been illegal, Stallings would not be entitled to his discharge, if, before final hearing in the habeas corpus proceedings, legal cause for detaining him had arisen through the institution of removal proceedings. Where it appears that sufficient ground for detention exists, a prisoner will not be discharged for defects in the original arrest or commitment. Nishimura Ekiu v. United States, 142 U. S. 651, 53 L. ed. 1146, 12 Sup. Ct. Rep. 336; Iasigi v. Van de Carr, 166 U. S. 391, 41 L. ed. 1045, 17 Sup. Ct. Rep. 595; Kelly v. Griffin, 241 U. S. 6, 13, 60 L. ed. 861, 864, 36 Sup. Ct. Rep. 487.

Third. The admission to bail by the commissioner to answer the indictment in the district of Wyoming was upon his own request, on advice of counsel. When this bail was given, no application had been made to the court for his removal; and there had not even been an order of the commissioner that he be held to await such application. He ceased, therefore, to be in the position ordinarily occupied by one who is contesting the validity of his detention, and who has been released on bail pending the habeas corpus proceeding. Sibray v. United States, 185 Fed. 401. Stallings's position was thereafter no better than if he had applied for the writ after he had given bail. It is well settled that, under such circumstances, a petitioner is not entitled to be discharged on habeas corpus. Respublica v. Arnold, 3 Yeates, 263; Dodge's Case, 6 Mart. (La.) 569; State v. Buyck, 3 S. C. L. (1 Brev.) 460. Being no longer under actual restraint within the District of Columbia, he was not entitled to the writ of habeas corpus. Wales v. Whitney, 114 U. S. 564, 29 L. ed. 277, 5 Sup. Ct. Rep. 1050.

Furthermore, by voluntarily giving bail to appear in Wyoming, the purpose of the removal proceedings had been accomplished, and all questions in controversy in the habeas corpus and in the removal proceedings terminated. [344] Whether his arrest and detention had originally been valid was thereby rendered immaterial. Re Esselborn, 8 Fed. 904. And likewise the question whether there was a right then to remove him. Compare Cheong Ah Moy v. United States, 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. Rep. 431; Ex parte Baez, 177 U. S. 378, 44 L. ed. 813, 20 Sup. Ct. Rep. 673.

Fourth. Stallings's contention that he should be discharged because the indictment failed to charge a crime under the laws of the United States is also unfounded. He was indicted under § 97 of the Penal Code [35 Stat. at L. 1106, chap. 321, Comp. Stat. § 10,265, 7 Fed. Stat. Anno. 2d ed. p. 650], which declares that any officer of the United States who shall embezzle any money which may have come into his possession in the execution of such office, or under claim of authority as such officer, shall be punished. The indictment charges Stallings with having received as commissioner divers sums of money from persons named, to be paid over to the receiver of the land office at Cheyenne, and embezzling the same. It is contended that the money could not have been received as commissioner for transmission, because it is not among the statutory duties of a commissioner. But § 2294 of the Revised Statutes, as amended by Act of March 4, 1904, chap. 394, 33 Stat. at L. 59, Comp. Stat. § 4546, 8 Fed. Stat. Anno. 2d ed. p. 572, provides that where applicants for the benefit of the Homestead and other Land Laws make the required affidavits before commissioners of the United States, the

proof so made shall have the same effect as if made before the register and receiver, "when transmitted to them with the fees and commissions allowed and required by law." The circular issued by the Land Office in 1905 (33 Land Dec. 480, 481), containing "Suggestions to United States Commissioners," etc., directs that the proofs so taken be "transmitted to the register and receiver with the necessary fees and commissions." And the circular issued in 1915 (44 Land Dec. 350, 352) directs that in "no case should the transmittal thereof be left to the claimant."

Duties of an officer may be prescribed by rule. If the validity of the indictment was open to reasonable doubt, [345] it was to be resolved not by the committing magistrate, but, after the removal, by the court which found the indictment. Beavers v. Henkel, 194 U. S. 73, 83, 48 L. ed. 882, 886, 24 Sup. Ct. Rep. 605; Benson v. Henkel, 198 U. S. 1, 10–12, 49 L. ed. 919, 922, 923, 25 Sup. Ct. Rep. 569; Haas v. Henkel, 216 U. S. 462, 481, 54 L. ed. 569, 578, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112.

Affirmed.

PORTO RICO RAILWAY, LIGHT, & POWER COMPANY v. ADALBERTO DIAZ MOR.

(See S. C. Reporter's ed. 345–349.)

Statutes — construction — general terms.

1. When several words in a statute are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.

[For other cases, see Statutes, II. f, in Digest Sup. Ct. 1908.]

Statutes — construction — effectuating legislative purpose.

2. A doubtful clause in a congressional enactment should be construed so as to effect the general purpose of Congress manifested in the statute.

[For other cases, see Statutes, II. c, in Digest Sup. Ct. 1908.]

Courts — jurisdiction of Federal district court for Porto Rico — alien as party.

3. Jurisdiction of the Federal district court for Porto Rico of a suit to which an alien domiciled in Porto Rico is a party is denied by the provision of the Act of March 2, 1917, § 41, which gives said court jurisdiction of controversies "where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico." The restriction of jurisdiction to cases where all the parties on either side of the controversy are "not domiciled in Porto Rico" applies to aliens as well as to American citizens.

[For other cases, see Courts, III. c, in Digest Sup. Ct. 1908.]

[No. 728.]

Argued April 23, 1920. Decided June 1, 1920.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the First Circuit, presenting the question whether the Federal District Court for Porto Rico has jurisdiction of a suit to which an alien domiciled in Porto Rico is a party. Answered in the negative.

The facts are stated in the opinion.

Mr. Carroll G. Walter argued the cause and filed a brief for the Porto Rico Railway, Light, & Power Company:

As a matter of ordinary construction, where several words are followed by a general expression, as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.

United States v. Standard Brewery, 251 U. S. 210, 218, 64 L. ed. 229, 234, 40 Sup. Ct. Rep. 139; Great Western R. Co. v. Swindon & C. Extension R. Co. L. R. 9 App. Cas. 808, 53 L. J. Ch. N. S. 1075, 51 L. T. N. S. 798, 32 Week. Rep. 957, 48 J. P. 821.

It is proper, indeed necessary, to consider the old law, the mischief, and the remedy (United States v. St. Paul, M. & M. R. Co. 247 U. S. 310, 318, 62 L. ed. 1130, 1134, 38 Sup. Ct. Rep. 525; Blackstone, Introduction, § 2, p. 87); and also the natural or absurd consequences of any particular interpretation (Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 227, 12 Sup. Ct. Rep. 511; Knowlton v.

Note.—On construction of statutes, generally—see notes to Riggs v. Palmer, 5 L.R.A. 340; Maillard v. Lawrence, 14 L. ed. U. S. 925; United States v. Saunders, 22 L. ed. U. S. 736; and Blake v. National City Bank, 23 L. ed. U. S. 119.

On construction of statute for purpose for which it was passed—see note to United States v. Saunders, 22 L. ed. U. S. 736.

Moore, 178 U. S. 41, 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747; United States v. Hogg, 50 C. C. A. 608, 112 Fed. 909; Interstate Drainage & Invest. Co. v. Freeborn County, 85 C. C. A. 532, 158 Fed. 270; Stockyards Loan Co. v. Nichols, 1 A.L.R. 547, 156 C. C. A. 209, 243 Fed. 511).

No brief was filed for Adalberto Diaz Mor.

Mr. Justice **Brandeis** delivered the opinion of the court:

Mor, a subject of the King of Spain, domiciled in Porto Rico, brought in the United States district court for [**346**] Porto Rico this action at law for an amount exceeding $3,000, exclusive of interest and costs, against the Porto Rico Railway, Light, & Power Company, a Porto Rico corporation having its principal place of business there. Objection to the jurisdiction of the trial court was overruled and the plaintiff recovered judgment. The case came before the circuit court of appeals for the first circuit on writ of error, and that court has presented to us by certificate the question whether the district court had jurisdiction. The answer depends upon the construction to be given to the following provision contained in § 41 of the so-called Jones Act of March 2, 1917, chap. 145, 39 Stat. at L. 951, 965, Comp. Stat. §§ 3803a, 3803qq, Fed. Stat. Anno. Supp. 1918, pp. 608, 626, which provides a civil government for Porto Rico:

"Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000. . . . "

It is clear under this act that if Mor, instead of being a Spanish subject, had been a citizen of one of the United States, the court would not have had jurisdiction, since he was domiciled in Porto Rico. The precise question, therefore, is whether the restriction of jurisdiction to cases where all the parties on either side of the controversy are "not domiciled in Porto Rico" applies to aliens as well as to American citizens.

The judicial system of Porto Rico prior to annexation to the United States comprised a supreme court and district trial courts of general jurisdiction and municipal courts. The proceedings in all of these courts were conducted in the Spanish language and according to the forms of the civil law. By § 33 of the Foraker Act, April 12, 1900, chap. 191, 31 Stat. at L. 77, 84, Comp. Stat. §§ 3747, 3784, 7 Fed. Stat. Anno. 2d ed. pp. 1259, 1273, which established what was intended [**347**] as a temporary civil government for the island, these insular courts were continued, with the proviso that the judges of the supreme court should be appointed by the President, and the judges of the inferior courts by the governor. By § 40 of the Jones Act the jurisdiction of these courts and the forms of procedure in them were further continued.

The "district court of the United States for Porto Rico," provided for by § 41 of the Jones Act, was, in effect, a continuation of the district court of the United States provided for by § 34 of the Foraker Act, as amended by the Act of March 2, 1901, chap. 812, § 3, 31 Stat. at L. 953, Comp. Stat. § 3786, 7 Fed. Stat. Anno. 2d ed. p. 1280.[1] Both acts conferred upon the court jurisdiction of all cases cognizable in circuit or district courts of the United States; the court is by both directed to proceed in the same manner as those courts; and in both there is an express provision that the pleadings and all proceedings shall be conducted in the English language. But the Jones Act greatly abridged the jurisdiction. The jurisdictional amount, which, by the amendatory Act of March 2, 1901, had been lowered to $1,000, was raised to $3,000. And whereas, by the amendment of 1901, the court had been given jurisdiction in case either party was a citizen of the United States, even if he was domiciled in Porto Rico, the Jones Act limited the jurisdiction dependent on American citizenship to the cases where the Americans were not domiciled in Porto Rico. Whether it likewise limited jurisdiction dependent on alienage is the question submitted to us.

[**348**] No reason appears why the clause "not domiciled in Porto Rico"

[1] Act of March 2, 1901, chap. 812, § 3: "That the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April twelfth, nineteen hundred, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

should not be read as applying to the entire phrase, "citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States." When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all. United States v. Standard Brewery, 251 U. S. 210, 218, ante, 229, 234, 40 Sup. Ct. Rep. 139; Johnson v. Southern P. Co. 196 U. S. 1, 18, 19, 49 L. ed. 363, 369, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, and cases cited. Furthermore, special reasons exist for so construing the clause in question. The act manifests a general purpose to greatly curtail the jurisdiction of the district court. If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress. American Secur. & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553; Inter-Island Steam Nav. Co. v. Ward, 242 U. S. 1, 61 L. ed. 113, 37 Sup. Ct. Rep. 1. But it seems to us clear that it applies alike to aliens and to American citizens.

Suit may be brought in the district court if either party has the jurisdictional qualifications; that is, the act confers upon such party not merely the right to sue, but the liability to be sued. In the population of Porto Rico there are many aliens, and these are largely Spaniards.[2] If the limitation "not domiciled in Porto Rico" were [349] inapplicable to aliens, the result would work peculiar hardship and assuredly unintended discrimination against these Spaniards. A Spanish subject domiciled in Porto Rico might be sued by an American domiciled in Porto Rico or a Porto Rican in the district court, where the proceedings are conducted in the English language and according to the forms of Anglo-American law; whereas an American domiciled in Porto Rico could be sued only in the insular courts, where the proceedings are conducted in the Spanish language and according to the procedure and processes of the civil law. This might not only prove very inconvenient to Spanish residents, but would be inconsistent with the spirit of Article 11 of the Treaty of December 10, 1898, between Spain and the United States (30 Stat. at L. 1754, 1760), under which Spaniards residing in Porto Rico were guaranteed "the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong."

Congress could not have intended to give the district court jurisdiction of any controversy to which a domiciled alien is a party, while denying, under similar circumstances, jurisdiction where a domiciled American is a party.

The question submitted is answered no.

---

[350] STATE OF RHODE ISLAND,[1] Complainant,
v.
A. MITCHELL PALMER, Attorney General, et al. (No. 29, Original.)

STATE OF NEW JERSEY, Complainant,
v.
A. MITCHELL PALMER, Attorney General, et al. (No. 30, Original.)

GEORGE C. DEMPSEY, Appt.,
v.
THOMAS J. BOYNTON, as United States Attorney, et al. (No. 696.)

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, Appt.,
v.
W. V. GREGORY, as United States Attorney, et al. (No. 752.)

CHRISTIAN FEIGENSPAN, a Corporation, Appt.,
v.
JOSEPH L. BODINE, as United States Attorney, et al. (No. 788.)

HIRAM A. SAWYER, as United States Attorney, et al., Appts.,
v.
MANITOWOC PRODUCTS COMPANY (No. 794.)

---

[2] "It is somewhat surprising to find that 886,442 of the actual population are classed as Spaniards, and only 4,324 as foreigners." Report on the Island of Porto Rico by Henry C. Carroll, Special Commissioner, October 6, 1899, p. 11.

"Spanish-born were 7,690, or 55 per cent of the total foreign born. The United States contributed 1,069." Commercial Porto Rico, Department of Commerce and Labor, April, 1907, p. 11.

"Of the total number of males twenty-one and over in 1910, 238,685 were of Porto Rican citizenship, 4,112 were of Spanish citizenship, 1,836 were citizens of the United States, and 2,385 were citizens of other foreign countries." Statistics for Porto Rico, 13th Census, p. 24.

[1] Reported by the Official Reporter under the title of "National Prohibition Cases."

ST. LOUIS BREWING ASSOCIATION, Appt.,
v.
GEORGE H. MOORE, Collector, et al.
(No. 837.)

(See S. C. Reporter's ed. 350–411.)

Constitutional law — amendment — necessity.

1. The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — amendment — two-thirds vote of Congress.

2. The two-thirds vote in each House of Congress, which is required in proposing an amendment to the Constitution, is a vote of two thirds of the members present, —assuming the presence of a quorum,—and not a two-thirds vote of the entire membership, present and absent.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — amendment of Federal Constitution — state referendum.

3. Referendum provisions of state constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirement of article 5 of such Constitution, that such ratification shall be by the legislatures of the several states, or by conventions therein, as Congress shall decide.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — Prohibition Amendment — validity.

4. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th Amendment to the Federal Constitution, is within the power to amend reserved by the 5th article of such Constitution.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — Prohibition Amendment — validity.

5. The Prohibition Amendment to the Federal Constitution by lawful proposal and ratification has become a part of that Constitution, and must be respected and given effect the same as other provisions of that instrument.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — Prohibition Amendment — effect.

6. That part of the Prohibition Amendment to the Federal Constitution which embodies the prohibition is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state legislature, or by a territorial assembly, which authorizes or sanctions what the Amendment prohibits.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — Prohibition Amendment — enforcement — concurrent power.

7. The declaration in the Prohibition Amendment to the Federal Constitution that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation" does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — Prohibition Amendment — enforcement — concurrent power.

8. The words "concurrent power" in the declaration in the 18th Amendment to the Federal Constitution that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation" do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them, nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign or interstate commerce from intrastate affairs.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Constitutional law — Prohibition Amendment — enforcement — concurrent power.

9. The power confided to Congress by the provisions of the 18th Amendment to the Federal Constitution, that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation," while not exclusive, is territorially coextensive with the prohibition of that Amendment, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

Note.—On ratification of amendments to Federal Constitution or other acts of the state legislature under provision of Federal Constitution as subject to state referendum—see note to Re Opinion of Justices, 5 A.L.R. 1417.

On initiative and referendum—see note to Hockett v. State Liquor Licensing Bd. L.R.A.1917B, 15; and State ex rel. Davies v. White, 50 L.R.A.(N.S.) 195.

Constitutional law — Prohibition Amendment — enforcement — liquors previously manufactured.

10. The power of Congress to enforce the Prohibition Amendment to the Federal Constitution may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1903.]

Constitutional law — Prohibition Amendment — enforcement — statutory definition of intoxicating liquors.

11. Congress did not exceed its powers, under U. S. Const., 18th Amend., to enforce the prohibition therein declared against the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, by enacting the provisions of the Volstead Act of October 28, 1919, wherein liquors containing as much as ½ of 1 per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power.

[For other cases, see Constitutional Law, I. in Digest Sup. Ct. 1908.]

[Nos. 29, Original, 30, Original, and 696, 752, 788, 794, and 837.]

No. 29, Original, argued March 8 and 9, 1920. No. 30, Original, argued March 29, 1920. No. 696, argued March 9, 1920. No. 752, argued March 9 and 10, 1920. No. 788, argued March 29 and 30, 1920. No. 794, argued March 30, 1920. No. 837, argued March 29, 1920. Decided June 7, 1920.

TWO ORIGINAL BILLS in Equity, brought respectively by the States of Rhode Island and New Jersey, to enjoin the execution of the Volstead Act, adopted to enforce the Prohibition Amendment. Bills dismissed. Also an

APPEAL from the District Court of the United States for the District of Massachusetts to review a decree refusing to enjoin the execution of the said Volstead Act. Affirmed. Also an

APPEAL from the District Court of the United States for the Western District of Kentucky to review a decree refusing to enjoin the enforcement of the said Volstead Act. Affirmed. Also an

APPEAL from the District Court of the United States for the District of New Jersey to review a decree refusing to enjoin the enforcement of the said Volstead Act. Affirmed. Also an

APPEAL from the District Court of the United States for the Eastern District of Wisconsin to review a decree enjoining the enforcement of the said Volstead Act. Reversed. Also an

APPEAL from the District Court of the United States for the Eastern District of Missouri to review a decree refusing to enjoin the enforcement of the said Volstead Act.[2] Affirmed.

Mr. Herbert A. Rice, Attorney General of Rhode Island, argued the cause, and, with Mr. A. A. Capotosto, filed a brief for complainant in No. 29, Original:

All sovereignty resides in the people.

5 Elliot, Debates, pp. 352, 355; M'Culloch v. Maryland, 4 Wheat. 316, 403, 4 L. ed. 579, 600.

The Federal government was limited to prevent encroachments.

2 Elliot, Debates, pp. 80, 87, 93, 332, 481; 3 Elliot, Debates, 150, 186, 203, 271, 451, 464; 4 Elliot, Debates, 10, 137, 140, 142, 148, 160, 161, 315; Barron v. Baltimore, 7 Pet. 243, 250, 8 L. ed. 672, 675; Madison, Federalist, No. 45; Martin v. Hunter, 1 Wheat. 304, 325, 4 L. ed. 97, 102; M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L. ed. 579, 601.

The Federal and state governments are independent sovereignties, have distinct and separate jurisdictions, and move in entirely different spheres.

Chisholm v. Georgia, 2 Dall. 419, 448, 1 L. ed. 440, 452; M'Culloch v. Maryland, 4 Wheat. 316, 410, 4 L. ed. 579, 602; Ableman v. Booth, 21 How. 506, 516, 16 L. ed. 169, 173; Claflin v. Houseman, 93 U. S. 130, 136, 137, 23 L. ed. 833, 838, 839; Collector v. Day (Buffington v. Day) 11 Wall. 113, 124, 20 L. ed. 122, 125; United States v. Cruikshank, 92 U. S. 542, 550, 23 L. ed. 588, 590; Claflin v. Houseman, 93 U. S. 130, 136, 23 L. ed. 833, 838.

The police power resides exclusively in the states.

4 Sharswood's Bl. Com. p. 162; 4 Elliot, Debates, p. 566; Slaughter-House Cases, 16 Wall. 36, 62, 21 L. ed. 394, 404; Leisy v. Hardin, 135 U. S. 100, 122, 127, 34 L. ed. 128, 137, 138, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Cooley, Const. Lim. 7th ed. pp. 829, 831; Crane v. Campbell, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Bartemeyer v. Iowa, 18 Wall. 129,

[2] Leave granted June 7, 1920, to present petitions for rehearing in these cases within sixty days on motion of counsel in that behalf.

21 L. ed. 929; License Tax Cases, 5 Wall. 462, 470, 18 L. ed. 497, 500; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 493, 31 L. ed. 700, 709, 1 Inters. Com. Rep. 828, 8 Sup. Ct. Rep. 689, 1062; Kidd v. Pearson, 128 U. S. 1, 23, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Re Heff, 197 U. S. 489, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506.

The Federal government has no police power.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 628, 42 L. ed. 878, 883, 18 Sup. Ct. Rep. 488; Re Heff, 197 U. S. 489, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593.

Article 5 should be construed as consistent with these principles.

Slaughter-House Cases, 16 Wall. 36, 62, 21 L. ed. 394, 404; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672.

The so-called 18th Amendment is not an amendment within the purview of article 5.

South Carolina v. United States, 199 U. S. 437, 447, 50 L. ed. 261, 264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Cooley, Const. Lim. 7th ed. p. 93.

A construction which substitutes a word of larger meaning than the word used in the Constitution could not be justified or defended upon any principle of judicial authority.

Passenger Cases, 7 How. 283, 493, 12 L. ed. 702, 790.

It is well known that the framers of the Constitution confined themselves, so far as possible, to words and phrases which had acquired, by long usage in legal procedure, a definite significance; and it has been said that the Constitution could not be fairly interpreted or well understood without tracing the history of such words and phrases through the succeeding stages of development of the common law.

South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

There was complete unanimity as to the scope and meaning of the word "amendment" as a legal term, applied to court procedure.

Blount, Law Dict. London, 1670; Lilly, Practical Register, London, 1725; Nutt & Gosling, Law Dict. London, 1727; Jacob, Common Law Common-Plac'd, London, 1733; Jacob, Law Dict. London, 1744; 3 Sharswood's Bl. Com. chap. 25, p. 207; Bellamy, Eng. Dict. 1760; Johnson, Dict. London, 1760; Bailey, Universal Etymological Eng. Dict. London, 1770, 1780; Kendrick, New Eng. Dict. London, 1773; Ash, New & Complete Dict. London, 1775; Fenning, Royal Eng. Dict. London, 1775; Sheridan, General Dict. London, 1780; Barclay, Complete & Universal Eng. Dict. 1782; Sheridan, Complete Dict. 3d ed. London, 1790; Sheridan, Dict. Dublin, 1790, 4th ed. p. 906; Walker, Pronouncing Dict. London, 1791.

The Constitution being viewed as a great legal process, warrant, or commission (4 Elliot, Debates, p. 148), the principle of amendment which had been applied for centuries to judicial processes and legal documents became directly applicable. And as amendment was always limited to the jurisdiction of the process, or to the purpose of the pleading, or to the scope of the legal document, the term was especially appropriate in relation to a written Constitution designedly limited in all these respects.

As the selection of the word "amendment" in article 5 was due to Mr. Madison, it is in point to ascertain the particular significance he gave to the word.

2 Farrand, Records, pp. 273, 276.

The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates. It was their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense.

Passenger Cases, 7 How. 283, 477, 12 L. ed. 702, 783.

Debates in the state conventions illustrate the use of the word "amendment" at that time. They also prove that it was the general understanding that an amendment was the correction of errors committed in drafting the Constitution; that such errors were expected to develop in the operation of the government, and that from experience alone they could be determined and best corrected.

2 Elliot, Debates, 83, 84, 116, 146, 155, 498; 3 Elliot, Debates, 61, 186, 614; 4 Elliot, Debates, 104, 130, 176.

Where the legal significance of a word may be gathered from its usage and application at the common law, and

where that meaning in connection with the context expresses a plain and simple intent, there must be some strong reason advanced for not accepting an interpretation so apparent on the face of the instrument.

7 Cooley, Const. Lim. p. 91.

This Constitution is a framework of government, and the embodiment of the fundamental principles upon which it is established. It is to this Constitution that Congress is authorized to make proposals of amendment.

2 Elliot, Debates, p. 364; 4 Elliot, Debates, pp. 144, 188; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Van Horne v. Dorrance, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857; 4 Jameson, Const. Conventions, § 85; Southern P. Co. v. Jensen, 244 U. S. 205, 227, 61 L. ed. 1086, 1103, L.R.A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900.

Necessity for amendment can only arise in consequence of defects in the operation of government under the Constitution. There can be no necessity beyond the scope of the Constitution.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; 1 Gales & S. Debates, 441–443, 445, 448, 461, 686, 751.

An examination of the prior Amendments to the Constitution will disclose that all of them have been declaratory and interpretative, or have had reference to a power or to a subject-matter dealt with in the instrument itself. They have all been within the scope of the Constitution.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Davis v. Texas, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675; O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257; Florida v. Georgia, 17 How. 478, 15 L. ed. 181; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Bartemeyer v. Iowa, 18 Wall. 129, 138, 21 L. ed. 929, 932; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Re Rahrer, 140 U. S. 545, 554, 35 L. ed 572, 574, 11 Sup. Ct. Rep. 865.

The amending function is purely Federal.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Dodge v. Woolsey, 18 How. 348, 15 L. ed. 407, 2 Watson, Const. p. 1310.

The preservation of the state governments by protecting them against encroachment by the Federal government may be said to have been the chief concern of all the patriots who had any part either in the framing or the adoption of the Constitution.

2 Elliot, Debates, pp. 304, 309; 4 Elliot, Debates, pp. 53, 58.

The Federal government has no territorial jurisdiction within the boundaries of the state of Rhode Island, nor within the boundaries of any state of the Union. The operation of its powers within the limits of states is confined strictly to the powers delegated. Beyond the powers delegated, it is powerless and can assume no jurisdiction.

Ableman v. Booth, 21 How. 506, 16 L. ed. 169.

The power of police is an attribute of state sovereignty. It resides in the states exclusively, and is necessary to their existence as organized governments. There is no divided authority, either in respect to its possession or in respect to its exercise. The Federal government has no police power. Each state is supreme in the possession and in the exercise of the power within its territorial limits.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122, Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Texas v. White, 7 Wall. 700, 725, 19 L. ed 227, 237; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

Messrs. Elihu Root, William D. Guthrie, Robert Crain, and Bernard Hershkopf filed a brief as amici curiæ:

The authority to pass such a prohibitory law must be sustained, if at all, as an exercise of a special power granted to Congress and the state legislatures by the terms of article 5 of the Constitution. It cannot be supported by any idea that the alleged amendment is in any other sense the action of the people of the United States. It has never been submitted to the people of the

United States, and they have never acted or had an opportunity to act upon it.

3 Documentary History of United States, pp. 405, 409, 410; M'Culloch v. Maryland, 4 Wheat. 316, 403, 4 L. ed. 579, 600; Cohen v. Virginia, 6 Wheat. 264, 389, 5 L. ed. 257, 287.

The prohibitory law now under consideration and called an amendment to the Constitution of the United States diminishes the police power of every state and impairs every state Constitution.

State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920.

The document to be amended is the Constitution of the United States. A constitution is a special kind of instrument, as certain in its character and definite in its limitations as are any written instruments known to the law. The full expression for which this word stands is "The Constitution of government."

1 Bryce, American Commonwealth, p. 350; Story, Const. 5th ed. § 352; Vanhorne v. Dorrance, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857; 33 Federalist, Ford's ed. pp. 260, 263; Century Dict.; Enc. Britannica, 9th ed.; Cooley, Const. Lim. 7th ed. pp. 2–4; 11 Holland, Jurisprudence, p. 365; Jameson, Const. Conventions, § 85; 9 Madison, p. 383; 53 Federalist, pp. 354, 355; 41 Federalist, p. 260; 45 Federalist, p. 309; M'Culloch v. Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601; Southern P. Co. v. Jensen, 244 U. S. 205, 227, 61 L. ed. 1086, 1103, L.R.A. 1918C, 451, 37 Sup. Ct. Rep. 524; Taylor v. Governor, 1 Ark. 27; Com. v. Collins, 8 Watts, 349.

The instrument framed by the Constitutional Convention of 1787 answered strictly to this conception of the nature of a constitution. It dealt solely with the powers of government.

Vanhorne v. Dorrance, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857; Marbury v. Madison, 1 Cranch, 137, 175, 2 L. ed. 60, 72.

The word "amend" has a necessary relation to some particular thing which is to be amended. The word has no meaning whatever except in relation to that thing. The change for better or worse which is called an amendment must be a change in the particular thing amended. An addition or supplement is not necessarily an amendment.

Re Pennsylvania Teleph. Co. 2 Chester Co. Rep. 129; 2 Morawetz, Corp. 2d ed. § 1096; 5 Hinds, Precedents, §§ 5753, 5767; Madison's Notes, 3 Documentary History, p. 518; Gagnon v. United States, 193 U. S. 451, 457, 48 L. ed. 745, 747, 24 Sup. Ct. Rep. 510; 43 Federalist, p. 291; 3 Elliot, Debates, 233, 234; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 404, 50 L.R.A. 568, 46 Atl. 505; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; Livermore v. Waite, 102 Cal. 118, 25 L.R.A. 312, 36 Pac. 424; 85 Federalist, p. 586.

Both the ordinary and natural meaning of the terms used in article 5, as well as the purpose to be accomplished, limit the authority granted by the article to changes in the system of government,—changes in the distribution and regulation of governmental powers.

Gibbons v. Ogden, 9 Wheat. 1, 188, 6 L. ed. 23, 68; Fletcher v. Peck, 6 Cranch, 87, 139, 3 L. ed. 162, 178; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 663, 22 L. ed. 455, 461; Murphy v. Ramsey, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; Collector v. Day (Buffington v. Day) 11 Wall. 113, 127, 22 L. ed. 122, 126.

That the power to amend the Constitution does not include the power of independent legislation by the amending agents is clearly indicated by the rulings both in the national and state courts that the proceedings of Congress and of the state legislatures are not ordinary legislation, and for that reason the resolutions on the one hand, proposing amendments, and, on the other, ratifying them, do not require to be submitted to the President and to the governors, under the general provisions which in terms apply to all bills, orders, resolutions, and votes.

Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 404, 50 L.R.A. 568, 46 Atl. 505; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; Livermore v. Waite, 102 Cal. 118, 25 L.R.A. 312, 36 Pac. 424.

The exercise of the power of ordinary legislation through the forms of amendment under article 5 would be inconsistent with the fundamental principles of the Constitution, because it would prevent the rule of the majority.

22 Federalist, Ford's ed. p. 135; Cooley, Const. Lim. 7th ed. p. 50.

The Constitution received its vitality, not from the vote of a majority of the people of the United States, but from the consents of the several people of the different states.

Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Texas v. White, 7 Wall. 700, 720, 724, 19 L. ed. 227, 235, 237;

Sturges v. Crowinshield, 4 Wheat. 122, 192, 4 L. ed. 529, 547; M'Culloch v. Maryland, 4 Wheat. 316, 403, 4 L. ed. 579, 600; Gibbons v. Ogden, 9 Wheat. 1, 187, 6 L. ed. 23, 68.

Any amendment which tends directly to destroy the right and power of the several states to local self-government should be held void as in conflict with the intent and spirit and implied limitations of the Federal Constitution adopted by the people of the United States.

M'Culloch v. Maryland, 4 Wheat. 403, 4 L. ed. 600; Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237; Hammer v. Dagenhart, 247 U. S. 251, 275, 62 L. ed. 1101, 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 663, 22 L. ed. 455, 461; Slaughter-House Cases, 16 Wall. 36, 77, 21 L. ed. 394, 409; Civil Rights Cases, 109 U. S. 3, 11, 15, 19, 27 L. ed. 835, 839, 840, 842, 3 Sup. Ct. Rep. 18; Northern Securities Co. v. United States, 193 U. S. 197, 348, 48 L. ed. 679, 704, 24 Sup. Ct. Rep. 436; Keller v. United States, 213 U. S. 138, 148, 149, 53 L. ed. 737, 740, 741, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Kentucky v. Dennison, 24 How. 66, 107, 16 L. ed. 717, 729; Guinn v. United States, 238 U. S. 347, 362, 59 L. ed. 1340, 1346, L.R.A.1916A, 1124, 35 Sup. Ct. Rep. 926; 2 Curtis, History of U. S. Const. pp. 160, 161; State v. Keith, 63 N. C. 144; Eason v. State, 11 Ark. 491.

Manifestly, the Constitution of the United States, like every other written instrument, must in many respects depend for its true construction upon plain implications to be derived from its nature and terms, the historical circumstances surrounding its origin, and, above all, the fundamental purposes of its creation.

Veazie Bank v. Fenno, 8 Wall. 533, 541, 19 L. ed. 482, 485; Collector v. Day (Buffington v. Day) 11 Wall. 113, 127, 20 L. ed. 122, 126; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 663, 22 L. ed. 455, 461; Downes v. Bidwell, 182 U. S. 244, 290, 291, 45 L. ed. 1088, 1107, 1108, 21 Sup. Ct. Rep. 770; Murphy v. Ramsey, 114 U. S. 15, 44, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747; Rathbone v. Wirth, 150 N. Y. 483, 34 L.R.A. 408, 45 N. E. 15; Re Fraser, 203 N. Y. 143, 96 N. E. 365, Ann. Cas. 1913B, 14.

In order to test the validity of any proposed amendment to the Constitution of the United States, its essential nature, its primary purpose, and its direct tendency, must be analyzed and determined. The adoption and validation of any amendment is, of course, authority for the adoption and validity of all others of a similar nature and purpose and having the same tendency, wherever they may lead; for it is too well settled to require argument that the test of the validity of a power is not how it is probable that it will be exercised in particular cases, but what can properly be done under it (Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Colon v. Lisk, 153 N. Y. 194, 60 Am. St. Rep. 609, 47 N. E. 302). Questions of power do not depend on the degree to which it may be exercised (Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678).

Quite indisputably this proposed amendment, if valid, would be self-executing (Civil Rights Cases, 109 U. S. 3, 20, 27, L. ed. 835, 842, 3 Sup. Ct. Rep. 18), and would withdraw from the several states all power and control over the manufacture, sale, and transportation in local or intrastate commerce of intoxicating liquors for beverage purposes,—a field heretofore exclusively within their absolute and independent control.

Re Rahrer, 140 U. S. 545, 554, 555, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; Re Heff, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506; South Carolina v. United States, 199 U. S. 437, 453, 454, 50 L. ed. 261, 266, 267, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920.

It is an inevitable conclusion that, if the so-called 18th Amendment, which directly and deliberately deprives the several states of a substantial portion of their respective police powers and revenues, be a constitutional exercise of power, then another amendment may constitutionally sweep away every remaining vestige of the police powers of the state; that is to say, the powers of government inherent in every sovereignty to the extent of its dominions,—the power to govern men and things within the limits of its dominions.

License Cases, 5 How. 504, 583, 12 L. ed. 256, 291; Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Sligh v. Kirkwood, 237 U. S. 52, 59, 59 L. ed. 835, 837, 35 Sup. Ct. Rep. 501; Ives v. South Buffalo R. Co. 201 N. Y. 300, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

The fundamental reason for the exist-

ence of separate, independent, and sovereign states is the power of internal police and local self-government with which they have always been clothed.

Sligh v. Kirkwood, 237 U. S. 52, 59, 59 L. ed. 835, 837, 35 Sup. Ct. Rep. 501; Patterson v. Kentucky, 97 U. S. 501, 503, 24 L. ed. 1115, 1116; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667, 24 L. ed. 1036, 1038; License Cases, 5 How. 504, 623, 12 L. ed. 256, 312.

The right of a state to have and exercise its police power is the very breath of its being; and without that power it would be a mere name,—a mere geographic unit,—an empty shell.

Ex parte Rowe, 4 Ala. App. 254, 59 So. 70.

In essence, as in practical effect, the police power of a state is the state itself: with it, the state is a potent, sovereign, autonomous, self-governing being; without it, the state is nothing but a name.

Stone v. Mississippi, 101 U. S. 814, 819, 820, 25 L. ed. 1079–1081; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; South Carolina v. United States, 199 U. S. 437, 451, 50 L. ed. 261, 265, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364; 2 Hare, American Const. Law, p. 766; Cooley, Const. Lim. 7th ed. pp. 243, 263.

There is much familiar historical matter that shows most convincingly the purpose of the framers of the Constitution, and the original states which adopted it, to establish an indestructible Union composed of indestructible states, and a national government of enumerated and limited powers, together with a series of state governments, sovereign and independent in the spheres of power not delegated to or vested in the nation, and endowed with the same perpetuity which the Articles of Confederation had asserted for the central government. Equally clear is the fact that the founders of our form of government intended that it should ever be a true Federal system, constituting a Union of free and independent states, each possessed of distinct and substantial autonomous and self-governing power as to its own people and its own local self-government, and not a single, consolidated, centralized government, in which the several states were to be but forms of municipal corporations of the central government, or less,—mere geographical divisions.

2 Elliot, Debates, 202, 267, 268; 3 Farrand, Records, pp. 99, 103; Webster, Weakness of Brutus Exposed, Philadelphia, 1787; 7 Ford, Writings of Jefferson, p. 296; Wayland, Political Opinions of Jefferson, pp. 42–46; Dartmouth College v. Woodward, 4 Wheat. 518, 629, 4 L. ed. 629, 657; Gibbons v. Ogden, 9 Wheat. 1, 195, 6 L. ed. 23, 69; Freund, Pol. Power, §§ 54, 68; Cooley, Const Lim. 7th ed. pp. 65, 243, 261, 263; House v. Mayes, 219 U. S. 270, 282, 55 L. ed. 213, 218, 31 Sup. Ct. Rep. 234; South Carolina v. United States, 199 U. S. 437, 454, 50 L. ed. 261, 266, 26 Sup. Ct. Rep. 110; M'Culloch v. Maryland, 4 Wheat. 316, 410, 4 L. ed. 579, 602; Re Rahrer, 140 U. S. 545, 555, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; Re Heff, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506; Lowenstein v. Evans, 69 Fed. 911; Oklahoma, K. & M. I. R. Co. v. Bowling, 161 C. C. A. 518, 249 Fed. 593; Lane County v. Oregon, 7 Wall. 71, 76, 19 L. ed. 101, 104.

If the so-called 18th Amendment would have been regarded as repugnant to the Constitution when the Constitution was adopted—which it is submitted cannot be doubted—it is so now, for the meaning and effect of the Constitution must at all times be the same.

Ex parte Bain, 121 U. S. 1, 12, 30 L. ed. 849, 853, 7 Sup. Ct. Rep. 781, 6 Am. Crim. Rep. 122; South Carolina v. United States, 199 U. S. 437, 448, 50 L. ed. 261, 264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Story, Const. § 1908.

The right of the states to continue as effective local governments, which is implied in the Constitution, has been emphatically recognized and enforced as against an express and practically unqualified power sought to be exercised in conflict therewith, in the cases which hold that it is unconstitutional for the Federal government to attempt to tax the several states or their governmental instrumentalities.

Collector v. Day (Buffington v. Day) 11 Wall. 113, 124, 125, 127, 20 L. ed. 122, 125, 126; United States v. Baltimore & O. R. Co. 17 Wall. 322, 327, 21 L. ed. 597, 599; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

The establishment and recognition in the Constitution of the two governments, Federal and state, plainly implies that neither shall be permitted to destroy the other; that the state power shall not be

exerted to overthrow the Federal government, nor the Federal power to impair the existence of the states.

South Carolina v. United States, supra.

Article 5, in its proviso that "no state, without its consent, shall be deprived of its equal suffrage in the Senate," necessarily implies and requires the continued existence of the states, for otherwise their equal suffrage in the Senate could be destroyed with them; and further implies that the states shall at all times exist as bodies capable of consenting,—in other words, as autonomous, self-governing sovereignties.

1 Tucker, U. S. Const. pp. 323, 324.

An analysis of the previous Amendments to the Federal Constitution will disclose that none of them has ever attempted directly and substantially to invade the police powers of the several states.

United States v. Cruikshank, 92 U. S. 542, 552, 23 L. ed. 588, 591; Spies v. Illinois, 123 U. S. 131, 166, 31 L. ed. 80, 86, 8 Sup. Ct. Rep. 21, 22; Barron v. Baltimore, 7 Pet. 243, 250, 8 L. ed. 672, 675; Minnesota & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963, L.R.A.1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505; Slaughter-House Cases, 16 Wall. 36, 68, 21 L. ed. 394, 406; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Bartemeyer v. Iowa, 18 Wall. 129, 138, 18 L. ed. 929, 932; Civil Rights Cases, 109 U. S. 3, 11, 27 L. ed. 835, 839, 3 Sup. Ct. Rep. 18; Mugler v. Kansas, 123 U. S. 623, 663, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 448, 449, 34 L. ed. 519, 524, 525, 10 Sup. Ct. Rep. 930; Re Rahrer, 140 U. S. 545, 556, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; Guinn v. United States, 238 U. S. 347, 362, 59 L. ed. 1340, 1346, L.R.A.1916A, 1124, 35 Sup. Ct. Rep. 926; Texas v. White, 7 Wall. 700, 728, 19 L. ed. 227, 238; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 22 L. ed. 455, 461.

The people acted upon the plain meaning of the instrument, and intended no such result as is urged by the defendants in the case at bar, and as the people reasonably read the Constitution, so should it be enforced.

State v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 197 S. W. 1013; Alexander v. People, 7 Colo. 155, 2 Pac. 894.

Contemporaneous legislative construction is of the utmost weight and entitled to great deference in determining the force and effect of a constitutional provision, since it may well be presumed to have resulted from the same views as were entertained by the framers themselves.

Missouri, P. R. Co. v. Kansas, 248 U. S. 276, 281, 282, 63 L. ed. 239-241, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93; Ames v. Kansas, 111 U. S. 449, 469, 28 L. ed. 482, 490, 4 Sup. Ct. Rep. 437; The Genesee Chief v. Fitzhugh, 12 How. 443, 458, 13 L. ed. 1058, 1065; Ogden v. Saunders, 12 Wheat. 213, 290, 6 L. ed. 606, 632; Cohen v. Virginia, 6 Wheat. 264, 420, 5 L. ed. 257, 295; 12 C. J. p. 714.

State legislatures have repeatedly required subordinate bodies and officers expressly to find and certify a fundamental fact and condition precedent in order to prevent its actual suppression under the cover of the implication assumed to arise from mere action and the silence of the body or officer upon the subject.

Hoyt v. East Saginaw, 19 Mich. 44, 2 Am. Rep. 76; Hoffman v. Pittsburg, 229 Pa. 36, 78 Atl. 26.

It argues nothing to say that other amendments have been proposed under substantially similar forms of joint resolution.

Fairbanks v. United States, 181 U. S. 283, 311, 45 L. ed. 862, 874, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Oakland Paving Co. v. Hilton, 69 Cal. 502, 11 Pac. 3; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 541, 4 Ann. Cas. 692.

The Constitution does not prescribe any requirement for the internal structure of a state government other than that it shall be republican in form; and, under our system of government, the right to decide what is or is not a republican form of government is exclusively vested in the political branches of the national government.

Luther v. Borden, 7 How. 1, 12 L. ed. 581; Pacific State Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

The right of a state to have whatever means or instrumentalities of local government it deems fit is, indeed, as clear as its right to enact measures of local self-government in accordance with its own peculiar wishes. Both of these powers are wholly reserved to the states in the 10th Amendment.

State ex rel. Davis v. Hildebrant, 94 Ohio St. 161, 114 N. E. 55, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708.

The Constitution being a written instrument, its meaning does not alter, and the word "legislatures," used therein, must now bear the same interpretation that would have been placed thereon by the framers (Dred Scott v. Sandford, 19 How. 393, 426, 15 L. ed. 691, 709; South Carolina v. United States, 199 U. S. 437, 448, 50 L. ed. 261, 264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737). As, however, the Constitution was not made for a day, but was intended to embrace within its provisions the entire duration of our national existence, however long that might be (Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102; M'Culloch v. Maryland, 4 Wheat. 316, 415, 4 L. ed. 579, 603; Cohen v. Virginia, 6 Wheat. 264, 387, 5 L. ed. 257, 287), it is manifest that, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred therein (South Carolina v. United States, 199 U. S. 437, 448, 50 L. ed. 261, 264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737), and that it would certainly not be permissible to read into the [Constitution] a nolumus mutare as against the lawmaking power of a state (Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487).

The framers certainly looked upon the people of the states as the source of all governmental power in the several states, and upon the legislative assemblies as merely their creatures or agents.

Cohen v. Virginia, 6 Wheat. 265, 5 L. ed. 257.

The founders indisputably realized that the people in the several states had the right and the power to circumscribe the functions of their respective state legislatures so as to subject any action of the legislatures to popular vote, and that consequence naturally followed from the conviction, which all of them must have had, that the people of the states were the exclusive source of governmental power in their respective states (Chisholm v. Georgia, 2 Dall. 419, 471, 1 L. ed. 440, 462; Van Horne v. Dorrance, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857). The New England town-meeting system of government prevailed when the Constitution was adopted, was familiar to virtually every enlightened citizen of the time, and was a perfect illustration of local government conducted under and by direct legislation.

People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 432, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; Re Pfahler, 150 Cal. 71, 11 L.R.A.(N.S.) 1092, 88 Pac. 270, 11 Ann. Cas. 911.

The Federal Constitution did not define the nature, composition, authority, or function of the legislatures of the states upon whom power was conferred in article 5. The Constitution left the state legislatures precisely where it found them,—exclusively under the control of the people of the respective states. When, therefore, the framers used the term "legislatures" in article 5, they were employing it in its broadest sense to denote the legislative instrumentalities by which the legislative power of a state might be expressed in the several states at any time during the future life of the nation. The all-pervading purpose was to have the people of the state express their will as to changing the fundamental law of the nation. It is their will that was intended to govern, and they are to express that will through the legislative department of the respective state governments which they have established. But how that department should be constituted, how it should act, when it should act, what conditions should be imposed before its action became effective —all these matters were left by the Constitution to the states to settle according to their pleasure.

State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848; State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920; Hawke v. Smith, — Ohio St. —, 126 N. E. 400; Carson v. Sullivan, — Mo. —, 223 S. W. 571.

Amending the Federal Constitution is certainly not ordinary legislation, and, consequently, it does not require many things generally required of the usual legislation; as, for example, the assent or veto of the Executive. But inasmuch as the process goes to the creation of the fundamental law in each state, it is necessarily lawmaking. Precisely because it is a legislative activity,—although not ordinary legislation,—it has been intrusted exclusively to those branches of the Federal and state governments whose function it is to formulate the laws.

Hawke v. Smith, — Ohio St. —, 126 N. E. 400.

It would ordinarily be regarded as quite clear that if two bodies were vested with concurrent power to enforce any particular constitutional or legislative provision, such two bodies would, ex

necessitate, have to concur in exercising the power; in other words, that there would have to be concurrence on the part of each.

Nielsen v. Oregon, 212 U. S. 315, 321, 53 L. ed. 528, 530, 29 Sup. Ct. Rep. 383; Wedding v. Meyler, 192 U. S. 573, 584, 585, 48 L. ed. 570, 575, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; Ex parte Desjeiro, 152 Fed. 1007; Re Mattson, 69 Fed. 542; Delaware Bridge Co. v. Trenton City Bridge Co. 13 N. J. Eq. 46; Black's Law Dict.; Century Dict.

In the 13th article of amendment to the Constitution of the United States the enforcement clause reads simply that "Congress shall have power to enforce this article by appropriate legislation;" and practically the same form of expression was employed in the 14th and 15th Amendments. In the 18th Amendment, however, a materially different form of expression was devised and employed, and it is, of course, reasonable and proper to presume that something different in effect was intended.

Slaughter-House Cases, 16 Wall. 36, 74, 21 L. ed. 394, 408.

Both the granting and the limiting clauses of the Constitution must be fairly construed.

Fairbank v. United States, 181 U. S. 283, 288, 289, 45 L. ed. 862, 864, 865, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

Common honesty requires that that construction be adopted against the party whose language it is; namely, the Congress.

State v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 197 S. W. 1013; Alexander v. People, 7 Colo. 167, 2 Pac. 894.

If the case at bar involved the interpretation of a contract, that would be the inevitable result.

White v. Hoyt, 73 N. Y. 505.

Messrs. Alexander Lincoln and Michael J. Lynch also filed a brief as amici curiæ:

The 18th Amendment has no validity as a constitutional provision unless authorized by article 5. It was not proposed by a constitutional convention, nor was it ratified by the people or by conventions in the several states.

2 Curtis, History of U. S. Const. chap. 6, pp. 152, 153; 2 Watson, Const. p. 1310; M'Culloch v. Maryland, 4 Wheat. 316, 403, 404, 4 L. ed. 579, 600, 601.

The term "constitution" means a form or framework of government. Consistently with this meaning a constitution is universally defined to be in its essence a framework of government.

Story, Const. 5th ed. § 352; Cooley, Const. Lim. 7th ed. pp. 4, 65–68, 114; Jameson, Const. Conventions, 4th ed. §§ 63, 85, 87, 96, 97, 370, 371; 1 Lowell's Government of England, p. 1; Vanhorne v. Dorrance, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857; 2 Kent, Com. Lecture XXIV.; 7 Dicey, Const. 7th ed. pp. 191–197; Hurtado v. California, 110 U. S. 516, 531, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 404, 50 L.R.A. 568, 46 Atl. 505; Warfield v. Vandiver, 101 Md. 115, 60 Atl. 538, 4 Ann. Cas. 692; Stevens, Const. chap. 8.

The Constitution of the United States (prior to the so-called 18th Amendment) conforms exactly to this general description of a constitution. It is both a framework of government and a bill of rights.

Southern P. Co. v. Jensen, 244 U. S. 205, 227, 61 L. ed. 1086, 1103, L.R.A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 597; 84 Federalist; 3 Story, Const. §§ 355, 372, chap. 44; Steven's Sources of U. S. Const. chap. 8; Chisholm v. Georgia, 2 Dall. 419, 474, 475, 1 L. ed. 440, 464; United States v. Cruikshank, 92 U. S. 542, 549–551, 23 L. ed. 588, 590, 591; 3 Story, Const. 5th ed. chap. 6, § 355; Barron v. Baltimore, 7 Pet. 243, 248, 8 L. ed. 672, 674; Monongahela Nav. Co. v. United States, 148 U. S. 312, 324, 37 L. ed. 463, 467, 13 Sup. Ct. Rep. 622; Maxwell v. Dow, 176 U. S. 581, 606, 607, 44 L. ed. 597, 606, 607, 20 Sup. Ct. Rep. 448, 494; Spies v. Illinois, 123 U. S. 131, 166, 31 L. ed. 80, 86, 8 Sup. Ct. Rep. 21, 22; M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L. ed. 579, 601.

None of the Amendments subsequent to the Bill of Rights has the effect of altering the fundamental characteristics of the Constitution as a form of Federal government and bill of rights. In none of them, it seems, are any of the powers reserved to the states surrendered by them and given to the Federal government. The powers of the states are restricted in these amendments, apparently, only by further or express application of the principles of political liberty and a republican form of government such as was guaranteed to the states by the Constitution.

Slaughter-House Cases, 16 Wall. 36, 67, 72, 21 L. ed. 394, 405, 407; United States v. Reese, 92 U. S. 217, 218, 23 L. ed. 564, 565; United States v. Cruikshank, 92 U. S. 542, 554, 555, 23 L. ed

588, 592; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Ex parte Virginia, 100 U. S. 339, 344, 345, 25 L. ed. 676, 678, 679, 3 Am. Crim. Rep. 547; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836; 2 Curtis, History of U. S. Const. pp. 161, 498.

The Constitution contemplates an indestructible union of sovereign and indestructible states.

M'Culloch v. Maryland, 4 Wheat. 316, 403, 4 L. ed. 579, 600; Gibbons v. Ogden, 9 Wheat. 1, 195, 4 L. ed. 23, 69; Lane County v. Oregon, 7 Wall. 71, 76, 19 L. ed. 101, 104; Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237; Collector v. Day (Buffington v. Day) 11 Wall. 113, 124, 125, 20 L. ed. 122, 125, 126; Keller v. United States, 213 U. S. 138, 149, 53 L. ed. 737, 741, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

The powers given to the Federal government are only those which are necessary to the existence and effective maintenance of the nation. There is no provision suggesting the exercise by the United States of any branch of that system of internal regulation called the police power, or power of local self-government. That power was intended by the framers of the Constitution to be reserved to the states, and has always been regarded as peculiarly within their jurisdiction.

License Cases, 5 How. 504, 583, 12 L. ed. 256, 291; Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Sligh v. Kirkwood, 237 U. S. 52, 59, 59 L. ed. 835, 837, 35 Sup. Ct. Rep. 501; Dartmouth College v. Woodward, 4 Wheat. 518, 629, 4 L. ed. 629, 657; New York v. Miln, 11 Pet. 102, 139, 9 L. ed. 648, 662; License Tax Cases, 5 Wall. 462, 470, 471, 18 L. ed. 497, 500, 501; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Slaughter-House Cases, 16 Wall. 36, 62–64, 21 L. ed. 394, 404, 405; Bartemeyer v. Iowa, 18 Wall. 129, 138, 21 L. ed. 929, 932; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Patterson v. Kentucky, 97 U. S. 501, 503, 506, 24 L. ed. 1115–1117; Stone v. Mississippi, 101 U. S. 814, 819, 820, 25 L. ed. 1079–1081; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 3 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 657, 667, 31 L. ed. 205, 209, 212, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Re Rahrer, 140 U. S. 545, 554, 555, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; Keller v. United States, 213 U. S. 138, 144, 149, 53 L. ed. 737, 738, 741, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Hammer v. Dagenhart, 247 U. S. 251, 274, 276, 62 L. ed. 1101, 1106, 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; United States v. Hill, 248 U. S. 420, 428, 63 L. ed. 337, 341, 39 Sup. Ct. Rep. 143; United States v. Doremus, 249 U. S. 86, 95, 63 L. ed. 493, 497, 39 Sup. Ct. Rep. 214; Cooley, Const. Lim. 7th ed. p. 243; Miller, Const. p. 412.

The Constitution was made supreme and permanent because it was a form of government and bill of rights, and not a code of laws.

1 Kent, Com. pp. 448, 449; Cooley, Const. Lim. 7th ed. pp. 5, 6; Dicey, Const. 7th ed. pp. 140–142; 78 Federalist; Marbury v. Madison, 1 Cranch, 137, 176, 2 L. ed. 60, 73; Paxton's Case, Quincy (Mass.) 52; Cooley, Const. Lim. 7th ed. chap. 7; Thayer, Cases on Const. Law, pp. 48–154; 2 Mass. Law Quart. pp. 441, 462; Vanhorne v. Dorrance, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857; Martin v. Hunter, 1 Wheat. 304, 326, 4 L. ed. 97, 102.

An amendment of the Constitution under article 5 must, by the meaning of the word "amendment," be a change consistent with the nature and purpose of the Constitution. The amending power is limited to changes of that character.

Livermore v. Waite, 102 Cal. 119, 25 L.R.A. 312, 36 Pac. 424; Re Pennsylvania Teleph. Co. 2 Chester Co. Rep. 131; Gagnon v. United States, 193 U. S. 451, 457, 48 L. ed. 745, 747, 24 Sup. Ct. Rep. 510; 2 C. J. 1317, title "Amendment;" State ex rel. Gamble v. Hubbard, 148 Ala. 394, 41 So. 903; McCleary v. Babcock, 169 Ind. 233, 82 N. E. 453; 1 Lewis's Sutherland, Stat. Constr. 2d ed. § 139; Shields v. Barrow, 17 How. 130, 144, 15 L. ed. 158, 162; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Lennox v. Vandalia Coal Co. 158 Mo. 488, 59 S. W. 242; 2 Curtis, U. S. Const. pp. 473, 474; 2 Farrand., pp. 629, 631; 5 Elliot, Debates, p. 182; 2 Farrand, Madison's Notes, p. 558; 3 Elliot, Debates, pp. 176, 177; 43 Federalist, § 8; Story, Const. § 1827; 2 Curtis, History of U. S. Const. pp. 160, 162.

The amending power does not extend to additions restricting the police power of the states.

Hammer v. Dagenhart, 247 U. S. 251, 276, 62 L. ed. 1101, 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Cooley, Const. Lim. 7th ed. pp. 243, 831; Miller, Const. p. 412.

The amending power does not include the power of legislation.

Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 50 L.R.A. 568, 46 Atl. 505; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692.

Principles of public policy constitute one of the sources of law. Where the decision of a case is not plainly governed by some constitutional provision, statute, or rule of law, and no previous authoritative decision seems to be applicable, such principles should be, and doubtless are, given consideration by the court.

Ezra R. Thayer in 5 Harvard L. Rev. 172; Gray, 6 Harvard L. Rev. 28; 21 Harvard L. Rev. 122, 125.

Mr. Aaron A. Ferris also filed a brief as amicus curiæ:

In construing statute or constitutional provisions, the court looks to the history of the times when the constitution or law was made, and into the proceedings of those framing the organic law, or an act of the legislature.

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060.

The 18th Amendment would nullify article 10 of the Amendments, and transfer police powers from the states to the general government.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Gibbons v. Ogden, 9 Wheat. 203, 6 L. ed. 71; License Cases, 5 How. 504, 12 L. ed. 256; United States v. DeWitt, 9 Wall. 41, 19 L. ed. 593; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Solicitor General **King** and Assistant Attorney General **Frierson** argued the cause and filed a brief for defendants:

The nature and propriety of any amendment, other than those prohibited by article 5, are left to the decision of the Congress as the proposer, and the legislatures specified as the ratifiers.

Luther v. Borden, 7 How. 1, 42, 12 L. ed. 581, 599; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Marshall Field & Co. v. Clark, 143 U. S. 649, 680, 36 L. ed. 294, 306, 12 Sup. Ct. Rep. 495; Harwood v. Wentworth, 162 U. S. 547, 562, 40 L. ed. 1069, 1073, 16 Sup. Ct. Rep. 890; Flint v. Stone Tracy Co. 220 U. S. 108, 143, 55 L. ed. 389, 410, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The only limitations on the constitutional power of the Congress to propose, and of the legislatures to ratify, by the majorities therein named, amendments to the Constitution under article 5, are those expressed in that article.

Willoughby, Const. § 227.

The adoption of an amendment in the constitutional way cannot be said to impose anything upon a state without its consent.

Dodge v. Woolsey, 18 How. 331, 348, 15 L. ed. 401, 407.

There is no merit in the contention that the Amendment is one which was not within the contemplation of the framers of the Constitution.

Kansas v. Colorado, 206 U. S. 46, 90, 51 L. ed. 956, 971, 27 Sup. Ct. Rep. 655.

For further contentions, see infra, pp. 966, 969, 974.

Mr. David J. Reinhardt, Attorney General of Delaware, Mr. J. S. Manning, Attorney General of North Carolina, Mr. Charles I. Dawson, Attorney General of Kentucky, Mr. Adolph V. Coco, Attorney General of Louisiana, Mr. Ele Stansbury, Attorney General of Indiana, Mr. J. Q. Smith, Attorney General of Alabama, Mr. Guy H. Sturgis, Attorney General of Maine, Mr. John D. Arbuckle, Attorney General of Arkansas, Mr. Alex J. Groesbeck, Attorney General of Michigan, Mr. Van C. Swearengen, Attorney General of Florida, Mr. George M. Brown, Attorney General of Oregon, Mr. Richard T. Hopkins, Attorney General of Kansas, Mr. E. T. England, Attorney General of West Virginia, Mr. Leonard Fowler, Attorney General of Nevada, Mr. Clarence A. Davis, Attorney General of Nebraska, Mr. S. Clarence Ford, Attorney General of Montana, Mr. William Langer, Attorney General of North Dakota, Mr. Byron S Payne, Attorney General of South Dakota, Mr. W. L. Walls, Attorney General of Wyoming, Mr. Dan B. Shields, Attorney General of Utah, Mr. Wiley E. Jones, Attorney General of Arizona, and Mr. Charles E. Hughes also filed a brief as amici curiæ:

The framers of the Constitution refused to adopt such a restriction upon the amending power as that for which the complainant contends, and no such restriction can be implied.

1 Farrand, Records of Fed. Conventions, 22; 5 Elliot, Debates, 128, 132; 3 Farrand, 601; 1 Farrand, 121, 122, 202, 203, 231; 2 Farrand, 84, 159, 174, 188, 467, 468, 557–559, 602, 629–631; 4 Elliot, Debates, 176–178; 3 Elliot, Debates, 636, 637; 43 Federalist; Willoughby, Const. § 227, p. 521; Story, Const

§ 1830, p. 600; 1 Hare, Const. Law, p. 30.

The Constitution is not a compact between the states. It proceeds directly from the people.

M'Culloch v. Maryland, 4 Wheat. 316, 402–405, 4 L. ed. 579, 600, 601.

Amendments are to be made through designated representatives, but they none the less emanate from the people, who have defined the method to be adopted on their behalf.

Dodge v. Woolsey, 18 How. 331, 348, 15 L. ed. 401, 407.

If the amending power could not be exercised, as provided in article 5, so as to restrict the exercise of police power of the state on dealing with its internal concerns, then this court has acted without authority in its almost daily application of the due process clause of the 14th Amendment to state legislation.

Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918A, 1201; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463.

Even with respect to the right of suffrage, the exercise of the amending power under the Federal Constitution has extended Federal authority into the states, so as to invalidate state action establishing the qualifications of voters.

Guinn v. United States, 238 U. S. 347, 59 L. ed. 1340, L.R.A.1916A, 1124, 35 Sup. Ct. Rep. 926.

The 13th Amendment operated directly upon the rights and status of persons. While it empowered the Congress to enact legislation to carry out its provisions, it was self-executing. It did not relate simply to the framework of government by making an additional grant of legislative power, but it directly affected the liberties and rights of individuals within the states, and restrained all those who sought to maintain a condition of servitude.

Civil Rights Cases, 109 U. S. 3, 20, 27 L. ed. 836, 842, 3 Sup. Ct. Rep. 18; Clyatt v. United States, 197 U. S. 207, 216, 49 L. ed. 726, 729, 25 Sup. Ct. Rep. 429; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.

Mr. **Thomas F. McCran**, Attorney General of New Jersey, argued the cause, and, with Mr. Francis H. McGee, filed a brief for complainant in No. 30, Original:

A constitution is the form of government denoted by the mighty hand of the people, in which certain first principles of fundamental law are established. The Constitution is certain and fixed.

Vanhorne v. Dorrance, 2 Dall. 304, 308, 1 L. ed. 391, 393, Fed. Cas. No. 16,857.

Constitutions should consist only of general provisions; the reason is that they must necessarily be permanent, and that they cannot calculate for the possible change of things.

2 Elliott,. Debates, p. 364.

The object of the framers of that instrument was to lay the foundations of the government, to set up its framework, and to establish merely the general principles by which it was to be animated; avoiding, as far as possible, any but the most fundamental regulations for controlling its operations.

Southern P. Co. v. Jensen, 244 U. S. 205, 227, 61 L. ed. 1086, 1103, L.R.A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596.

The framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed.

Dartmouth College v. Woodward, 4 Wheat. 629, 4 L. ed. 657.

The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution. In interpreting the Constitution, it must never be forgotten that the nation is made up of states to which are intrusted the powers of local government, and to them and to the people the powers not expressly delegated to the national government are reserved.

Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101.

The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government.

Slaughter-House Cases, 16 Wall. 36, 63, 21 L. ed. 394, 404; Kidd v. Pearson, 128 U. S. 1, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep.

6; Hammer v. Dagenhart, 247 U. S. 275, 276, 62 L. ed. 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724.

The framers of the Constitution unquestionably had no other intent in the formation of the instrument than to incorporate therein the fundamental, permanent law for the guidance of government, rather than to make it an instrument usable for legislative purposes in the sense of formation of municipal law.

Slaughter-House Cases, 16 Wall. 63, 21 L. ed. 404.

The original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten the Constitution is written.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.

The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state.

Gibbons v. Ogden, 9 Wheat. 195, 6 L. ed. 69.

The term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.

Livermore v. Waite, 102 Cal. 113, 25 L.R.A. 312, 36 Pac. 424.

The power to amend, too, must not be confounded with the power to create. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property.

Gagnon v. United States, 193 U. S. 457, 48 L. ed. 747, 24 Sup. Ct. Rep. 510.

The fact that the phrase concerning the internal police of the states was omitted, and that the phrase that no state should be deprived of its equal suffrage in the Senate was included, is not an argument to the effect that it was intended thereby to be so read as to permit an amendment to the Constitution tending or effectuating the destruction of the internal police powers of complainant.

Madison, Notes, 2 Farrand, 629–631.

The police power is the power of state government without which the excuse for the existence of the states composing the Union would be done away with.

Texas v. White, 7 Wall. 700, 19 L. ed. 227.

The 9th and 10th Amendments, declaratory of the Constitution itself, fixed the reserved rights of the states. The words "reserved to the respective states or the people," it is settled, refer to the police power.

1 Curtis, History of U. S. Const. pp. 160, 161.

"We know of no rule," said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, in discussing the powers granted to the general government under the Constitution, "for construing the extent of such powers, other than is given by the language of that instrument which confers them, taken in connection with the purposes for which they were conferred."

The word "amendment" implies a change which is closely related to the subject-matter of the instrument.

Passenger Cases, 7 How. 283, 453, 12 L. ed. 702, 773.

A construction which suggests a word of larger meaning than the word used in the Constitution could not be justified or defended upon any principle of judicial authority.

Passenger Cases, 7 How. 283, 493, 12 L. ed. 702, 790.

When the constitutional meaning is clear, a practical construction, by legislative action, though repeated several times and never before challenged, cannot overthrow what is seen to be a constitutional requirement.

Fairbank v. United States, 181 U. S. 283, 311, 45 L. ed. 862, 874, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

The fact that previous amendments to the Constitution have not been properly made a part of such instrument does not justify a present construction which is contrary to the intent of the founders of our Federal government, because neither Congress nor the courts have the lawful power to so construe the fundamental article of government delegated by the power of the people themselves, when once convinced of the error.

Oakland Paving Co. v. Hilton, 69 Cal. 502, 11 Pac. 3; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692.

Such a present construction as to the method prescribed by the Constitution for a two-thirds vote of both Houses by which an amendment to the Constitution is deemed necessary, would not operate to disturb prior amendments, where the practice in the procedure has been er-

roneously carried out, by reason of the fact that the people themselves have acquiesced in those particular instances.

Pease v. Peck, 18 How. 595, 597, 15 L. ed. 518, 519.

Those doctrines only will eventually stand which bear the strictest examination and the test of experience.

Barden v. Northern P. R. Co. 154 U. S. 288, 322, 38 L. ed. 992, 1000, 14 Sup. Ct. Rep. 1030.

In the referendum states the people have reserved the right to make themselves a part of the legislatures.

Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708.

The framers of the Constitution had in mind that the word "legislatures," as used therein, might possibly comprehend lawmaking bodies under changed conditions.

South Carolina v. United States, 199 U. S. 437–448, 50 L. ed. 261–264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

In referendum states the question of the ratification of the 18th Amendment must be submitted to the people before the legislatures of these states can be said to have passed on the question of ratification.

State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848; State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, 241 U. S. 565, 60 L ed. 1172, 36 Sup. Ct. Rep. 708; State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920; Hawke v. Smith, — Ohio St. —, 126 N. E. 400; Carson v. Sullivan (Cir. Ct. Cole Co. Mo. Slate, J.).

All prior amendments are but matters germane to the original Constitution, having to do with government, and not with municipal law, and were corrective of errors concluded to be existent in the original document, or improvements on the original Constitution, and are entirely dissimilar in nature from the present so-called 18th Article.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Spies v. Illinois, 123 U. S. 166, 31 L. ed. 86, 8 Sup. Ct. Rep. 21, 22; Brown v. New Jersey, 175 U. S. 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Bartenmeyer v. Iowa, 18 Wall. 129, 138, 21 L. ed. 929, 932; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Minor v. Happersett, 21 Wall. 178, 22 L. ed. 631.

Concurrent power under the 18th Amendment is a power in the Federal government to enforce the Amendment only so far and to the extent that the same relates to the external concerns of the United States, and within the peculiar domain of the Federal government, to regulate commerce among the states as heretofore, as distinguished from the right of the state of New Jersey to enforce the Amendment intrastate by virtue of the power conferred on the state exclusively under the Amendment.

South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; M'Culloch v. Maryland, 4 Wheat. 316, 430, 4 L. ed. 579, 607; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; License Cases, 5 How. 504, 592, 12 L. ed. 256, 296; 1 Kent, Com. p. 388, Lecture 18; Sturges v. Crowninshield, 4 Wheat. 193, 4 L. ed. 548; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364; Denver & R. G. R. Co. v. Denver, 250 U. S. 241, 244, 63 L. ed. 958, 961, 39 Sup. Ct. Rep. 450; Passenger Cases, 7 How. 283, 383, 399, 12 L. ed. 702, 744, 750; Re Rahrer, 140 U. S. 545, 554, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; Civil Rights Cases, 109 U. S. 3, 13, 27 L. ed. 836, 840, 3 Sup. Ct. Rep. 18; Barbier v. Connolly, 113 U. S. 27, 31. 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060.

In framing its enforcement legislation Congress has not that degree of liberty of action with which its war powers may be exercised, nor that degree of freedom from restraint with which the several states may exercise their police power.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44.

The power of Congress in this instance is to enforce a prohibition expressly limited in its scope, and to permit it, under an authorization to enforce, to enlarge the scope of the prohibition by suppressing and regulating things not comprehended in the Amendment,—is, in effect, to thwart the will of the people as expressed in their Constitution, and further to interfere with rights to an extent beyond that necessary to remedy the mischief aimed at in amending the Constitution.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep.

18; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Manitowoc Products Co. v. Sawyer (Jan. 17, 1920; U. S. Dist. Ct. E. D. Wis.).

Mr. Alexander Lincoln filed a brief as amicus curiæ:

Where Congress acts in the exercise of its exclusive power, state legislation, to the extent of the conflict, must be regarded as annulled, because the Constitution and laws of the United States made in pursuance thereof are the supreme law of the land.

Gibbons v. Ogden, 9 Wheat. 203, 205, 209, 210, 6 L. ed. 71–73; Sinnot v. Davenport, 22 How. 227, 242, 244, 16 L. ed. 243, 247, 248; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185; Smith v. Alabama, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; License Cases, 5 How. 504, 12 L. ed. 256; Passenger Cases, 7 How. 283, 12 L. ed. 702; Conway v. Taylor, 1 Black. 603, 17 L. ed. 191; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Austin v. Tennessee, 179 U. S. 343, 362, 370, 45 L. ed. 224, 233, 236, 21 Sup. Ct. Rep. 132; Southern P. Co. v. Jensen, 244 U. S. 205, 243–248, 61 L. ed. 1086, 1110–1112, L.R.A.1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596.

A concurrent power excludes the idea of a dependent power.

Passenger Cases, 7 How. 283, 399, 12 L. ed. 702, 750.

The words "concurrent power," as applied to the action of two distinct sovereignties upon the same subject-matter, if they have any meaning, must in every case describe a power in the exercise of which the sovereignties must concur in order that the exercise shall be valid.

Re Mattson, 69 Fed. 542; Ex parte Desjeiro, 152 Fed. 1007; Nielsen v. Oregon, 212 U. S. 315, 53 L. ed. 528, 29 Sup. Ct. Rep. 383.

Assistant Attorney General **Frierson** argued the cause, and, with Solicitor General King, filed a brief for defendant.

For their contentions, see supra, p. 958, infra, pp. 966, 969, 974.

Mr. **Patrick Henry Kelley** argued the cause and filed a brief for appellant in No. 696:

Neither the scope nor the object of the 18th Amendment, nor the nature and extent of the respective powers of Congress and of the several states thereunder, can be properly understood or determined without a definite knowledge of the existing law which the Amendment was intended to supersede and supplant.

Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; Turner v. Maryland, 107 U. S. 38, 52, 27 L. ed. 370, 376, 2 Sup. Ct. Rep. 44; Rhode Island v. Massachusetts, 12 Pet. 723, 9 L. ed. 1260.

Prior to the 18th Amendment the power exercised by the several states over intoxicating liquor within their own boundaries was exclusive and supreme in its nature and extent.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 705, 8 Sup. Ct. Rep. 273; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Duncan Townsite Co. v. Lane, 245 U. S. 308, 62 L. ed. 309, 38 Sup. Ct. Rep. 99; Seaboard Air Line R. Co. v. North Carolina, 245 U. S. 298, 62 L. ed. 299, 38 Sup. Ct. Rep. 96.

And prior to the 18th Amendment the power of Congress over intoxicating liquor, within the District of Columbia and within the territories and other places subject to the Federal government, was exclusive and supreme in its nature and extent.

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242; Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995; Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 817; Nelson v. United States, 30 Fed. 112; Endleman v. United States, 30 C. C. A. 186, 57 U. S. App. 1, 86 Fed. 459; Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep. 794.

And prior to the 18th Amendment the power of Congress over the transportation of intoxicating liquor in interstate

and foreign commerce was exclusive and supreme in its nature and extent.

Gibbons v. Ogden, 9 Wheat. 207, 6 L. ed. 73; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Clark Distilling Co. v. Western Maryland R. Co. 242 U. S. 311, 6 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845.

The prohibitions of § 1 of the 18th Amendment, intended to be absolute in character, universal in extent, and without any exception as to their operation, were necessarily intended, if they ever take effect as a law, to destroy and annihilate both the exclusive power of Congress and the power of the several states above enumerated, by destroying the status of such intoxicating liquor as lawful property within their respective jurisdictions.

Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; United States v. Morris, 125 Fed. 324; United States v. McClellan, 127 Fed. 971; Fairbanks v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

The prohibitions of § 1 are intended to apply everywhere throughout and within the United States; they necessarily include the District of Columbia and all the territories of the United States over which Congress has exclusive territorial jurisdiction. The exclusive power of Congress over intoxicating liquor within the District of Columbia under article 1, § 8, cl. 17, and within the territories by article 4, § 3, cl. 2, was therefore intended to be destroyed by the prohibitions enumerated in § 1; the exercise of such power thereafter being incompatible with and repugnant to the 18th Amendment.

Hamilton v. Kentucky Distilleries & Warehouse Co. supra; Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; Rassmussen v. United States, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18.

It necessarily follows that, when the 18th Amendment was first proposed as such by Congress to the states for ratification, at that time Congress had no legislative power whatever over the subject-matter and its operation within the several states.

Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Hopkins v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; United States v. De Witt, 9 Wall. 41, 19 L. ed. 593; Re Greene, 52 Fed. 104.

The mere ratification of the 18th Amendment alone did not operate to destroy the exclusive power of the several states, nor the laws enacted thereunder, because, by the express grant in § 2 of the Amendment itself, the several states had explicitly reserved the complete and sovereign power to reject any and all proposed laws intended by § 2 to enforce the policy of § 1, which did not meet with their approval.

Cooley, Const. Lim. 7th ed. p. 121; Davis v. Burke, 179 U. S. 399, 403, 404, 45 L. ed. 249, 252, 21 Sup. Ct. Rep. 210; State ex rel. Moncure v. Dubuclet, 28 La. Ann. 704; Groves v. Slaughter, 15 Pet. 497, 10 L. ed. 818; Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Owings v. Speed, 5 Wheat. 420, 5 L. ed. 124; United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259; United States v. Reese, 92 U. S. 216, 23 L. ed. 564; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 542, 7 L. ed. 255; Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005; Griffin Case, Chase, 364, Fed. Cas. No. 5815; Mitchel v. United States, 9 Pet. 711, 9 L. ed. 283; Strother v. Lucas, 12 Pet. 418, 9 L. ed. 1140; Sharp v. National Biscuit Co. 179 Mo. 553, 78 S. W. 787; Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425; Ex parte State, 52 Ala. 231, 23 Am. Rep. 567; St. Joseph Bd. of Public Schools v. Patten, 62 Mo. 444; Missouri, K. & T. R. Co. v. Texas & St. L. R. Co. 10 Fed. 497; Illinois C. R. Co. v. Ihlenberg, 34 L.R.A. 393, 21 C. C. A. 546, 43 U. S. App. 726, 75 Fed. 873; People ex rel. Collins v. McLaughlin, 128 App. Div. 599, 113 N. Y. Supp. 188; Henry v. Cherry & Webb, 30 R. I. 37, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 73 Atl. 97, 18 Ann. Cas. 1006; Re Cole, 12 Cal. App. 290, 107 Pac. 581; Doherty v. Ransom County, 5 N. D. 1, 63 N. W. 148; Coatsville Gas Co. v. Chester County, 97 Pa. 476; Wattson v. Chester & D. River R. Co. 83 Pa. 254; Chahoon v. Com. 20 Gratt. 733; Doddridge Co. v. Stout, 9 W. Va. 703; Parker v. Hubbard, 64 Ala. 203; Knox County v. Christianer, 68 Ill. 453; Wa-

terworks Co. of Indianapolis v. Burkhart, 41 Ind. 364; State v. Berry, 12 Iowa, 58; Com. v. Grinstead, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471; Pearce v. Mason County, 99 Ky. 357, 35 S. W. 1122; Pecot v. Police Jury, 41 La. Ann. 706, 6 So. 677; Lunt v. Hunter, 16 Me. 9; M'Neil v. Bright, 4 Mass. 282; State ex rel. Greaves v. Henry, 87 Miss. 125, 5 L.R.A.(N.S.) 340, 40 So. 152; State v. Cameron, 89 Ohio St. 214, 106 N. E. 28; State v. McCoomer, 79 S. C. 63, 60 S. E. 237; Arey v. Lindsey, 103 Va. 250, 48 S. E. 889.

The plain, unequivocal, and obvious meaning of the 18th Amendment, construed as a whole, shows that the several states reserved the power by § 2 of the Amendment to ratify or reject any enforcement law to be enacted under the authority of § 2, and that, until such law had been so enacted with their consent, the powers of the several states and all existing laws were to remain in force. The congressional construction, being destructive of the object and purpose intended to be accomplished by the 18th Amendment, must therefore be rejected.

Legal Tender Cases, 12 Wall. 531, 20 L. ed. 287; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Rhode Island v. Massachusetts, 12 Pet. 723, 9 L. ed. 1260; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Virginia v. Tennessee, 148 U. S. 519, 37 L. ed. 543, 13 Sup. Ct. Rep. 728; United States v. Wong Kim Ark, 169 U. S. 699, 42 L. ed. 908, 18 Sup. Ct. Rep. 456; Jacobson v. Massachusetts, 197 U. S. 22, 49 L. ed. 648, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

Congress can exercise no powers which are not granted by the 18th Amendment; the provisions of the National Prohibition Act being beyond the power of Congress to enact, and not being authorized by the 18th Amendment, that act is illegal and unconstitutional.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

The exclusive power which Congress has usurped results only in purely statutory prohibition under the sole direction of Congress; whereas the common, obvious, and plain, unambiguous language of the Amendment itself provides a scheme for constitutional prohibition, thereby doing away with all statutory regulation by either Congress or the several states. The nature of the powers granted or reserved by any provision of the Federal Constitution cannot be something different from the nature of the subject to which the powers were intended to extend and apply.

Cooley v. Port Wardens, 12 How. 302, 13 L. ed. 997; Knowlton v. Moore, 178 U. S. 96, 44 L. ed. 991, 20 Sup. Ct. Rep. 747.

Legislation authorized by § 2 of the 18th Amendment, if enacted by the concurrent power of Congress and the several states, will thereby operate as constitutional prohibition by the surrender of the exclusive power of the several states over the subject-matter. The mode of exercising the power granted by § 2, therefore, must conform to the mode by which the power of the several states can be surrendered and destroyed; and the only mode in which that can be done under the Constitution is by an act of Congress enacted and ratified by the several states in the manner provided for changing the Constitution.

Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18.

In every case, without exception, where the Federal Constitution grants concurrent power to enact a law for the nation to separate agents or functionaries, the power so granted is exercised by the joint action of both, and not by the separate act of each.

Re Sutherland, 53 Fed. 551; 14 Diamond Rings v. United States, 183 U. S. 183, 46 L. ed. 143, 22 Sup. Ct. Rep. 59; Resolutions of Congress, 6 Ops. Atty. Gen. 680.

The powers of the several states are as necessary to be preserved as are the powers of the Federal government itself.

Collector v. Day (Buffington v. Day) 11 Wall. 124, 20 L. ed. 125; Texas v. White, 7 Wall. 724, 19 L. ed. 237.

The 18th Amendment provides that the several states shall concur with Congress to make the law intended to enforce the prohibitions of § 1; not a law for the people within the territories nor within the several states; but a law to operate on all the people in the United States, without regard to state boundaries. This means and can only mean one law for all; neither the Congress nor the several states, therefore, can enact separate legislation at all to enforce the 18th Amendment, as the grant of power carried concurrent power and jurisdiction only.

Wedding v. Meyler, 192 U. S. 573,

584, 585, 48 L. ed. 570, 575, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; Nielsen v. Oregon, 212 U. S. 315, 53 L. ed. 528, 29 Sup. Ct. Rep. 383; Atty. Gen. v. Delaware & B. B. R. Co. 27 N. J. Eq. 647; Delaware Bridge Co. v. Trenton City Bridge Co. 13 N. J. Eq. 47; Re Mattson, 69 Fed. 535; Ex parte Desjeiro, 152 Fed. 1004; State v. Faudre, 54 W. Va. 131, 63 L.R.A. 877, 102 Am. St. Rep. 927, 46 S. E. 269, 1 Ann. Cas. 104; State v. Moyers, 155 Iowa, 684, 41 L.R.A.(N.S.) 366, 136 N. W. 896; Eubanks v. State, 5 Okla. Crim. Rep. 333, 114 Pac. 748; Elder v. State, 5 Okla. Crim. Rep. 693, 114 Pac. 752; Bouldin v. Lockhart, 3 Baxt. 278; State Board of Finance, Prosecutors, v. Street & Water Comrs. 55 N. J. L. 233, 26 Atl. 92; Dillon v. Scofield, 11 Neb. 419, 9 N. W. 554; L'Engle v. Scottish Union & Nat. F. Ins. Co. 48 Fla. 90, 67 L.R.A. 581, 37 So. 462, 5 Ann. Cas. 748; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co. 110 Iowa, 423, 80 Am. St. Rep. 311, 81 N. W. 707; Corkery v. Security F. Ins. Co. 99 Iowa, 390, 68 N. W. 792; Connecticut F. Ins. Co. v. Union Mercantile Co. 161 Ky. 725, 171 S. W. 407; State v. Johnson, 170 N. C. 689, 86 S. E. 788; East Texas F. Ins. Co. v. Blum, 76 Tex. 653, 13 S. W. 572; Rogers v. State, 72 Ark. 565, 82 S. W. 169; People ex rel. Oliver v. Knopf, 198 Ill. 340, 64 N. E. 843, 1127; State ex rel. Caillouet v. Laiche, 105 La. 84, 29 So. 700; People ex rel. Atty. Gen. v. Burch, 84 Mich. 408, 47 N. W. 765; Moore v. Neece, 80 Neb. 600, 114 N. W. 767; Opinion of Justices, 35 N. H. 579.

The grant, "Congress and the several states shall have concurrent power to enforce this article by appropriate legislation," cannot be construed as a grant of power to the several states to enact laws for the government of the several states. The power of the several states to enact laws for the government of the people within their own boundaries does not arise and cannot depend upon the authority of the Federal Constitution. The congressional theory of the 18th Amendment is therefore destructive of the Federal Constitution and the fundamental principles upon which it operates.

Barron v. Baltimore, 7 Pet. 247, 8 L. ed. 674; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Scott v. Sandford, 19 How. 404, 15 L. ed. 700; Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Chisholm v. Georgia, 2 Dall. 470, 1 L. ed. 462; M'Culloch v. Maryland, 4 Wheat. 403, 4 L. ed. 600; Re Debs, 158 U. S. 578, 39 L. ed. 1100, 15 Sup. Ct. Rep. 900; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Grafton v. United States, 206 U. S. 352, 51 L. ed. 1091, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640; Ableman v. Booth, 21 How. 517, 16 L. ed. 173.

Assuming that the 18th Amendment is construed as a grant of exclusive power to Congress to enforce the 18th Amendment, and that the power of the several states was surrendered by the ratification of the 18th Amendment, by reason of the restrictions and prohibitions of § 1, then in such case the enactment of the National Prohibition Act by Congress, combined with the prohibitions of § 1, operating to restrict the power of the several states, thereby destroyed all power of concurrent legislation by the several states on the subject-matter of the 18th Amendment.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; License Cases, 5 How. 504, 12 L. ed. 256; Passenger Cases, 7 How. 283, 12 L. ed. 702; Cooley v. Port Wardens, 12 How. 300, 13 L. ed. 997; Collector v. Day (Buffington v. Day) 11 Wall. 124, 20 L. ed. 125; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 471, 24 L. ed. 530; Gulf, C. & S. F. R. Co. v. Hefley, 158 U S. 104, 39 L. ed. 912, 15 Sup. Ct. Rep. 802; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 297, 43 L. ed. 706, 19 Sup. Ct. Rep. 465.

Assuming, with Congress, that the grant of concurrent power to Congress and the several states is construed as authorizing the several states, independently of Congress, to enact legislation for people within their own boundaries to suit their several discretions, so as to be a concurrent jurisdiction to legislate on the subject, then, in such case, the authority and power of Congress and of the several states to legislate and enact laws on the subject, both arising from the same source (the Federal Constitution), a prosecution against a citizen under the state law, in the state courts therefor, would be a bar to a prosecution under the act of Congress in the Federal courts for the same act, and vice versa.

Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640.

The congressional theory not only is

destructive of the Federal Constitution in assuming that the grant in § 2 of the Amendment is a grant of power to the several states to exercise their independent powers of legislation concurrently with Congress to enforce the 18th Amendment, but also is destructive of the exclusive jurisdiction which Congress itself claims; because, when carried to its logical conclusion, it comes into conflict with the 5th Amendment, preventing two prosecutions for the same act, resulting in double jeopardy.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Passenger Cases, 7 How. 283, 12 L. ed. 702; Grafton v. United States, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640.

The fundamental principle of the Constitution established in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, was that, where exclusive power is granted to Congress over any subject, and Congress has legislated and covered the whole field, the powers of the several states cannot be exercised on the same subject for the same purpose. That principle has never been departed from in the judicial history of the Supreme Court.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Passenger Cases, 7 How. 283, 12 L. ed. 702; New York v. Miln, 11 Pet. 102, 9 L. ed. 648; License Cases, 5 How. 504, 12 L. ed. 256; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 14 L. ed. 249; Smith v. Maryland, 18 How. 71, 15 L. ed. 269; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

In construing constitutional provisions no words can be rejected as superfluous, and each word must be given its plain, obvious meaning.

Knowlton v. Moore, 178 U. S. 41, 87, 44 L. ed. 969, 987, 20 Sup. Ct. Rep. 747; Hurtado v. California, 110 U. S. 516, 534, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Jacobson v. Massachusetts, 197 U. S. 22, 49 L. ed. 648, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Holmes v. Jennison, 14 Pet. 571, 10 L. ed. 594; Pollock v. Farmers' Loan & T. Co. 158 U. S. 618, 39 L. ed. 1119, 15 Sup. Ct. Rep. 912; Martin v. Hunter, 1 Wheat. 326, 4 L. ed. 102; Sturges v. Crowninshield, 4 Wheat. 202, 4 L. ed. 550; Cohen v. Virginia, 6 Wheat. 384, 5 L. ed. 286; Rhode Island v. Massachusetts, 12 Pet. 722, 9 L. ed. 1259.

Assistant Attorney General Frierson argued the cause, and, with Solicitor General King, filed a brief for appellees:

Section 1 of the 18th Amendment, standing alone, makes the liquor traffic unlawful throughout the United States.

Civil Rights Cases, 109 U. S. 3, 20, 27 L. ed. 835, 842, 3 Sup. Ct. Rep. 18; Clyatt v. United States, 197 U. S. 207, 216, 49 L. ed. 726, 729, 25 Sup. Ct. Rep. 429.

Concurrent power, as applied to Congress and the several states, means simply the independent power in each to legislate upon the same subject.

32 Federalist; Fox v. Ohio, 5 How. 410, 418, 12 L. ed. 213, 210; Houston v. Moore, 5 Wheat. 1, 47, 5 L. ed. 19, 30; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Gibbons v. Ogden, 9 Wheat. 1, 209, 6 L. ed. 23, 73; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Passenger Cases, 7 How. 283, 396, 12 L. ed. 702, 749.

Messrs. Wayne B. Wheeler, George S. Hobart, G. Rowland Monroe, R. C. Minton, and J. A. White filed a brief as amici curiæ:

Two thirds of both Houses means two thirds of a quorum of each.

Ohio ex rel. Erkenbrecher v. Cox, 257 Fed. 346; Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93.

The court has neither the duty nor the power to pass upon the motives of legislators; it must take the law as it is written.

Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 63 L. ed. 194, 40 Sup. Ct. Rep. 106.

A state has no power to make the ratification of a proposed amendment to the Federal Constitution dependent upon a referendum vote.

Re Opinion of Justices, 118 Me. 544, 5 A.L.R. 1412, 107 Atl. 673.

The word "legislature" does not mean legislative power.

McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

The legislative power which the general grant in our Constitution bestows upon the general assembly has been held to be the power to make, alter, and repeal laws.

State ex rel. Jameson v. Denny, 118 Ind. 387, 4 L.R.A. 79, 21 N. E. 252; People ex rel. Hughes v. May, 3 Mich. 598; O'Neil v. American Ins. Co. 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943; Cooley, Const. Lim. 7th ed. p. 131; Chicago v. Reeves, 220 Ill.

288, 77 N. E. 237; State ex rel. Postel v. Marcus, 160 Wis. 354, 152 N. W. 419; State v. Cox, 8 Ark. 443; Jameson, Const. Conventions, p. 586.

The legislature, in proposing amendments to the Constitution, is not exercising legislative power.

Oakland Paving Co. v. Hilton, 69 Cal. 514, 11 Pac. 19; Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; 4 Elliot, Debates, pp. 177, 404; Mathew, Legislative & Judicial History of 15th Amend. p. 68; Hatch v. Stoneman, 66 Cal. 634, 6 Pac. 734; Chicago v. Reeves, 220 Ill. 283, 77 N. E. 237; Weston v. Ryan, 70 Neb. 218, 97 N. W. 347, 6 Ann. Cas. 922; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 664; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 50 L.R.A. 568, 46 Atl. 505; Re Senate File, 25 Neb. 864, 41 N. W. 981.

Congress construed the term "legislature" appearing in art. 1, § 4, ¶ 1, as not sufficiently comprehensive to include a referendum unless Congress should pass some additional legislation.

Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708.

The fact that Congress has given a particular construction to the constitutional provision is of very great weight with the Supreme Court when it is called upon to examine the correctness of this interpretation.

Willoughby, Const. p. 20, § 20.

Constitutional provisions must be interpreted with reference to the times and circumstances under which the Constitution was formed,—the general spirit of the times and the prevailing sentiments among the people.

People v. Harding, 53 Mich. 48, 51 Am. Rep. 95, 18 N. W. 555; Maxwell v. Dow, 176 U. S. 581, 602, 44 L. ed. 597, 605, 20 Sup. Ct. Rep. 448, 494.

The history of the Constitutional Convention shows that a referendum was never comtemplated.

Madison's Journal, pp. 111, 112, 199, 200, 410, 416, 452; New Mexico ex rel. Levy v. Martinez (Sept. 1, 1919) Secretary of State, No. 9287; 4 Madison, p. 412.

In trying to comprehend the legislative purpose in prohibition statutes, it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage.

West Virginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794; State v. J. P. Bass Pub. Co. 104 Me. 288, 20 L.R.A.(N.S.) 496, 71 Atl. 894; Re Crane, 27 Idaho, 671, L.R.A. 1918A, 942, 151 Pac. 1006; Lincoln v. Smith, 27 Vt. 337; Marks v. State, 159 Ala. 84, 133 Am. St. Rep. 20, 48 So. 864; Southern Exp. Co. v. Whittle, 194 Ala. 406, L.R.A.1916C, 278, 69 So. 652; State v. Phillips, 109 Miss. 22, L.R.A. 1915D, 530, 67 So. 651.

The following propositions are now well established:

First. Where the Constitution confers exclusive power over a subject-matter upon the Federal government, any attempt of the state to legislate upon the subject-matter is null and void.

Second. If the state and Federal government each possess concurrent power over the subject-matter, in that event an act of the legislature of the state is binding upon the state until Congress shall have exercised its authority. However, when Congress passes a valid law under a grant of authority to the Federal government, the law of Congress is supreme and paramount to any act of the state legislature.

Third. As a result of the above propositions, if there is a conflict between an act of the state legislature and an act of Congress, the question is, Has the state exceeded its power under the grant of the Constitution? A valid enactment of Congress is the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.

Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. ed. 23, 73; Marshall, p. 210; Northern Securities Co. v. United States, 193 U. S. 347, 48 L. ed. 704, 24 Sup. Ct. Rep. 436; Ex parte Siebold, 100 U. S. 392, 25 L. ed. 724; Tennessee v. Davis, 100 U. S. 262, 25 L. ed. 650; Re Neagle, 5 L.R.A. 78, 39 Fed. 833, 14 Sawy. 232; M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

When a state or the Federal government has authority to pass a prohibition law, it carries with it the power to enact any law having a reasonable relation to the end sought by the original authorized act.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 193, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Hoke v. Smith, 227 U. S. 309, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Crane v. Campbell, 245 U. S. 304,

62 L. ed. 304, 38 Sup. Ct. Rep. 98; Jacob Ruppert v. Gaffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141.

Messrs. **Levy Mayer** and **William Marshall Bullitt** argued the cause and filed a brief for appellant in No. 752:

The expressed exception contained in article 5 of the Constitution, namely, that the state's equal suffrage in the Senate shall not be disturbed, is not exclusive.

Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Ableman v. Booth, 21 How. 506, 16 L. ed. 169; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

The 9th and 10th Amendments merely put in express form that which was irrevocably implied before their enactment.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Collector v. Day (Buffington v. Day) 11 Wall. 113, 20 L. ed. 122; 2 Elliot, Debates, p. 435.

Article 5 does not confer power to deprive by Amendment any state of any of its rights of local sovereignty which it did not concede to the government at the time of the framing of the Constitution.

2 Curtis, History of U. S. Const. p. 160.

The Constitution and its amendments must be construed as one instrument.

Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

Among the powers which it has always been held have been reserved to the states is the police power and more specifically the powers of the state to regulate the liquor traffic.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, ante, 194, 40 Sup. Ct. Rep. 106; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

The great and leading intent of the Constitution was to preserve an indestructible Union composed of indestructible states.

Texas v. White, 7 Wall. 700, 19 L. ed. 227; Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787.

In construing the Constitution, it is indispensable to keep in view its objects.

Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Ex parte Yerger, 8 Wall. 85, 19 L. ed. 332; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

The vote referred to in article 5 of the Constitution is not in any manner controlled by other provisions of the Constitution.

Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644.

Congress, in proposing amendments to the Constitution, does not act in a legislative capacity.

Hollingsworth v. Virginia, supra; Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237; State ex rel. McClurg v. Powell, 77 Miss. 543, 48 L.R.A. 652, 27 So. 927; Weston v. Ryan, 70 Neb. 211, 97 N. W. 347, 6 Ann. Cas. 922; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; Com. ex rel. Atty. Gen. v. Griest, 196 Pa. 396, 50 L.R.A. 568, 46 Atl. 505.

The differences in phraseology in the language used in article 1 (the legislative section) and article 5 (the amending section) create a presumption that a difference in meaning was intended.

Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; United States v. Fisher, 2 Cranch, 358, 2 L. ed. 304.

The decision in Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93, should not control.

(a) The question was not there actually presented for determination.

Cohen v. Virginia, 6 Wheat. 399, 5 L. ed. 290; Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Union Tank Line Co. v. Wright, 249 U. S. 278, 63 L. ed. 605, 39 Sup. Ct. Rep. 276; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

(b) This court has often overruled prior cases when convinced of its error.

The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; Legal Tender Cases, 12 Wall. 457, 13 L. ed. 287; Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Standard Oil Co. v. United States, 221 U. S. 1, 57 L. ed. 619, 34

L.R.A.(N.S.) 834. 31 Sup. Ct. Rep. 502, Ann Cas. 1912D, 734; Garland v. Washington, 232 U. S. 642, 58 L. ed. 772, 34 Sup. Ct. Rep. 456.

The 18th Amendment has not been ratified by the legislatures of three fourths of the states.

State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848; State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920; Hawke v. Smith, — Ohio St. —, 126 N. E. 400; Carson v. Sullivan (May 19, 1919; Cir. Ct. Cole Co. Mo.).

It is no objection that the framers of the Constitution were not acquainted with the referendum.

South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Re Debs, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

The various provisions and limitations contained in the Constitution should be so interpreted that all of them are given force and effect.

Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.

Constitutional provisions for the security of property should be liberally construed.

Boyd v. United States, 116 U. S. 619, 29 L. ed. 747, 6 Sup. Ct. Rep. 524.

The Volstead Act takes the Kentucky Company's liquor for a public use.

Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, L.R.A.1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918A, 1201; United States v. Cress, 243 U. S. 316, 61 L. ed. 746, 37 Sup. Ct. Rep. 380; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Wynehamer v. People, 13 N. Y. 378; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976.

Whisky is property within the meaning of the 5th Amendment.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Lyng v. Michigan, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

The Volstead Act is inoperative until provision for compensation has been made.

Sweet v. Rechel, 159 U. S. 380, 40 L ed. 188, 16 Sup. Ct. Rep. 43; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 658, 36 L. ed. 302, 10 Sup. Ct. Rep. 965; A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 56 L. ed. 771, 32 Sup. Ct. Rep. 488.

Solicitor General **King** and Assistant Attorney General **Frierson** argued the cause and filed a brief for appellees:

The whole matter of proposing amendments, except as specifically limited in article 5, was, when the Constitution was adopted, understood to be left to the discretion of Congress.

12 Washington's Writings, p. 4.

The 18th Amendment was properly proposed when the resolution proposing it was adopted by two thirds of the members of each House present and constituting a quorum.

Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93.

The question of whether an amendment proposed in the manner provided by article 5 has been adopted is a political, and not a justiciable, question, and is to be decided by the political branch of the government, and not by the courts.

Luther v. Borden, 7 How. 1, 39, 12 L. ed. 581, 597; Marshall Field Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Rainey v. United States, 232 U. S. 310, 58 L. ed. 617, 34 Sup. Ct. Rep. 429; Harwood v. Wentworth, 162 U. S. 547, 40 L. ed. 1069, 16 Sup. Ct. Rep. 890; Flint v. Stone Tracy Co. 220 U. S. 109, 55 L. ed. 380, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

Ratification by the legislature of the state is final, regardless of any constitutional provisions on the subject of the referendum.

Dodge v. Woolsey, 18 How. 331, 348, 15 L. ed. 401; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

The fact that the Amendment does not provide compensation for whisky previously manufactured does not render it invalid.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; Jacob Ruppert v.

Caffey, 251 U. S. 264, 64 L. ed. 260, 40 Sup. Ct. Rep. 141.

Mr. David J. Reinhardt, Attorney General of Delaware, Mr. J. S. Manning, Attorney General of North Carolina, Mr. Charles I. Dawson, Attorney General of Kentucky, Mr. Adolph V. Coco, Attorney General of Louisiana, Mr. Ele Stansbury, Attorney General of Indiana, Mr. Frank Robertson, Attorney General of Mississippi, Mr. J. Q. Smith, Attorney General of Alabama, Mr. Guy H. Sturgis, Attorney General of Maine, Mr. John D. Arbuckle, Attorney General of Arkansas, Mr. Alex. J. Groesbeck, Attorney General of Michigan, Mr. Van C. Swearengen, Attorney General of Florida, Mr. George M. Brown, Attorney General of Oregon, Mr. Richard T. Hopkins, Attorney General of Kansas, Mr. E. T. England, Attorney General of West Virginia, Mr. Leonard Fowler, Attorney General of Nevada, Mr. Clarence A. Davis, Attorney General of Nebraska, Mr. Victor E. Keyes, Attorney General of Colorado, Mr. S. Clarence Ford, Attorney General of Montana, Mr. William Langer, Attorney General of North Dakota, Mr. Byron S. Payne, Attorney General of South Dakota, Mr. Roy L. Black, Attorney General of Idaho, Mr. W. L. Walls, Attorney General of Wyoming, Mr. Dan B. Shields, Attorney General of Utah, Mr. Wiley E. Jones, Attorney General of Arizona, and Mr. Charles E. Hughes filed a brief as amici curiæ:

The provision of article 5 of the Constitution for the proposal of amendments by the Congress whenever two thirds of both Houses shall deem it necessary is satisfied by a joint resolution passed by a vote of two thirds of a quorum of each House. A vote of two thirds of all of the members of each House is not required.

Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93; Ohio ex rel. Erkenbrecher v. Cox, 257 Fed. 346.

This court does not inquire into the motives of the Congress.

Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106.

Either there is no question at all, in case the "legislatures of the several states" means the legislative bodies of these states as they were known at the time of the adoption of the Constitution, or the question is one involving modified forms of legislative action which necessarily relate to the structure of government and involve political determinations.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; 1 Willoughby, Const. § 581, p. 1005; Prize Cases, 2 Black, 635, 17 L. ed. 459; United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471; McElrath v. United States, 102 U. S. 426, 438, 26 L. ed. 189, 191; 2 Willoughby, Const. §§ 580, 582, pp. 1003, 1007; Doe ex dem. Clark v. Braden, 16 How. 635, 14 L. ed. 1090; Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; Re Biaz, 135 U. S. 403, 421, 422, 34 L. ed. 222, 227, 228, 10 Sup. Ct. Rep. 854; Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Oetjen v. Central Leather Co. 246 U. S. 297, 62 L. ed. 726, 38 Sup. Ct. Rep. 309; Luther v. Borden, 7 How. 1, 12 L. ed. 581; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224.

Under the Constitution, the states are without power to alter or modify the provision of article 5 as to the manner in which amendments shall be ratified.

M'Culloch v. Maryland, 4 Wheat. 316, 402, 405, 4 L. ed. 579, 600, 601; Dodge v. Woolsey, 18 How. 331, 348, 15 L. ed. 401, 407.

There can be no question but that at the time the Constitution was adopted the expression "legislatures of the several states" had reference to legislative bodies acting in a representative capacity.

M'Culloch v. Maryland, supra; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644; Re Opinion of Justices, 118 Me. 544, 107 Atl. 674; Ohio ex rel. Erkenbrecher v. Cox, 257 Fed. 340; State v. Cox, 8 Ark. 443; Oakland Paving Co. v. Hilton, 69 Cal. 514, 11 Pac. 3.

It does not follow that because there is a referendum provision in the state Constitution that, even as a matter of state law, it is applicable to a Federal amendment.

Re Opinion of Justices, 118 Me. 544, 107 Atl. 673; Herbring v. Brown, 92 Or. 176, 180 Pac. 328; New Mexico ex rel. Levy v. Martinez (Sept. 1, 1919) Secretary of State, No. 9287.

There is no warrant for implying such a restriction upon the amending power conferred by article 5 as to make impossible the exercise of that power in the adoption of the 18th Amendment.

43 Federalist; 85 Federalist; 2 Story, Const. §§ 1827–1830, pp. 598–600.

The provision in the 18th Amendment

that the Congress and the several states shall have concurrent power to enforce the article by appropriate legislation is to be construed in accordance with the established principle in that class of cases, heretofore described as involving concurrent power, in which the states may act until Congress sees fit to act, and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.

Story, Const. §§ 435–439; Ex parte Siebold, 100 U. S. 371, 385, 25 L. ed. 717, 722; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 211, 212, 38 L. ed. 962, 965, 966, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Willoughby, Const. § 41.

The Amendment is not confiscatory.

Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106.

Messrs. Wayne B. Wheeler, George S. Hobart, G. Rowland Monroe, R. C. Minton, and J. A. White also filed a brief as amici curiæ.

For their contentions, see supra, p. 966.

Messrs. **Elihu Root** and **William D. Guthrie** argued the cause, and, with Messrs. Robert Crain and Bernard Hershkopf, filed a brief for appellant in No. 788:

It is impossible to reconcile with the decision of this court in Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237, the contention that the amending power contained in article 5 of the Constitution is unlimited and may be exercised by some of the states so as to take part or all of the police or governmental powers of an objecting state against its will.

See also Northern Securities Co. v. United States, 193 U. S. 197, 348, 48 L. ed. 679, 704, 24 Sup. Ct. Rep. 436; Keller v. United States, 213 U. S. 138, 148, 149, 53 L. ed. 737, 740, 741, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Hammer v. Dagenhart, 247 U. S. 251, 275, 62 L. ed. 1101, 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724.

A determined attempt was made in the Slaughter-House Cases, 16 Wall. 36, 77, 21 L. ed. 394, 409, to secure the approval of this court of an effort to impair the police power of the states under the pretext that that result necessarily followed from the terms and provisions of the 14th Amendment to the Constitution, but the contentions to that effect were most emphatically repudiated.

See also Civil Rights Cases, 109 U. S. 3, 11, 15, 19, 27 L. ed. 836, 839 840, 842, 3 Sup. Ct. Rep. 18.

It would be vain to urge, as does the court in Hammer v. Dagenhart, supra, that the maintenance of the authority of the states over matters purely local is essential to the preservation of our institutions, and the power of the states to regulate their purely internal affairs inherent and never surrendered to the general government, if the states held that authority only temporarily and could be deprived of all of it whenever two thirds of the Houses of Congress and three fourths of the legislatures of the states saw fit to take advantage of the power conferred in article 5 of the Constitution.

See also Kentucky v. Dennison, 24 How. 66, 107, 16 L. ed. 717, 729; Guinn v. United States, 238 U. S. 347, 362, 59 L. ed. 1340, 1346, L.R.A.1916A, 1124, 35 Sup. Ct. Rep. 926.

The right of the states to continue as effective local governments, which is implied in the Constitution, has been emphatically recognized and enforced, as against an express and practically unqualified power sought to be exercised in conflict therewith, in the cases which hold that it is unconstitutional for the Federal government to attempt to tax the several states or their governmental instrumentalities.

Collector v. Day (Buffington v. Day) 11 Wall. 113, 124, 125, 127, 20 L. ed. 122, 125, 126; United States v. Baltimore & O. R. Co. 17 Wall. 322, 327, 21 L. ed. 597, 599; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673; South Carolina v. United States, 199 U. S. 437, 453, 50 L. ed. 261, 266, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

The ratio decidendi of these authorities is not based upon any express limitation upon the Federal taxing power, for the grant of power is unlimited, but solely upon the necessary implication which arises out of our dual and Federal system of government and the great law of self-preservation, which the states are entitled to invoke against efforts tending to bring about their ultimate destruction.

Collector v. Day, supra.

If, however, article 5 of the Constitution authorizes amendments directly withdrawing police powers from the states, which their necessarily implied right of self-preservation may, nevertheless, not resist, it would be baseless to argue, as did the court in Collector v. Day, supra, that the existence of the states is indispensable under our constitutional system, for the states then would

have their being only at the mercy of the Congress and the legislatures of three fourths of the states.

The preservation of the state government was one of the chief concerns of the framers of the Constitution.

2 Elliot, Debates, 304, 309; 4 Elliot, Debates, pp. 53, 58; 2 Curtis, History of U. S. Const. pp. 160, 161.

The establishment and recognition in the Constitution of the two governments, Federal and state, plainly imply that neither shall be permitted to destroy the other, and that the state power shall not be exerted to overthrow the Federal government, nor the Federal power to impair the existence of the states.

South Carolina v. United States, supra.

Article 5, in its proviso that no state, without its consent, shall be deprived of its equal suffrage in the Senate, necessarily implies and requires the continued existence of the states, for otherwise their equal suffrage in the Senate could be destroyed with them; and further implies that the states shall at all times exist as bodies capable of consenting,—in other words, as autonomous, self-governing sovereignties.

1 Tucker, U. S. Const. pp. 323, 324.

It is no answer to these contentions to urge that the 10th Amendment, which expressly reserves the police powers to the states, is after all but an amendment, and as such may be altered like any other provision or amendment. The 10th Amendment stands upon its own peculiar ground. It is in fact but the expression of matters implied in the original Constitution, and it added no power to the states and subtracted none from the Federal government.

United States v. Cruikshank, 92 U. S. 542, 552, 23 L. ed. 588, 591; Wilkinson v. Leland, 2 Pet. 627, 657, 7 L. ed. 542, 553; Citizens Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

The guaranty rendered express by the 10th Amendment is of vital obligation and was necessarily recognized and approved by every state when it entered into the Union, which can only remain a true Federal Union so long as the several states retain the powers which that Amendment expressly reserves. With the subject-matter of that Amendment substantially altered or destroyed, we may remain a free people, but the Union will not be the Union of the Constitution.

Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688.

The people acted upon the plain meaning of the instrument and intended no such result as is urged by the defendants in the case at bar, and as the people reasonably read the Constitution, so should it be enforced.

Cooley, Const. Lim. 7th ed. pp. 101, 102; Maxwell v. Dow, 176 U. S. 581, 601, 602, 44 L. ed. 597, 604, 605, 20 Sup. Ct. Rep. 448, 494; State v. St. Louis South Western R. Co. — Tex. Civ. App. — 197 S. W. 1012; Alexander v. People, 7 Colo. 167, 2 Pac. 894.

In interpreting or construing any clause in the Constitution of the United States or its amendments, the settled principle of interpretation is always applied that effect must be given to every word, if possible, and that it is not to be assumed that any word was employed without distinct occasion or definite purpose or without intent that it should have some effect as part of the Constitution.

Knowlton v. Moore, 178 U. S. 41, 87, 44 L. ed. 969, 987, 20 Sup. Ct. Rep. 747; Hurtado v. California, 110 U. S. 516, 534, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Holmes v. Jennison, 14 Pet. 540, 570, 571, 10 L. ed. 579, 594, 595; Cooley, Const. Lim. 7th ed. p. 92; United States v. Standard Brewery, 251 U. S. 210, ante, 229, 40 Sup. Ct. Rep. 139; Newell v. People, 7 N. Y. 9.

The 18th Amendment was intended to provide for co-operation and concurrence in the exclusive legislative fields of action of the Congress and the several states respectively, and such purpose was in the legislative atmosphere of the time. Nothing else was necessary or expedient in view of the existing powers of Congress and the states.

Delamater v. South Dakota, 205 U. S. 93, 98, 51 L. ed. 724, 728, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680; Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086, L.R.A. 1918C, 451, 37 Sup. Ct. Rep. 524, Ann. Cas. 1917E, 900, 14 N. C. C. A. 596; Hamilton v. Kentucky Distilleries Co. 251 U. S. 146, 156, ante, 194, 199, 40 Sup. Ct. Rep. 106; Hodges v. United States, 203 U. S. 1, 16, 51 L. ed. 65, 68, 27 Sup. Ct. Rep. 6; De Bary v. Louisiana, 227 U. S. 108, 57 L. ed. 441, 33 Sup. Ct. Rep. 239; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Clark Distilling Co. v. West-

ern Maryland R. Co. 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; United States v. Hill, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. Rep. 143.

Both the granting and the limiting clauses of the Constitution must be fairly construed.

Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

The grant of concurrent power to enforce requires concurrence on the part of the grantees of the power, that is to say, concurrence respectively by Congress in respect of any state legislation relating to interstate or foreign commerce, and concurrence by the state in respect of any legislation by Congress relating to the internal and local affairs of that state.

Century Dict.; Webster Dict.; Standard Dict.; Wedding v. Meyler, 192 U. S. 573, 584, 48 L. ed. 570, 575, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; Re Mattson, 69 Fed. 542; Ex parte Desjeiro, 152 Fed. 1007; Nielsen v. Oregon, 212 U. S. 315, 53 L. ed. 528, 29 Sup. Ct. Rep. 383.

The standard of ½ of 1 per cent arose in the Federal system merely as a standard for taxation, and so continues to this day, and it was never intended to be a criterion or test of intoxicating quality.

United States v. Standard Brewery, 251 U. S. 210, ante, 229, 40 Sup. Ct. Rep. 139; Jacob Hoffman Brewing Co. v. McElligott, 259 Fed. 338; Com. v. Blos, 116 Mass. 58; Intoxicating Liquor Cases, 25 Kan. 768, 37 Am. Rep. 284; State v. Piche, 98 Me. 351, 56 Atl. 1052; State v. May, 52 Kan. 53, 34 Pac. 407; Estes v. State, 13 Okla. Crim. Rep. 604, 4 A.L.R. 1135, 166 Pac. 77; Marks v. State, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; State v. Virgo, 14 N. D. 293, 103 N. W. 610; Blatz v. Rohrbach, 116 N. Y. 452, 6 L.R.A. 669, 22 N. E. 1049; Black, Intoxicating Liquors, § 2; Post Office Dept. Liquor Bulletin No. 2, June 15, 1917.

The definition of an intoxicating liquor contained in the National Prohibition Act is arbitrary, oppressive, and unconstitutional.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 663, 33 L. ed. 456, 461; Dobbins v. Los Angeles, 195 U. S. 223, 236, 241, 49 L. ed. 169, 175, 177, 25 Sup. Ct. Rep. 18; Adair v. United States, 208 U. S. 161, 175, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Adams v. Tanner, 244 U. S. 590, 596, 597, 61 L. ed. 1336, 1344, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 359, 56 L. ed. 799, 800, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 345, 347, 59 L. ed. 1337, 1339, 1340, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 84, 46 L. ed. 92, 99, 22 Sup. Ct. Rep. 30; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

Nothing of effectual value would be left of any part of a constitution—neither the rights which it confers, nor the duties which it imposes, nor the prohibitions which it ordains, nor the limitations which it decrees—if the legislature had power to define them away by mere statutory enactments contrary to the fact.

Eisner v. Macomber, 252 U. S. 189, ante, 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 298, 59 L. ed. 234, 237, 35 Sup. Ct. Rep. 27; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 37, 54 L. ed. 355, 370, 30 Sup. Ct. Rep. 190; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 63, 27 L. ed. 383, 385, 2 Sup. Ct. Rep. 87; Monongahela Nav. Co. v. United States, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622; Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 357, 14 L.R.A. 481, 28 N. E. 358; San Mateo County v. Coburn, 130 Cal. 634, 63 Pac. 78, 621; Yeatmen v. King, 2 N. D. 424, 33 Am. St. Rep. 797, 51 N. W. 721; Keller v. State, — Tex. Crim. Rep. —, 1 L.R.A.(N.S.) 489, 87 S. W. 675.

A revenue statute, in fact concerned exclusively with fermented or alcoholic liquors, cannot cast any light upon a constitutional provision which is concerned solely with, and expressly limited to, intoxicating liquors in the ordinary, and not in any unnatural or specially defined, sense.

Tennessee v. Whitworth, 117 U. S. 139, 147, 29 L. ed. 833, 835, 6 Sup. Ct. Rep. 649.

It would be a new terror in the construction of statutes and constitutions if we were required to limit a word to an unnatural sense because in some act which is not incorporated or referred to such an interpretation is given to it for the purposes of that act alone.

Macbeth & Co. v. Chislett [1910] A. C. 220, 79 L. J. K. B. N. S. 376, 102 L. T. N. S. 82, 26 Times L. R. 268, 54 Sol. Jo. 268, 47 Scot. L. R. 623, 17 Ann. Cas. 102.

It is too well established to warrant discussion that what constitutes an intoxicating liquor is purely a matter of fact (State v. Piche, 98 Me. 351, 56 Atl. 1052; Com. v. Blos, 116 Mass. 58; Intoxicating Liquor Cases, 25 Kan. 768, 37 Am. Rep. 284; Jacob Hoffmann Brewing Co. v. McElligott, 259 Fed. 338; Post Office Dept. Liquor Bulletin No. 2, June 15, 1917; Black, Intoxicating Liquors, § 2), and it may not, therefore, be decided arbitrarily and without foundation in fact by any governmental authority, legislative or executive, to the detriment and oppression of any individual.

The National Prohibition Act is not appropriate legislation to enforce the prohibition of intoxicating liquors.

Civil Rights Cases, 109 U. S. 3, 14, 27 L. ed. 835, 840, 3 Sup. Ct. Rep. 18; United States v. Dewitt, 9 Wall. 41, 44, 19 L. ed. 593, 594; Hodges v. United States 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; Lackey v. United States, 53 L.R.A. 660, 46 C. C. A. 189, 107 Fed. 114; Adams v. Tanner, 244 U. S. 590, 593, 594, 61 L. ed. 1336, 1342, 1343, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

The destruction of lawfully pre-existing property is unconstitutional.

Wynehamer v. People, 13 N. Y. 378; Bartemeyer v. Iowa, 18 Wall. 129, 133, 21 L. ed. 929, 930; Eberle v. Michigan, 232 U. S. 700, 706, 58 L. ed. 803, 806, 34 Sup. Ct. Rep. 464; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 22 L. ed. 455, 461; Calder v. Bull, 3 Dall. 386, 388, 1 L. ed. 648, 649; Wilkinson v. Leland, 2 Pet. 627, 657, 7 L. ed. 542, 553; Fletcher v. Peck, 6 Cranch, 87, 135, 3 L. ed. 162, 177.

Messrs. Levi Cooke and George R. Beneman filed a brief as amici curiæ.

Solicitor General **King** and Assistant Attorney General **Frierson** argued the cause and filed a brief for appellees:

The 18th Amendment, establishing a fundamental rule of law, is an amendment within the meaning of article 5.

Willoughby, Const. § 227.

No state, by any provision of its laws or its Constitution, can make the ratification of an amendment to the Constitution of the United States by its legislature subject to a referendum vote of the people.

Dodge v. Woolsey, 18 How. 331, 348, 15 L. ed. 401, 407; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

The Volstead Act, if otherwise constitutional, is effective in the state of New Jersey without the concurrence of the legislature of that state.

32 Federalist; Fox v. Ohio, 5 How. 410, 418, 12 L. ed. 213, 216; Houston v. Moore, 5 Wheat. 1, 47, 5 L. ed. 19, 30; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Gibbons v. Ogden, 9 Wheat. 1, 209, 6 L. ed. 23, 73; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Passenger Cases, 7 How. 283, 396, 12 L. ed. 702, 749; United States v. Marigold, 9 How. 560, 13 L. ed. 257.

In order to enforce, with any degree of efficiency, the 18th Amendment, a definition of intoxicating liquor was essential. The definition provided by the Volstead Act includes nothing which Congress could not properly deem necessary to enforce the provisions of the Amendment, and is therefore not arbitrary.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Jacob Ruppert v. Caffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141.

The fact that by the passage of the Volstead Act on October 28, 1919, and the going into effect of the second title of that act and the 18th Amendment of January 16, 1920, the sale of nonintoxicating beer containing as much as ½ of 1 per centum of alcohol was prohibited by the War Prohibition Act, does not render title 2 of the Volstead Act invalid, even as to the sale of such beer lawfully manufactured before October 28, 1919.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 156, 157, ante, 194, 199, 40 Sup. Ct. Rep. 106; Jacob Ruppert v. Caffey, supra.

Messrs. Wayne B. Wheeler, B. W. Hicks, E. L. McIntyre, Walter H. Bender, J. A. White, George S. Hobart, and G. R. Munroe also filed a brief as amici curiæ:

In the interpretation of a constitutional provision, the primary rule of construction is the same as is applied to statutes, to give effect to the manifest intent of the

people in its adoption, if it is possible so to do.

12 Cyc. title, Const. Law, 700; Juilliard v. Greenman, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122; Jarrolt v. Moberly, 103 U. S. 580, 26 L. ed. 492; Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Bank of United States v. Deveaux, 5 Cranch, 61, 3 L. ed. 38.

The purpose of the 18th Amendment was to accomplish throughout the United States and all territory under its jurisdiction the complete and absolute prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes. The duty of enforcing this prohibition was laid upon Congress (concurrently with the states), and the imposition of this duty carried with it plenary authority to do all things necessary for its accomplishment.

United States v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16,151; Civil Rights Cases, 109 U. S. 3, 20, 27 L. ed. 835, 842, 3 Sup. Ct. Rep. 18; United States v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897.

The so-called "definition" of intoxicating liquors embodied in the Volstead Act is a legitimate exercise by Congress of the power of enforcement conferred upon it by the 18th Amendment.

Jacob Ruppert v. Caffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; United States v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16,151; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 473, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Adams v. Milwaukee, 144 Wis. 375, 43 L.R.A.(N.S.) 1066, 129 N. W. 518; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; United States v. Reese, 92 U. S. 214, 217, 23 L. ed. 563, 564; State v. Guinness, 16 R. I. 401, 16 Atl. 910; Marks v. States, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864; Sawyer v. Botti, 147 Iowa, 453, 27 L.R.A.(N.S.) 1007, 124 N. W. 787; Fiebelman v. States, 130 Ala. 122, 30 So. 384; Gherna v. State, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94; Black, Intoxicating Liquors, § 43; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100.

When the people of the state write into the Constitution the authority over a subject-matter, the court looks to the specific constitutional provision for legislative authority, rather than to police power.

Hockett v. State Liquor Licensing Board, 91 Ohio St. 176, L.R.A.1917B, 7, 110 N. E. 485.

Solicitor General **King** and Assistant Attorney General **Frierson** argued the cause and filed a brief for appellants in No. 794.

For their contentions, see supra, pp. 958, 966, 969, 974.

Mr. **Ralph W. Jackman** argued the cause, and, with Mr. William H. Austin, filed a brief for appellee:

Neither Congress nor the several states have power to define the words "intoxicating liquor" by virtue of any power granted under the 18th Amendment.

State v. Piche, 98 Me. 351, 56 Atl. 1052; Com. v. Blos, 116 Mass. 58; Intoxicating-Liquor Cases, 25 Kan. 768, 37 Am. Rep. 284; 23 Cyc. 57; Marks v. State, 159 Ala. 81, 133 Am. St. Rep. 20, 48 So. 864; Decker v. State, 39 Tex. Crim. Rep. 20, 44 S. W. 845; Mason v. State, 1 Ga. App. 534, 58 S. E. 139; Board of Excise v. Taylor, 21 N. Y. 173; Blatz v. Rohrbach, 116 N. Y. 455, 6 L.R.A. 669, 22 N. E. 1049; Black, Intoxicating Liquors, § 2; United States v. Standard Brewery, 251 U. S. 210, ante, 229, 40 Sup. Ct. Rep. 139; Re La Fayette County ex rel. Knowlton, 2 Pinney (Wis.) 523; Plumer v. Marathon County, 46 Wis. 163, 50 N. W. 416; Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; United States v. Smith, 5 Wheat. 153, 5 L. ed. 57; Monongahela Nav. Co. v. United States, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622; Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 721; State ex rel. Bundy v. Nygaard, 163 Wis. 307, L.R.A.1917E, 563, 158 N. W. 87; Towne v. Eisner, 242 Fed. 704; Eisner v. Macomber, 252 U. S. 189, ante, 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 619, 39 L. ed. 1108, 1119, 15 Sup. Ct. Rep. 912; Keller v. State, — Tex. Crim. Rep. —, 1 L.R.A.(N.S.) 489, 87 S. W. 675; Sturges v. Crowninshield, 4 Wheat. 122, 202, 203, 4 L. ed. 529, 550; Oakley v. Aspinwall, 3 N. Y. 547; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 298, 59 L. ed. 234, 237, 35 Sup. Ct. Rep. 27; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 37, 54 L. ed. 355, 370, 30 Sup.

Ct. Rep. 190; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 63, 27 L. ed. 383, 385, 2 Sup. Ct. Rep. 87; Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 357, 14 L.R.A. 481, 28 N. E. 358; San Mateo County v. Coburn, 130 Cal. 634, 63 Pac. 78, .621; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Robertson v. Baldwin, 165 U. S. 275, 292, 41 L. ed. 715, 721, 17 Sup. Ct. Rep. 326.

Congress has no power under the enforcement clause to enlarge the scope of the express grant of power as contained in the 18th Amendment so as to include beverages nonintoxicating in fact. The incidental power to enforce a grant cannot be used to enlarge the grant itself.

Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; Kansas v. Colorado, 206 U. S. 46, 87, 88, 51 L. ed. 956, 970, 971, 27 Sup. Ct. Rep. 655; United States v. Lackey, 99 Fed. 963; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Eisner v. Macomber, 252 U. S. 189, ante, 521, 9 A.L.R. 1570, 40 Sup. Ct. Rep. 189; Slaughter-House Cases, 16 Wall. 36, 42, 21 L. ed. 394; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; Keller v. United States, 213 U. S. 138, 149, 53 L. ed. 737, 741, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Karem v. United States, 61 L.R.A. 437, 57 C. C. A. 486, 121 Fed. 250; Lackey v. United States, 53 L.R.A. 660, 46 C. C. A. 189, 107 Fed. 114; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; United States v. Miller, 107 Fed. 913; Le Grand v. United States, 12 Fed. 577; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; United States v. Reynolds, 235 U. S. 133, 59 L. ed. 162, 35 Sup. Ct. Rep. 86; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; People v. Brady, 40 Cal. 198, 6 Am. Rep. 604; Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; United States v. De Witt, 9 Wall. 41, 19 L. ed. 593; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Lottery Case (Champion v. Ames) 188 U. S. 321, 367, 47 L. ed. 492, 505, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Hare, Am. Const. Law, p. 533; Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71; License Tax Cases, 5 Wall. 471, 18 L. ed. 500; Gherna v. State, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 98; State v. Weiss, 84 Kan. 165, 36 L.R.A. (N.S.) 73, 113 Pac. 389; State v. Durein, 70 Kan. 13, 15 L.R.A.(N.S.) 908, 80 Pac. 994; Hammer v. Dagenhart, 247 U. S. 251, 273, 276, 62 L. ed. 1101, 1106, 1107, 3 A.L.R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Re Rahrer, 140 U. S. 545, 554, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; Re Heff, 197 U. S. 488, 505, 49 L. ed. 848, 855, 25 Sup. Ct. Rep. 506; Cooley, Const. Lim. 7th ed. 158; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625.

Congress and the respective states are granted concurrent power to enforce the prohibition. The state of Wisconsin having, under the power reserved by and granted to it by the 18th Amendment, enacted legislation to enforce the prohibition contained in such amendment, and not having concurred in the congressional legislation, Congress is without power to enforce its legislation as to strictly intrastate transactions, and override the state enactment.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Konkel v. State, 168 Wis. 335, 170 N. W. 715; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. ed. 1045, L.R.A.1918C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917D, 1139, 13 N. C. C. A. 680; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Corn Products Ref. Co. v. Eddy, 249 U. S. 427, 63 L. ed. 689, 39 Sup. Ct. Rep. 325; Weigle v. Curtice Bros. Co. 248 U. S. 285, 63 L. ed. 242, 39 Sup. Ct. Rep. 124; Passenger Cases, 7 How. 283, 397, 12 L. ed. 702, 749; State ex rel. Cook v. Houser, 122 Wis. 550, 100 N. W. 964; McFall v. Com. 2 Met. (Ky.) 394; Postmaster General v. Early, 12 Wheat. 136, 148, 6 L. ed. 577, 582; Davis v. Planters' Trust Co. 196 Fed. 970; Phelps v. Mutual Reserve Fund Life Asso. 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 464; Ex parte Siebold, 100 U. S. 371, 389, 25 L. ed. 717, 724; Lowenstein v. Evans, 69 Fed. 911; Roberts v. Fullerton, 117 Wis. 222, 65 L.R.A. 953, 93 N. W. 1111; State v. Bowen, 149 Wis. 203, 39 L.R.A.(N.S.) 200, 135 N. W. 494; Central R. Co. v. Jersey City, 70 N. J. L. 81, 56 Atl. 239, 209 U. S. 473, 52 L. ed. 896, 28 Sup. Ct. Rep. 592; McCready

v. Virginia, 94 U. S. 391, 394, 24 L. ed. 248; Wedding v. Meyler, 192 U. S. 573, 584, 48 L. ed. 570, 575, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; Delaware Bridge Co. v. Trenton City Bridge Co. 13 N. J. Eq. 46; Nicoulin v. O'Brien, 172 Ky. 473, 189 S. W. 724, 248 U. S. 113, 63 L. ed. 155, 39 Sup. Ct. Rep. 23; Indiana v. Kentucky, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; Re Mattson, 69 Fed. 535; Ex parte Desjeiro, 152 Fed. 1004; Nielsen v. Oregon, 212 U. S. 315, 53 L. ed. 528, 29 Sup. Ct. Rep. 383; McGowan v. Columbia River Packers' Asso. 245 U. S. 352, 62 L. ed. 342, 38 Sup. Ct. Rep. 129; Arnold v. Shields, 5 Dana. 18, 22; Fairbank v. United States, 181 U. S. 283, 288, 45 L. ed. 862, 865, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

The 18th Amendment is not a valid amendment within the meaning of article 5 of the Constitution, and is in violation of article 10 of the Amendments.

M'Culloch v. Maryland, 4 Wheat. 316, 403, 4 L. ed. 579, 600.

Messrs. Wayne B. Wheeler, B. W. Hicks, E. L. McIntyre, Walter H. Bender, J. A. White, George S. Hobart, and G. R. Munroe also filed a brief as amici curiæ.

For their contentions, see supra, 974.

Messrs. **Charles A. Houts, John T. Fitzsimmons,** and **Edward C. Crow** submitted the cause for appellant in No. 837:

Three fourths of the states have not ratified the 18th Amendment.

Chisholm v. Georgia, 2 Dall. 419, 471, 1 L. ed. 440, 462; State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N. E. 55, affirmed in 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920; State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848; South Carolina v. United States, 199 U. S. 454, 50 L. ed. 266, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737.

The 18th Amendment is invalid as an amendment to the Federal Constitution because it is of a class of amendment which could lead to the destruction of either the United States or the states.

United States v. Cruikshank, 92 U. S. 552, 553, 23 L. ed. 591; Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237.

The 18th Amendment is an attempt to exercise ordinary legislative power through the means of a Federal amendment, and this cannot be done.

State ex rel. Halliburton v. Roach, 230 Mo. 410, 139 Am. St. Rep. 639, 130 S. W. 689; Kamper v. Hawkins, 1 Va. Cas. 20, 24; State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530; Cooley, Const. Lim. p. 37; Hollingsworth v. Virginia, 3 Dall. 378, 1 L. ed. 644.

Title II. of the Act of Congress of October 28, 1919, the short title of which is the "National Prohibition Act," is not appropriate enforcement legislation under § 2 of the 18th Amendment.

Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678.

The destruction of the beverages lawfully pre-existing theretofore by means of the 18th Amendment, and the legislation enacted to enforce the same by the Federal government, are unconstitutional.

Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

Solicitor General **King** and Assistant Attorney General **Frierson** submitted the cause for appellees.

For their contentions, see supra, 958, 966, 969, 974.

Mr. Justice **Van Devanter** announced the conclusions of the court:

Power to amend the Constitution was reserved by article 5, which reads:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures [385] of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The text of the 18th Amendment, proposed by Congress in 1917 and proclaimed as ratified in 1919 (December 19, 1917, January 29, 1919, 40 Stat. at L. 1050, 1941), is as follows:

"Section 1. After one year from the ratification of this article the manufac-

ture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

We here are concerned with seven cases involving the validity of that Amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, 41 Stat. at L. 305, chap. 83, Acts 66th Cong., 1st Sess., which was adopted to enforce the Amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases—Nos. 29 and 30, Original—were brought in this court, and the others in district courts. Nos. 696, 752, 788, and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the bar and in [386] printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

1. The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each House which is required in proposing an amendment is a vote of two thirds of the members present,—assuming the presence of a quorum,—and not a vote of two thirds of the entire membership, present and absent. Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93.

3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. Hawke v. Smith, 253 U. S. 221, ante, 871, 40 Sup. Ct. Rep. 495, decided June 1, 1920.

4. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th Amendment, is within the power to amend reserved by article 5 of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment —the one embodying the prohibition— is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every [387] legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

7. The second section of the Amendment—the one declaring "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title II. § 1), wherein liquors containing as much as ½ of 1

per cent of alcohol by volume, and fit for use for beverage [388] purposes, are treated as within that power. Jacob Ruppert v. Caffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141.

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, Original, the bills are dismissed.

In No. 794 the decree is reversed.

In Nos. 696, 752, 788, and 837 the decrees are affirmed.

Mr. Chief Justice White, concurring:

I profoundly regret that in a case of this magnitude, affecting, as it does, an amendment to the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions, without an exposition of the reasoning by which they have been reached.

I appreciate the difficulties which a solution of the cases involves and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion that the Amendment accomplishes and was intended to accomplish the purposes now attributed to it in the propositions concerning that subject which the court has just announced and in which I concur. Primarily in doing this I notice various contentions made concerning the proper construction of the provisions of the Amendment which I have been unable to accept, in order that by contrast they may add cogency to the statement of the understanding I have of the Amendment.

The Amendment, which is reproduced in the announcement for the court, contains three numbered paragraphs or sections, two of which only need be noticed. The first prohibits "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, [389] or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." The second is as follows: "Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

1. It is contended that the result of these provisions is to require concurrent action of Congress and the states in enforcing the prohibition of the first section, and hence that, in the absence of such concurrent action by Congress and the states, no enforcing legislation can exist, and therefore until this takes place the prohibition of the first section is a dead letter. But, in view of the manifest purpose of the first section to apply and make efficacious the prohibition, and of the second, to deal with the methods of carrying out that purpose, I cannot accept this interpretation, since it would result simply in declaring that the provisions of the second section, avowedly enacted to provide means for carrying out the first, must be so interpreted as to practically nullify the first.

2. It is said, conceding that the concurrent power given to Congress and to the states does not, as a prerequisite, exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the states, and makes each action effective; but, as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict, the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. The proposition is that the concurrent powers conferred [390] upon Congress and the states are not subject to conflict because their exertion is authorized within different areas; that is, by Congress within the field of Federal authority, and by the states within the sphere of state power; hence leaving the states free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress, the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at once exposed by directing attention to the fact that in a case where no state legislation was enacted, there would be no prohibition; thus again frustrating the first section by a construction affixed to the second. It is no answer to suggest that a regulation by Congress would in such event be operative in such a state, since the basis of the distinction upon

which the argument rests is that the concurrent power conferred upon Congress is confined to the area of its jurisdiction, and therefore is not operative within a state.

Comprehensively looking at all these contentions, the confusion and contradiction to which they lead, serve, in my judgment, to make it certain that it cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true, indeed, that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the amendment dealt, and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent.

In the first place, it is indisputable, as I have stated, [391] that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative.

Mark the relation of the text to this view, since the power which it gives to state and nation is not to construct or perfect or cause the Amendment to be completely operative, but, as already made completely operative, to enforce it. Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement.

I take it that if the second section of the article did not exist, no one would gainsay that the first section, in and of itself, granted the power and imposed the duty upon Congress to legislate to the end that, by definition and sanction, the Amendment would become fully operative. This being [392] true, it would follow, if the contentions under consideration were sustained, that the second section gave the states the power to nullify the first section, since a refusal of a state to define and sanction would again result in no amendment to be enforced in such refusing state.

Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the states power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the states to give effect to, that is, to carry out or enforce, the Amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment.

Mr. Justice **McReynolds**, concurring:

I do not dissent from the disposition of these causes as ordered by the court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the 18th Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive.

Mr. Justice **McKenna**, dissenting:

This case is concerned with the 18th Amendment of the Constitution of the United States, its validity and construction. In order to have it and its scope in attention, I quote it:

[**393**] "Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The court, in applying it, has dismissed certain of the bills, reversed the decree in one, and affirmed the decrees in four others. I am unable to agree with the judgment reversing No. 794 and affirming Nos. 752, 696, 788, and 837.

I am, however, at a loss how, or to what extent, to express the grounds for this action. The court declares conclusions only, without giving any reasons for them. The instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase its lucidity. However, reasons for the conclusions have been omitted, and my comment upon them may come from a misunderstanding of them, their present import and ultimate purpose and force.

There are, however, clear declarations that the 18th Amendment is part of the Constitution of the United States, made so in observance of the prescribed constitutional procedure, and has become part of the Constitution of the United States, to be respected and given effect like other provisions of that instrument. With these conclusions I agree.

Conclusions 4, 5, and 6 seem to assert the undisputed. I neither assent to them nor dissent from them except so far as I shall presently express.

Conclusion 7 seems an unnecessary declaration. It may, however, be considered as supplementary to some other declaration. My only comment is that I know of no [**394**] intimation in the case that § 2, in conferring concurrent power on Congress and the states to enforce the prohibition of the 1st section, conferred a power to defeat or obstruct prohibition. Of course, the power was conferred as a means to enforce the prohibition, and was made concurrent to engage the resources and instrumentalities of the nation and the states. The power was conferred for use, not for abuse.

Conclusions 8 and 9, as I view them, are complements of each other, and express, with a certain verbal detail, the power of Congress and the states over the liquor traffic, using the word in its comprehensive sense as including the production of liquor, its transportation within the states, its exportation from them, and its importation into them. In a word, give power over the liquor business from producer to consumer, prescribe the quality of latter's beverage. Certain determining elements are expressed. It is said that the words "concurrent power" of § 2 do not mean joint power in Congress and the states, nor the approval by the states of congressional legislation, nor its dependency upon state action or inaction.

I cannot confidently measure the force of the declarations or the deductions that are or can be made from them. They seem to be regarded as sufficient to impel the conclusion that the Volstead Act is legal legislation and operative throughout the United States. But are there no opposing considerations, no conditions upon its operation? And what of conflicts, and there are conflicts, and more there may be, between it and state legislation? The conclusions of the court do not answer the questions and yet they are submitted for decision; and their importance appeals for judgment upon them. It is to be remembered states are litigants as well as private citizens; the former presenting the rights of the states, the latter seeking protection against the asserted aggression of the act in controversy. And there is opposing state legislation; why not a decision [**395**] upon it? Is it on account of the nature of the actions being civil and in equity, the proper forum being a criminal court investigating a criminal charge? There should be some way to avert the necessity or odium of either.

I cannot pause to enumerate the contentions in the case. Some of them present a question of joint action in Congress and the states, either collectively with all or severally with each. Others assert spheres of the powers, involving no collision, it is said, the powers of Congress and the states being supreme and exclusive within the spheres of their

exercise,—called by counsel "historical fields of jurisdiction." I submit again, they should have consideration and decision.

The government has felt and exhibited the necessity of such consideration and decision. It knows the conflicts that exist or impend. It desires to be able to meet them, silence them, and bring the repose that will come from a distinct declaration and delimitation of the power of Congress and the states. The court, however, thinks otherwise, and I pass to the question in the case. It is a simple one, it involves the meaning of a few English words,—in what sense they shall be taken,—whether in their ordinary sense, or have put upon them an unusual sense.

Recurring to the first section of the Amendment, it will be seen to be a restriction upon state and congressional power, and the deduction from it is that neither the states nor Congress can enact legislation that contravenes its prohibition. And there is no room for controversy as to its requirement. Its prohibition of "intoxicating liquors" "for beverage purposes" is absolute. And, as accessory to that prohibition, is the further prohibition of their manufacture, sale, or transportation within or their importation into or exportation "from the United States." Its prohibition, therefore, is national, and, considered alone, the means of its enforcement might be such as Congress, the agency of national power, might [**396**] prescribe. But it does not stand alone. Section 2 associates Congress and the states in power to enforce it. Its words are, "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

What, then, is meant by the words "concurrent power?" Do they mean united action, or separate and independent action, and, if the actions differ (there is no practical problem unless they differ), shall that of Congress be supreme?

The government answers that the words mean separate and independent action, and, in case of conflict, that of Congress is supreme, and asserts besides, that the answer is sustained by historical and legal precedents.[1] I contest the assertions and oppose to them the common usage of our language, and the definitions of our lexicons, [**397**] general and legal.[2] Some of the definitions assign to the words "concurrent power," action in conjunction, contribution of effort, certainly harmony of action, not antagonism. Opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance. Such is the result of the government's contention. It does not satisfy the definitions, or the requirement of § 2,—"a concurrent power excludes the idea of a dependent power,"—Mr. Justice McLean in the Passenger Cases, 7 How. 283, 399, 12 L. ed. 702, 750.

Other definitions assign to the words, "existing or happening at the same time," "concurring together," "coexistent." These definitions are, as the oth-

[1] The following is the contention of the government which we give to accurately represent it: "It is true that the word 'concurrent' has various meanings, according to the connection in which it is used. It may undoubtedly be used to indicate that something is to be accomplished by two or more persons acting together. It is equally true that it means, in other connections, a right which two or more persons, acting separately and apart from each other, may exercise at the same time. It would be idle, however, to go into all the meanings which may attach to this word. In certain connections, it has a well-fixed and established meaning, which is controlled in this case."

And again: "It is to be noted that § 2 does not say that *legislation shall be concurrent*, but that *concurrent power* to legislate shall exist. The concurrent power of the states and Congress to legislate is nothing new. And its meaning has been too long settled, historically and judicially, to now admit of question. The term has acquired a fixed meaning through its frequent use by this court and eminent statesmen and writers in referring to the concurrent power of Congress and the states to legislate."

And after citing cases, the government says: "It will thus be seen that in legal nomenclature the concurrent power of the states and of Congress is clearly and unmistakably defined. It simply means the right of each to act with respect to a particular subject-matter separately and independently."

[2] Definitions of the dictionaries are as follows: The Century: "Concurrent: . . . 2. Concurring; or acting in conjunction; agreeing in the same act; contributing to the same event or effect; operating with; coincident. 3. Conjoined; joint; concomitant; co-ordinate; combined. . . . That which concurs; a joint or contributory thing." Webster's first definition is the same as that of the Century. The second is as follows: "Joint; associate; concomitant; existing or happening at the same time."

ers are, inconsistent with the government's contention. If coexistence of the power of legislation is given to Congress and the state by § 2, it is given to be coexistently exercised. It is to be remembered that the 18th Amendment was intended to deal with a condition, not a theory, and one demanding something more than exhortation and precept. The habits of a people were to be changed, large business interests were to be disturbed, and it was considered that the change and disturbance could only be effected by punitive and repressive legislation, and it was naturally thought that legislation enacted by "the Congress and the several states," by its concurrence, would better enforce prohibition and avail for its enforcement the two great divisions of our governmental system, [398] the nation and the states, with their influences and instrumentalities.

From my standpoint, the exposition of the case is concluded by the definition of the words of § 2. There are, however, confirming considerations; and militating considerations are urged. Among the confirming considerations are the cases of Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322, and Nelson v. Oregon, 212 U. S. 315, 53 L. ed. 528, 29 Sup. Ct. Rep. 383, in which "concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio river by the Virginia compact, and respectively to Washington and Oregon over the Columbia river by act of Congress. And it was decided that it conferred equality of powers, "legislative, judicial, and executive," and that neither state could override the legislation of the other. Other courts have given like definitions. 2 Words & Phrases, 1391 et seq.; 1 Bouvier's Law Dict., Rawle's 3d Rev. p. 579. Analogy of the word "concurrent" in private instruments may also be invoked.

Those cases are examples of the elemental rule of construction that, in the exposition of statutes and constitutions, every word "is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it;" and there cannot be imposed upon the words "any recondite meaning or any extraordinary gloss." 1 Story, Const. § 451; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651. And it is the rule of reason as well as of technicality, that if the words so expounded be "plain and clear, and the sense distinct and perfect arising on them," interpretation has nothing to do. This can be asserted of § 2. Its words express no "double sense," and should be accepted in their single sense. It has not yet been erected into a legal maxim of constitutional construction, that words were made to conceal thoughts. Besides, when we depart from the words, ambiguity comes. There are as many solutions [399] as there are minds considering the section, and out of the conflict, I had almost said chaos, one despairs of finding an undisputed meaning. It may be said that the court, realizing this, by a declaration of conclusions only, has escaped the expression of antithetical views, and considered it better not to blaze the trails, though it was believed that they all led to the same destination.

If it be conceded, however, that to the words "concurrent power" may be ascribed the meaning for which the government contends, it certainly cannot be asserted that such is their ordinary meaning, and I might leave § 2, and the presumptions that support it, to resist the precedents adduced by the government. I go farther, however, and deny the precedents. The Federalist and certain cases are cited as such. There is ready explanation of both, and neither supports the government's contention. The dual system of government contemplated by the Union encountered controversies, fears, and jealousies that had to be settled or appeased to achieve union, and the Federalist, in good and timely sense, explained to what extent the "alienation of state sovereignty" would be necessary to "national sovereignty," constituted by the "consolidation of the states," and the powers that would be surrendered, and those that would be retained. And the explanation composed the controversies and allayed the fears of the states that their local powers of government would be displaced by the dominance of a centralized control. And this court, after union had been achieved, fulfilled the assurances of the explanation and adopted its distribution of powers, designating them as follows: (1) Powers that were exclusive in the states—reserved to them; (2) powers that were exclusive in Congress, conferred upon it; (3) powers that were not exclusive in either, and hence said to be "concurrent." And it was decided that, when exercised by Congress, they were supreme,—"the authority of the states then retires" to in-

action. [400] To understand them, it must be especially observed that their emphasis was, as the fundamental principle of the new government was, that it had no powers that were not conferred upon it, and that all other powers were reserved to the states. And this necessarily must not be absent from our minds, whether construing old provisions of the Constitution or amendments to it, or laws passed under the amendments.

The government nevertheless contends that the decisions (they need not be cited) constitute precedents for its construction of § 2 of the 18th Amendment. In other words, the government contends (or must so contend, for its reasoning must bear the test of the generalization) that it was decided that in all cases where the powers of Congress are concurrent with those of the states, they are supreme as incident to concurrence. The contention is not tenable; it overlooks the determining consideration. The powers of Congress were not decided to be supreme because they were concurrent with powers in the states, but because of their source, their source being the Constitution of the United States and the laws made in pursuance of the Constitution, as against the source of the powers of the states, their source being the Constitution and laws of the states, the Constitution and laws of the United States being made by article 6 the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." M'Culloch v. Maryland, 4 Wheat. 316, 426, 4 L. ed. 579, 606.

This has example in other powers of sovereignty that the states and Congress possess. In M'Culloch v. Maryland, at pages, 425, 430, Chief Justice Marshall said that the power of taxation retained by the states was not abridged by the granting of a similar power to the government of the Union, and that it was to be concurrently exercised; and these truths, it was added, had never been denied, and that there was no "clashing sovereignty" from incompatibility of right. And necessarily, a concurrence [401] of power in the states and Congress excludes the idea of supremacy in either. Therefore, neither principle nor precedent sustains the contention that § 2, by giving concurrent power to Congress and the states, gave Congress supreme power over the states. I repeat the declaration of Mr. Justice McLean: "A concurrent power excludes the idea of a dependent power."

It is, however, suggested (not by the government) that if Congress is not supreme upon the considerations urged by the government, it is made supreme by article 6 of the Constitution. The article is not applicable. It is not a declaration of the supremacy of one provision of the Constitution or laws of the United States over another, but of the supremacy of the Constitution and laws of the United States over the constitutions and laws of the states. Gibbons v. Ogden, 9 Wheat. 1, 209, 211, 6 L. ed. 23, 73, 74; 2 Story, Const. 5th ed. §§ 1838 et seq.

The 18th Amendment is part of the Constitution of the United States, therefore, as of high sanction as article 6. There seems to be a denial of this, based on article 5. That article provides that the amendments proposed by either of the ways there expressed "shall be valid to all intents and purposes as part of this Constitution." Some undefinable power is attributed to this in connection with article 6, as if article 5 limits in some way, or defeats an amendment to the Constitution inconsistent with a previously existing provision. Of course, the immediate answer is that an amendment is made to change a previously existing provision. What other purpose could an amendment have, and it would be nullified by the mythical power attributed to article 5, either alone or in conjunction with article 6. A contention that ascribes such power to those articles is untenable. The 18th Amendment is part of the Constitution, and as potent as any other part of it. Section 2, therefore, is a new provision of power,—power to the [402] states as well as to Congress,—and it is a contradiction to say that a power constitutionally concurrent in Congress and the states in some way becomes constitutionally subordinate in the states to Congress.

If it be said that the states got no power over prohibition that they did not have before, it cannot be said that it was not preserved to them by the Amendment, notwithstanding the policy of prohibition was made national; and besides, there was a gift of power to Congress that it did not have before,—a gift of a right to be exercised within state lines, but with the limitation or condition that the powers of the states should remain with the states, and be participated in by Congress only in concurrence with the states, and thereby preserved from abuse by either, or exercise to the detriment of prohibition.

There was, however, a power given to the states,—a power over importations. This power was subject to concurrence with Congress and had the same safeguards.

This construction of § 2 is enforced by other considerations. If the supremacy of Congress had been intended, it would have been directly declared, as in the 13th, 14th, and 15th Amendments. And such was the condition when the Amendment left the Senate. The precedent of preceding amendments was followed; there was a single declaration of jurisdiction in Congress.

Section 2 was amended in the House upon recommendation of the Judiciary Committee, and the provision giving concurrent power to Congress and to the states was necessarily estimated and intended to be additive of something. The government's contention makes it practically an addition of nothing but words, in fact denuding it of function, making it a gift of impotence, not one of power, to be exercised independently of Congress concurrently with Congress, or, indeed, at all. Of this there can be no contradiction, for what power is assigned to the states to legislate if the legislation be immediately [403] superseded,—indeed, as this case shows, is possibly forestalled and precluded by the power exercised in the Volstead Act? And meaningless is the difference the government suggests between concurrent power and concurrent legislation. A power is given to be exercised, and we are cast into helpless and groping bewilderment in trying to think of it apart from its exercise or the effect of its exercise. The addition to § 2 was a conscious adaptation of means to the purpose. It changed the relation between the states and the national government. The lines of exclusive power in one or the other were removed, and equality and community of powers substituted.

There is a suggestion, not made by the government, though assisting its contention, that § 2 was a gift of equal power to Congress and to the states; not, however, to be concurrently exercised, but to be separately exercised; conferred and to be exercised is the suggestion, to guard against neglect in either Congress or the states, the inactivity of the one being supplied by the activity of the other. But here again we encounter the word "concurrent" and its inexorable requirement of coincident or united action, not alternative or emergent action to safeguard against the delinquency of Congress or the states. If, however, such neglect was to be apprehended, it is strange that the framers of § 2, with the whole vocabulary of the language to draw upon, selected words that expressed the opposite of what the framers meant. In other words, expressed concurrent action instead of substitute action. I cannot assent. I believe they meant what they said, and that they must be taken at their word.

The government, with some consciousness that its contention requires indulgence or excuse, but, at any rate, in recognition of the insufficiency of its contention to satisfy the words of § 2, makes some concessions to the states. They are, however, not very tangible to measurement. They seem to yield a power of legislation to the states [404] and a power of jurisdiction to their courts, but almost at the very instant of concession, the power and jurisdiction are declared to be without effect.

I am not, therefore, disposed to regard the concessions seriously. They confuse, "make not light but darkness visible." Of what use is a concession of power to the states to enact laws which cannot be enforced? Of what use a concession of jurisdiction to the courts of the states when their judgments cannot be executed; indeed, the very law upon which it is exercised may be declared void in an antagonistic jurisdiction exerted in execution of an antagonistic power?[3] And equally worthless is the analogy that the government assays between the power of the national government and the power of the states to criminally punish violations of their respective sovereignties; as, for instance, in counterfeiting cases. In such cases the exercises of sovereignty are not in antagonism. Each is inherently possessed and independently exercised, and can be enforced no matter what the other sovereignty may do or abstain

[3] The government feels the inconsistency of its concessions and recessions. It asserts at one instant that the legislation of the states may be enforced in their courts, but in the next instant asserts that the conviction or acquittal of an offender there will not bar his prosecution in the Federal courts for the same act as a violation of the Federal law. From this situation the government hopes that there will be rescue by giving the 18th Amendment "such meaning that a prosecution in the courts of one government may be held to bar a prosecution for the same offense in the courts of the other." The government considers, however, the question is not now presented.

from doing. On the other hand, under the government's construction of § 2, the legislation of Congress is supreme and exclusive. Whatever the states may do is abortive of effect.

The government, seeking relief from the perturbation of mind and opinions produced by departure from the words of § 2, suggests a modification of its contention that, in case of conflict between state legislation and congressional [405] legislation, that of Congress would prevail, by intimating that if state legislation be more drastic than congressional legislation, it might prevail, and, in support of the suggestion, urges that § 1 is a command to prohibition, and that the purpose of § 2 is to enforce the command, and whatever legislation is the most prohibitive subserves best the command, displaces less restrictive legislation, and becomes paramount. If a state, therefore, should define an intoxicating beverage to be one that has less than ½ of 1 per cent of alcohol, it would supersede the Volstead Act, and a state might even keep its legislation supreme by forestalling congressional retaliation by prohibiting all artificial beverages of themselves innocuous, the prohibition being accessory to the main purpose of power; adducing Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Jacob Ruppert v. Caffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141. Of course, this concession of the more drastic legislation destroys all that is urged for congressional supremacy, for necessarily supremacy cannot be transferred from the states to Congress, or from Congress to the states, as the quantity of alcohol may vary in the prohibited beverage. Section 2 is not quite so flexible to management. I may say, however, that one of the conclusions of the court has limited the range of retaliations. It recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement," and declares "that those limits are not transcended by the provisions of the Volstead Act." Of course, necessarily, the same limitations apply to the power of the states as well.

From these premises the deduction seems inevitable that there must be united action between the states and Congress, or, at any rate, concordant and harmonious action; and will not such action promote better the purpose of the Amendment—will it not bring to the enforcement of prohibition the power of the states and the power of [406] Congress, make all the instrumentalities of the states, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its courts and officers, agencies of the enforcement? Will it not bring to the states as well, or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections? And it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the 18th Amendment regards and respects, and, by doing so, sacrifices nothing of the policy of prohibition.

It is, however, urged that to require such concurrence is to practically nullify the prohibition of the Amendment, for without legislation its prohibition would be ineffectual, and that it is impossible to secure the concurrence of Congress and the states in legislation. I cannot assent to the propositions. The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the Amendment—will impel its execution through Congress and the states. It may not be in such legislation as the Volstead Act, with its ½ of 1 per cent of alcohol, or in such legislation as some of the states have enacted with their 2.75 per cent of alcohol, but it will be in a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt. However, whatever the difficulties of achievement in view of the requirement of § 2, it may be answered as this court answered in Wedding v. Meyler, 192 U. S. 573, 48 L. ed. 570, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322. The conveniences and inconveniences of concurrent power by the Congress and the states are obvious and do not need to be stated. We have nothing to do with them when the lawmaking power has spoken.

I am, I think, therefore, justified in my dissent. I am alone in the grounds of it, but in the relief of the solitude of my position, I invoke the coincidence of my views with [407] those entertained by the minority membership of the Judiciary Committee of the House of Representatives, and expressed in its report upon the Volstead Act.

Mr. Justice **Clarke**, dissenting:

I concur in the first seven paragraphs and in the tenth paragraph of the an-

nounced "Conclusions" of the court, but I dissent from the remaining three paragraphs.

The eighth, ninth, and eleventh paragraphs, taken together, in effect declare the Volstead Act of October 28, 1919 [41 Stat. at L. 305, chap. 83], to be the supreme law of the land,—paramount to any state law with which it may conflict in any respect.

Such a result, in my judgment, can be arrived at only by reading out of the 2d section of the 18th Amendment to the Constitution the word "concurrent," as it is used in the grant to Congress and the several states of "concurrent power to enforce this article by appropriate legislation." This important word, which the record of Congress shows was introduced, with utmost deliberation, to give accurate expression to a very definite purpose, can be read out of the Constitution only by violating the sound and wise rule of constitutional construction early announced and often applied by this court,—that, in expounding the Constitution of the United States, no word in it can be rejected as superfluous or unmeaning, but effect must be given to every word, to the extent that this is reasonably possible.

This rule was first announced in 1824 in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; it was applied with emphasis in 1840 in Holmes v. Jennison, 14 Pet. 540, 570, 10 L. ed. 579, 594; and in the recent case of Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it is referred to as an elementary canon of constitutional construction.

The authoritative dictionaries, general and law, and the decided cases, agree, that "concurrent" means "joint and equal authority," "running together, having the same [408] authority," and therefore the grant of concurrent power to the Congress and the states should give to each equal—the same—authority to enforce the Amendment by appropriate legislation. But the conclusions of the court from which I dissent, by rendering the Volstead Act of Congress paramount to state laws, necessarily deprive the states of all power to enact legislation in conflict with it, and construe the Amendment precisely as if the word "concurrent" were not in it. The power of Congress is rendered as supreme as if the grant to enforce the Amendment had been to it alone, as it is in the 13th, 14th, and 15th Amendments, and as it was in one proposed form of the 18th Amendment which was rejected by Congress (Cong. Rec., July 30, 1917, p. 5548, and December 17, 1917, p. 469).

Such a construction should not be given the Amendment if it can reasonably be avoided, as it very clearly may be, I think, with a resultant giving of a large and beneficent effect to the grant, as it is written. Giving to the word "concurrent" its usual and authoritative meaning would result in congressional legislation under this grant of power being effective within the boundaries of any state only when concurred in by action of Congress and of such state, which, however, could readily be accomplished by the approval by either of the legislation of the other, or by the adoption of identical legislation by both. Such legislation would be concurrent in fact and in law, and could be enforced by the courts and officers of either the nation or the state, thereby insuring a more general and satisfactory observance of it than could possibly be obtained by the Federal authorities alone. It would, to a great extent, relieve Congress of the burden, and the general government of the odium to be derived from the antagonism which would certainly spring from enforcing within states Federal laws which must touch the daily life of the people very intimately and often very irritatingly.

[409] Such co-operation in legislation is not unfamiliar to our Constitution or in our practical experience.

By § 10 of art. 1 of the Constitution of the United States the states are deprived of power to do many things without the consent of Congress, and that consent has frequently been given, especially to contracts and agreements between states, which, without it, would be unconstitutional and void. The Wilson Act of August 8, 1890 [26 Stat. at L. 313, chap. 728, Comp. Stat. § 8738, 4 Fed. Stat. Anno. 2d ed. p. 585], the Webb-Kenyon Act of March 1, 1913 [37 Stat. at L. 699, chap. 90, Comp. Stat. § 8739, 4 Fed. Stat. Anno. 2d ed. p. 593], and the Reed Amendment of March 3, 1917 [39 Stat. at L. 1069, chap. 162, Comp. Stat. § 8739a, Fed. Stat. Anno. Supp. 1918, p. 394], are familiar examples of co-operative legislation on the subject of intoxicating liquors. Other instances could readily be supplied. When to this we add that the Volstead Act is obviously in very large part a compilation from the prohibition codes of various states, and is supposed to contain what is best in each of them, there is every reason to believe that, if concurrent legislation were insisted up-

on, the act would be promptly approved by the legislatures of many of the states, and would thereby become the concurrent law of the state and nation throughout a large part of the Union.

Under this construction, which I think should be given the Amendment, there would be large scope also for its operation even in states which might refuse to concur in congressional legislation for its enforcement. In my judgment the law in such a state would be as if no special grant of concurrent power for the enforcement of the first section had been made in the second section, but, nevertheless, the first section, prohibiting the manufacture, sale, transportation, importation, or exportation, of intoxicating liquors for beverage purposes, would be the supreme law of the land within the nonconcurring states, and they would be powerless to license, tax, or otherwise recognize as lawful anything violating that section, so that any state law in form attempting such recognition would be unconstitutional and void. Congress would have full power under the interstate commerce clause, [410] and it would be its duty, to prevent the movement of such liquor for beverage purposes into or out of such a state, and the plenary police power over the subject, so firmly established in the states before the 18th Amendment was adopted, would continue for use in the restricted field which the first section of the Amendment leaves unoccupied,—and the presumption must always be indulged that a state will observe, and not defy, the requirements of the national Constitution.

Doubtless such a construction as I am proposing would not satisfy the views of extreme advocates of prohibition or of its opponents; but, in my judgment, it is required by the salutary rule of constitutional construction referred to, the importance of which cannot be overstated. It is intended to prevent courts from rewriting the Constitution in a form which judges think it should have been written, instead of giving effect to the language actually used in it, and very certainly departures from it will return to plague the authors of them. It does not require the eye of a seer to see contention at the bar of this court against liberal, paramount, congressional definition of intoxicating liquors as strenuous and determined as that which we have witnessed over the strict definition of the Volstead Act.

With respect to the 11th conclusion of the court, it is enough to say that it approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered. This is deemed warranted, I suppose, as legislation appropriate to the enforcement of the first section, and precedent is found for it in prohibition legislation by states. But I cannot agree that the prohibition of the manufacture, sale, etc., of intoxicating liquors in the first section of the 18th Amendment gives that plenary power over the subject which the legislatures of the states derive from the people, or which may be derived from the war powers [411] of the Constitution. Believing, as I do, that the scope of the first section cannot constitutionally be enlarged by the language contained in the second section, I dissent from this conclusion of the court.

In the Slaughter House and other cases, this court was urged to give a construction to the 14th Amendment which would have radically changed the whole constitutional theory of the relations of our state and Federal governments by transferring to the general government that police power, through the exercise of which the people of the various states theretofore regulated their local affairs in conformity with the widely differing standards of life, of conduct, and of duty which must necessarily prevail in a country of so great extent as ours, with its varieties of climate, of industry, and of habits of the people. But this court, resisting the pressure of the passing hour, maintained the integrity of state control over local affairs to the extent that it had not been deliberately and clearly surrendered to the general government, in a number of decisions which came to command the confidence even of the generation active when they were rendered, and which have been regarded by our succeeding generation as sound and wise and highly fortunate for our country.

The cases now before us seem to me to again present questions of like character to, and of not less importance than, those which were presented in those great cases, and I regret profoundly that I cannot share in the disposition which the majority of my associates think should be made of them.

[412] F. S. ROYSTER GUANO COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF VIRGINIA.

(See S. C. Reporter's ed. 412-420.)

Constitutional law — equal protection of the laws — classification — income tax — discrimination.

The exemption of domestic corporations doing business outside the state, but none within the state, except the holding of stockholders' meetings, from the payment of any income tax, while domestic corporations doing business both within and without the state are required to pay a tax on income derived from their business transacted outside the state as well as upon the income derived from that done within the state, which is the result of Va. Laws 1916, chap. 472, read in connection with Laws 1916, chap. 495, amounts to an arbitrary discrimination forbidden by the equal protection of the laws clause of the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

[No. 165.]

Argued March 19 and 22, 1920. Decided June 7, 1920.

IN ERROR to the Supreme Court of Appeals of the Commonwealth of Virginia to review a judgment which in effect affirmed a judgment of the Corporation Court of the City of Norfolk, in that state, sustaining an income tax. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Note.—As to personal property having a situs for taxation elsewhere, as subject of taxation in the state of the owner's domicil—see notes to Com. v. West India Oil Ref. Co. 36 L.R.A.(N.S.) 295; New England Mut. L. Ins. Co. v. Board of Assessors, 26 L.R.A.(N.S.) 1120; Johnson County v. Hewitt, 14 L.R.A.(N.S.) 493; Monongahela River Consol. Coal & Coke Co. v. Board of Assessors, 2 L.R.A.(N.S.) 637; and Fidelity & C. Trust Co. v. Louisville, L.R.A.1918C, 124.

As to constitutionality of income tax —see notes to State ex rel. Bolens v. Frear, L.R.A.1915B, 569; and Alderman v. Wells, 27 L.R.A.(N.S.) 864.

As to the validity and construction of statutes taxing the income of a resident derived from foreign trade or investments—see note to Maguire v. Trefry, ante, 739.

Mr. **Cadwallader J. Collins** argued the cause and filed a brief for plaintiff in error.

Mr. **J. D. Hank, Jr.**, argued the cause, and, with Mr. John R. Saunders, Attorney General of Virginia, filed a brief for defendant in error:

The tax in question does not deny the plaintiff the equal protection of the laws.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Michigan C. R. Co. v. Powers, 201 U. S. 245, 293, 50 L. ed. 744, 761, 26 Sup. Ct. Rep. 459; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. ed. 1025, 38 Sup. Ct. Rep. 444; Keeney v. New York, 222 U. S. 525, 536, 56 L. ed. 299, 305, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; Northwestern Mut. L. Ins Co. v. State, 163 Wis. 491, 155 N. W. 609, 158 N. W. 328; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Northwestern Mut. L. Ins. Co. v. Wisconsin, 247 U. S. 132, 137, 62 L. ed. 1025, 1036, 38 Sup. Ct. Rep. 444; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 118, 61 L. ed. 176, 37 Sup. Ct. Rep. 58; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; King v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; Middleton v. Texas Power & Light Co. 249 U. S. 152, 63 L. ed. 527, 39 Sup. Ct. Rep. 227; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Home Ins. Co. v. New York, 134 U. S. 594, 606, 607, 33 L. ed. 1025, 1031, 1032, 10 Sup. Ct. Rep. 593.

Mr. Justice **Pitney** delivered the opinion of the court:

Plaintiff in error is a corporation created by and existing under the laws of Virginia, engaged in the business of manufacturing and selling commercial fertilizers. It operates a manufacturing plant in the county of Norfolk, in that state, and several plants in other states. From the operation of its plant in Virginia it made net profits during the year ending December 31, 1916, amounting in round figures to $260,000; and

ture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

We here are concerned with seven cases involving the validity of that Amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, 41 Stat. at L. 305, chap. 83, Acts 66th Cong., 1st Sess., which was adopted to enforce the Amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases—Nos. 29 and 30, Original—were brought in this court, and the others in district courts. Nos. 696, 752, 788, and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the bar and in [386] printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

1. The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each House which is required in proposing an amendment is a vote of two thirds of the members present,—assuming the presence of a quorum,—and not a vote of two thirds of the entire membership, present and absent. Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93.

3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. Hawke v. Smith, 253 U. S. 221, ante, 871, 40 Sup. Ct. Rep. 495, decided June 1, 1920.

4. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th Amendment, is within the power to amend reserved by article 5 of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every [387] legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

7. The second section of the Amendment—the one declaring "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title II. § 1), wherein liquors containing as much as ½ of 1

per cent of alcohol by volume, and fit for use for beverage [388] purposes, are treated as within that power. Jacob Ruppert v. Caffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141.

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, Original, the bills are dismissed.

In No. 794 the decree is reversed.

In Nos. 696, 752, 788, and 837 the decrees are affirmed.

Mr. Chief Justice White, concurring:

I profoundly regret that in a case of this magnitude, affecting, as it does, an amendment to the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions, without an exposition of the reasoning by which they have been reached.

I appreciate the difficulties which a solution of the cases involves and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion that the Amendment accomplishes and was intended to accomplish the purposes now attributed to it in the propositions concerning that subject which the court has just announced and in which I concur. Primarily in doing this I notice various contentions made concerning the proper construction of the provisions of the Amendment which I have been unable to accept, in order that by contrast they may add cogency to the statement of the understanding I have of the Amendment.

The Amendment, which is reproduced in the announcement for the court, contains three numbered paragraphs or sections, two of which only need be noticed. The first prohibits "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, [389] or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." The second is as follows: "Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

1. It is contended that the result of these provisions is to require concurrent action of Congress and the states in enforcing the prohibition of the first section, and hence that, in the absence of such concurrent action by Congress and the states, no enforcing legislation can exist, and therefore until this takes place the prohibition of the first section is a dead letter. But, in view of the manifest purpose of the first section to apply and make efficacious the prohibition, and of the second, to deal with the methods of carrying out that purpose, I cannot accept this interpretation, since it would result simply in declaring that the provisions of the second section, avowedly enacted to provide means for carrying out the first, must be so interpreted as to practically nullify the first.

2. It is said, conceding that the concurrent power given to Congress and to the states does not, as a prerequisite, exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the states, and makes each action effective; but, as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict, the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. The proposition is that the concurrent powers conferred [390] upon Congress and the states are not subject to conflict because their exertion is authorized within different areas; that is, by Congress within the field of Federal authority, and by the states within the sphere of state power; hence leaving the states free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress, the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at once exposed by directing attention to the fact that in a case where no state legislation was enacted, there would be no prohibition; thus again frustrating the first section by a construction affixed to the second. It is no answer to suggest that a regulation by Congress would in such event be operative in such a state, since the basis of the distinction upon

ture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

We here are concerned with seven cases involving the validity of that Amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, 41 Stat. at L. 305, chap. 83, Acts 66th Cong., 1st Sess., which was adopted to enforce the Amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases—Nos. 29 and 30, Original—were brought in this court, and the others in district courts. Nos. 696, 752, 788, and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the bar and in [386] printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

1. The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

2. The two-thirds vote in each House which is required in proposing an amendment is a vote of two thirds of the members present,—assuming the presence of a quorum,—and not a vote of two thirds of the entire membership, present and absent. Missouri P. R. Co. v. Kansas, 248 U. S. 276, 63 L. ed. 239, 2 A.L.R. 1589, 39 Sup. Ct. Rep. 93.

3. The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. Hawke v. Smith, 253 U. S. 221, ante, 871, 40 Sup. Ct. Rep. 495, decided June 1, 1920.

4. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th Amendment, is within the power to amend reserved by article 5 of the Constitution.

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

6. The first section of the Amendment —the one embodying the prohibition— is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every [387] legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

7. The second section of the Amendment—the one declaring "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title II. § 1), wherein liquors containing as much as ½ of 1

per cent of alcohol by volume, and fit for use for beverage [388] purposes, are treated as within that power. Jacob Ruppert v. Caffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141.

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, Original, the bills are dismissed.

In No. 794 the decree is reversed.

In Nos. 696, 752, 788, and 837 the decrees are affirmed.

Mr. Chief Justice White, concurring:

I profoundly regret that in a case of this magnitude, affecting, as it does, an amendment to the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions, without an exposition of the reasoning by which they have been reached.

I appreciate the difficulties which a solution of the cases involves and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion that the Amendment accomplishes and was intended to accomplish the purposes now attributed to it in the propositions concerning that subject which the court has just announced and in which I concur. Primarily in doing this I notice various contentions made concerning the proper construction of the provisions of the Amendment which I have been unable to accept, in order that by contrast they may add cogency to the statement of the understanding I have of the Amendment.

The Amendment, which is reproduced in the announcement for the court, contains three numbered paragraphs or sections, two of which only need be noticed. The first prohibits "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, [389] or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." The second is as follows: "Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

1. It is contended that the result of these provisions is to require concurrent action of Congress and the states in enforcing the prohibition of the first section, and hence that, in the absence of such concurrent action by Congress and the states, no enforcing legislation can exist, and therefore until this takes place the prohibition of the first section is a dead letter. But, in view of the manifest purpose of the first section to apply and make efficacious the prohibition, and of the second, to deal with the methods of carrying out that purpose, I cannot accept this interpretation, since it would result simply in declaring that the provisions of the second section, avowedly enacted to provide means for carrying out the first, must be so interpreted as to practically nullify the first.

2. It is said, conceding that the concurrent power given to Congress and to the states does not, as a prerequisite, exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the states, and makes each action effective; but, as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict, the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. The proposition is that the concurrent powers conferred [390] upon Congress and the states are not subject to conflict because their exertion is authorized within different areas; that is, by Congress within the field of Federal authority, and by the states within the sphere of state power; hence leaving the states free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress, the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at once exposed by directing attention to the fact that in a case where no state legislation was enacted, there would be no prohibition; thus again frustrating the first section by a construction affixed to the second. It is no answer to suggest that a regulation by Congress would in such event be operative in such a state, since the basis of the distinction upon

which the argument rests is that the concurrent power conferred upon Congress is confined to the area of its jurisdiction, and therefore is not operative within a state.

Comprehensively looking at all these contentions, the confusion and contradiction to which they lead, serve, in my judgment, to make it certain that it cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true, indeed, that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the amendment dealt, and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent.

In the first place, it is indisputable, as I have stated, [391] that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative.

Mark the relation of the text to this view, since the power which it gives to state and nation is not to construct or perfect or cause the Amendment to be completely operative, but, as already made completely operative, to enforce it. Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement.

I take it that if the second section of the article did not exist, no one would gainsay that the first section, in and of itself, granted the power and imposed the duty upon Congress to legislate to the end that, by definition and sanction, the Amendment would become fully operative. This being [392] true, it would follow, if the contentions under consideration were sustained, that the second section gave the states the power to nullify the first section, since a refusal of a state to define and sanction would again result in no amendment to be enforced in such refusing state.

Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the Amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the states power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the states to give effect to, that is, to carry out or enforce, the Amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment.

Mr. Justice **McReynolds**, concurring:

I do not dissent from the disposition of these causes as ordered by the court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the 18th Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive.

Mr. Justice **McKenna**, dissenting:

This case is concerned with the 18th Amendment of the Constitution of the United States, its validity and construction. In order to have it and its scope in attention, I quote it:

[**393**] "Section 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to .enforce this article by appropriate legislation."

The court, in applying it, has dismissed certain of the bills, reversed the decree in one, and affirmed the decrees in four others. I am unable to agree with the judgment reversing No. 794 and affirming Nos. 752, 696, 788, and 837.

I am, however, at a loss how, or to what extent, to express the grounds for this action. The court declares conclusions only, without giving any reasons for them. The instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase its lucidity. However, reasons for the conclusions have been omitted, and my comment upon them may come from a misunderstanding of them, their present import and ultimate purpose and force.

There are, however, clear declarations that the 18th Amendment is part of the Constitution of the United States, made so in observance of the prescribed constitutional procedure, and has become part of the Constitution of the United States, to be respected and given effect like other provisions of that instrument. With these conclusions I agree.

Conclusions 4, 5, and 6 seem to assert the undisputed. I neither assent to them nor dissent from them except so far as I shall presently express.

Conclusion 7 seems an unnecessary declaration. It may, however, be considered as supplementary to some other declaration. My only comment is that I know of no [**394**] intimation in the case that § 2, in conferring concurrent power on Congress and the states to enforce the prohibition of the 1st section, conferred a power to defeat or obstruct prohibition. Of course, the power was conferred as a means to enforce the prohibition, and was made concurrent to engage the resources and instrumentalities of the nation and the states. The power was conferred for use, not for abuse.

Conclusions 8 and 9, as I view them, are complements of each other, and express, with a certain verbal detail, the power of Congress and the states over the liquor traffic, using the word in its comprehensive sense as including the production of liquor, its transportation within the states, its exportation from them, and its importation into them. In a word, give power over the liquor business from producer to consumer, prescribe the quality of latter's beverage. Certain determining elements are expressed. It is said that the words "concurrent power" of § 2 do not mean joint power in Congress and the states, nor the approval by the states of congressional legislation, nor its dependency upon state action or inaction.

I cannot confidently measure the force of the declarations or the deductions that are or can be made from them. They seem to be regarded as sufficient to impel the conclusion that the Volstead Act is legal legislation and operative throughout the United States. But are there no opposing considerations, no conditions upon its operation? And what of conflicts, and there are conflicts, and more there may be, between it and state legislation? The conclusions of the court do not answer the questions and yet they are submitted for decision; and their importance appeals for judgment upon them. It is to be remembered states are litigants as well as private citizens; the former presenting the rights of the states, the latter seeking protection against the asserted aggression of the act in controversy. And there is opposing state legislation; why not a decision [**395**] upon it? Is it on account of the nature of the actions being civil and in equity, the proper forum being a criminal court investigating a criminal charge? There should be some way to avert the necessity or odium of either.

I cannot pause to enumerate the contentions in the case. Some of them present a question of joint action in Congress and the states, either collectively with all or severally with each. Others assert spheres of the powers, involving no collision, it is said, the powers of Congress and the states being supreme and exclusive within the spheres of their

serve a complaint stating the charges "in that respect," and give opportunity to the accused to show why an order should not issue directing him to "cease and desist from the violation of the law so charged in said complaint." If, after a hearing, the Commission shall deem "the method of competition in question is prohibited by this act," it shall issue an order requiring the accused "to cease and desist from using such method of competition."

If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words, there is no foundation for an order to desist,—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court.

The words "unfair method of competition" are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was [428] certainly not intended to fetter free and fair competition as commonly understood and practised by honorable opponents in trade.

Count one alleges, in effect, that Warren, Jones, & Gratz are engaged in selling either directly to the trade or through their corespondents, cotton ties produced by the Carnegie Steel Company, and also jute bagging manufactured by the American Manufacturing Company. That P. P. Williams & Company of Vicksburg, and C. O. Elmer of New Orleans, are the selling and distributing agents of Warren, Jones, & Gratz, and as such sell and distribute their ties and bagging to jobbers and dealers, who resell them to retailers, ginners, and farmers. That, with the purpose and effect of discouraging and stifling competition in the sale of such bagging, all the respondents, for more than a year, have refused to sell any of such ties unless the purchaser would buy from them a corresponding amount of bagging,—six yards with as many ties.

The complaint contains no intimation that Warren, Jones, & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging, or had ability, purpose, or intent to acquire one. So far as appears, acting independently, they undertook to sell their lawfully acquired property in the ordinary course, without deception, misrepresentation, or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

Nothing is alleged which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint. All question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion [429] in respect of his own business methods must be preserved. United States v. Colgate & Co. 250 U. S. 300, 63 L. ed. 992, 7 A.L.R. 443, 39 Sup. Ct. Rep. 465; United States v. A. Schrader's Son (March 1, 1920) 252 U. S. 85, ante, 471, 40 Sup. Ct. Rep. 251.

The first count of the complaint fails to show any unfair method of competition practised by respondents, and the order based thereon was improvident.

The judgment of the court below is affirmed.

Mr. Justice **Pitney** concurs in the result.

Mr. Justice **Brandeis** dissenting, with whom Mr. Justice **Clarke** concurs:

First. The court disposes of the case on a question of pleading. This, under the circumstances, is contrary to established practice. The circumstances are these:

The pleading held defective is not one in this suit. It is the pleading by which was originated the proceeding before the Federal Trade Commission, an administrative tribunal, whose order this suit was brought to set aside. No suggestion was made in the proceeding before the Commission that the complaint was defective. No such objection was raised in this suit in the court below. It was not made here by counsel. The objection is taken now for the first time and by the court.

This suit, begun in the circuit court of appeals for the second circuit, was brought to set aside an order of the Fed-

eral Trade Commission. Before the latter the matter involved was thoroughly tried on the merits. There was a complaint and answers. Thirty-five witnesses were examined and cross-examined. A report of proposed findings as to facts was submitted by the examiner and exceptions were filed thereto. Then, the case was heard before the Commission, which made a finding of facts, stated its conclusions as to the law, and ultimately issued the order in question. The proceedings occupied more [480] than sixteen months. The report of them fills four hundred pages of the printed record. In my opinion it is our duty to determine whether the facts found by the Commission are sufficient in law to support the order; and, also, if it is questioned, whether the evidence was sufficient to support the findings of fact.

Second. If the sufficiency of the complaint is held to be open for consideration here, we should, in my opinion, hold it to be sufficient. The complaint was filed under § 5 of the Federal Trade Commission Act [38 Stat. at L. 719, chap. 311, Comp. Stat. 8836e, 4 Fed. Stat. Anno. 2d ed. p. 577], which declares unlawful "unfair methods of competition in commerce;" empowers the Commission to prevent their use; and directs it to issue and serve "a complaint stating its charges in that respect" whenever it has reason to believe that a concern "has been or is using" such methods. The function of the complaint is solely to advise the respondent of the charges made, so that he may have due notice and full opportunity for a hearing thereon. It does not purport to set out the elements of a crime, like an indictment or information, nor the elements of a cause of action, like a declaration at law or a bill in equity. All that is requisite in a complaint before the Commission is that there be a plain statement of the thing claimed to be wrong, so that the respondent may be put upon his defense. The practice of the Federal Trade Commission in this respect, as in many others, is modeled on that which has been pursued by the Interstate Commerce Commission for a generation, and has been sanctioned by this as well as the lower Federal courts. United States Leather Co. v. Southern R. Co. 21 Inters. Com. Rep. 323, 324; Clinton Sugar Refin. Co. v. Chicago & N. W. R. Co. 28 Inters. Com. Rep. 364, 367; Stuarts Draft Mill. Co. v. Southern R. Co. 31 Inters. Com. Rep. 623, 624; New York C. & H. R. R. Co. v. Interstate Commerce Commission, 168 Fed. 131, 138, 139; Dickerson v. Louisville & N. R. Co. 187 Fed. 874, 878; Texas & P. R. Co. v. Interstate Commerce Commission, 162 [481] U. S. 197, 215, 40 L. ed. 940, 946, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 149, 51 L. ed. 995, 998, 27 Sup. Ct. Rep. 648.

The complaint here under consideration stated clearly that an unfair method of competition had been used by respondents, and specified what it was; namely, refusing to sell cotton ties unless the customer would purchase with each six ties also six yards of bagging. The complaint did not set out the circumstances which rendered this tying of bagging to ties an unfair practice. But this was not necessary. The complaint was similar in form to those filed with the Interstate Commerce Commission on complaints to enforce the prohibition of "unjust and unreasonable charges" or of "undue or unreasonable preference or advantage" which the Act to Regulate Commerce imposes. It is unnecessary to set forth why the rate specified was unjust, or why the preference specified is undue or unreasonable, because these are matters not of law, but of fact, to be established by the evidence. Pennsylvania Co. v. United States, 236 U. S. 351, 361, 59 L. ed. 616, 623, P.U.R.1915B, 261, 35 Sup. Ct. Rep. 370. So far as appears, neither this nor any other court has ever held that an order entered by the Interstate Commerce Commission may be set aside as void, because the complaint by which the proceeding was initiated, failed to set forth the reasons why the rate or the practice complained of was unjust or unreasonable; and I cannot see why a different rule should be applied to orders of the Federal Trade Commission, issued under § 5.[1]

[1] See Report Senate Committee on Interstate Commerce, June 13, 1914, Sixty-third Congress, Second Session, No. 597, p. 13: It is believed that the term "unfair competition" has a legal significance which can be enforced by the Commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.

[432] In considering whether the complaint is sufficient, it is necessary to bear in mind the nature of the proceeding under review. The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, nor with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public. And what it is brought to prevent is not the commission of *acts* of unfair competition, but the pursuit of unfair *methods*. Furthermore, the order is not self-executory. Standing alone it is only informative and advisory. The Commission cannot enforce it. If not acquiesced in by the respondents, the Commission may apply to the circuit court of appeals to enforce it. But the Commission need not take such action; and it did not do so in respect to the order here in question. Respondents may, if they see fit, become the actors and ask to have the order set aside. That is what was done in the case at bar.

The proceeding is thus a novelty. It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which, for more than a generation, they had vainly attempted to remedy by the ordinary processes of law. It was believed that widespread and growing concentration in industry and commerce restrained trade, and that monopolies were acquiring increasing control of business. Legislation designed to arrest the movement and to secure disintegration of existing combinations had been enacted by some of the states as early as 1889. In 1890 Congress passed the Sherman Law. [Act of July 2, 1890, 26 Stat. at L. 209, chap. 647, Comp. Stat. § 8820, 9 Fed. Stat. Anno. 2d ed. p. 644.] It was followed by much [433] legislation in the states[2] and many official investigations. Between 1906 and 1913 reports were made by the Federal Bureau of Corporations of its investigations into the petroleum industry, the tobacco industry, the steel industry, and the farm implement industry. A special committee of Congress investigated the affairs of the United States Steel Corporation. And in 1911 this court rendered its decision in Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, and in American Tobacco Co. v. United States, 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632. The conviction became general in America, that the legislation of the past had been largely ineffective. There was general agreement that further legislation was desirable. But there was a clear division of opinion as to what its character should be. Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and be regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies, and particularly through regulating competition. The latter view prevailed in the Sixty-third Congress.[3] [434] The Clayton Act (October 15, 1914, chap. 323, 38 Stat. at L. 730, Comp. Stat. § 8835a, 9 Fed. Stat. Anno. 2d ed. p. 730) was framed largely with a view to making more effective the remedies given by the Sherman Law. The Federal Trade Commission Act (September 26, 1914, chap. 311, 38 Stat. at L. 717, Comp. Stat. § 8836a, 4 Fed. Stat. Anno. 2d ed. p. 575) created an administrative tribunal, largely with a view to regulating competition.

[2] See Laws on Trusts and Monopolies. Compiled under direction of the Clerk of the House Committee on the Judiciary, Sixty-third Congress, by Nathan B. Williams. Revised January 10, 1914; also Trust Laws and Unfair Competition, (Federal) Bureau of Corporations. March 15, 1915.

[3] See Report of Senate Committee on Interstate Commerce, June 13, 1914, Sixty-third Congress, Second Session, No. 597, p. 10, reporting the bill:

"Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution, and that it should be so recognized, and declared to be vested with a public interest, and, as such, regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. . . .

"The commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea."

Many of the duties imposed upon the Trade Commission had been theretofore performed by the Bureau of Corporations. That which was in essence new legislation was the power conferred by § 5. The belief was widespread that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort to unfair practices.[4] As Standard Oil rebates led to the creation of the Interstate Commerce Commission,[5] other unfair methods of competition, which the investigations of the trusts had laid bare, led to the creation of the Federal Trade Commission. It was hoped that as the former had substantially eliminated rebates, the latter might put an end to all other unfair trade practices; and that it might prove possible thereby to preserve the competitive system. It was a new experiment on old lines; and the machinery employed was substantially similar.

In undertaking to regulate competition through the Trade Commission, Congress (besides resorting to administrative, as distinguished from judicial, machinery) departed in two important respects from the methods and measures theretofore applied in dealing with trusts and restraints of trade.

(1) Instead of attempting to inflict punishment for having done prohibited acts, instead of enjoining the [435] continuance of prohibited combinations, and compelling distintegration of those formed in violation of law, the act undertook to preserve competition through supervisory action of the Commission. The potency of accomplished facts had already been demonstrated. The task of the Commission was to protect competitive business from *further* inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury, because in its nature it would tend to aid or develop into a restraint of trade, the Commission was directed to intervene, before any act should be done or condition arise violative of the Anti-trust Act. And it should do this by filing a complaint with a view to a thorough investigation; and, if need be, the issue of an order. Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure.[6]

[436] (2) Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission.[7] Experience with exist-

[4] See "Unfair Competition," by William S. Stevens, Political Science Quarterly (1914), p. 283; "The Morals of Monopoly and Competition" (1916), by H. B. Reed.

[5] See Railway Problems, by William Z. Ripley (1907), p. X.

[6] Senator Cummins, chairman of the committee which reported the bill, said (Cong. Rec., vol. 51, p. 11,455):

"Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the Anti-trust Law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the Anti-trust Law. The purpose of this bill in this section and in other sections which I hope will be added to it is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.

"We knew little of these things in 1890. The commerce of the United States has largely developed in the last twenty-five years. The modern methods of carrying on business have been discovered and put into operation in the last quarter of a century; and as we have gone on under the Anti-trust Law and under the decisions of the court in their effort to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited, whether, in and of themselves, they restrain trade or commerce, or not. We have discovered that their tendency is evil; we have discovered that the end which is inevitably reached through these methods is an end which is destructive of fair commerce between the states. It is these considerations which, in my judgment, have made it wise, if not necessary, to supplement the Anti-trust Law by additional legislation, not in antagonism to the Anti-trust Law, but in harmony with the Anti-trust Law, to more effectively put into the industrial life of America the principle of the Anti-trust Law, which is fair, reasonable competition, independence to the individual, and disassociation among the corporations. . . ."

[7] See Report Senate Committee on Interstate Commerce, June 13, 1914, Sixty-third Congress, Second Session, No. 597, p. 13: "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce, and to forbid their continuance, or whether it would, by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better. . . ." See also "Unfair Competition," by W. H. S. Stevens (University of Chicago Press, 1916), pp. 1, 2. For laws prohibiting specific acts of unfair competition, see "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (March 15, 1915), pp. 184, 199.

ing laws had taught that definition, being necessarily rigid, would prove embarrassing, and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable.[8] [437] Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition, must necessarily soon prove incomplete, as, with new conditions constantly arising, novel unfair methods would be devised and developed. In leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of century earlier, when, by the Act to Regulate Commerce, it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage.[9] See Pennsylvania Co. v. United States, 236 U. S. 361, 59 L. ed. 623, P.U.R.1915B, 261, 35 Sup. Ct. Rep. 370; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 220, 40 L. ed. 940, 947, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666. Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts; and it declared that findings of fact so made (if duly supported by evidence) were to be taken as final. The question whether the method of competition pursued could, on those facts, reasonably be held by the Commission to constitute an unfair method of competition, being a question of law, was necessarily left open to review by the court. Compare Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Third. Such a question of law is presented to us for decision; and it is this: Can the refusal by a manufacturer to sell his product to a jobber or retailer except upon condition that the purchaser will buy from him also his [438] trade requirements in another article or articles reasonably be found by the Commission to be an unfair method of competition under the circumstances set forth in the findings of fact? If we were called upon to consider the sufficiency of the complaint, and that merely, the question for our decision would be, whether the particular practice could, under any circumstances, reasonably be deemed an unfair method of competition. But as this suit to set aside the order of the Commission brings before us its findings of fact, we must determine whether these are sufficient to support their conclusion of law that the practice constituted

"under the circumstances therein set forth, unfair methods of competition in interstate commerce against other manufacturers, dealers, and distributers in the material known as sugar-bag cloth, and against manufacturers, dealers, and distributers of the bagging known as rewoven bagging and secondhand bagging, in violation of" [the statute].

It is obvious that the imposition of such a condition is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear. Under the usual conditions of competitive trade the practice might be wholly unobjectionable. But the history of combinations has shown that what one may do with impunity may have intolerable results when done by several in co-operation. Similarly, what approximately equal individual traders may do in honorable rivalry may result in grave injustice and public injury if done by a great corporation in a particular field of business which it is able to dominate. In other words, a method of competition fair among equals may be very unfair if applied where there is inequality of re-

[8] Report of (Federal) Bureau of Corporations on the International Harvester Company, March 3, 1913, p. 30: "In discussing the competitive methods of the company it should be recognized that some practices which might be regarded with indifference if there were a number of competitors of substantially equal size and power may become objectionable when one competitor far outranks not only its nearest rival, but practically all rivals combined, as is true of the International Harvester Company, so far as several of its most important lines are concerned."

The Australian Industries Preservation Act, 1908–1910, expressly declares that "unfair competition means competition which is unfair in the circumstances." "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (March 15, 1915), pp. 552, 747.

[9] See note 1, supra.

sources.[10] Without providing for those cases where the method of competition here involved would be unobjectionable, [439] Massachusetts legislated against the practice, as early as 1901, by a statute (chap. 478) of general application. Its highest court, in applying the law which it held to be constitutional, described the prohibited method as "unfair competition." Com. v. Strauss, 188 Mass. 229, 74 N. E. 308, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842. Compare People v. Duke, 19 Misc. 292, 44 N. Y. Supp. 336. The [Federal] Bureau of Corporations held the practice, which it described as "full-line forcing," to be highly reprehensible.[11] Congress, by § 3 of the Clayton Act, specifically prohibited the practice in a limited field under certain circumstances. An injunction against the practice has been included in several decrees in favor of the government, entered in cases under the Sherman Law.[12] In the decree by which the American Tobacco Company was disintegrated pursuant to the mandate of this court, each of the fourteen companies was enjoined from "refusing to sell to any jobber any brand of any tobacco product manufactured by it, except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it. . . ." United States v. American Tobacco Co. 191 Fed. 371, 429. The practice here in question is merely one form of the so-called "tying clauses" or "conditional requirements" which had been declared in a discerning study of the whole subject to be "perhaps the most interesting of any of the methods of unfair competition."[13]

The following facts found by the Commission, and which the circuit court of appeals held were supported by sufficient evidence, show that the conditions in the [440] cotton tie and bagging trade were, in 1918, such that the Federal Trade Commission could reasonably find that the tying clause here in question was an unfair method of competition: Cotton, America's chief staple, is marketed in bales. To bale cotton, steel ties and jute bagging are essential. The Carnegie Steel Company, a subsidiary of the United States Steel Corporation, manufactures so large a proportion of all such steel ties that it dominates the cotton tie situation in the United States, and is able to fix and control the price of such ties throughout the country. The American Manufacturing Company manufactures about 45 per cent of all bagging used for cotton baling; one other company about 20 per cent; and the remaining 35 per cent is made up of secondhand bagging and a material called sugar-bag cloth. Warren, Jones, & Gratz, of St. Louis, are the Carnegie Company's sole agents for selling and distributing steel ties. They are also the American Manufacturing Company's sole agents for selling and distributing jute bagging in the cotton-growing section west of the Mississippi. By virtue of their selling agency for the Carnegie Company, Warren, Jones, & Gratz held a dominating and controlling position in the sale and distribution of cotton ties in the entire cotton-growing section of the country, and thereby it was in a position to force would-be purchasers of ties to also buy from them bagging manufactured by the American Manufacturing Company. A great many merchants, jobbers, and dealers in bagging and ties throughout the cotton-growing states were many times unable to procure ties from any other firm than Warren, Jones, & Gratz. In many instances Warren, Jones, & Gratz refused to sell ties unless the purchaser would also buy from them a corresponding amount of bagging, and such purchasers were oftentimes compelled to buy from them bagging manufactured by the American Manufacturing Company in order to procure a sufficient supply of steel ties.

[441] These are conditions closely resembling those under which "full-line forcing," "exclusive-dealing requirements," or "shutting off materials, supplies, or machines from competitors,"—well-known methods of competition,—have been held to be unfair when practised by concerns holding a preponderant position in the trade.[14]

Fourth. The circuit court of appeals set aside the order of the Commission solely on the ground that it was without authority to determine the merits

[10] See "The Morals of Monopoly and Competition," by H. B. Reed (1916), pp. 120–122.

[11] Report of the (Federal) Bureau of Corporations on the International Harvester Company (March 3, 1913), p. 308.

[12] See "Unfair Methods of Competition and their Prevention," by W. H. S. Stevens, Annals American Academy of Political and Social Science (1916), pp. 42, 43. "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (March 15, 1915), pp. 484–486, 493.

[13] "Unfair Competition," by W. H. S. Stevens (1916), p. 54.

[14] See "Trust Laws and Unfair Competition," (Federal) Bureau of Corporations (March 15, 1915), pp. 319–323, 328.

of specific individual grievances, and that the evidence did not support its finding that Warren, Jones, & Gratz had "adopted and practised the policy of refusing to sell steel ties to those merchants and dealers who wished to buy from them unless such merchants and dealers would also buy from them a corresponding amount of jute bagging."

The reason assigned by the circuit court of appeals for so holding was that the evidence failed to show that the practice complained of (although acted on in individual cases by respondents) had become their "general practice." But the power of the Trade Commission to prohibit an unfair method of competition found to have been used is not limited to cases where the practice had become general. What § 5 declares unlawful is not unfair competition. That had been unlawful before. What that section made unlawful were "unfair *methods* of competition;" that is, the method or means by which an unfair end might be accomplished. The Commission was directed to act if it had reason to believe that an "unfair method of competition in commerce has been or is being used." The purpose of Congress was to prevent any unfair method which may have been used by any concern in competition from becoming its general practice. It was only by stopping its use before it became a general practice [442] that the apprehended effect of an unfair method in suppressing competition by destroying rivals could be averted. As the circuit court of appeals found that the evidence was sufficient to support the facts set forth above, and since on those facts the Commission could reasonably hold that the method of competition in question was unfair under the circumstances, it had power under the act to issue the order complained of.

In my opinion the judgment of the Circuit Court of Appeals should be reversed.

JOSEPH E. NADEAU, Martha Nadeau, His Wife, et al., Plaintiffs in Err.,
v.
UNION PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 442–446.)

Public lands — railway right of way — Indian lands.

1. Congress could and did, by the Act of July 1, 1862, granting a railway right of way over the public lands, include lands forming a part of the Pottawatomie Indian Reservation not actually allotted in severalty when the grant took effect, notwithstanding the agreement on the part of the United States in the Treaty of June 5 and 17, 1846, to grant to such Indians possession and title to a specified district, and to guarantee full and complete possession thereof as their land and home forever, and the stipulation in the Treaty of November 5, 1861, that land within the reservation designated in the earlier treaty should be allotted thereafter in severalty to tribe members.

[For other cases, see Public Lands, I. c, 2, d; I. c, 2, k, in Digest Sup. Ct. 1908.]

Adverse possession — public lands — railway right of way.

2. Adverse possession could confer no rights to lands within the Pottawatomie Indian Reservation granted by the Act of July 1, 1862, to a railway company for a right of way.

[For other cases, see Adverse Possession, I. h, in Digest Sup. Ct. 1908.]

[No. 119.]

Argued January 9 and 12, 1920. Decided June 7, 1920.

IN ERROR to the District Court of the United States for the District of Kansas to review a judgment in favor of plaintiff in an action in ejectment. Affirmed.

The facts are stated in the opinion.

Mr. **A. E. Crane** argued the cause, and, with Messrs. Z. T. Hazen and J. B. Larimer, filed a brief for plaintiffs in error:

The lands involved in this action were not public lands on July 1, 1862, nor were they public lands on July 2, 1864, within the meaning of the acts of Congress of those dates.

Missouri, K. & T. R. Co. v. United States, 235 U. S. 40, 59 L. ed. 120, 35 Sup. Ct. Rep. 6; Union P. R. Co. v. Harris, 215 U. S. 386, 54 L. ed. 246, 30 Sup. Ct. Rep. 138; Kindred v. Union P. R. Co. 225 U. S. 595, 56 L. ed. 1220, 32 Sup. Ct. Rep. 780; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Wilcox v. Jackson, 13 Pet. 513, 10 L. ed. 271; Bardon v. Northern P. R. Co. 145 U. S. 543, 36 L. ed. 810, 12 Sup. Ct. Rep. 856.

The Acts of Congress of July 1, 1862, and July 2, 1864, were not intended to grant a right of way across the lands

---

Note.—As to land grants to railroads, generally—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

On adverse possession of railroad right of way—see note to Dulin v. Ohio River R. Co. L.R.A.1916B, 657.

involved in this action under the term "public lands."

Bardon v. Northern P. R. Co. 145 U. S. 543, 36 L. ed. 810, 12 Sup. Ct. Rep. 856; Wilcox v. Jackson, 13 Pet. 513, 10 L. ed. 271; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Missouri, K. & T. R. Co. v. United States, 235 U. S. 37, 40, 59 L. ed. 116, 120, 35 Sup. Ct. Rep. 6; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 742, 23 L. ed. 638; Northern P. R. Co. v. Musser-Sauntry Land, Logging & Min. Co. 168 U. S. 610, 42 L. ed. 598, 18 Sup. Ct. Rep. 205.

The lands in question became individual property at the date of signing the Treaty of November 15, 1861, and when the patents were issued they took effect as of that time.

Francis v. Francis, 203 U. S. 238, 239, 51 L. ed. 165, 167, 27 Sup. Ct. Rep. 129; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Stockton v. Williams, 1 Dougl. (Mich.) 546; McAffee v. Lynch, 26 Miss. 259; Best v. Polk, 18 Wall. 118, 21 L. ed. 808; Francis v. Francis, 136 Mich. 288, 99 N. W. 15; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Hartman v. Warren, 22 C. C. A. 30, 40 U. S. App. 245, 76 Fed. 157; Meehan v. Jones, 70 Fed. 453.

The Treaty of November 15, 1861, gave to the allottees the equitable title in the lands allotted to them from the date of signing the treaty, and the legal title by their complying with its provisions.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Stockton v. Williams, 1 Dougl. (Mich.) 546; McAffee v. Lynch, 26 Miss. 259; Smith v. Bonifer, 132 Fed. 889; Lownsberry v. Rakestraw, 14 Kan. 151; Oliver v. Forbes, 17 Kan. 130; Francis v. Francis, 203 U. S. 238, 51 L. ed. 166, 27 Sup. Ct. Rep. 129; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Clark v. Lord, 20 Kan. 390; Briggs v. McClain, 43 Kan. 653, 23 Pac. 1045.

Such treaty gave the prospective allottees at the time of signing it a vested interest in the allotments, and no acts of theirs estop them from claiming that the right of way should not exceed 100 feet in width.

Briggs v. McClain, 43 Kan. 653, 23 Pac. 1045; Clark v. Lord, 20 Kan. 390; Francis v. Francis, 203 U. S. 239, 51 L. ed. 167, 27 Sup. Ct. Rep. 129; Bird v. Terry, 129 Fed. 472; Oliver v. Forbes, 17 Kan. 130; Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584.

The Indian title has not been extinguished to the lands involved in this action, and the title therefore remains in the grantee of the Indians.

Atlantic & P. R. Co. v. Mingus, 165 U. S. 437–440, 41 L. ed. 779–781, 17 Sup. Ct. Rep. 348; Missouri, K. & T. R. Co. v. United States, 235 U. S. 39, 40, 59 L. ed. 120, 121, 35 Sup. Ct. Rep. 6; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 743, 23 L. ed. 638; Missouri, K. & T. R. Co. v. United States, 235 U. S. 41, 59 L. ed. 121, 35 Sup. Ct. Rep. 6; Doe ex dem. Mann v. Wilson, 23 How. 463, 16 L. ed. 586.

The Indians and their grantees were the first to commence proceedings to acquire title to the allotments, and have the best title thereto.

Union P. R. Co. v. Harris, 215 U. S. 386, 54 L. ed. 246, 30 Sup. Ct. Rep. 138; Northern P. R. Co. v. Musser-Sauntry Land, Logging & Min. Co. 168 U. S. 610, 42 L. ed. 599, 18 Sup. Ct. Rep. 205; Missouri, K. & T. R. Co. v. United States, 235 U. S. 37, 59 L. ed. 116, 35 Sup. Ct. Rep. 6; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634; Shepley v. Cowan, 91 U. S. 331, 23 L. ed. 424; United States v. Detroit Timber & Lumber Co. 200 U. S. 334, 335, 50 L. ed. 504, 505, 26 Sup. Ct. Rep. 282; Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 433, 36 L. ed. 764, 12 Sup. Ct. Rep. 877, 17 Mor. Min. Rep. 488.

The railroad company accepted its grant of right of way under the Act of Congress of 1862, with full knowledge of the provisions of the treaty between the United States and the Pottawatomie Trie of Indians, and was bound thereby.

33 Cyc. 86, 87; West Virginia & P. R. Co. v. Harrison County Ct. 47 W. Va. 273, 34 S. E. 789; 1 Elliott, Railroads, ¶¶ 116, 117; Atlantic & P. R. Co. v. Mingus, 165 U. S. 439, 440, 41 L. ed. 780, 781, 17 Sup. Ct. Rep. 348; Missouri, K. & T. R. Co. v. United States, 235 U. S. 41, 59 L. ed. 121, 35 Sup. Ct. Rep. 6.

The railroad company lost all of its rights as against parties acquiring an interest by its failure to file its map of general location with the Department of the Interior within two years from July 1, 1862.

Smith County v. Labore, 37 Kan. 483, 15 Pac. 577; Pugh v. Reat, 107 Ill. 440; Sheets v. Selden, 2 Wall. 177, 17 L. ed. 822.

An amendment to an act of Congress gives to the portions retained no further force and effect than existed at the time of the amendment.

Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453.

By the Act of Congress of July 2, 1864, the railroad company was for the first time given the right to build its road on the north side of the Kansas river, and its rights to a right of way date from that time.

Union P. R. Co. v. Harris, 215 U. S. 389, 54 L. ed. 248, 30 Sup. Ct. Rep. 138.

The grant of the right of way of the defendant did not take effect until July 2, 1864.

Ibid.

Indian treaties made prior to March 2, 1871, were valid and binding between the United States and the Indian tribe.

Uhlig v. Garrison, 2 Dak. 98, 2 N. W. 253; Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Re Race Horse, 70 Fed. 607.

The decision of the court below disregards the treaty of 1861, and the provisions of the two acts of Congress, and cannot be sustained.

Missouri, K. & T. R. Co. v. United States, 235 U. S. 40, 59 L. ed. 121, 35 Sup. Ct. Rep. 6; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 742, 23 L. ed. 638; Uhlig v. Garrison, 2 Dak. 98, 2 N. W. 253; Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Atlantic & P. R. Co. v. Mingus, 165 U. S. 439, 440, 41 L. ed. 780, 781, 17 Sup. Ct. Rep. 348.

Why should there be a difference between a party who has filed a pre-emption entry on the public domain and an Indian allottee under the Treaty of 1861?

Union P. R. Co. v. Harris, 215 U. S. 386, 54 L. ed. 246, 30 Sup. Ct. Rep. 138, 76 Kan. 255, 91 Pac. 68.

Messrs. **R. W. Blair** and **N. H. Loomis** argued the cause, and, with Mr. H. W. Clark, filed a brief for defendant in error:

The lands involved in this action were public lands within the meaning of the Pacific Railroad Acts of July 1, 1862, and July 2, 1864.

Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Grinter v. Kansas, P. R. Co. 23 Kan. 642; State v. Horn, 34 Kan. 556, 9 Pac. 208; State v. Horn, 35 Kan. 717, 12 Pac. 148; Union P. R. Co. v. Kindred, 43 Kan. 134, 23 Pac. 112; Veale v. Maynes, 23 Kan. 1; United States v. Chase, 245 U. S. 89, 62 L. ed. 168, 38 Sup. Ct. Rep. 24; United States v. Rowell, 243 U. S. 464, 61 L. ed. 848, 37 Sup. Ct. Rep. 425; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634.

The Acts of Congress of July 1, 1862, and July 2, 1864, were intended to, and did, grant a right of way across the lands involved in this action, they being a part of the Pottawatomie Indian Reservation.

Grinter v. Kansas P. R. Co. 23 Kan. 642; Union P. R. Co. v. Kindred, 43 Kan. 134, 23 Pac. 112; Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780.

The Treaty of 1861 gave the Pottawatomie Indians the usual Indian title, and after allotment gave the allottees only the right to individual occupancy of the tract assigned.

Veale v. Maynes, 23 Kan. 1; Grinter v. Kansas P. R. Co. 23 Kan. 642; Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; United States v. Chase, 245 U. S. 89, 62 L. ed. 168, 38 Sup. Ct. Rep. 24.

The grant of the right of way was in præsenti, and when the railroad was finally located or constructed, the title to the right of way related back to the date of the grant, July 1, 1862.

St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Stuart v. Union P. R. Co. 227 U. S. 342, 57 L. ed. 535, 33 Sup. Ct. Rep. 338.

Congress conclusively determined that a right of way 400 feet wide was necessary for a public work of such importance.

Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 194; Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671.

The construction of the railroad fixed the boundary of the right of way.

Northern P. R. Co. v. Smith, supra; Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568; Stalker v. Oregon Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636; Stuart v. Union P. R. Co. 227 U. S. 342, 57 L. ed. 535, 33 Sup. Ct. Rep. 338; Barlow v. Northern P. R. Co. 240 U. S. 484, 60 L. ed. 760, 36 Sup. Ct. Rep. 456.

Plaintiffs in error purchased the land adjoining the railroad more than twenty-five years after it was constructed, and they cannot claim that they purchased without notice of the claim of the railroad company to own the right of way.

Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct Rep. 794; St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578; Stuart v. Union P. R. Co. 227 U. S. 342, 57 L. ed. 535, 33 Sup. Ct. Rep. 338;

Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756.

Even if the government should have extinguished the Indian title and paid the Indians for the right of way, grantees of the Indians cannot complain.

Kindred v. Union P. R. Co. 225 U. S. 582, 56 L. ed. 1216, 32 Sup. Ct. Rep. 780; Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756.

The railroad was built under the supervision of, and approved and accepted by, the government, and an individual cannot question the proceedings.

Van Dyke v. Arizona Eastern R. Co. 248 U. S. 49, 63 L. ed. 119, 39 Sup. Ct. Rep. 29; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756.

The right of way was granted by the Act of July 1, 1862, as amended by the Act of July 2, 1864.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Stuart v. Union P. R. Co. 227 U. S. 342, 57 L. ed. 535, 33 Sup. Ct. Rep. 338.

Having been granted a right of way, the company retains title to it, whether the full width is occupied by it or not.

Stuart v. Union P. R. Co. supra.

By building its road in accordance with the requirement of the act, the grant became final, and not even the government could deprive the company of its title after it had performed its part.

Sinking Fund Case, 99 U. S. 700, 25 L. ed. 496; United States v. Union P. R. Co. 160 U. S. 1–33, 40 L. ed. 319–330, 16 Sup. Ct. Rep. 190; Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756.

The Act of June 24, 1912, entitled "An Act to Legalize Certain Conveyances Heretofore Made by the Union Pacific Railroad Company," is not retroactive.

Union P. R. Co. v. Laramie Stock Yards Co. 231 U. S. 190, 58 L. ed. 179, 34 Sup. Ct. Rep. 101; Union P. R. Co. v. Sides, 231 U. S. 213, 58 L. ed. 189, 34 Sup. Ct. Rep. 107; Union P. R. Co. v. Snow, 231 U. S. 204, 58 L. ed. 184, 34 Sup. Ct. Rep. 104.

Mr. Justice **McReynolds** delivered the opinion of the court:

Defendant in error brought this action to obtain possession of certain lands, formerly part of the Pottawatomie Indian Reservation and now in Pottawatomie county, Kansas, which lie in the margins of the 400-foot strip claimed by it as legal successor to the original grantee. Counsel for plaintiffs in error well say, but one question is presented for our determination: "Were the lands involved in this action 'public lands' within the meaning of the acts of Congress dated July 1, 1862 [12 Stat. at L. 489, chap. 120], and July 2, 1864 [13 Stat. at L. 356, chap. 216], granting a right of way to the Leavenworth, Pawnee, & Western Railroad Company and its successors?"

The cause was tried by the court below upon pleadings and Agreed Statement of Facts; and a memorandum states the reasons for judgment favorable to the railroad.

By the Act of July 1, 1862 (12 Stat. at L. 489, chap. 120), Congress granted a right of way "200 feet in width on each side of said railroad, where it may pass over the public lands" (Stuart v. Union P. R. Co. 227 U. S. 342, 345, 57 L. ed. 535, 540, 33 Sup. Ct. Rep. 338), and declared: "The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act, and required for the said [444] right of way and grants hereinafter made." Some amendments added by the Act of July 3, 1866 (14 Stat. at L. 79, chap. 159), are not specially important here.

It is said that under Treaties of June 5 and 17, 1846, and November 5, 1861, with the United States (9 Stat. at L. 853; 12 Stat. at L. 1191), the Pottawatomie Reservation was no part of the "public lands;" moreover, that Congress lacked power to grant rights therein to a railroad company.

In Kindred v. Union P. R. Co. 225 U. S. 582, 596, 56 L. ed. 1216, 1220, 32 Sup. Ct. Rep. 780, lands in the Delaware Diminished Indian Reservation—east of the Pottawatomies—were declared "public lands" within the intendment of the right-of-way clause, Act of 1862, although then actually occupied by individual members of the Tribe, under assignments executed as provided by treaty. That case renders clear the definite purpose of Congress to treat Indian Reservations, subject to its control, as public lands within the right-of-way provision. This provision is not to be regarded as bestowing bounty on the railroad; it stands upon a somewhat different footing from private grants, and should receive liberal construction favorable to the purposes in view. United States v.

Denver & R. G. R. Co. 150 U. S. 1, 8, 14, 37 L. ed. 975, 977, 979, 14 Sup. Ct. Rep. 11.

Whether Congress had power to make grants in respect of the lands here involved must be determined upon a consideration of their history.

November 14, 1862, the railroad company accepted the Act of 1862, and during 1865 and 1866 duly constructed its road through the Pottawatomie Reservation: so far as appears, without protest or objection.

By the Treaty of 1846,—article 4,—the United States agreed to grant to the Pottawatomie Indians possession and title to a district 30 miles square, on the Kansas river, and to guarantee full and complete possession thereof "as their land and home forever." 9 Stat. at L. 854.

In 1861 the same parties entered into another treaty [445] which stipulated —articles 1 and 2—that land within the Reservation designated by the Treaty of 1846 should be allotted thereafter in severalty to tribal members who had acquired customs of the whites, and desired separate tracts; that the United States agent should take an accurate census showing those desiring to hold in severalty and those desiring to hold in common, and "thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs," specified amounts of land, "to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey." "When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs."

Article 5, Treaty of 1861, offered certain privileges to the railroad company which were never accepted; the road was not constructed as provided by the treaty, but under the act of Congress.

Subsequent to July 1, 1862, a census was duly taken; commissioners, appointed January 16, 1863, made allotments, and in November, 1863, submitted their report. The Secretary of the Interior, December 12, 1864, approved allotments for the lands now involved to tribal members having improvements thereon before the Treaty of 1861, and who had continued to live there. Patents thereto issued at different dates, the earliest being June 14, 1867, without expressly reserving a right of way for the railroad. Plaintiffs in error claim through mesne conveyances from those who received such allotments and patents.

It seems plain that, at least, until actually allotted in [446] severalty (1864), the lands were but part of the domain held by the Tribe under the ordinary Indian claim,—the right of possession and occupancy,—with fee in the United States. Beecher v. Wetherby, 95 U. S. 517, 525, 24 L. ed. 440, 441. The power of Congress, as guardian for the Indians, to legislate in respect of such lands, is settled. Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 653, 34 L. ed. 295, 300, 10 Sup. Ct. Rep. 965; United States v. Rowell, 243 U. S. 464, 468, 61 L. ed. 848, 851, 37 Sup. Ct. Rep. 425; United States v. Chase, 245 U. S. 89, 62 L. ed. 168, 38 Sup. Ct. Rep. 24.

The grant of the right of way in 1862 was present and absolute, and, upon identification of the route, took effect as of the date of the act. All who thereafter acquired public lands took subject to such granted right. St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 430, 26 L. ed. 578, 579. Although parties to the Treaty of 1861 contemplated future allotments, it made none. No individual title to any portion of the land arose until allotted, and none was allotted until after 1862.

Any claim by plaintiffs in error based upon adverse occupancy or possession is precluded by Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794; Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671; Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302; Kindred v. Union P. R. Co. 225 U. S. 597, 56 L. ed. 1220, 32 Sup. Ct. Rep. 780.

We find no error in the judgment below, and it is affirmed.

Mr. Justice **Clarke** dissents.

Mr. Justice **Holmes**, Mr. Justice **Pitney**, and Mr. Justice **Brandeis** did not participate in consideration or decision of this case.

---

[447] GEORGE C. BEIDLER, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 447-454.)

Patents — construction — state of art.

1. The claim of invention embodied in patent No. 1,057,397, for an improvement in photographing and developing apparatus.

must, in view of the prior art, be restricted to the disclosed construction and operation of the mechanism for carrying the exposed section of film through the developing and other solutions or liquids after it leaves the camera.

[For other cases, see Patents, XI. in Digest Sup. Ct. 1908.]

Patents — description — disclosure of invention.

2. A practical and useful invention is not disclosed by patent No. 1,057,397, for an improvement in photographing and developing apparatus, where the short reciprocating movement of the film-carrying rack, without which the machine confessedly cannot be successfully operated, is not disclosed in the patent, as it must be under U. S. Rev. Stat. § 4888, in order to render it valid.

[For other cases, see Patents, VII. b, in Digest Sup. Ct. 1908.]

[No. 260.]

Argued April 27 and 28, 1920. Decided June 7, 1920.

APPEAL from the Court of Claims to review a judgment dismissing the petition in a suit against the United States to recover damages for the alleged infringement of a patent. Affirmed.

See same case below, 53 Ct. Cl. 636.

The facts are stated in the opinion.

Mr. **Charles J. Williamson** argued the cause, and, with Mr. Frank S. Appleman, filed a brief for appellant.

Mr. **Daniel L. Morris** argued the cause, and, with Assistant Attorney General Davis and Mr. Edward G. Curtis, filed a brief for appellee.

Mr. Justice **Clarke** delivered the opinion of the court:

This is a suit to recover damages for the infringement of five of the forty-one claims of letters patent No. 1,057,397, applied for March 23, 1907, and granted on March 25, 1913.

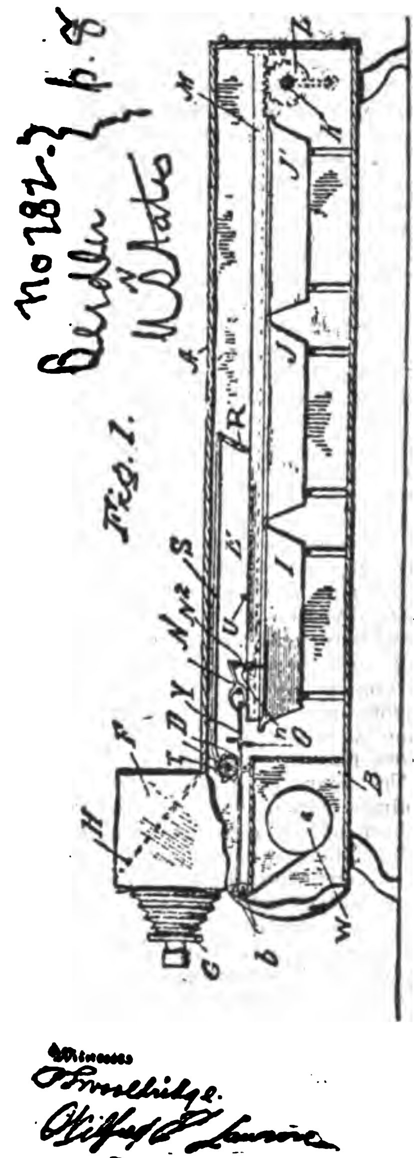
The specification describes the claimed invention as an Improvement in Photographing and Developing Apparatus, and as designed primarily for reproducing writings, drawings, pictures, or the like, —"novel means being also provided to convey the sensitized film through a series of receptacles containing suitable developing and fixing fluids, or through suitable baths, according to requirements."

[**448**] The patent is for a machine made up of a combination of elements all of which were old, to produce a result which was old, but by a method of co-ordination and operation which it is claimed is new and useful. The invention is declared in the specification to consist in "the details of construction and in the arrangement and combination of the parts," as "set forth and claimed" by the inventor.

Figure 1 of the drawings, forming a part of the specification, will aid in explaining the construction and function of the invention as claimed, and in determining the character and extent of the disclosures of the patent.

[**449**]

1,057,397.



Note.—As to construction of patents —see notes to Dashiell v. Grosvenor, 40 L. ed. U. S. 1025, and Evans v. Eaton, 4 L. ed. U. S. 433.

The described mode of operation is substantially as follows:

W is a roll of sensitized paper or film, placed immediately below the exposure chamber F of a camera, with its sensitized surface uppermost to receive the desired image, reflected from the mirror H. This film is fed into the chamber between the rolls b, and thence along the floor thereof to the rollers D, where it emerges from the camera and is seized by "clips" or clamps N. These clamps are supported and carried by a rack M, and may be moved to and fro (reciprocated) by turning the pinions L on the shaft K, by means of a crank.

I, J, and J′ are shallow pans or "tanks" in which suitable "developing," "fixing," and "washing" solutions or fluids are placed, and the whole of the construction to the right of the camera, as we face the print, is inclosed in a light-proof case E, referred to in the patent sometimes as a "compartment" and sometimes as a "chamber." The rack M, and the clamps which hold and support the film, move above the tanks and necessarily above the level of the liquid within them. By turning the pinion L, the rack M is moved outwardly away from the camera, and the clamps draw the film after them until the required length is attained, when it is severed from the roll by a manually operated cutter, O. When the film is thus cut to the [450] desired length, obviously only the free end will fall to the surface of the solution in the tank I, and by continuing the outward movement of the rack M, the specification declares, "the film is carried through the several tanks." The "clips" or clamps are set and released automatically, and at the limit of the outward movement the film is released and falls into the tank J′. By reversing the turning of the pinions L the rack and clamps are returned inwardly to the camera, so that the operation just detailed may be repeated.

The court of claims carries into its findings of fact fourteen patents as illustrative of the prior art, and with this exhibit before us we fully agree with that court that the claim of invention of appellant must be restricted to the disclosed construction and operation of the mechanism for carrying the exposed section of film "through the developing and other solutions or liquids" after it leaves the camera.

In the description of the operation of the machine as we have just given it, there is no provision other than gravity for causing the free end of the film, when it is cut from the roll, to sink into the developing fluid, and the other end of it is held between the clamps, above the surface of the fluid, as it is drawn along from one tank to another. The court of claims found that under such conditions of operation all of the film would not be submerged with sufficient rapidity and uniformity to secure a proper and useful development of the image, and this conclusion is not seriously disputed. But the appellant contends that the required submergence may be obtained by oscillating the rack and clamps (and thereby the film) back and forth within the range of a few inches when the film is over the first tank I, with the result that the free end of the film, first sinking into the fluid, is turned under and over and the exposed side of it wholly submerged and thereby developed.

[451] In reply to this it is contended by the government that the disclosures of the patent do not contain any suggestion of a short, reciprocating movement of the rack, such as is thus relied upon, and that the drawings provide for a construction of the machine which would be inoperative if such movement were resorted to.

Upon this subject the finding of the court of claims is, that the machine can be rendered operative only "by resorting to a new oscillating mode of operation evolved by the claimant for submerging and developing the film," and that such mode of operation is not disclosed in the patent. On the contrary, it is especially found that:

"By the method contemplated and disclosed in the patent, the film with the exposed side up, held at one end by the clamps attached to the rack M and moving in a plane above the pans containing the developing and fixing fluids, is intended, by the outward movement of the rack, to be drawn successively through the developing and fixing fluids, the rack moving in one direction only through its entire course, the end of the film next the knife and away from the clamps falling, when severed by the knife, on the surface of the developer in the first pan and submerging by gravity."

Treating this finding by the court as an interpretation of the patent, and therefore as a conclusion of law, and subject to review, we are brought to the question whether the short, reciprocating movement of the rack, confessedly necessary to successful operation of the machine, is disclosed in the patent, as it must be to render it valid. Rev. Stat.

§ 4888, Comp. Stat. § 9432, 7 Fed. Stat. 2d ed. p. 145.

The only description of the mode of operation of appellant's machine, and the statute requires that this must be the best mode known to the patentee (Rev. Stat. § 4888), is found in the specification, and is as follows:

"In order to draw the film through the several compartments, I provide a mechanism consisting of a shaft K, [452] having toothed wheels L, which mesh with a rack M, the said rack being suitably guided in the compartment E, and being alternately reciprocated through the rotation of the shaft K, in opposite directions. When the shaft is turned to the right, the said rack will be projected from the compartment until the inner end thereof is nearly above the shaft K. When the shaft is rotated in the opposite direction, the said rack will, of course, be retracted and thrust into the compartment. It is the purpose of this invention that the said rack shall carry clips N, which are designed to clamp on the edges of the film Y, and as the said rack is moved outwardly, the film is carried through the several tanks as indicated. The clips are automatically released and set through the contact with trips within the casing in the path of travel of said clips."

We agree with the court of claims that this language describes a movement of the rack M, carrying the clamps N in one direction only—outwardly and progressively away from the camera—until the movement is completed and the film is released, and that the reciprocating movement referred to in the patent is the return of the mechanism for clamping and carrying the film to its initial position for the purpose of repeating the operation.

There is nothing in the disclosure or in the claims to suggest the arresting of the outward movement of the clamps as soon as the film is severed from the roll, and the initiating thereupon of a short oscillating movement of the mechanism to and fro, until the film shall have been immersed in the developing liquid sufficiently to bring out the image photographed. It is very clear that no such operation can be derived from the disclosure in the patent, and we agree with the further finding of the court of claims that, in order to permit "this new oscillating mode of operation evolved by the claimant," material changes would be required in the construction of the machine, from that disclosed in the description and drawings.

[453] The statutes, which are the source of all patent rights, provide that a valid patent may be granted for a new and useful machine, or for a new and useful improvement thereof (Rev. Stat. § 4886), but they require that every applicant for a patent shall file a written description of the manner and process of making and using his invention, "in such full, clear, concise, and exact" terms as to enable any person skilled in the art to which it relates to make and construct it, and in case of a machine the description must disclose the best mode in which the inventor has contemplated the application of his discovery. Rev. Stat. § 4888.

Ever since Grant v. Raymond, 6 Pet. 218, 247, 8 L. ed. 376, 386, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent shall expire. The source of the power to grant patents, and the consideration for granting them, is the advantage which the public will derive from them, especially after the expiration of the patent monopoly, when the discoveries embodied in them shall become a part of the public stock of knowledge.

The application of these requirements of the law to our conclusion that the only form of construction of the machine and the only method of operation of it which are disclosed in the patent would not produce a sufficiently uniform and rapid development of the film to render it useful must result in the approval of the judgment of the court of claims, that the patent is invalid and void, for the reason that it fails to disclose a practical and useful invention.

This result renders it unnecessary to consider the further conclusion of the court below that the use by the [454] United States of photo-copying machines of a type known as "Photostat," manufactured and sold under warrant of letters patent issued to D. S. Green, No. 1,001,019, would not have constituted an infringement of appellant's patent had it proved to be valid. However, for its bearing on future possible controversy we add that the construction and relation of the two appliances, designed to produce the same result or product, have been fully considered, and that we agree with the conclusion of the Court of Claims.

Affirmed

KWOCK JAN FAT, Petitioner,
v.
EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco.

(See S. C. Reporter's ed. 454-465.)

Habeas corpus — petition — construction — subsequent proceedings.

1. Allegations in the petition for habeas corpus sued out by a Chinese applicant for admission to the United States may be interpreted in the light of the immigration records filed with the petition and with respondent's return, where, with such petition, were filed all the testimony and papers pertaining to the proceedings prior to the appeal to the Secretary of Labor, and there was a prayer that when the copy of the proceedings thereafter had should become available, they might be made a part of the petition.

[For other cases, see Habeas Corpus, IV. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — Chinese exclusion.

2. A decision of the Secretary of Labor denying the admission into the United States of a Chinaman claiming American citizenship was rendered without the fair hearing which due process of law demands, where the only form in which the recognition of the Chinese applicant by three white witnesses called by him and examined in his presence by the government inspector was placed before the Secretary was a letter which the acting commissioner of immigration, who did not himself render the decision, sent to applicant's counsel and placed with the record, and where apparently there was no record of such recognition before the immigration commissioner when he decided the case.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Appeal — judgment — remanding for trial.

3. The denial of a fair hearing to a Chinese applicant who was refused admission into the United States requires that a judgment of the Federal circuit court of appeals which affirmed a judgment of the district court, sustaining a demurrer to the petition of such Chinaman for habeas corpus, be reversed and the cause remanded to the district court for trial of the merits.

[For other cases, see Appeal and Error, IX. i, in Digest Sup. Ct. 1908.]

[No. 313.]

Argued and submitted April 30, 1920. Decided June 7, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of California, First Division, sustaining a demurrer to a petition for habeas corpus. Reversed; writ of habeas corpus to issue.

See same case below, 166 C. C. A. 493, 255 Fed. 323.

The facts are stated in the opinion.

Mr. **Jackson H. Ralston** argued the cause, and, with Mr. Dion R. Holm, filed a brief for petitioner:

A fair hearing must be granted by the immigration authorities.

Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31; Low Wah Suey v. Backus, 225 U. S. 461, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359.

The hearing accorded Kwock Jan Fat was inadequate and manifestly unfair.

Chew Hoy Quong v. White, 162 C. C. A. 103, 249 Fed. 869; Re Can Pon, 93 C. C. A. 635, 168 Fed. 479; Ex parte Chooey De Ying, 214 Fed. 873.

Assistant Attorney General **Stewart** and Mr. **Harry S. Ridgely** submitted the cause for respondent:

These executive hearings are conducted in a summary manner, and it would destroy the effectiveness and the purpose of such hearings if omission to record a fact or facts considered, which record is subsequently supplied as in the case at bar, could be made the basis of securing a judicial hearing on habeas corpus.

Ex parte Wong Yee Toon, 227 Fed. 249; Re Jem Yuen, 188 Fed. 353.

It can hardly be contended that petitioner, in a hearing by the immigration officials, is entitled to see the official report of the inspector, and even though, as petitioner contends, it should have been withdrawn from the record, if not to be considered as evidence, its reten-

---

Note.—On habeas corpus in Federal courts—see notes to Tinsley v. Anderson, 43 L. ed. U. S. 92, and Re Reinitz, 4 L.R.A. 236.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

tion merely made out a case of incompetent evidence.

Ex parte Pouliot, 196 Fed. 442; Low Wah Suey v. Backus, 225 U. S. 460, 471, 56 L. ed. 1165, 1168, 32 Sup. Ct. Rep. 734; Tang Tun v. Edsell, 223 U. S. 673, 677, 679, 56 L. ed. 606, 608, 609, 32 Sup. Ct. Rep. 359; Streeter v. Sanitary Dist. 66 C. C. A. 190, 133 Fed. 124.

The mere fact that the findings and other papers were prepared by the inspector does not make the decision any the less that of the commissioner, for the findings and papers are so signed.

Tang Tun v. Edsell, 223 U. S. 673, 682, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 359.

Petitioner has been accorded every opportunity to submit all the evidence he desired. His case has received the careful consideration of the immigration officials, and the claims of unfair hearing are not well founded.

Ex parte Garcia, 205 Fed. 53.

Mr. Justice **Clarke** delivered the opinion of the court:

In January, 1915, Kwock Jan Fat, the petitioner, intending to leave the United States on a temporary visit to China, filed with the commissioner of immigration for the port of San Francisco an application, as provided for by law, for a "preinvestigation of his claimed status as an American citizen by birth."

He claimed that he was eighteen years of age, was born at Monterey, California, was the son of Kwock Tuck Lee, then deceased, who was born in America of Chinese parents and had resided at Monterey for many years; that his mother at the time was living at Monterey; and that there were five children in the family,—three girls and two boys.

The Department of Immigration made an elaborate investigation of the case presented by this application, taking the testimony of the petitioner, of his mother, of his brother and one sister, and of three white men, of whom the inspector said in his report: "The three white witnesses are representative men of this town and would have no motive in misstating the facts." As a result of this inquiry, the original of his application, approved, signed, and sealed by the commissioner of immigration at San Francisco, was delivered to the petitioner, and [456] with this evidence in his possession, which he was amply justified in believing would secure his readmission into the United States when he returned, he went to China.

The record shows that during his absence anonymous information reached the San Francisco Immigration Office (in which there had been a change of officials) to the effect that petitioner's name was not Kwock Jan Fat, as claimed, but was Leu Suey Chong, and that he had entered the United States in 1909 as the minor son of a merchant, Lew Wing Tong, of Oakland, California. Thereupon an investigation was conducted, chiefly by the comparison of photographs, for the purpose of determining the truthfulness of this anonymous suggestion, with the result that when the petitioner returned to San Francisco he was not allowed to land, and a few days thereafter was definitely denied entry to the country by the commissioner of immigration. Thereafter, this decision of the commissioner was reconsidered, the case reopened, and testimony for and against the petitioner was taken, but the commissioner adhered to his denial of admission. The only reason given for the decision was "the claimed American citizenship is not established to my satisfaction."

Thereupon an appeal was taken to the Secretary of Labor, who approved the order appealed from.

Promptly thereafter the petition for a writ of habeas corpus in this case was filed, which is based chiefly upon two claims, viz.:

(1) That the examining inspector reported to the commissioner of immigration as evidence, statements purporting to have been obtained from witnesses under promise that their names would not be disclosed, and that when demand was made for the names of such witnesses for purpose of reply, it was refused, with the result that petitioner did not have a fair hearing.

(2) That the examining inspector did not record an [457] important part of the testimony of three white witnesses called by petitioner, with the result that it was not before the commissioner of immigration or the Secretary of Labor when they decided adversely to him, and thereby he was arbitrarily denied a fair hearing.

A general demurrer to this petition was sustained by the district court, and on appeal to the circuit court of appeals that judgment was affirmed. The case is here on writ of certiorari.

With the petition were filed all of the testimony and papers pertaining to the proceedings prior to the appeal to the Secretary of Labor, and since it is prayed that when the copy of the proceedings thereafter had shall become available,

The described mode of operation is substantially as follows:

W is a roll of sensitized paper or film, placed immediately below the exposure chamber F of a camera, with its sensitized surface uppermost to receive the desired image, reflected from the mirror H. This film is fed into the chamber between the rolls b, and thence along the floor thereof to the rollers D, where it emerges from the camera and is seized by "clips" or clamps N. These clamps are supported and carried by a rack M, and may be moved to and fro (reciprocated) by turning the pinions L on the shaft K, by means of a crank.

I, J, and J' are shallow pans or "tanks" in which suitable "developing," "fixing," and "washing" solutions or fluids are placed, and the whole of the construction to the right of the camera, as we face the print, is inclosed in a light-proof case E, referred to in the patent sometimes as a "compartment" and sometimes as a "chamber." The rack M, and the clamps which hold and support the film, move above the tanks and necessarily above the level of the liquid within them. By turning the pinion L, the rack M is moved outwardly away from the camera, and the clamps draw the film after them until the required length is attained, when it is severed from the roll by a manually operated cutter, O. When the film is thus cut to the [450] desired length, obviously only the free end will fall to the surface of the solution in the tank I, and by continuing the outward movement of the rack M, the specification declares, "the film is carried through the several tanks." The "clips" or clamps are set and released automatically, and at the limit of the outward movement the film is released and falls into the tank J'. By reversing the turning of the pinions L the rack and clamps are returned inwardly to the camera, so that the operation just detailed may be repeated.

The court of claims carries into its findings of fact fourteen patents as illustrative of the prior art, and with this exhibit before us we fully agree with that court that the claim of invention of appellant must be restricted to the disclosed construction and operation of the mechanism for carrying the exposed section of film "through the developing and other solutions or liquids" after it leaves the camera.

In the description of the operation of the machine as we have just given it, there is no provision other than gravity for causing the free end of the film, when it is cut from the roll, to sink into the developing fluid, and the other end of it is held between the clamps, above the surface of the fluid, as it is drawn along from one tank to another. The court of claims found that under such conditions of operation all of the film would not be submerged with sufficient rapidity and uniformity to secure a proper and useful development of the image, and this conclusion is not seriously disputed. But the appellant contends that the required submergence may be obtained by oscillating the rack and clamps (and thereby the film) back and forth within the range of a few inches when the film is over the first tank I, with the result that the free end of the film, first sinking into the fluid, is turned under and over and the exposed side of it wholly submerged and thereby developed.

[451] In reply to this it is contended by the government that the disclosures of the patent do not contain any suggestion of a short, reciprocating movement of the rack, such as is thus relied upon, and that the drawings provide for a construction of the machine which would be inoperative if such movement were resorted to.

Upon this subject the finding of the court of claims is, that the machine can be rendered operative only "by resorting to a new oscillating mode of operation evolved by the claimant for submerging and developing the film," and that such mode of operation is not disclosed in the patent. On the contrary, it is especially found that:

"By the method contemplated and disclosed in the patent, the film with the exposed side up, held at one end by the clamps attached to the rack M and moving in a plane above the pans containing the developing and fixing fluids, is intended, by the outward movement of the rack, to be drawn successively through the developing and fixing fluids, the rack moving in one direction only through its entire course, the end of the film next the knife and away from the clamps falling, when severed by the knife, on the surface of the developer in the first pan and submerging by gravity."

Treating this finding by the court as an interpretation of the patent, and therefore as a conclusion of law, and subject to review, we are brought to the question whether the short, reciprocating movement of the rack, confessedly necessary to successful operation of the machine, is disclosed in the patent, as it must be to render it valid. Rev. Stat.

§ 4888, Comp. Stat. § 9432, 7 Fed. Stat. 2d ed. p. 145.

The only description of the mode of operation of appellant's machine, and the statute requires that this must be the best mode known to the patentee (Rev. Stat. § 4888), is found in the specification, and is as follows:

"In order to draw the film through the several compartments, I provide a mechanism consisting of a shaft K, [452] having toothed wheels L, which mesh with a rack M, the said rack being suitably guided in the compartment E, and being alternately reciprocated through the rotation of the shaft K, in opposite directions. When the shaft is turned to the right, the said rack will be projected from the compartment until the inner end thereof is nearly above the shaft K. When the shaft is rotated in the opposite direction, the said rack will, of course, be retracted and thrust into the compartment. It is the purpose of this invention that the said rack shall carry clips N, which are designed to clamp on the edges of the film Y, and as the said rack is moved outwardly, the film is carried through the several tanks as indicated. The clips are automatically released and set through the contact with trips within the casing in the path of travel of said clips."

We agree with the court of claims that this language describes a movement of the rack M, carrying the clamps N in one direction only—outwardly and progressively away from the camera—until the movement is completed and the film is released, and that the reciprocating movement referred to in the patent is the return of the mechanism for clamping and carrying the film to its initial position for the purpose of repeating the operation.

There is nothing in the disclosure or in the claims to suggest the arresting of the outward movement of the clamps as soon as the film is severed from the roll, and the initiating thereupon of a short oscillating movement of the mechanism to and fro, until the film shall have been immersed in the developing liquid sufficiently to bring out the image photographed. It is very clear that no such operation can be derived from the disclosure in the patent, and we agree with the further finding of the court of claims that, in order to permit "this new oscillating mode of operation evolved by the claimant," material changes would be required in the construction of the machine, from that disclosed in the description and drawings.

[453] The statutes, which are the source of all patent rights, provide that a valid patent may be granted for a new and useful machine, or for a new and useful improvement thereof (Rev. Stat. § 4886), but they require that every applicant for a patent shall file a written description of the manner and process of making and using his invention, "in such full, clear, concise, and exact" terms as to enable any person skilled in the art to which it relates to make and construct it, and in case of a machine the description must disclose the best mode in which the inventor has contemplated the application of his discovery. Rev. Stat. § 4888.

Ever since Grant v. Raymond, 6 Pet. 218, 247, 8 L. ed. 376, 386, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent shall expire. The source of the power to grant patents, and the consideration for granting them, is the advantage which the public will derive from them, especially after the expiration of the patent monopoly, when the discoveries embodied in them shall become a part of the public stock of knowledge.

The application of these requirements of the law to our conclusion that the only form of construction of the machine and the only method of operation of it which are disclosed in the patent would not produce a sufficiently uniform and rapid development of the film to render it useful must result in the approval of the judgment of the court of claims, that the patent is invalid and void, for the reason that it fails to disclose a practical and useful invention.

This result renders it unnecessary to consider the further conclusion of the court below that the use by the [454] United States of photo-copying machines of a type known as "Photostat," manufactured and sold under warrant of letters patent issued to D. S. Green, No. 1,001,019, would not have constituted an infringement of appellant's patent had it proved to be valid. However, for its bearing on future possible controversy we add that the construction and relation of the two appliances, designed to produce the same result or product, have been fully considered, and that we agree with the conclusion of the Court of Claims.

Affirmed

The described mode of operation is substantially as follows:

W is a roll of sensitized paper or film, placed immediately below the exposure chamber F of a camera, with its sensitized surface uppermost to receive the desired image, reflected from the mirror H. This film is fed into the chamber between the rolls b, and thence along the floor thereof to the rollers D, where it emerges from the camera and is seized by "clips" or clamps N. These clamps are supported and carried by a rack M, and may be moved to and fro (reciprocated) by turning the pinions L on the shaft K, by means of a crank.

I, J, and J′ are shallow pans or "tanks" in which suitable "developing," "fixing," and "washing" solutions or fluids are placed, and the whole of the construction to the right of the camera, as we face the print, is inclosed in a light-proof case E, referred to in the patent sometimes as a "compartment" and sometimes as a "chamber." The rack M, and the clamps which hold and support the film, move above the tanks and necessarily above the level of the liquid within them. By turning the pinion L, the rack M is moved outwardly away from the camera, and the clamps draw the film after them until the required length is attained, when it is severed from the roll by a manually operated cutter, O. When the film is thus cut to the [450] desired length, obviously only the free end will fall to the surface of the solution in the tank I, and by continuing the outward movement of the rack M, the specification declares, "the film is carried through the several tanks." The "clips" or clamps are set and released automatically, and at the limit of the outward movement the film is released and falls into the tank J′. By reversing the turning of the pinions L the rack and clamps are returned inwardly to the camera, so that the operation just detailed may be repeated.

The court of claims carries into its findings of fact fourteen patents as illustrative of the prior art, and with this exhibit before us we fully agree with that court that the claim of invention of appellant must be restricted to the disclosed construction and operation of the mechanism for carrying the exposed section of film "through the developing and other solutions or liquids" after it leaves the camera.

In the description of the operation of the machine as we have just given it, there is no provision other than gravity for causing the free end of the film, when it is cut from the roll, to sink into the developing fluid, and the other end of it is held between the clamps, above the surface of the fluid, as it is drawn along from one tank to another. The court of claims found that under such conditions of operation all of the film would not be submerged with sufficient rapidity and uniformity to secure a proper and useful development of the image, and this conclusion is not seriously disputed. But the appellant contends that the required submergence may be obtained by oscillating the rack and clamps (and thereby the film) back and forth within the range of a few inches when the film is over the first tank I, with the result that the free end of the film, first sinking into the fluid, is turned under and over and the exposed side of it wholly submerged and thereby developed.

[451] In reply to this it is contended by the government that the disclosures of the patent do not contain any suggestion of a short, reciprocating movement of the rack, such as is thus relied upon, and that the drawings provide for a construction of the machine which would be inoperative if such movement were resorted to.

Upon this subject the finding of the court of claims is, that the machine can be rendered operative only "by resorting to a new oscillating mode of operation evolved by the claimant for submerging and developing the film," and that such mode of operation is not disclosed in the patent. On the contrary, it is especially found that:

"By the method contemplated and disclosed in the patent, the film with the exposed side up, held at one end by the clamps attached to the rack M and moving in a plane above the pans containing the developing and fixing fluids, is intended, by the outward movement of the rack, to be drawn successively through the developing and fixing fluids, the rack moving in one direction only through its entire course, the end of the film next the knife and away from the clamps falling, when severed by the knife, on the surface of the developer in the first pan and submerging by gravity."

Treating this finding by the court as an interpretation of the patent, and therefore as a conclusion of law, and subject to review, we are brought to the question whether the short, reciprocating movement of the rack, confessedly necessary to successful operation of the machine, is disclosed in the patent, as it must be to render it valid. Rev. Stat.

§ 4888, Comp. Stat. § 9432, 7 Fed. Stat. 2d ed. p. 145.

The only description of the mode of operation of appellant's machine, and the statute requires that this must be the best mode known to the patentee (Rev. Stat. § 4888), is found in the specification, and is as follows:

"In order to draw the film through the several compartments, I provide a mechanism consisting of a shaft K, [452] having toothed wheels L, which mesh with a rack M, the said rack being suitably guided in the compartment E, and being alternately reciprocated through the rotation of the shaft K, in opposite directions. When the shaft is turned to the right, the said rack will be projected from the compartment until the inner end thereof is nearly above the shaft K. When the shaft is rotated in the opposite direction, the said rack will, of course, be retracted and thrust into the compartment. It is the purpose of this invention that the said rack shall carry clips N, which are designed to clamp on the edges of the film Y, and as the said rack is moved outwardly, the film is carried through the several tanks as indicated. The clips are automatically released and set through the contact with trips within the casing in the path of travel of said clips."

We agree with the court of claims that this language describes a movement of the rack M, carrying the clamps N in one direction only—outwardly and progressively away from the camera—until the movement is completed and the film is released, and that the reciprocating movement referred to in the patent is the return of the mechanism for clamping and carrying the film to its initial position for the purpose of repeating the operation.

There is nothing in the disclosure or in the claims to suggest the arresting of the outward movement of the clamps as soon as the film is severed from the roll, and the initiating thereupon of a short oscillating movement of the mechanism to and fro, until the film shall have been immersed in the developing liquid sufficiently to bring out the image photographed. It is very clear that no such operation can be derived from the disclosure in the patent, and we agree with the further finding of the court of claims that, in order to permit "this new oscillating mode of operation evolved by the claimant," material changes would be required in the construction of the machine, from that disclosed in the description and drawings.

[453] The statutes, which are the source of all patent rights, provide that a valid patent may be granted for a new and useful machine, or for a new and useful improvement thereof (Rev. Stat. § 4886), but they require that every applicant for a patent shall file a written description of the manner and process of making and using his invention, "in such full, clear, concise, and exact" terms as to enable any person skilled in the art to which it relates to make and construct it, and in case of a machine the description must disclose the best mode in which the inventor has contemplated the application of his discovery. Rev. Stat. § 4888.

Ever since Grant v. Raymond, 6 Pet. 218, 247, 8 L. ed. 376, 386, it has been consistently held that a correct and adequate description or disclosure of a claimed discovery (which, in the case of a machine, involves particularly the operation of it) is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent shall expire. The source of the power to grant patents, and the consideration for granting them, is the advantage which the public will derive from them, especially after the expiration of the patent monopoly, when the discoveries embodied in them shall become a part of the public stock of knowledge.

The application of these requirements of the law to our conclusion that the only form of construction of the machine and the only method of operation of it which are disclosed in the patent would not produce a sufficiently uniform and rapid development of the film to render it useful must result in the approval of the judgment of the court of claims, that the patent is invalid and void, for the reason that it fails to disclose a practical and useful invention.

This result renders it unnecessary to consider the further conclusion of the court below that the use by the [454] United States of photo-copying machines of a type known as "Photostat," manufactured and sold under warrant of letters patent issued to D. S. Green, No. 1,001,019, would not have constituted an infringement of appellant's patent had it proved to be valid. However, for its bearing on future possible controversy we add that the construction and relation of the two appliances, designed to produce the same result or product, have been fully considered, and that we agree with the conclusion of the Court of Claims.

Affirmed

KWOCK JAN FAT, Petitioner,
v.
EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco.

(See S. C. Reporter's ed. 454–465.)

Habeas corpus — petition — construction — subsequent proceedings.

1. Allegations in the petition for habeas corpus sued out by a Chinese applicant for admission to the United States may be interpreted in the light of the immigration records filed with the petition and with respondent's return, where, with such petition, were filed all the testimony and papers pertaining to the proceedings prior to the appeal to the Secretary of Labor, and there was a prayer that when the copy of the proceedings thereafter had should become available, they might be made a part of the petition.

[For other cases, see Habeas Corpus, IV. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — Chinese exclusion.

2. A decision of the Secretary of Labor denying the admission into the United States of a Chinaman claiming American citizenship was rendered without the fair hearing which due process of law demands, where the only form in which the recognition of the Chinese applicant by three white witnesses called by him and examined in his presence by the government inspector was placed before the Secretary was a letter which the acting commissioner of immigration, who did not himself render the decision, sent to applicant's counsel and placed with the record, and where apparently there was no record of such recognition before the immigration commissioner when he decided the case.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Appeal — judgment — remanding for trial.

3. The denial of a fair hearing to a Chinese applicant who was refused admission into the United States requires that a judgment of the Federal circuit court of appeals which affirmed a judgment of the district court, sustaining a demurrer to the petition of such Chinaman for habeas corpus, be reversed and the cause remanded to the district court for trial of the merits.

[For other cases, see Appeal and Error, IX. i, in Digest Sup. Ct. 1908.]

[No. 313.]

Argued and submitted April 30, 1920. Decided June 7, 1920.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of California, First Division, sustaining a demurrer to a petition for habeas corpus. Reversed; writ of habeas corpus to issue.

See same case below, 166 C. C. A. 493, 255 Fed. 323.

The facts are stated in the opinion.

Mr. **Jackson H. Ralston** argued the cause, and, with Mr. Dion R. Holm, filed a brief for petitioner:

A fair hearing must be granted by the immigration authorities.

Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31; Low Wah Suey v. Backus, 225 U. S. 461, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359.

The hearing accorded Kwock Jan Fat was inadequate and manifestly unfair.

Chew Hoy Quong v. White, 162 C. C. A. 103, 249 Fed. 869; Re Can Pon, 93 C. C. A. 635, 168 Fed. 479; Ex parte Chooey De Ying, 214 Fed. 873.

Assistant Attorney General **Stewart** and Mr. **Harry S. Ridgely** submitted the cause for respondent:

These executive hearings are conducted in a summary manner, and it would destroy the effectiveness and the purpose of such hearings if omission to record a fact or facts considered, which record is subsequently supplied as in the case at bar, could be made the basis of securing a judicial hearing on habeas corpus.

Ex parte Wong Yee Toon, 227 Fed. 249; Re Jem Yuen, 188 Fed. 353.

It can hardly be contended that petitioner, in a hearing by the immigration officials, is entitled to see the official report of the inspector, and even though, as petitioner contends, it should have been withdrawn from the record, if not to be considered as evidence, its reten-

---

Note.—On habeas corpus in Federal courts—see notes to Tinsley v. Anderson, 43 L. ed. U. S. 92, and Re Reinitz, 4 L.R.A. 236.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

tion merely made out a case of incompetent evidence.

Ex parte Pouliot, 196 Fed. 442; Low Wah Suey v. Backus, 225 U. S. 460, 471, 56 L. ed. 1165, 1168, 32 Sup. Ct. Rep. 734; Tang Tun v. Edsell, 223 U. S. 673, 677, 679, 56 L. ed. 606, 608, 609, 32 Sup. Ct. Rep. 359; Streeter v. Sanitary Dist. 66 C. C. A. 190, 133 Fed. 124.

The mere fact that the findings and other papers were prepared by the inspector does not make the decision any the less that of the commissioner, for the findings and papers are so signed.

Tang Tun v. Edsell, 223 U. S. 673, 682, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 359.

Petitioner has been accorded every opportunity to submit all the evidence he desired. His case has received the careful consideration of the immigration officials, and the claims of unfair hearing are not well founded.

Ex parte Garcia, 205 Fed. 53.

Mr. Justice **Clarke** delivered the opinion of the court:

In January, 1915, Kwock Jan Fat, the petitioner, intending to leave the United States on a temporary visit to China, filed with the commissioner of immigration for the port of San Francisco an application, as provided for by law, for a "preinvestigation of his claimed status as an American citizen by birth."

He claimed that he was eighteen years of age, was born at Monterey, California, was the son of Kwock Tuck Lee, then deceased, who was born in America of Chinese parents and had resided at Monterey for many years; that his mother at the time was living at Monterey; and that there were five children in the family,—three girls and two boys.

The Department of Immigration made an elaborate investigation of the case presented by this application, taking the testimony of the petitioner, of his mother, of his brother and one sister, and of three white men, of whom the inspector said in his report: "The three white witnesses are representative men of this town and would have no motive in misstating the facts." As a result of this inquiry, the original of his application, approved, signed, and sealed by the commissioner of immigration at San Francisco, was delivered to the petitioner, and [**456**] with this evidence in his possession, which he was amply justified in believing would secure his readmission into the United States when he returned, he went to China.

The record shows that during his absence anonymous information reached the San Francisco Immigration Office (in which there had been a change of officials) to the effect that petitioner's name was not Kwock Jan Fat, as claimed, but was Leu Suey Chong, and that he had entered the United States in 1909 as the minor son of a merchant, Lew Wing Tong, of Oakland, California. Thereupon an investigation was conducted, chiefly by the comparison of photographs, for the purpose of determining the truthfulness of this anonymous suggestion, with the result that when the petitioner returned to San Francisco he was not allowed to land, and a few days thereafter was definitely denied entry to the country by the commissioner of immigration. Thereafter, this decision of the commissioner was reconsidered, the case reopened, and testimony for and against the petitioner was taken, but the commissioner adhered to his denial of admission. The only reason given for the decision was "the claimed American citizenship is not established to my satisfaction."

Thereupon an appeal was taken to the Secretary of Labor, who approved the order appealed from.

Promptly thereafter the petition for a writ of habeas corpus in this case was filed, which is based chiefly upon two claims, viz.:

(1) That the examining inspector reported to the commissioner of immigration as evidence, statements purporting to have been obtained from witnesses under promise that their names would not be disclosed, and that when demand was made for the names of such witnesses for purpose of reply, it was refused, with the result that petitioner did not have a fair hearing.

(2) That the examining inspector did not record an [**457**] important part of the testimony of three white witnesses called by petitioner, with the result that it was not before the commissioner of immigration or the Secretary of Labor when they decided adversely to him, and thereby he was arbitrarily denied a fair hearing.

A general demurrer to this petition was sustained by the district court, and on appeal to the circuit court of appeals that judgment was affirmed. The case is here on writ of certiorari.

With the petition were filed all of the testimony and papers pertaining to the proceedings prior to the appeal to the Secretary of Labor, and since it is prayed that when the copy of the proceedings thereafter had shall become available,

they may be made a part of the petition, it was proper for the courts below, and is proper for this court, to interpret the allegations of the petition, giving due effect to the immigration records filed with the petition and with respondent's return. Low Wah Suey v. Backus, 225 U. S. 460, 469, 472, 56 L. ed. 1165, 1168, 1169, 32 Sup. Ct. Rep. 734.

(3) It is not disputed that if petitioner is the son of Kwock Tuck Lee and his wife, Tom Ying Shee, he was born to them when they were permanently domiciled in the United States, is a citizen thereof, and is entitled to admission to the country. United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456. But while it is conceded that he is certainly the same person who, upon full investigation, was found, in March, 1915, by the then commissioner of immigration, to be a natural born American citizen, the claim is that that commissioner was deceived, and that petitioner is really Lew Suey Chong, who was admitted to this country in 1909, as son of a Chinese merchant, Lew Wing Tong, of Oakland, California.

It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were "manifestly unfair," were "such as to prevent [458] a fair investigation," or show "manifest abuse" of the discretion committed to the executive officers by the statute (Low Wah Suey v. Backus, supra), or that "their authority was not fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." Tang Tun v. Edsell, 223 U. S. 673, 681, 682, 56 L. ed. 606, 610, 32 Sup. Ct. Rep. 359. The decision must be after a hearing in good faith, however summary (Chin Yow v. United States, 208 U. S. 8, 12, 52 L. ed. 369, 370, 28 Sup. Ct. Rep. 201), and it must find adequate support in the evidence (Zakonaite v. Wolf, 226 U. S. 272, 274, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31).

As to the first ground of complaint in the petition for habeas corpus:

After the final decision by the commissioner of immigration adverse to petitioner, his counsel requested an opportunity to examine the record on which it was rendered. This request was granted, and promptly thereafter demand was made for permission to see the testimony referred to, but not reported, in a designated report of Inspector Wilkinson. Assistant Commissioner Boyce answered this request, saying:

"The portion of Inspector Wilkinson's report which was withheld from you contained no evidence whatsoever and nothing material to the issue in this case. As a matter of fact, this inspector's report in no way influenced my decision, and was useful only in locating other material witnesses, whose testimony appears in the record."

This report appears in the record before us, and is of a remarkable character. It is dated August 8th, and after saying that "only upon the assurance that the identity of the witness would be kept secret" could the information contained in it be obtained, the writer proceeds with much detail to narrate what, if believed, would be evidence of first importance making against the claim of petitioner. The report continues, that after his first visit the inspector [459] returned to Monterey and learned from his confidential witness that in the interval he had inquired of "an old Chinese resident" who said that "Tuck Lee had no son," and adds, "I was unable to ascertain the name of this Chinese person."

On the margin of this letter is written August 8, 1917, "approved, Edward White" (the immigration commissioner).

In this manner, with much detail, statements of a person who must remain unknown, and in part derived from another person who must remain unknown, were communicated by the investigating inspector to his superior, who was to dispose of the case on the evidence which was furnished him, and he, in form at least, approved of this report. This approval is explained by the acting commissioner as referring to the recommendation contained in it that further investigation should be made, and there is confirmation of this explanation in the fact that the record shows that immediately thereafter evidence of the character suggested in the report was taken in affidavits which were open to the inspection of the petitioner. While we would not give the weight to these affidavits which the commissioner of immigration and the Secretary of Labor seem to have given to them, nevertheless, when taken with the statement of the acting commissioner that the inspector's report objected to was not allowed to influence his decision, we might not say that the taking and reporting of the testimony objected to of witnesses whose names are not disclosed, rendered the hearing so manifestly unfair as to re-

quire reversal, if there were nothing else objectionable in the record.

There remains the question whether the hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law because an inspector failed to record in its proper place an important part of [460] the testimony of three white witnesses called by the petitioner.

A discussion of what the record shows and of the character of the witnesses involved will be necessary to an appreciation of the importance, in determining the issue presented, of having a full report of what was said and done by these three witnesses.

When the petitioner, before going to China, applied for a preinvestigation of his claimed status as an American citizen, three white witnesses from Monterey were called in his behalf,—two of whom were notable.

Ernest Michaelis, for twenty-six years a justice of the peace, and for many years the official collector of fish licenses, testified, making reference, for purpose of identification, to a photograph of the petitioner. He said he had known the parents of the boy since shortly after he himself went to live at Monterey, in 1879; that there were two boys and three girls in the family; that he had seen the petitioner frequently as a little fellow when he went to collect fish licenses (the boy's father was a fisherman); and had known him ever since; and, referring to the photograph, he declared positively that he was sure of his identity, and that he was born in Monterey. He added that the father of the boy was native born and was a voter in that community.

W. E. Parker testified that he had been agent for the Wells Fargo Company at Monterey for twenty-five years, and was also chief of the fire department and city clerk for many years. He said, referring to a photograph of petitioner, that he had known the parents of the boy for many years and the boy himself since he was five or six years old; that he remembered two boys and at least one girl, but later he stated that he recalled that there were three girls in the family, and his identification of the petitioner by photograph was very definite. He stated that the father of the boy was a fisherman and shipped fish frequently [461] by express, so that he came to know him well and his wife also, because she often transacted business for her husband. He recalled that after the fire and earthquake the petitioner was sent to school at San Francisco, but returned to Monterey every few months when he saw him.

A third witness, Manuel Ortins, a retired business man, gave similar testimony, but it is not so definite and circumstantial as that of the others and need not be detailed.

The government inspector to whom the case in this preliminary stage was referred, wrote the commissioner of immigration at San Francisco that the testimony of petitioner, of his alleged brother, his mother, and three credible white witnesses, had been taken; that the petitioner gave his testimony mostly in English, presented a good appearance and "tells his story in a straightfor ward manner in a way to convince one that he is telling the truth," and that "the three white witnesses are representative men of this town and would have no motive in misstating the facts." He concluded with the statement that in his mind there was no doubt that the Chinaman named Quock Tuck Lee (claimed by applicant to be his father) had lived in Pacific Grove (the Chinatown of Monterey), and was a registered voter there; that he was married and had several children, and that the testimony seemed to prove that the petitioner was a member of his family. He added that a sister of the boy lived at a given number in Chicago, and suggested that her testimony should be taken. This sister's testimony was taken, as recommended, and then the inspector reported to the commissioner of immigration that her testimony did not vary in the main from that of the mother or brother of the petitioner; that "the white witnesses, Judge Michaelis, and chief of the fire department and Wells Fargo agent, and retired grocer, Mr. Ortins, are men of standing in this town," and that he had no reason to doubt their testimony. He added that, taking the testimony as a whole, "he [462] believed the applicant made a good showing, and recommended favorable action." On this record the application was approved and the young man went to China.

When the petitioner returned from China and the investigation was renewed, Michaelis, Ortins, and another important white witness, Pugh, were examined at San Francisco by an inspector. Michaelis and Ortins testified substantially as they had done a year before, and Pugh, also a business man of Monterey, gave similar testimony and def-

initely identified the petitioner as the son of Kwock Tuck Lee. The examination of these witnesses, by question and answer, was taken down and is in the record, but no reference whatever was made to the fact that the petitioner was brought into their presence to test their recognition of him and his recognition of them, or of any examination in his presence. The testimony was in this form when it was sent to the commissioner of immigration for his consideration and decision, and, acting upon it, on September 6, 1917, he denied the petitioner admission to the country. After this decision, on September 12th, counsel for petitioner wrote the commissioner that Michaelis, Pugh, and Ortins had told him that when they were examined at San Francisco they were confronted with the petitioner, and that they recognized him, that he recognized them, and that the examining inspector was present and asked a number of questions, which were answered, and calls this to the attention of the commissioner, "as it may have been an oversight on the part of the official stenographer in recording everything said and done at the hearing of the case." On the same date affidavits by Michaelis, Pugh, and Ortins were filed, in each of which, after referring to his examination at San Francisco, the affiant says in substance, as Michaelis does in form, that "after being questioned by the inspector the affiant was confronted with Kwock Jan Fat, who met him while the inspector was present, and that said inspector [463] heard everything said between affiant and Kwock Jan Fat;" and that affiant then told the inspector that the petitioner was the son of Tuck Lee, that he had known him from infancy, and that he was a native of Monterey.

To this letter of counsel for petitioner an acting commissioner replied, saying:

"With regard to the identification of the applicant by Messrs. Michaelis, Pugh, and Ortins, you are advised that these witnesses were confronted with the applicant, with the result that said witnesses mutually recognized and identified the applicant as the person whom they had known as Kwock Jan Fat, and the applicant was equally prompt in recognizing said witnesses. While I was advised of this incident and gave it full consideration in arriving at my decision, it was not made of record in connection with the statements taken from the witnesses. A copy of this letter will be placed with the record as evidence to the fact that there was mutual recognition between said witnesses and the applicant which will thus be available for the consideration of the Secretary on appeal."

This excerpt from the letter of an acting commissioner (the decision was rendered by the commissioner personally) is the only form in which the facts and circumstances of the recognition of the petitioner by these important witnesses, and their examination in his presence by the inspector, were placed before the Secretary of Labor, and apparently there was no record whatever of either before the commissioner of immigration when he decided the case.

Comment cannot add to the impression which this plain statement of facts should make upon every candid mind. Here was testimony being taken which was to become the basis for decision by men who must depend wholly upon the report of what was said and done by the witnesses. The men examined were important, intelligent, and very [464] certainly as dependable as any who were called. All they had said with respect to the identity and nativity of the petitioner when his photograph was exhibited to them was carefully reported, but when their knowledge of him and their acquaintance with him were put to the final test of having him brought before them (he had then been in China for a year), nothing whatever was recorded of what they said and did. Very certainly this must be regarded as such an important part of the testimony of these most important witnesses that it may well have been of such character as to prove sufficient to determine the result in a case even much stronger against a claim of United States citizenship than was made in this record against the claim of petitioner, and a report which suppressed or omitted it was not a fair report, and a hearing based upon it was not a fair hearing, within the definition of the cases cited.

The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuses of this extraordinary power, and this is possible only when a full record is pre-

served of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the commissioner of immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.

[465] The practice indicated in Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits.

Judgment reversed.

Writ of habeas corpus to issue.

STATE OF OKLAHOMA, Complainant,
v.
STATE OF TEXAS, Defendant; the United States of America, Intervener.

(See S. C. Reporter's ed. 465-470.)

[No. 27, Original.]

June 7, 1920.

Order Instructing Receiver.

Announced by Mr. Chief Justice White:

Upon consideration of the first report of Frederic A. Delano, receiver, in the above-entitled cause, and of the supplemental report of June 3, 1920, and the various suggestions of the United States, intervener, and of the state of Texas, and of the several motions, applications, exceptions, and suggestions heretofore filed by parties claiming an interest in the subject-matter of this suit, it is, this 7th day of June, A. D. 1920, adjudged and ordered that the action of said receiver in taking possession of and operating under his own management and control the property described in the order of this court of April 1, 1920, until the further order of this court, including the oil and gas wells and plants, toll bridges, water plants, tank wagons, pipe lines, storage tanks, and other property located thereon and therein; the arrangements made by said receiver for guarding and policing said property; the office and field organization created by [466] him for the operation and development of the property and the resources thereof, and for collecting, conserving, and investing the proceeds of the sale of all oil, gas, gasolene, and other products taken therefrom since April 1, 1920, be, and they are hereby, ratified and approved.

2. So much of the land described in the order of this court of April 1, 1920, in range 14 west, as lies between the south edge of the present sand bed of the Red river (marked generally by the border line of vegetation along the edge of the flood plain) and the foot of the Texas bluff, as was, on the 1st day of April, 1920, in the possession of persons claiming under patents from the state of Texas, and is not included in the river-bed lands, as hereinafter defined, shall be returned by the receiver to the several operators or claimants in possession on April 1, 1920, or their assigns, together with all wells, tanks, pipe lines, structures, equipment, and material, upon condition that such operator, claimant, or assigns account for, pay over to, and impound with the receiver, if not already done, three sixteenths of the gross proceeds of all oil taken from the respective lands on and since April 1, 1920, and the royalty on commercial gas customary in the Burk-Burnett and Northwest Extension oil fields, and royalty on casing-head gas in accordance with the regulations and schedule of prices promulgated for Indian lands by the Secretary of the Interior August 10, 1917, the proceeds thereof to be either paid in cash, or the payment thereof within ninety days to be secured by good and sufficient surety to be approved by the receiver, and upon the further condition that said operator or claimant shall enter into an agreement in writing with the receiver, by the terms of which the operator shall develop and operate said properties in a workmanlike and businesslike manner, subject to the supervision of the receiver and to the orders of this court, and shall impound with the receiver three sixteenths of the gross amount of the proceeds from the sale of oil [467] thereafter produced, and the royalty on gas and casing-head gas as hereinbefore specified. This agreement to contain such further stipulations as the receiver may deem proper for regulating the production of gas and oil and to prevent waste or the entrance of water to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits, or the damage of wells in the possession of the receiver; and provided further, that the receiver, in his discretion, may agree with any operator

or claimant to operate for his benefit and at his expense the lands in said "Big Bend" area. Until the several operators or claimants comply with the foregoing conditions, the receiver shall retain possession of the respective properties and shall operate the same in accordance with the order of this court of April 1, 1920, as modified by this order.

In the event of failure or refusal of any operator to operate the property as directed by the receiver, or if any operator shall violate his agreement with the receiver, the receiver is authorized to take possession of and operate such property, impound three sixteenths of the proceeds, as provided by this order, and pay out of said proceeds the expenses of operation, keeping a separate account of the expense of production of each well, as nearly as practicable.

3. The river-bed lands, for the purposes of this order, shall comprise all lands not hereinbefore excepted, being more specifically that part covered by the receivership of all the broad and approximately flat sandy stretch which extends from the foot of the bluff or the edge of the flood plain, as the case may be, on the south side of the river, to the midchannel of the river, as defined in said order of April 1, 1920, and as it then existed, including everything within the bounds just described.

4. It is further ordered that said receiver be and he is hereby authorized and directed, out of the gross proceeds derived from the production of any well in the river-bed [468] area paid to him since April 1, 1920, (1) to pay to the operator or operators of any such well the actual cost of operating the same since April 1, 1920, inclusive, including in such cost a reasonable allowance for field supervision, but excluding any allowance for general or office supervision; (2) to refund to those operators or drillers who have drilled and brought into production new wells in said area since April 1, 1920, a fair percentage of the entire actual cost of such work, including a reasonable allowance for field supervision, but excluding any allowance for general or office supervision; (3) to pay the just claims of mechanics and materialmen for work done and materials furnished on wells in said area brought in since April 1, 1920, and the claims of persons, associations, and corporations for advancements made in good faith for drilling operations upon such wells, provided satisfactory evidence of the existence of all of such claims be furnished.

5. Said receiver is further authorized and directed to release and surrender to the lawful owners thereof (1) all oil and gas stored within the receivership area which is shown by evidence satisfactory to him to have been produced by operations outside of said area; (2) all machinery, tools, and other equipment stored within the receivership area when the receiver took possession, and not actually used in the production, storage, transportation, etc., of the oil and gas products thereof, and such other machinery, tools, drilling rigs, and similar apparatus found within the receivership area as may not be required for the receivership operations; (3) all oil, gas, and the products thereof which are shown by evidence satisfactory to the receiver to have been produced by operations outside of the receivership area, but which were mingled and stored with similar products produced within said area on and subsequent to April 1, 1920.

6. Said receiver is further authorized and directed (1) to arrange for the sale and disposition of all oil, gas, [469] gasolene, water, and other products of said property; (2) to take possession and license the operation of all toll bridges within the receivership area, and to regulate and limit the tolls chargeable thereon; (3) to sell at the best price obtainable, properly credit and account for, such derricks, tanks, pipe lines, tools, appliances, and materials not claimed by the owners thereof, and not required for the receiver's operations; (4) to purchase at the best price obtainable such tanks, machinery, appliances, tools, motor cars, and equipment, as may be necessary for the operation, protection, and development of the property in his charge; (5) to retain and employ whatever technical or other assistants he may require or may deem necessary to satisfactorily operate, develop, and protect the property in his charge, fix the terms of employment, and the rate of compensation; (6) to make such banking arrangements as he may deem necessary to properly conserve and safeguard the funds resulting from his operations, and to invest the surplus funds in United States Treasury certificates; (7) to make such contracts for fire, tornado, employee, and public liability insurance as may be deemed necessary or advisable, and take whatever other reasonable precautions are customarily employed in the management, operation, development, and

protection of oil and gas properties of similar magnitude.

7. The receiver is hereby further authorized and directed to drill in the river-bed area, described in ¶ 3 hereof, and bring into production whatever new wells he may be advised by his geologist and other experts are necessary for the conservation and development of the river-bed lands as a whole, pay the cost thereof out of the funds in his hands derived from the production of the wells in said river-bed area, keep separate accounts of the costs of drilling and operating and of the proceeds of the production of each well, and make a full report thereof, with his recommendations for the equitable allocation and distribution [470] of such costs and proceeds, as soon after the court reconvenes in October next as may be practicable.

8. In addition to the specific powers herein contained, the receiver, until the further order of this court, is hereby given whatever additional administrative powers may be found to be necessary to properly protect, operate, manage, and develop the property within the receivership area and the oil and gas deposits therein.

9. The receiver is directed to report to the court, for such action as it may deem necessary and proper, any interference with the property or operations in his charge and any violation of the orders and directions given by him in the performance of his official duties; and he may apply in vacation to the Chief Justice or any Associate Justice of this court for a writ of injunction in any case where an injunction might be granted by the court.

10. Nothing in the order of this court of April 1, 1920, or in this order, shall be construed to prevent or in any wise obstruct the duly constituted authorities of the United States and of the states of Texas and Oklahoma in the exercise of their several and respective jurisdictions, as heretofore, in the prevention, detection, and punishment of crime within the area embraced within the orders of this court.

The parties hereto and their respective officers and agents are requested to afford to the receiver and his agents all reasonable and appropriate assistance in guarding, protecting, and conserving the property within said area.

64 L. ed.

STATE OF OKLAHOMA, Complainant,
v.
STATE OF TEXAS, Defendant; the United States of America, Intervener.

(See S. C. Reporter's ed. 470, 471.)

[No. 27, Original.]

Submitted June 7, 1920. Decided June 7, 1920.

ORIGINAL SUIT in Equity, brought by the State of Oklahoma against the State of Texas. On motions for leave to file petitions for intervention. Motions granted.

Messrs. Jesse B. Roote and J. I. Howard for the motions.

Order announced by Mr. Chief Justice White:

The motions of the Judsonia Developing Association, Burk Divide Oil Company No. 2 and others, Burk Divide Oil Company No. 3 and others, and Mellish Consolidated Placer Oil Company, for leave to file petitions in intervention [471] herein, are hereby granted; and similar leave is granted to any and all other parties claiming any title to or interest in the lands in the possession of the receiver herein by virtue of the orders of April 1, 1920, and June 7, 1920.

STATE OF OKLAHOMA, Complainant,
v.
STATE OF TEXAS, Defendant; the United States of America, Intervener.

(See S. C. Reporter's ed. 471, 472.)

[No. 27, Original.]

June 7, 1920.

Order Setting Cause Down for Hearing upon Certain Questions.

Announced by Mr. Chief Justice White:

On consideration of the motion of the United States and the state of Oklahoma, requesting that this cause be set down for hearing at an early day upon certain questions of law, and of the response of the state of Texas to said motion, this day presented,

It is ordered that this cause be and it is hereby set down for hearing on the 15th day of November, 1920, upon the following questions of law, to wit:

(1) Is the decree of this court in United States v. Texas, 162 U. S. 1, 40 L. ed.

1017

867, 16 Sup. Ct. Rep. 725, final and conclusive upon the parties to this cause in so far as it declares that the Treaty of February 22, 1819 [8 Stat. at L. 252], between the United States and Spain, fixed the boundary along the south bank of Red river?

(2) If said decree is not conclusive, then did the Treaty of 1819, construed in the light of pertinent public documents and acts, fix the boundary along the mid-channel of Red river, or along the south bank of said river?

It is further ordered that the parties be permitted to take and present testimony in respect of the governmental practice on the part of all governments and states, concerned at the time, bearing upon the construction and effect of said Treaty as to the second question above stated.

The evidence in chief of the United States and the state of Oklahoma shall be taken and closed on or before August 15, 1920; the evidence in chief of the state of Texas [472] shall be taken and closed on or before October 1, 1920; and rebuttal testimony on the part of the United States and the state of Oklahoma shall be taken and closed on or before October 15, 1920. The evidence in each case to be taken on seven days' notice, unless notice is waived.

Ernest Knaebel, Esq., of the District of Columbia, is hereby appointed as commissioner to take the said evidence and report the same to the court, without findings or conclusions.[1]

[1] Frederick S. Tyler, Esq., of the District of Columbia, appointed by order of the Chief Justice, in place of Ernest Knaebel, Esq., June 30, 1920.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

CITY TRUST COMPANY, Plaintiff in Error, v. BANKERS' MORTGAGE LOAN COMPANY. [No. 493.]

Error to state court—Federal question—error or certiorari.

In Error to the Supreme Court of the State of Nebraska to review a judgment which dismissed an appeal from a judgment of the District Court of Douglas County, in that state, in favor of defendant in a suit for an accounting.

See same case below, on first appeal, 102 Neb. 532, 167 N. W. 785.

Mr. Sylvester R. Rush for plaintiff in error.

Messrs. Frank H. Gaines and C. J. Baird for defendant in error.

April 26, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, 5 Fed. Stat. Anno. 2d ed. p. 723), as amended by the Act of September 6, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. § 1214, Fed. Stat. Anno. Supp. 1918, p. 411), § 2.

EX PARTE: IN THE MATTER OF JAMES J. O'BRIEN, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus or Prohibition.

Mr. James J. O'Brien, petitioner, pro se.

April 26, 1920. Denied.

EDWARD A. SHEDD et al., Appellants, v. GUARDIAN TRUST COMPANY et al. [No. 231.]

Appeal—from district court—frivolous Federal question.

Appeal from the District Court of the United States for the Western District of Missouri to review a compromise decree entered in a minority stockholders' suit.

Mr. J. C. Rosenberger for appellants.

Messrs. Charles [474] W. German and J. D. Bowersock for appellees.

May 17, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Empire State-Idaho Min. Co. v. Hanley, 205 U. S. 225, 232, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

COUNTY OF DOUGLAS, in the State of Nebraska, Plaintiff in Error, v. GEORGE WARREN SMITH. [No. 437.]

Error to circuit court of appeals—jurisdiction below—Federal question.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the District Court for the District of Nebraska, in favor of plaintiff, in a suit to assess an inheritance tax.

See same case below, 165 C. C. A. 532, 254 Fed. 244.

Mr. William C. Lambert for plaintiff in error.

Messrs. Francis A. Brogan and A. G. Ellick for defendant in error.

May 17, 1920. Per Curiam: Dismissed for the want of jurisdiction upon the authority of

(1) § 128 of the Judicial Code [36 Stat. at L. 1133, chap. 231, Comp. Stat. § 1120, 5 Fed. Stat. Anno. 2d ed. p. 607]; Shulthis v. McDougal, 225 U. S. 561, 568, 56 L. ed. 1205, 1210, 32 Sup. Ct.

Rep. 704; Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892; Louisville & N. R. Co. v. Western U. Teleg. Co. 237 U. S. 300, 302, 59 L. ed. 965, 966, 35 Sup. Ct. Rep. 598; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 444, 59 L. ed. 1397, 1400, 35 Sup. Ct. Rep. 902.

(2) Brown v. Alton Water Co. 222 U. S. 325, 332, 333, 56 L. ed. 221, 224, 32 Sup. Ct. Rep. 156; Alaska Pacific Fisheries v. Alaska, 249 U. S. 53, 61, 63 L. ed. 474, 478, 39 Sup. Ct. Rep. 208.

ROBERT D. KINNEY, Plaintiff in Error, v. PLYMOUTH ROCK SQUAB COMPANY. [No. 324.]

Error to district court—frivolous Federal question.

In Error to the District Court of the United States for the District of Massachusetts to review a judgment dismissing an action brought by writ of scire facias.

Mr. Robert D. Kinney, plaintiff in error, pro se.

No appearance for defendant in error.

May 17, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

(2) Kinney v. Plymouth Rock Squab Co. 236 U. S. 43, 49, 59 L. ed. 457, 459, 35 Sup. Ct. Rep. 236.

JAMES K. PERRINE, Plaintiff in Error, v. STATE OF OKLAHOMA EX REL. JOHN EMBRY, County Attorney. [No. 310.]

Error to state court—Federal question—who may raise.

In Error to the [475] Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court for Oklahoma County, in that state, enforcing a penalty for permitting the use of certain premises for traffic in intoxicating liquors.

See same case below, — Okla. —, 178 Pac. 97.

Mr. E. G. McAdams for plaintiff in error.

Messrs. S. P. Freeling and W. C. Hall for defendant in error.

May 17, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 24, 62 L. ed. 124, 128, 38 Sup. Ct. Rep. 35.

(2) Southern R. Co. v. King, 217 U. S. 524, 534, 54 L. ed. 868, 871, 30 Sup. Ct. Rep. 594; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 473, 56 L. ed. 510, 513, 32 Sup. Ct. Rep. 236; Middleton v. Texas Power & Light Co. 249 U. S. 152, 157, 63 L. ed. 527, 531, 39 Sup. Ct. Rep. 227.

(3) Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 67, 54 L. ed. 930, 934, 30 Sup. Ct. Rep. 663.

SAMUEL W. SCOTT et al., Plaintiffs in Error, v. IDA B. W. BOOTH [No. 256.]

Error to state court—final judgment.

In Error to the Supreme Court of the State of Missouri to review a judgment which reversed a judgment of the Circuit Court of Jackson County, in that state, in favor of defendants in an action to avoid a sale of real property, and remanded the cause for further proceedings.

See same case below, 276 Mo. 1, 205 S. W. 633.

Messrs. H. M. Langworthy and Jackson H. Ralston for plaintiffs in error.

Mr. C. W. Prince for defendant in error.

May 17, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 Sup. Ct. Rep. 654; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 101, 57 L. ed. 138, 140, 33 Sup. Ct. Rep. 78; Grays Harbor Logging Co. v. Coats Fordney Logging Co. (Washington ex rel. Grays Harbor Logging Co. v. Superior Ct.) 243 U. S. 251, 255, 61 L. ed. 702, 705, 37 Sup. Ct. Rep. 295; Bruce v. Tobin, 245 U. S. 18, 19, 62 L. ed. 123, 124, 38 Sup. Ct. Rep. 7.

FRED W. WEITZEL, Plaintiff in Error, v. UNITED STATES. [No. 633.]

Error to district court—frivolous Federal question.

In Error to the District Court of the United States for the Eastern District of Kentucky to review a conviction of a receiver of a national bank for embezzlement and making false reports.

Mr. A. E. Stricklett for plaintiff in error.

Solicitor General King for defendant in error.

May 17, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; [476] Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 24, 62 L. ed. 124, 128, 38 Sup. Ct. Rep. 35.

(2) Lamar v. United States, 240 U. S. 60, 60 L. ed. 526, 36 Sup. Ct. Rep. 255; Lamar v. United States, 241 U. S. 103, 60 L. ed. 912, 36 Sup. Ct. Rep. 535.

JOHN F. DONAHUE, Appellant, v. HELEN MAY DONAHUE, alias Helen May Huskey. [No. 570.]

Appeal—from district court—frivolous Federal question.

Appeal from the District Court of the United States for the District of Nevada to review a decree which dismissed the bill in suit to set aside a decree of divorce in which a writ of habeas corpus was sought.

Mr. George C. Otto for appellant.

Mr. H. W. Huskey for appellee.

June 1, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 232, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

J. D. PURCELL et al., Plaintiffs in Error, v. CITY OF LEXINGTON ON RELATION OF THOMAS E. COYNE, Back Tax Assessor. [No. 708.]

Error to state court—Federal question—impairing contract obligations.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Fayette County, in that state, for the assessment and collection of taxes.

See same case below, 186 Ky. 381, 216 S. W. 599.

Messrs. George C. Webb and George R. Hunt for plaintiffs in error.

Messrs. Jesse J. Miller and Harry B. Miller for defendant in error.

June 1, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of

(1) New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 38, 39, 31 L. ed. 607, 614, 615, 8 Sup. Ct. Rep. 741; Central Land Co. v. Laidley, 159 U. S. 103, 111, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; Bacon v. Texas, 163 U. S. 207, 216, 41 L. ed. 132, 136, 16 Sup. Ct. Rep. 1023; McCullough v. Virginia, 172 U. S. 102, 116, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134; Louisiana ex rel. Hubert v. New Orleans, 215 U. S. 170, 175, 54 L. ed. 144, 147, 30 Sup. Ct. Rep. 40; Missouri & K. Interurban R. Co. v. Olathe, 222 U. S. 187, 56 L. ed. 156, 32 Sup. Ct. Rep. 47.

(2) Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 232, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 917, 29 Sup. Ct. Rep. 580; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; [477] Sugarman v. United States, 249 U. S. 182, 184, 63 L. ed. 550, 551, 39 Sup. Ct. Rep. 191.

JOHN W. DAVIDGE v. LEO SIMMONS. [No. ——.]

Petition for the allowance of a Writ of Error to the Court of Appeals of the District of Columbia.

Mr. Chapin Brown for the petitioner.

June 1, 1920. Allowed upon petitioner giving bond in the sum of $1,000.

LINCOLN GAS & ELECTRIC LIGHT COMPANY, Appellant, v. CITY OF LINCOLN et al. [No. 810.]

Appeal—from district court—final judgment.

Appeal from the District Court of the United States for the District of Nebraska to review a decree ordering a public service corporation to refund excess charges to consumers, reserving jurisdiction to make further orders, and continuing the cause for that purpose.

Messrs. Edmund C. Strode, Charles A. Frueauff, and Robert Burns for appellant.

Mr. C. Petrus Peterson for appellees.

June 7, 1920. Per Curiam: Dismissed for want of jurisdiction upon the authority of Heike v. United States, 217 U. S. 423, 429, 54 L. ed. 821, 824, 30 Sup. Ct. Rep. 539; United States v. Beatty, 232 U. S. 463, 466, 58 L. ed. 686, 687, 34 Sup. Ct. Rep. 392; Rexford v. Brunswick-Balke Collender Co. 228 U. S. 339, 346, 57 L. ed. 864, 867, 33 Sup. Ct. Rep. 515; and see Eichel v. United States Fidelity & G. Co. 239 U. S. 629, 60 L. ed. 475, 36 Sup. Ct. Rep. 165.

STATE OF GEORGIA, Complainant, v. STATE OF SOUTH CAROLINA. [No. 22, Original.]

Motion for the appointment of a special master to take such testimony as may be necessary, and to receive in evidence such exhibits as may be offered by the parties hereto.

Mr. Clifford Walker for complainant.

Messrs. A. M. Lumpkin and Sam A. Wolfe for respondent.

June 7, 1920. Granted, and on the suggestion of counsel for both parties, Mr. Charles S. Douglas, of Washington, D. C., appointed [478] as such special master, and directed to report the testimony and exhibits to the court without conclusions of law or findings of fact.

UNITED STATES OF AMERICA, Appellant, v. READING COMPANY et al. [No. 3]; and READING COMPANY et al., Appellants, v. UNITED STATES OF AMERICA [No. 4].

Motions to modify the decree in these cases.

Solicitor General King and Mr. C. B. Ames, Assistant to the Attorney General, for appellants.

Messrs. William Clarke Mason, Robert W. De Forest, and Charles E. Miller for appellees.

June 7, 1920. Denied.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error, v. YORK & WHITNEY COMPANY. [No. 802.]

Petition for a Writ of Certiorari to the Superior Court of the State of Massachusetts.

Mr. William L. Parsons for plaintiff in error.

Mr. Amos L. Taylor for defendant in error.

April 26, 1920. Granted.

YORK & WHITNEY COMPANY, Plaintiff in Error, v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. [No. 803.]

Petition for a Writ of Certiorari [479] to the Superior Court of the State of Massachusetts.

Mr. Amos L. Taylor for plaintiff in error.

Mr. William L. Parsons for defendant in error.

April 26, 1920. Granted.

DISTRICT OF COLUMBIA, Petitioner, v. R. P. ANDREWS PAPER COMPANY. [No. 805.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 263 Fed. 1017.

Mr. F. H. Stephens for petitioner.

No appearance for respondent.

April 26, 1920. Granted.

DISTRICT OF COLUMBIA, Petitioner, v. SAKS & COMPANY. [No. 806.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, — App. D. C. —, 263 Fed. 1020.

Mr. F. H. Stephens for petitioner.

No appearance for respondent.

April 26, 1920. Granted.

DISTRICT OF COLUMBIA, Petitioner, v. ABRAHAM LISNER. [No. 807.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, — App. D. C. —, 263 Fed. 1020.

Mr. F. H. Stephens for petitioner.

No appearance for respondent.

April 26, 1920. Granted.

ANNA LANG, as Administratrix, etc., Petitioner, v. NEW YORK CENTRAL RAILROAD COMPANY. [No. 817.]

Petition for a Writ of Certiorari to the Supreme Court of the State of New York.

See same case below, in supreme court, 187 App. Div. 967, 175 N. Y. Supp. 908; in court of appeals, 227 N. Y. 507, 125 N. E. 681.

Mr. Hamilton Ward for petitioner.

Mr. M. C. Spratt for respondent.

April 26, 1920. Granted.

ARCHIE J. MCLAREN, Administrator, etc., Petitioner, v. L. G. FLEISCHER. [No. 831.]

Petition for a Writ [480] of Certiorari to the Supreme Court of the State of California.

See same case below, — Cal. —, 185 Pac. 967.

Mr. Samuel Herrick for petitioner.

No appearance for respondent.

April 26, 1920. Granted.

ROBERT L. CULPEPPER, Petitioner, v. JAMES M. OCHELTREE. [No. 832.]

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

See same case below, — Cal. —, 185 Pac. 971.

Mr. Samuel Herrick for petitioner.

No appearance for respondent.

April 26, 1920. Granted.

WESTERN UNION TELEGRAPH COMPANY, Petitioner, v. S. B. POSTON. [No. 833.]

Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina.

Messrs. Rush Taggart, Francis Raymond Stark, P. A. Willcox, and Henry E. Davis for petitioner.

No appearance for respondent.

By leave of court, Solicitor General King filed a brief herein in behalf of the United States.

April 26, 1920. Granted.

PHILADELPHIA & READING RAILWAY COMPANY, Petitioner, v. MARIA DOMENICA DI DONATO. [No. 842.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

See same case below, 266 Pa. 412, 109 Atl. 627.

Mr. George Gowen Parry for petitioner.

No appearance for respondent.

April 26, 1920. Granted.

PHILADELPHIA & READING RAILWAY COMPANY, Petitioner, v. MARIE E. POLK. [No. 844.]

Petition for a Writ of Certiorari to the Supreme Court of the State of [481] Pennsylvania.

See same case below, 266 Pa. 335, 109 Atl. 627.

Mr. George Gowen Parry for petitioner.

Mr. Francis M. McAdams for respondent.

April 26, 1920. Granted.

WEBER ELECTRIC COMPANY, Petitioner, v. E. H. FREEMAN ELECTRIC COMPANY. [No. 789.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 262 Fed. 769.

Mr. Charles Neave for petitioner.

Messrs. Livingston Gifford and David P. Wolhaupter for respondent.

May 3, 1920. Granted.

UNITED STATES OF AMERICA, Petitioner, v. ÆTNA EXPLOSIVES COMPANY. [No. 841.]

Petition for a Writ of Certiorari to the United States Court of Customs Appeals.

Solicitor General King and Assistant Attorney General Hanson for petitioner.

Mr. Addison S. Pratt for respondent.

May 3, 1920. Granted.

MICHIGAN CENTRAL RAILROAD COMPANY, Petitioner, v. MARK OWEN & COMPANY. [No. 847.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

See same case below, 291 Ill. 149, 125 N. E. 767.

Mr. Ralph M. Shaw for petitioner.

No appearance for respondent.

May 3, 1920. Granted.

HENRY ALBERS, Petitioner, v. UNITED STATES OF AMERICA. [No. 871.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 263 Fed. 27.

Messrs. Charles H. Carey and James B. Kerr for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

June 1, 1920. Granted.

PHILADELPHIA & READING RAILWAY COMPANY, Petitioner, v. AMY SMITH. [No. 900.]

Petition for a Writ of [482] Certiorari to the Supreme Court of the State of Pennsylvania.

See same case below, 267 Pa. 123, 110 Atl. 142.

Mr. George Gowen Parry for petitioner.

No appearance for respondent.

June 1, 1920. Granted.

FEDERAL TRADE COMMISSION, Petitioner, v. BEECH-NUT PACKING COMPANY. [No. 916.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 264 Fed. 885.

Solicitor General King and Mr. Claude R. Potter for petitioner.

No appearance for respondent.

June 1, 1920. Granted.

EUGENE SOL LOUIE, Petitioner, v. UNITED STATES OF AMERICA. [No. 926.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 264 Fed. 295.

Mr. Robert Early McFarland for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 7, 1920. Granted.

JOHN SIMMONS COMPANY, Petitioner, v. GRIER BROTHERS COMPANY. [No. 932.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 265 Fed. 481.

Mr. James Q. Rice for petitioner.

Messrs. Clarence P. Byrnes, George H. Parmelee, and George E. Stebbins for respondent.

June 7, 1920. Granted.

LEHIGH VALLEY RAILROAD COMPANY, Petitioner, v. FREDERICK W. HOWELL et al., as Firm of B. H. Howell, Son & Company, et al. [No. 818.]

Petition for a Writ of Certiorari to the Court of Errors and Appeals of the State of New Jersey.

See same case below, — N. J. L. —, 109 Atl. 309.

Messrs. Lindley [483] M. Garrison, Edgar H. Boles, Richard W. Barrett, and George S. Hobart for petitioner.

Messrs. Frederick B. Campbell and John O. H. Pitney for respondents.

April 26, 1920. Denied.

LEHIGH VALLEY RAILROAD COMPANY, Petitioner, v. ROYAL INDEMNITY COMPANY and others. [Nos. 819 to 830.]

Petition for Writs of Certiorari to the Court of Errors and Appeals of the State [484] of New Jersey.

See same case below, — N. J. L. —, 109 Atl. 745.

Messrs. Lindley M. Garrison, Edgar H. Boles, Richard W. Barrett, and George S. Hobart for petitioner.

Messrs. M. M. Stallman, Edwin F. Smith, and James D. Carpenter, Jr., for respondents.

April 26, 1920. Denied.

DAVID G. WINE, Petitioner, v. UNITED STATES OF AMERICA. [No. 615.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 260 Fed. 911.

Mr. C. C. Flansburg for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

April 26, 1920. Denied.

STATE OF LOUISIANA, Petitioner, v. WILLIAM T. JOYCE COMPANY et al. [No. 767.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 128.

Mr. William Winans Wall for petitioner.

Messrs. Robert R. Reid and Henry Fitts for respondents.

April 26, 1920. Denied.

HERMAN BLOCH, Petitioner, v. UNITED STATES OF AMERICA. [No. 782.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 321.

Messrs. C. B. Hudspeth, George E. Wallace, and St. Clair Adams for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

April 26, 1920. Denied.

E. A. KING (and Those Who Wish Also to Intervene for Their Benefit), Petitioner, v. ROBERT H. BARR et al. [No. 786.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 262 Fed. 56.

Messrs. William C. Bristol and Levi Cooke for petitioner.

Mr. C. E. S. Wood for respondents.

April 26, 1920. Denied.

---

[485] CUYAMEL FRUIT COMPANY, Petitioner, v. JOHNSON IRON WORKS, Limited. [No. 797.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 262 Fed. 387.

Mr. Walter S. Penfield for petitioner.

Mr. Monte M. Lemann for respondent.

April 26, 1920. Denied.

GERHARDT WESSELS, Petitioner, v. UNITED STATES OF AMERICA. [No. 798.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 262 Fed. 389.

Mr. R. H. Ward for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

April 26, 1920. Denied.

DUNKLEY COMPANY and Michigan Canning & Machinery Company, Petitioners, v. PASADENA CANNING COMPANY and George E. Grier. [No. 800.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 261 Fed. 386.

Messrs. Fred L. Chappell, Drury W. Cooper, and William S. Hodges for petitioners.

Messrs. Kemper B. Campbell, Francis J. Heney, Frederick S. Lyon, and William J. Carr for respondents.

April 26, 1920. Denied.

HERMAN THEDEN and Anna Theden, Petitioners, v. UNION PACIFIC RAILROAD COMPANY. [No. 812.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas.

See same case below, 104 Kan. 289, 178 Pac. 441; on rehearing, 106 Kan. 40, 186 Pac. 752.

Mr. L. W. Keplinger for petitioners.

Messrs. N. H. Loomis, R. W. Blair, and T. M. Lillard for respondent.

April 26, 1920. Denied.

ALBERT F. HOUGHTON et al., Petitioners, v. EUGENE F. ENSLEN et al. [No. 816.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth [486] Circuit.

See same case below, 261 Fed. 113.

Mr. Z. T. Rudolph for petitioners.

No appearance for respondents.

April 26, 1920. Denied.

PHILADELPHIA & READING RAILWAY COMPANY, Petitioner, v. ANNIE REYNOLDS. [No. 843.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

See same case below, 266 Pa. 400, 109 Atl. 660.

Mr. George Gowen Parry for petitioner.

Mr. Francis M. McAdams for respondent.

April 26, 1920. Denied.

FREEMAN-SWEET COMPANY, Petitioner, v. LUMINOUS UNIT COMPANY. [No. 852.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 264 Fed. 107.

Mr. Paul Bakewell for petitioner.

Mr. Harry Lea Dodson for respondent.

April 26, 1920. Denied.

D. W. RYAN TOWBOAT COMPANY (Inc.), Petitioner, v. CARRIE S. DRAPER et al. [No. 856.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 263 Fed. 31.

Mr. John Charles Harris for petitioner.

No appearance for respondents.

April 26, 1920. Denied.

BOWERS SOUTHERN DREDGING COMPANY, Petitioner, v. CARRIE S. DRAPER et al. [No. 857.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 263 Fed. 31.

Messrs. J. W. Terry and John Neethe for petitioner.

No appearance for respondents.

April 26, 1920. Denied.

THOMAS D. THOMAS, Petitioner, v. SOUTH BUTTE MINING COMPANY. [No. 781.]

Petition for a Writ of Certiorari [487] to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 540, 260 Fed. 814.

Mr. Charles A. Beardsley for petitioner.

Mr. John A. Shelton for respondent.

May 3, 1920. Denied.

EPHRAIM LEDERER, Collector of Internal Revenue, Petitioner, v. NORTHERN TRUST COMPANY and Henry R. Zesinger, Executors, etc. [No. 845.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 262 Fed. 52.

Solicitor General King and Assistant Attorney General Frierson for petitioner.

Mr. William M. Stewart, Jr., for respondents.

May 3, 1920. Denied.

C. T. DOREMUS, Petitioner, v. UNITED STATES OF AMERICA. [No. 853.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below — A. L. R. —, 262 Fed. 849.

Mr. C. A. Davis for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

May 3, 1920. Denied.

GRACE MCMILLAN GIBSON, Petitioner, v. ETHEL M. GERNAT. [No. 875.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, — App. D. C. —, 267 Fed. 305.

Messrs. Frederic D. McKenney, John Spalding Flannery, and G. Bowdoin Craighill for petitioner.

Messrs. Thomas P. Littlepage and Sidney F. Taliaferro for respondent.

May 3, 1920. Denied.

EMILY DE FOUR, Petitioner, v. UNITED STATES OF AMERICA. [No. 840.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 171 C. C. A. 360, 260 Fed. 596.

Mr. Marshall B. Woodworth for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

May 17, 1920. Denied.

---

[488] BACKSTAY MACHINE & LEATHER CO., Petitioner, v. HELEN WADE HAMILTON. [Nos. 848 and 849.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 262 Fed. 411.

Messrs. Henry D. Williams and Frederic D. McKenney for petitioner.

Mr. W. Orison Underwood for respondent.

May 17, 1920. Denied.

TEXAS & GULF STEAMSHIP CO., Petitioner, v. CLARENCE PARKER et al. [No. 850.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 263 Fed. 864.

Mr. William B. Lockhart for petitioner.

No appearance for respondents.

May 17, 1920. Denied.

BECKWITH COMPANY (formerly the estate of P. D. Beckwith, Inc.), Petitioner, v. MINNESOTA STOVE COMPANY. [No. 860.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 264 Fed. 337.

Mr. Harry C. Howard for petitioner.

Mr. Walter H. Chamberlain for respondent.

May 17, 1920. Denied.

JEANNETTE W. LEE, Petitioner, v. RICHARD C. MINOR, as Trustee, etc., et al. [No. 861.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 263 Fed. 507.

Messrs. F. C. Heffron and Samuel Herrick for petitioner.

Mr. John H. Miller for respondents.

May 17, 1920. Denied.

COMMERCIAL CREDIT COMPANY et al., Petitioners, v. CONTINENTAL TRUST COMPANY. [No. 865.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for [489] the Fifth Circuit.

See same case below, 263 Fed. 873.

Mr. Alex. W. Smith for petitioners.

Messrs. Warren Grice and Robert C. Alston for respondent.

May 17, 1920. Denied.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Petitioner, v. MRS. MINNIE OWENS, Administratrix, etc. [No. 868.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma.

See same case below, 78 Okla. 50, 186 Pac. 1092.

Messrs. Willard R. Bleakmore, C. O. Blake, and Thomas P. Littlepage for petitioner.

No appearance for respondent.

May 17, 1920. Denied.

ATLANTIC COAST LINE RAILROAD COMPANY, Petitioner, v. STATE OF ALABAMA. [No. 869.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama.

See same case below, 202 Ala. 558, 81 So. 60.

Mr. Richard V. Lindabury for petitioner.

Messrs. J. Q. Smith and Lawrence E. Brown for respondent.

May 17, 1920. Denied.

CHARLES KOLLMAN, Petitioner, v. UNITED STATES. [No. 873.]

Petition for a Writ of Certiorari to the Supreme Court of the Philippine Islands.

Messrs. Samuel T. Ansell, Edward S. Bailey, and Chester J. Gerkin for petitioner.

No brief was filed for respondent.

May 17, 1920. Denied.

PENNSYLVANIA RAILROAD COMPANY, Petitioner, v. ALFRED STIEDLER. [No. 888.]

Petition for a Writ of Certiorari to the Court of Errors and Appeals of the State of New Jersey.

See same case below, — N. J. L. —, 109 Atl. 512.

Messrs. F. D. McKenney, Albert C. Wall, and John A. Hartpence for petitioner.

Mr. Alexander Simpson for respondent.

May 17, 1920. Denied.

---

[490] DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Petitioner, v. CHARLES S. CANDEE, JR. [No. 889.]

Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey.

See same case below, in court of errors and appeals, — N. J. L. —, 109 Atl. 202.

Mr. Frederic B. Scott for petitioner.

No appearance for respondent.

June 1, 1920. Denied.

G. W. BOULDIN, Petitioner, v. UNITED STATES OF AMERICA. [No. 839.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 674.

Mr. George W. Huntress for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

June 1, 1920. Denied.

NATIONAL SURETY COMPANY, Petitioner, v. LEFLORE COUNTY, in the State of Mississippi. [No. 851.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 262 Fed. 325.

Mr. John R. Tyson for petitioner.

Mr. R. C. McBee for respondent.

June 1, 1920. Denied.

SAMUEL L. SNEIERSON, Petitioner, v. UNITED STATES OF AMERICA. [No. 863.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 268.

Mr. William Shaw McCallum for petitioner.

Assistant Attorney General Stewart and Mr. Franklin G. Wixson for respondent.

June 1, 1920. Denied.

H. M. WHEELER, Petitioner, v. CHARLES P. TAFT and H. W. INSCORE. [No. 872.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 261 Fed. 978.

Mr. G. P. Bullis for petitioner.

Mr. Henry J. Livingston for respondents.

June 1, 1920. Denied.

---

[491] F. H. ORCUTT & SON COMPANY et al., Petitioners, v. NATIONAL TRUST & CREDIT COMPANY. [No. 880.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, on first appeal, 170 C. C. A. 630, 259 Fed. 830, on second appeal, 265 Fed. 267.

Messrs. H. Musgrave and William S. Oppenheim for petitioners.

Mr. James W. Hyde for respondent.

June 1, 1920. Denied.

CHESAPEAKE STEAMSHIP COMPANY, of Baltimore City, Owner, etc., et al., Petitioners, v. FRANK HAND, Master, etc. [No. 885.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 266 Fed. 641.

Mr. Floyd Hughes for petitioners.

Mr. R. M. Hughes, Jr., for respondent.

June 1, 1920. Denied.

ANTHONY PHILLIPS, Petitioner, v. UNITED STATES OF AMERICA. [No. 891.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 264 Fed. 657.

Mr. Frederick T. Saussy for petitioner.

Assistant Attorney General Stewart and Mr. Franklin G. Wixson for respondent.

June 1, 1920. Denied.

HIRAM N. STANCIL et al., Petitioners, v. FREDERICK LEYLAND & COMPANY, Limited, Claimant, etc., et al. [No 898.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 264 Fed. 511.

Messrs. John D. Grace and Frederick S. Tyler for petitioners.

No appearance for respondents.

June 1, 1920. Denied.

ARNOLD JACOB UHL, Petitioner, v. UNITED STATES OF AMERICA. [No. 907.]

Petition for a Writ of Certiorari to the United States [492] Circuit Court of Appeals for the Fifth Circuit.

See same case below, 263 Fed. 79.

Mr. William Augustus Denson for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 1, 1920. Denied.

CURACAO TRADING COMPANY (Curacaosche Handel Mattschappij), Petitioner, v. CARL BJORGE, Master and Claimant, etc., et al. [No. 914.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 263 Fed. 693.

Messrs. J. Blanc Monroe and Monte M. Lemann for petitioner.

Mr. William Waller Young for respondents.

June 1, 1920. Denied.

BOSTON WEST AFRICA TRADING COMPANY, Petitioner, v. QUAKER CITY MOROCCO COMPANY. [No. 730.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 261 Fed. 665.

Mr. Lee M. Friedman for petitioner.

Mr. William L. Putnam for respondent.

June 7, 1920. Denied.

R. L. MAYFIELD, Petitioner, v. STATE OF TENNESSEE EX REL. F. M. GERARD. [No. 854.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

Mr. James A. Cobb for petitioner.

No appearance for respondent.

June 7, 1920. Denied.

FITZ B. SULLIVAN, Petitioner, v. P. SANFORD ROSS, Inc. [No. 874.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 263 Fed. 348.

Mr. Henry J. Bigham for petitioner.

Mr. A. Leo Everett for respondent.

June 7, 1920. Denied.

---

[493] ANGEL VARGAS, Petitioner, v. F. M. YAPTICO & COMPANY. [No. 882.]

Petition for a Writ of Certiorari to the Supreme Court of the Philippine Islands.

Mr. Ernest Wilkinson for petitioner.

No appearance for respondent.

June 7, 1920. Denied.

HARMON P. MACKNIGHT, Petitioner, v. UNITED STATES OF AMERICA. [No. 884.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 263 Fed. 832.

Mr. Harmon P. MacKnight for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

June 7, 1920. Denied.

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner, v. R. L. BLOCK. [No. 893.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Arkansas.

See same case below, — Ark. —, 218 S. W. 682.

Mr. Troy Pace for petitioner.

No appearance for respondent.

June 7, 1920. Denied.

GEORGE W. CANFIELD et al., Petitioners, v. LUSANNA BRINK. [No. 894.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma.

See same case below, 78 Okla. 189, 187 Pac. 223.

Messrs. William J. Hughes and Charles W. Grimes for petitioners.

Messrs. D. A. McDougal and W. V. Pryor for respondent.

June 7, 1920. Denied.

GEORGE W. CANFIELD et al., Petitioners, v. IRA E. CORNELIUS et al. [No. 895.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma.

See same case below, 78 Okla. 127, 188 Pac. 1040.

Messrs. William J. Hughes and Charles W. Grimes for petitioners.

Messrs. L. O. Lytle, Joseph C. Stone, [494] Charles A. Moon, and Francis Stewart for respondents.

June 7, 1920. Denied.

C. B. SCHOBERG, Petitioner, v. UNITED STATES OF AMERICA. [No. 902.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 264 Fed. 1.

Mr. Sherman T. McPherson for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 7, 1920. Denied.

HENRY KRUSE, Petitioner, v. UNITED STATES OF AMERICA. [No. 903.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 264 Fed. 1.

Mr. Sherman T. McPherson for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 7, 1920. Denied.

HENRY FELTMAN, Petitioner, v. UNITED STATES OF AMERICA. [No. 904.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 264 Fed. 1.

Mr. Sherman T. McPherson for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 7, 1920. Denied.

PETER WIMMER, Petitioner, v. UNITED STATES OF AMERICA. [No. 905.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 264 Fed. 11.

Mr. Frederick M. Schmitz for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 7, 1920. Denied.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Petitioner, v. WALLACE L. SCHAMBS, Trustee in Bankruptcy for the estate of Hudson D. Fowler. [No. 908.]

[495] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, on first writ of error, 6 A.L.R. 1231, 170 C. C. A. 55, 259 Fed. 55; on second writ of error, 263 Fed. 895.

Mr. J. Wilmer Latimer for petitioner.

Mr. Newton D. Baker for respondent.

June 7, 1920. Denied.

JOSEPH BIVENS, SR., Petitioner, v. UNITED TIMBER CORPORATION. [No. 912.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 308.

Messrs. Julian Mitchell, Charles A. Douglas, and Hugh H. Obear for petitioner.

Mr. Legaré Walker for respondent.

June 7, 1920. Denied.

JOSEPH BIVENS, SR., Petitioner, v. UNITED TIMBER CORPORATION. [No. 913.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 264 Fed. 308.

Messrs. Julian Mitchell, Charles A. Douglas, and Hugh H. Obear for petitioner.

Mr. Legaré Walker for respondent.

June 7, 1920. Denied.

ORVILLE ANDERSON, Petitioner, v. UNITED STATES OF AMERICA. [No. 919.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 264 Fed. 75.

Mr. Joe Kirby for petitioner.

Assistant Attorney General Stewart and Mr. Harry S. Ridgely for respondent.

June 7, 1920. Denied.

DAY AMMERMAN, Petitioner, v. UNITED STATES OF AMERICA. [No. 925.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 262 Fed. 124.

Mr. Robert S. Morrison for petitioner

Assistant Attorney General Stewart for respondent.

June 7, 1920. Denied.

---

[496] COMMERCIAL CREDIT COMPANY, Petitioner, v. SPONGE EXCHANGE BANK OF TARPON SPRINGS. [No. 928.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 263 Fed. 20.

Messrs. N. B. K. Pettingill, M. B. Macfarlane, and Leo Oppenheimer for petitioner.

Mr. James F. Glen for respondent.

June 7, 1920. Denied.

JOHN WHITE, Petitioner, v. UNITED STATES OF AMERICA. [No. 940.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 263 Fed. 17.

Mr. Frederick S. Tyler for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 7, 1920. Denied.

ÆTNA LIFE INSURANCE COMPANY, Petitioner, v. WALTER N. BRAND. [No. 942.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, — A.L.R. —, 265 Fed. 6.

Mr. William H. Foster for petitioner.

Mr. Louis L. Waters for respondent.

June 7, 1920. Denied.

W. B. TREDWELL, Petitioner, v. UNITED STATES OF AMERICA. [No. 945.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 266 Fed. 350.

Mr. Harry K. Wolcott for petitioner.

Assistant Attorney General Stewart and Mr. W. C. Herron for respondent.

June 7, 1920. Denied.

MARY L. GREER CONKLIN, Appellant, v. AUGUSTA CHRONICLE PUBLISHING COMPANY. [No. 946.]

Petition for a Writ of Certiorari herein.

Mrs. Mary [497] L. Greer Conklin, in propria persona, for the petition.

June 7, 1920. Denied.

GEORGE E. VANDENBURGH, Petitioner, v. ELECTRIC WELDING COMPANY. [No. 947.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 263 Fed. 95.

Mr. Carlos P. Griffin for petitioner.

Mr. Frederick W. Winter for respondent.

June 7, 1920. Denied.

G. SANDAA, Master and Claimant, etc., et al., Petitioners, v. UNITED STATES OF AMERICA et al. [No. 949.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 265 Fed. 921.

Mr. Henry H. Little for petitioners.

Assistant Attorney General Spellacy, Mr. J. Frank Staley, and Mr. James W. Ryan for respondents.

June 7, 1920. Denied.

PECK, STOW, & WILCOX COMPANY, Petitioner, v. H. D. SMITH & COMPANY. [No. 957.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 262 Fed. 415.

Mr. Frederick P. Fish for petitioner.

Mr. Archibald Cox for respondent.

June 7, 1920. Denied.

THOMAS PENNACCHIO, Petitioner, v. UNITED STATES OF AMERICA. [No. 959.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 263 Fed. 66.

Mr. John B. Golden for petitioner.

No brief was filed for respondent.

June 7, 1920. Denied.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Petitioner, v. HAGEMEYER TRADING COMPANY [No. 960]; and [498] ST. PAUL FIRE & MARINE INSURANCE COMPANY, Petitioner, v. HUGO A. THOMSEN et al. [No. 961.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 266 Fed. 14.

Messrs. D. Roger Englar and Oscar R. Houston for petitioner.

Mr. Van Vechten Veeder for respondents.

June 7, 1920. Denied.

ROXFORD KNITTING COMPANY, Petitioner, v. MOORE & TIERNEY (Inc.) [No 965.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, — A.L.R. —, 265 Fed. 177.

Messrs. Walter S. Hilborn and David J. Gallert for petitioner.

Mr. Thomas O'Connor for respondent.

June 7, 1920. Denied.

ROXFORD KNITTING COMPANY, Petitioner, v. WILLIAM MOORE KNITTING COMPANY. [No. 966.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, — A.L.R. —, 265 Fed. 177.

Messrs. Walter S. Hilborn and David J. Gallert for petitioner.

Mr. Thomas O'Connor for respondent.

June 7, 1920. Denied.

PETE MORGAN, Petitioner, v. STATE OF LOUISIANA. [No. 971.]

Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana.

See same case below, on first appeal, 142 La. 755, 77 So. 588; on second appeal, 145 La. 585, 82 So. 711; on third appeal, 147 La. —, 84 So. 589.

Messrs. R. E. Milling, Allan Sholars, and J. B. Roberts for petitioner.

No appearance for respondent.

June 7, 1920. Denied.

---

[499] INTERURBAN RAILWAY COMPANY and London Guarantee & Accident Company, Petitioners v. MRS. FRED SMITH. [No. 846.]

On Petition for Writ of Certiorari to the Supreme Court of the State of Iowa.

See same case below, — Iowa, —, 171 N. W. 134.

Mr. Frank J. Hogan for petitioners.

No appearance for respondent.

April 26, 1920. Dismissed on motion of counsel for the petitioners.

LILLIAN B. PEMBLETON, Petitioner, v. ILLINOIS COMMERCIAL MEN'S ASSOCIATION. [No. 625.]

On Writ of Certiorari to the Supreme Court of the State of Illinois.

See same case below, 289 Ill. 99, 124 N. E. 355.

Messrs. Harrison Musgrave and William S. Oppenheim for petitioner.

Mr. James G. Condon for respondent.

April 29, 1920. Dismissed with costs, on motion of counsel for the petitioner.

JOHN S. RANDOLPH, Plaintiff in Error, v. UNITED STATES OF AMERICA. [No. 346.]

In Error to the District Court of the United States for the Northern District of New York.

Mr. Frederick A. Mohr for plaintiff in error.

The Attorney General for defendant in error.

May 17, 1920. Dismissed, on motion of counsel for the plaintiff in error.

UNITED STATES, Appellant, v. QUAKER OATS COMPANY et al. [No. 14.]

Appeal from the District Court of the United States for the Northern District of Illinois.

See same case below, 232 Fed. 499.

The Attorney General for appellant.

Mr. Elmer H. Adams for appellees.

June 1, 1920. Dismissed, on motion of counsel for the appellant.

EX PARTE: IN THE MATTER OF WALTER PETERSON, as Receiver, etc., Petitioner. [No. ——, Original.]

Motion for leave to file petition for writ of prohibition or mandamus.

Mr. Abram J. Rose for petitioner.

January 12, 1920. Granted, and a rule to show cause awarded.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1919.

ORDER.

It is ordered that the bond of James D. Maher, as clerk of this court, presented this day, be approved and recorded, and that the original of said bond be filed in the Department of Justice, pursuant to § 220 of the Judicial Code.

October 16, 1919.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1919.

ORDER.

It is ordered by the court that the bond presented by the Marshal this day be approved and recorded.

January 5, 1920.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1919.

ORDER.

The Reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume, it is, therefore, now here ordered that he publish an additional volume in this year, pursuant to § 224 of the Judicial Code, approved March 3, 1911.

May 17, 1920.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1919.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued to the next term.

June 7, 1920.

GENERAL INDEX

TO THE

THREE VOLUMES CONTAINED IN THIS BOOK,

251, 252, 253

OCTOBER TERM, 1919.

Editorial Notes are Indexed by the word "Annotated" appended to the paragraphs to which they apply.

Exclusiveness of Federal jurisdiction.

1. The Federal Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters, and bring them within control of the Federal government, was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. Rep. 438, **64: 834**

2. The mere reservation of partially concurrent cognizance to state courts by an act of Congress conferring an otherwise exclusive admiralty jurisdiction upon the Federal courts could not create substantive rights or obligations, nor indicate assent to their creation by the states. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. Rep. 438, **64: 834**

3. Congress exceeded its constitutional power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, by attempting, as it did in the Act of October 6, 1917, to permit the application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction, thus virtually destroying the harmony and uniformity which the Constitution not only contemplated, but actually established. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. Rep. 438, **64: 834**

4. A state Workmen's Compensation Law may not be applied to an injury sustained prior to the enactment of the Act of October 6, 1917, by a longshoreman while he was unloading a vessel lying in navigable waters, in view of the Judicial Code, §§ 24 and 256, giving Federal district courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it. Peters v. Veasey, 251 U. S. 121, 40 Sup. Ct. Rep. 65, **64: 180**

5. A cause of action accruing before the enactment of the Act of October 6, 1917, is not affected by the provision of that act which amends the clauses of the Judicial Code, §§ 24 and 256, giving Federal district courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law was competent to give it, by adding the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." Peters v. Veasey, 251 U. S. 121, 40 Sup. Ct. Rep. 65, **64: 180**

ADMISSIONS.

As evidence, see Evidence, 8.

ADVERSE POSSESSION.

Adverse possession could confer no rights to lands within the Pottawatomie Indian Reservation granted by the Act of July 1, 1862, to a railway company for a right of way. Nadeau v. Union P. R. Co. 253 U. S. 442, 40 Sup. Ct. Rep. 570, **64: 1002**

AGREEMENTS.

Contracts generally, see Contracts.

ALIENS.

Remanding cause for hearing of Chinese applicant for admission to United States, see Appeal and Error, 56.

Due process of law in Chinese exclusion, see Constitutional Law, 65.

Alienage as affecting jurisdiction, see Courts, 6.

Habeas corpus on behalf of Chinese applicant for admission to the United States, see Habeas Corpus, 2.

Remedy of alien enemy, see War, 12.

Deportation.

A Chinese person claiming the right to re-enter the United States under the Act of November 3, 1893, as a returning merchant, may not be deported by executive action on the ground that the original entry was fraudulent, but he must be deemed to be entitled to a judicial inquiry and determination of his rights, in view of the provision of that act that a Chinaman who applies for admission into the United States on the ground that he was formerly engaged therein as a merchant must establish the fact by two credible witnesses other than Chinese that he was such at least one year before his departure from the United States, and had not engaged during such year in any manual labor except such as was necessary in the conduct of his business. White v. Chin Fong, 253 U. S. 90, 40 Sup. Ct. Rep. 449. **64: 797**

AMENDMENT.

Allowing amendment of pleading as reversible error, see Appeal and Error, 42.

Of Constitution, see Constitutional Law, I.

ANIMALS.

Validity of Migratory Bird Treaty, see Treaties.

ANSWER.

See Pleading.

ANTICIPATION.
Of patent, see Patents.

ANTI-TRUST LAW.
See Monopoly.

APPEAL AND ERROR.

Revision of proceedings of courts of bankruptcy, see Bankruptcy, 6.
Mandamus as substitute for writ of error or appeal, see Mandamus, 1.
Rules for appeals from court of claims, see Rules of Courts.

I. Appellate jurisdiction generally.

a. Decisions reviewable; final judgments.

See also infra, 8, 30.

1. An order of a Federal district court which denied the application of a receiver of an insolvent corporation, appointed by a state chancery court, for an order turning over to him the assets of the corporation in the possession of a receiver previously appointed by the Federal court, is a final decision within the meaning of the Judicial Code, § 128, governing the appellate review in the circuit courts of appeals of final decisions of the district court. Re Tiffany, 252 U. S. 32, 40 Sup. Ct. Rep. 239, **64: 443**

2. An order of a Federal district court denying the application of a municipality to intervene in a suit by a gas company against the attorney general, the district attorney, and the state Public Service Commission, to enjoin the enforcement of state legislation fixing gas rates, is not of that final character which furnishes the basis for an appeal. New York v. Consolidated Gas Co. 253 U. S. 219, 40 Sup. Ct. Rep. 511, **64: 870**

3. A single judgment upon a petition for a writ of habeas corpus setting forth a detention of the relator in extradition proceedings on three separate affidavits is not reviewable on appeal, where such judgment, though directing that the writ be denied as to the commitment on one of these affidavits, also declared that the writs of habeas corpus are granted as to the commitments on the other two affidavits, and ordered that the case be remanded for further hearing, since, only one branch of the case having been finally disposed of below, none of it is reviewable. Collins v. Miller, 252 U. S. 364, 40 Sup. Ct. Rep. 347, **64: 616**

4. A decree of a Federal district court dismissing for lack of jurisdiction the petition of the defendant vessel owner in an admiralty suit to bring in as a party defendant a corporation which it is asserted would be liable as an indemnitor if the liability of the vessel should be established lacks the finality essential to support an appeal. Oneida Nav. Corp. v. W. & S. Job & Co. 252 U. S. 521, 40 Sup. Ct. Rep. 357, **64: 697**

5. Decrees of a circuit court of appeals which reversed decrees below for the recovery of amounts awarded in a reparation order made by the Interstate Commerce Commission, and remanded the cause for a new trial, are not final for the purpose of a writ of error. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, **64: 810**

b. Review by government in criminal case.

6. A ruling taking the form of a grant of a motion to quash an indictment on the ground that the charges, having been submitted to a previous grand jury which failed to indict, were resubmitted to a later grand jury by the Federal district attorney without leave of court first obtained, is a "decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy," within the meaning of the Criminal Appeals Act of March 2, 1907, granting the government a right to review in a criminal case. United States v. Thompson, 251 U. S. 407, 40 Sup. Ct. Rep. 289, (Annotated) **64: 333**

II. Jurisdiction of United States Supreme Court.

a. Over Federal courts.

Over circuit courts of appeals.
Certiorari to circuit courts of appeals, see Certiorari, 2–6.
See also supra, 5.

7. An appeal having been taken to a circuit court of appeals in a case in which jurisdiction below was based upon constitutional grounds, and hence was not appealable to that court, and a final order having been made by the circuit court of appeals, the Federal Supreme Court has jurisdiction under the Judicial Code, § 241, to review the question of the jurisdiction of the circuit court of appeals. New York v. Consolidated Gas Co. 253 U. S. 219, 40 Sup. Ct. Rep. 511, **64: 870**

Over district courts.
See also supra, 1–4, 6.

8. An appeal to the Federal Supreme Court, taken under the Judicial Code, § 266, from the denial by a district court of an interlocutory application for an injunction to restrain the enforcement of a state statute on constitutional grounds, must be dismissed where the decree as entered not only disposed of the

application, but dismissed the action, and another appeal was later taken from the same decree under § 238, this being the proper practice, since the denial of the application was merged in the final decree. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, **64: 445**

9. The question whether the obligations of a contract with the state were impaired by subsequent state legislation is one which will warrant a direct writ of error from the Federal Supreme Court to a district court. Hays v. Seattle, 251 U. S. 233, 40 Sup. Ct. Rep. 125, **64: 243**

10. The contention, by the owner of a nonexclusive franchise to use the streets of a town for the distribution of electric current, that competition in business likely to result from a similar grant to another corporation would be a violation of its own contract, or a taking of its property in violation of the Federal Constitution, is too plainly frivolous to serve as the basis of an appeal to the Federal Supreme Court from a decree of a district court, dismissing a suit for injunctive relief. Piedmont Power & Light Co. v. Graham, 253 U. S. 193, 40 Sup. Ct. Rep. 453, **64: 855**

b. Over state courts.

Error or certiorari.

Certiorari to state court, see Certiorari, 1.

11. Since the amendment of September 6, 1916, to the Judicial Code, § 237, a writ of error to a state court lies only where there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or where there was drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity. Godchaux Co. v. Estopinal, 251 U. S. 179, 40 Sup. Ct. Rep. 116, **64: 213**

12. The mere objection to an exercise of authority under a state statute whose validity is not attacked cannot be made the basis of a writ of error from the Federal Supreme Court to a state court since the amendment of September 6, 1916, to the Judicial Code, § 237. There must be a substantial challenge of the validity of the statute or authority upon the claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention. Jett Bros. Distilling Co. v. Carrollton, 252 U. S. 1, 40 Sup. Ct. Rep. 255, **64: 421**

13. The assertion of a title, right, privilege, or immunity under the Federal Constitution may afford the basis for a writ of certiorari from the Federal Supreme Court to a state court, but it constitutes no ground for a writ of error. Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 40 Sup. Ct. Rep. 133, **64: 255**

14. Writ of error, not certiorari, is the proper mode of reviewing, in the Federal Supreme Court, a judgment of the highest court of a state upholding a state statute challenged as repugnant to the Federal Constitution. Kenney v. Supreme Lodge of the World, Loyal Order Moose, 252 U. S. 411, 40 Sup. Ct. Rep. 371, **64: 638**

When judgment is that of highest state court.

15. A judgment of a Missouri court of appeals which reversed the judgment below after the state supreme court had, on certiorari, quashed a prior judgment of affirmance in the court of appeals, and had remanded the cause to that court for decision, is a judgment of the highest state court for purposes of a writ of error from the Federal Supreme Court. Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 40 Sup. Ct. Rep. 133, **64: 255**

16. A judgment of a California district court of appeal refusing certiorari to an inferior court is the judgment of the state court of last resort having power to consider the case so far as the appellate jurisdiction of the Federal Supreme Court is concerned, where such appellate court assumed jurisdiction of the cause, and the supreme court of the state refused, for want of jurisdiction, to review the judgment, although the district court of appeal may have erred in assuming jurisdiction, since this is purely a question of state law. Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22, 40 Sup. Ct. Rep. 79, **64: 112**

Presentation of Federal question to state court.

17. The claim in the state trial court that a ruling was contrary to U. S. Const. 14th Amend., affords no basis for a writ of error from the Federal Supreme Court, where no such contention was made in the assignment of errors in the highest court of the state, nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. Hiawassee River Power Co. v. Carolina-Tennessee Power Co. 252 U. S. 341, 40 Sup. Ct. Rep. 330, **64: 601**

18. A Federal question first raised on motion for rehearing in a state appellate court comes too late to serve as the basis of a writ of error from the Federal Supreme Court. Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 40 Sup. Ct. Rep. 133, **64: 255**

19. To give the Federal Supreme Court jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been specially set up there at the proper time and in the proper manner, and if first presented in a petition for rehearing to the state court of last resort, it comes too late, unless the court actually entertains the petition and passes upon the point. Godchaux Co. v. Estopinal, 251 U. S. 179, 40 Sup. Ct. Rep. 116, **64: 213**

20. The overruling by the highest court

of a state without opinion of a petition for rehearing cannot be made the basis of a writ of error from the Federal Supreme Court. Jett Bros. Distilling Co. v. Carrollton, 252 U. S. 1, 40 Sup. Ct. Rep. 255, 64: 421

21. The omission to set up a Federal question in the highest court of a state is not cured by the allowance of a writ of error from the Federal Supreme Court by the chief justice of the highest state court, nor by the specific assertion of such question in the petition for such writ of error, and in the assignment of errors filed in the Federal Supreme Court. Hiawassee River Power Co. v. Carolina-Tennessee Power Co. 252 U. S. 341, 40 Sup. Ct. Rep. 330, 64: 601

Decision on non-Federal grounds.

As defeating certiorari to state court, see Certiorari, 1.

22. A decision of the highest court of a state is not reviewable in the Federal Supreme Court as presenting the question whether contract obligations were impaired by the effect given to a municipal ordinance repealing a street lighting and power franchise, where this contention was first made in the intermediate state appellate court, and no effect whatever was given to such ordinance, either by that court or by the state court of last resort, each court reaching the conclusion under review independently of and without reference to such ordinance. Hardin-Wyandot Lighting Co. v. Upper Sandusky, 251 U. S. 173, 40 Sup. Ct. Rep. 104, 64:210

What reviewable generally.

See also infra, 55.

23. The validity of state statutes is a question, the decision of which by the highest state court is not open to review in the Federal Supreme Court on writ of error to the state court. Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. Rep. 499, 64:878

24. The Federal Supreme Court, when dealing with the constitutionality of state statutes challenged under U. S. Const., 14th Amend., accepts the meaning of such statutes as construed by the highest court of the state. Farncomb v. Denver, 252 U. S. 7, 40 Sup. Ct. Rep. 271, 64:424

25. Whether a state statute did or did not validate a contract theretofore unenforceable is a question for the state courts to decide, and their decision is not subject to review in the Federal Supreme Court. Munday v. Wisconsin Trust Co. 252 U. S. 499, 40 Sup. Ct. Rep. 365, 64:684

III. The record.

Bill of exceptions.

26. The trial court could not, without the consent of the adverse party, extend the time for filing a bill of exceptions by an order made after the term had expired, and subsequent to the day to which the term was extended, by a general rule for the purpose of filing such bills. O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. Rep. 444, 64:827

27. The Federal Supreme Court may not consider a bill of exceptions not presented until after the power of the trial court over the same had expired. O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. Rep. 444, 64:827

IV. Objections and exceptions.

On error to state court, see supra, 17–21.
Review of question not raised below, see infra, 38.
See also infra, 39.

28. Assertions by counsel during a hearing before the Interstate Commerce Commission in a reparation proceeding that there was a failure of proof, and suggestions that the proceeding ought to be dismissed, come too late and are too general in character to be equivalent to an objection to the reception of certain evidence as hearsay. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, 64:810

V. Preliminary motions and orders.

Dismissal.

Remanding for dismissal, see infra, 57–59.
See also supra, 8; infra, 34.

29. The enactment of the Transportation Act of February 28, 1920, which necessitates changes in bills of lading prescribed by the Interstate Commerce Commission, renders moot the controversy presented by a petition which seeks to set aside an order of the Commission requiring carriers to use such bills of lading, and requires that an order granting a preliminary injunction to restrain the Commission from putting into force the bills of lading in the form prescribed be reversed, and that the cause be remanded to the court below with directions to dismiss the petition without costs to either party, and without prejudice to the right of the complainants to assail in the future any order of the Commission prescribing bills of lading after the enactment of the Transportation Act. United States v. Alaska S. S. Co. 253 U. S. 113, 40 Sup. Ct. Rep. 448, 64:808

VI. Hearing and determination.

Review on certiorari, see Certiorari, 4–6.
Denying hearing in banc as affording due process of law, see Constitutional Law, 64.
Judicial notice by appellate court, see Evidence, 1, 2.

30. The fundamental question whether the judgment appealed from is a final one must be answered, although not raised by either party. Collins v. Miller, 252 U. S. 364, 40 Sup. Ct. Rep. 347, 64:616

31. The Federal Supreme Court will not ordinarily disturb the decision of the trial

court, made after both parties moved for a directed verdict, that a certain issue was determined in a former suit tried by the same judge. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, **64: 286**

What reviewable generally.

On error to state court, see supra, 23–25.

32. The failure of the court of claims to find certain facts in accordance with claimant's contention may not be assigned as error on appeal to the Federal Supreme Court, since the review by the latter court is based upon the findings as made. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522, **64: 901**

33. A finding of the court of claims that an infirmary building constructed by the government for Indians was not used and was not such a building as was contemplated by treaties with such Indians means not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians, and, so construed, it is either a finding upon a mere question of fact, or, at most, is a finding of mixed fact and law, where the question of law is inseparable, and in either case the finding is not reviewable by the Federal Supreme Court on appeal. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522, **64: 901**

34. The power of circuit courts of appeals under the Judicial Code, § 129, to review preliminary orders granting injunctions, is not limited to the mere consideration of, and action upon, the order appealed from, but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, **64: 822**

Extending review beyond Federal question.

35. Jurisdiction of a direct writ of error from the Federal Supreme Court to a district court once having attached because of the presence of constitutional questions continues, although such questions have since been decided in other cases to be without merit, for the purpose of disposing of other questions raised in the record. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

Discretionary matters.

36. Whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court, and on appeal an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, **64: 822**

37. The discretion of the trial judge in a criminal case in overruling motions to change the venue on grounds of local prejudice, and to quash the panel of prospective jurors on like grounds, will not be disturbed by an appellate court except for abuse. Stroud v. United States, 251 U. S. 15, 40 Sup. Ct. Rep. 50, **64: 103**

Question not raised below.

38. The action of a Federal circuit court of appeals in simply reversing the judgment of a district court against a collector of internal revenue for the recovery back of certain taxes paid under protest without remanding the case for a new trial is not open to attack in the Federal Supreme Court where there was no objection made to that action and no request for a remand of the case,—especially where there was nothing to retry, the case involving only propositions of law. Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511, 40 Sup. Ct. Rep. 285, **64: 380**

Errors waived or cured below.

Waiver of defect in pleading, see Pleading, 1.

39. Any lack of precision in some of the allegations of a complaint which fully meets the requirement of the local Code is waived by failure to make timely objection after the case has been removed from a state to a Federal court. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, **64: 567**

40. Defendant in a suit by placer mining claimants against a conflicting lode claimant has no right to complain that he was not permitted, on cross-examination of a witness for the plaintiffs, to show the contents of certain assay reports, where, though some of these reports were at first excluded, they were all produced under a new ruling of the court except two, which covered samples taken from openings made after the placer claims were located, and defendant did not call for them when the witness was recalled, or reserve any exceptions to the new ruling, and it is more than inferable from the record that he acquiesced in it. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, **64: 567**

Review of facts.

See also supra, 33.

41. The concurrent judgment of the two courts below that a railway carrier was not negligent in failing to give warning to a brakeman concerning the use of freight cars with handholds only at two diagonal corners will not be disturbed by the Federal Supreme Court. Boehmer v. Pennsylvania R. Co. 252 U. S. 496, 40 Sup. Ct. Rep. 409, **64: 680**

What errors warrant reversal.

42. The allowance of an amendment to the declaration after the Statute of Limitations had run is not error, where the original declaration was sufficient, and the amendment plainly left the cause of action unchanged. Fidelity Title & T. Co. v. Dubois Electric Co. 253 U. S. 212, 40 Sup. Ct. Rep. 514, **64: 865**

43. The conceded insufficiency of one of the counts in an indictment does not warrant a reversal of a conviction where the sentence imposed upon the defendants does not exceed that which might lawfully have been imposed under the good counts upon

which they were also found guilty. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, 64: 542

44. A charge that contributory negligence would prevent a recovery under the Federal Employers' Liability Act could not have prejudiced the defendants, being more favorable to them than they were entitled to. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275, 64: 430

45. The inaccuracy of a charge on the assumption of risk could have worked no harm to the defendant where the situation did not make the doctrine of assumed risk a defense to the action. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275, 64: 430

46. No valid objection can be urged against that part of a charge to the jury, in a prosecution under the Espionage Act of June 15, 1917, for publishing and conspiring to publish false news despatches with intent to interfere with the military and naval success of the United States and promote the success of its enemies; to cause insubordination in the military or naval forces, and to obstruct the recruiting or enlistment service, in which the minds of the jurors were directed to the gist of the case, which was despatches received and then changed to express falsehood, to the detriment of the success of the United States, and they were told that, in passing upon the questions of the falsity of these publications and of whether the United States was at war, and any other questions which were, in like manner, a matter of public knowledge and of general information, they might call upon the fund of general information which was in their keeping. Schaefer v. United States, 251 U. S. 466, 40 Sup. Ct. Rep. 259, 64: 360

47. An erroneous ruling in a homicide case upon defendant's challenge of a juror for cause could not prejudice the accused where such juror was peremptorily challenged by the accused, and the latter was in fact allowed two more than the statutory number of peremptory challenges, and there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable. Stroud v. United States, 251 U. S. 15, 40 Sup. Ct. Rep. 50, 64: 103

48. Any error in overruling defendant's challenge of a juror for cause in a homicide case could not have prejudiced the accused, where such juror was excluded on peremptory challenge, and the accused was allowed one more than the statutory number of peremptory challenges, and had other peremptory challenges which he might use after the ruling and challenge to this juror,—the record not disclosing that other than an impartial jury sat on the trial. Stroud v. United States, 251 U. S. 380, 40 Sup. Ct. Rep. 176, 64: 317

49. The refusal of the trial court to direct a verdict for defendant will not be disturbed by the Federal Supreme Court where that court is of the opinion that the evidence presented several disputable questions of fact which it was the province of the jury to determine, and this was the view, not only of the judge who presided at the trial, but of another judge who overruled a motion for a new trial. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

50. A verdict on the trial of an indictment containing two counts which finds defendants "guilty on the —— count of the indictment, and —— on the —— count of the indictment," will be regarded on writ of error as a general verdict of guilty upon both counts, where apparently a printed form was used in preparing the jury's verdict, and when presented no objection was made to its form or wording, neither the motion for a new trial nor in arrest of judgment indicating any such objection, and defendants mentioning none when called upon to show why sentence should not be imposed. O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. Rep. 444, 64: 827

Effect of matters occurring after decision below.

51. A circuit court of appeals, on appeal from an order of a district court which had granted a preliminary injunction in entire reliance upon a decree of another district court, properly takes notice of and considers the changed circumstances arising out of the subsequent reversal of such decree. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, 64: 822

VII. Judgment.

Rendering proper judgment.

52. A final decree upon the merits may not be entered by a circuit court of appeals on grounds of estoppel by judgment upon an appeal from an order granting a preliminary injunction. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, 64: 822

53. The want of prosecution of an appeal by one of several joint appellants should not result in the affirmance of the judgment below as to such appellant, where the judgment is reversed on the merits upon the appeal of the other appellants. Newman v. Moyers, 253 U. S. 182, 40 Sup. Ct. Rep. 478, 64: 850

54. Where a majority of the individual defendants in a suit to dissolve a combination found to contravene the Sherman Anti-trust Act have died since the suit was instituted, and their successors in office have not been made parties, and the conclusion to be announced can be given full effect by an appropriate decree against the corporate defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64: 760

55. A judgment of the highest court of a state which, by affirming, without more, a judgment of the trial court directing a reassessment against the property itself instead of against a street railway company

of the share of the expense of a pavement properly apportioned to a central strip in a highway owned in fee by the street railway company, leaves in serious doubt the right of the company to a new and adequate hearing in respect of the assessment, will be so modified and corrected by the Federal Supreme Court on writ of error as definitely to preserve such right. Oklahoma R. Co. v. Severns Paving Co. 251 U. S. 104, 40 Sup. Ct. Rep. 73, **64: 168**

Remanding; directions to lower court.

Reversal without remanding for a new trial, see supra, 38.

See also supra, 29, 34.

56. The denial of a fair hearing to a Chinese applicant who was refused admission into the United States requires that a judgment of the Federal circuit court of appeals which affirmed a judgment of the district court, sustaining a demurrer to the petition of such Chinaman for habeas corpus, be reversed and the cause remanded to the district court for trial of the merits. Kwock Jan Fat v. White, 253 U. S. 454, 40 Sup. Ct. Rep. 566, **64: 1010**

57. The proper course for the Federal Supreme Court on an appeal from a decree of affirmance made by a circuit court of appeals in a case wrongfully appealed to that court is to reverse the judgment of the circuit court of appeals and remand the case to that court, with directions to dismiss the appeal. New York v. Consolidated Gas Co. 253 U. S. 219, 40 Sup. Ct. Rep. 511, **64: 870**

58. Error below in overruling the objection of Treasury officials in a suit by attorneys against their client and such officials, that a valid act of Congress prohibited the recovery sought, requires that a judgment for plaintiffs be reversed upon the appeals of such officials, and that the cause be remanded, with directions to dismiss the bill as to them. Newman v. Moyers, 253 U. S. 182, 40 Sup. Ct. Rep. 478, **64: 849**

Subsequent proceedings below.

59. A dismissal of an appeal for want of prosecution will remit the cause to the lower court in the same condition as before the appeal was taken, and will leave the lower court free to take appropriate action to prevent itself from being used as an instrument in illegality. Newman v. Moyers, 253 U. S. 182, 40 Sup. Ct. Rep. 478, **64: 849**

APPEARANCE.

By real party in interest as waiver of objection to jurisdiction, see Courts, 7.

APPOINTMENT.

Of officer, see Officers.

Of Federal employee, see United States, 1–3.

ARBITRATION.

Of dispute under charter party, see Shipping, 1.

ARCHITECT.

Appointment of, see United States, 1–4.

ARKANSAS.

Boundary between Arkansas and Mississippi, see Boundaries, 1.

ARMY.

Exclusive jurisdiction of military tribunal, see War, 13.

ARREST.

Release on bail, see Bail.

A person charged with a felony by an indictment found in one Federal district, who has fled to another district, may be arrested without warrant by a peace officer in the latter district, and be detained a reasonable time to await the institution of proceedings for his removal to the district where the indictment was found. The arrest being lawful without warrant was none the less so because the peace officer was possessed of a bench warrant issued in the Federal district where the indictment was found. Stallings v. Splain, 253 U. S. 339, 40 Sup. Ct. Rep. 537, **64: 940**

ASSESSMENT WORK.

On mining claim, see Mines, 3.

ASSIGNMENT.

Of claim against United States, see Claims, 10, 11.

Suit by assignee of legal title, see Parties, 1.

There is nothing in the letter or spirit of the Interstate Commerce Acts inconsistent with the view that claims for reparation because of the exaction of unreasonable freight charges are assignable. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, **64: 810**

ASSIGNMENT FOR CREDITORS.

As to bankruptcy matters, see Bankruptcy.

ASSOCIATIONS.

Illegal combination, see Monopoly.

ASSUMPSIT.

The United States as the drawee of a forged draft cannot recover as for money paid out under a mistake of fact the sum paid by it on such draft to an innocent collecting bank, even though the signature of the indorser as well as that of the drawer was forged. United States v. Chase Nat. Bank, 252 U. S. 485, 40 Sup. Ct. Rep. 361, **64: 675**

ASSUMPTION OF RISK.

By servant, see Master and Servant, 9–12.

ATTORNEYS.

Compensation for prosecuting claim against United States, see Claims, 3.

AUDITOR.

Appointment of, as infringing right to jury trial, see Jury, 3.

Power of court to appoint, see Reference.

AVULSION.

Effect on state boundary, see Boundaries, 1.

BAIL.

1. Funds held in trust primarily as security against liability on a bail bond may not be charged by the surety with the cost of defending against proceedings brought by the United States to collect a judgment upon such bond as forfeited, merely because the United States impounded the funds available for payment. Leary v. United States, 253 U. S. 94, 40 Sup. Ct. Rep. 446, 64: 798

2. The surety on a forfeited bail bond cannot charge a fund held in trust as security against liability on such bond with his expenses in defending the trust and establishing its priority over the claims of the United States, nor with the poundage fees of a clerk of court having possession of such fund. Leary v. United States, 253 U. S. 94, 40 Sup. Ct. Rep. 446, 64: 798

BANKRUPTCY.

General orders and forms in, see Rules of Courts.

Referee.

1. A referee in bankruptcy is not in any sense a separate court nor endowed with any independent judicial authority. He is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference, read in the light of the Bankruptcy Act, and his judicial functions, however important, are subject always to the review of the bankruptcy court. Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. Rep. 534, 64: 898

2. A referee in bankruptcy, by virtue of a general reference under General Orders in Bankruptcy No. 12, which provides that "thereafter all the proceedings, except such as are required by the act or by these General Orders to be had before the judge, shall be had before the referee," has no jurisdiction of a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e of the Bankruptcy Act, and affecting property not in the custody or control of the court of bankruptcy. Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. Rep. 534, 64: 898

Claims and distribution.

3. A claim for unliquidated damages arising out of a pure tort which neither constitutes a breach of an express contract nor results in any unjust enrichment of the tort-feasor that may form the basis of an implied contract is not made provable in bankruptcy by the provision of the Bankrupt Act of July 1, 1898, § 63b, that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate, since this provision does not add claims of purely tortious origin to the provable debts enumerated in paragraph a of such section, but provides a procedure for liquidating claims provable under that paragraph if not already liquidated. Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. Rep. 135, 64: 247

4. The class of provable claims in bankruptcy, as set forth in the provisions of the Bankrupt Act of July 1, 1898, § 63, was not enlarged so as to include mere tort claims by anything in the amendment to § 17 made by the Act of February 5, 1903, confessedly designed to restrict the scope of a discharge in bankruptcy. Schall v. Camors, 251 U. S. 239, 40 Sup. Ct. Rep. 135, 64: 247

5. No legal or equitable claim as against individual partners that might, by waiver of the tort or otherwise, be deemed to arise out of a tort done in the course of the partnership business for the benefit of the firm, and without benefit to the partners as individuals, can displace the equity of other creditors recognized in the Bankrupt Act of July 1, 1898, § 5, and put the claimants in a position of equality with others who were actual creditors of the individual partners, and of preference over other firm creditors. Schall v. Camors 251 U. S. 239, 40 Sup. Ct. Rep. 135, 64: 247

Review.

6. A decision of a bankruptcy court that the referee had no jurisdiction of a bill filed by the trustee to avoid certain transfers as in fraud of creditors is reviewable in the circuit court of appeals by petition to revise under the Bankruptcy Act, § 24b, although, had the district court sustained the jurisdiction and passed upon the merits, the exclusive remedy would have been by appeal under § 24a, as the court thereby would have determined a controversy arising in bankruptcy proceedings. Weidhorn v. Levy, 253 U. S. 268, 40 Sup. Ct. Rep. 534, 64: 898

BANKS.

Power to contract with loan company notwithstanding identity of stock ownership and affiliation in management, see Corporations, 3.

Measure of damages, see Damages, 2.

Usury by national bank, see Usury.

Powers; limitation on loans.

1. The limitation in U. S. Rev. Stat. § 5200, upon the total liabilities to a national bank of any single borrower, will not be construed as including his liability as surety or indorser for money borrowed by another, in view of the long-continued practice and administrative rulings of the Comptroller of the Currency not to include such liabilities in the computation. Cor-

sicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) 64: 141

Liability of officers.

Prematurity of suit against national bank director, see Action or Suit, 1.

Want of denial by director of knowledge of excessive loan, see Evidence, 11.

Limitation of actions to enforce liability of bank director for excessive loan, see Limitation of Actions, 3.

Sufficiency of allegations in complaint in action against national bank director, see Pleading, 5.

2. The failure of the president and executive officer of a national bank to heed hints and warnings, including an apparent shrinkage in deposits, which, however little they may have pointed to the specific facts of theft by a teller and bookkeeper, would, if accepted, have led to an examination of the depositors' ledger, thereby disclosing past and preventing future thefts, may be treated by the courts as such negligence as renders him liable for thefts by such employee after he had the warnings which should have led to steps that would have made fraud impossible, even though the precise form that the fraud would take hardly could have been foreseen. Bates v. Dresser, 251 U. S. 524, 40 Sup. Ct. Rep. 247, 64: 388

3. The directors of a national bank did not necessarily so neglect their duty as to be answerable for thefts by a teller and bookkeeper, concealed by overcharging a depositor, or by a false addition in the column of drafts or deposits in the depositors' ledger, merely because they accepted the cashier's statement of liabilities and did not inspect the depositors' ledger, even after an apparent shrinkage in deposits, where the cashier's statements of assets always were correct, the semiannual examination by the government examiners had disclosed nothing pointing to malfeasance, and they were encouraged in their belief that all was well by the president, whose responsibility as executive officer, interest as large stockholder and depositor, and knowledge from long daily presence in the bank were greater than theirs. Bates v. Dresser, 251 U. S. 524, 40 Sup. Ct. Rep. 247, 64: 388

4. Directors of a national bank cannot be held liable, under U. S. Rev. Stat. §§ 5200 and 5239, for knowingly participating in or assenting to an excessive loan unless such participation or assent was not through mere negligence, but was knowing and in effect intentional. If, however, a director deliberately refrains from investigating that which it is his duty to investigate, any violation of the statute must be regarded as in effect intentional. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) 64: 141

5. The question whether a director of a national bank knowingly participated in or assented to, contrary to U. S. Rev. Stat. § 5239, the making of a loan in excess of the limit prescribed by § 5200, is not to be confused by any consideration of the supposed personal or financial standing of the borrower. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) 64: 141

6. The absence of any improper motive or desire for personal profit on defendant's part is no defense to an action against a director of a national bank for violating U. S. Rev. Stat. §§ 5200 and 5239, by knowingly participating in or assenting to an excessive loan. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) 64: 141

7. Every director of a national bank knowingly participating in or assenting to a loan in excess of the limit prescribed by U. S. Rev. Stat. § 5200, is made liable by § 5239, in his personal and individual capacity, without regard to the question whether other directors likewise are liable; and he may alone be sued. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) 64: 141

8. A national bank may recover from a director the damages sustained by reason of his knowing participation in or assent to an excessive loan, contrary to U. S. Rev. Stat. §§ 5200 and 5239, although it remained solvent or even prosperous, and irrespective of any changes in stockholding interest or control occurring between the time the cause of action arose and the time of the commencement of the suit or of the trial, and even if the new stockholders acquired their interests with knowledge of the fact that a loss had been sustained, and that such director was responsible for it. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) 64: 141

9. The damages sustained by a national bank by reason of a director's knowing participation in or assent to an excessive loan, contrary to U. S. Rev. Stat. §§ 5200 and 5239, are satisfied by a transfer of the borrower's notes and indebtedness to another corporation for their full face value if, and only if, the transfer is good and valid as against such corporation and its stockholders, or is duly ratified by them. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep 82, (Annotated) 64: 141

10. A national bank director cannot escape liability, under U. S. Rev. Stat. §§ 5200 and 5239, for knowingly participating in or assenting to an excessive loan because of a sale of the borrower's notes and indebtedness for their full face value to a loan company having the same directors and managers as the bank, and identity of stock ownership, if the transfer was made under circumstances rendering it voidable as against the loan company and as against the stockholders of both corporations, and the stockholders of the loan company exercised their right to rescind without unreasonable delay and gave notice to the bank, and the bank, recognizing the justness of

the claim, restored to the loan company what was accepted as the equivalent in value of that which the bank had received for the transfer, the director not having changed his position and not being prejudiced by such delay as there was in exercising the right to rescind. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) **64: 141**

11. The rescission for fraud of a sale by a national bank of the notes and indebtedness of a borrower for their full face value to a loan company having the same directors and managers as the bank, and identity of stock interest, may not be challenged by a director in the bank in an action against him for having participated in, or assented to, an excessive loan to such borrower, contrary to U. S. Rev. Stat. §§ 5200 and 5239, merely because such rescission may have been had in order to permit the bank to bring the action. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) **64: 141**

12. The question whether a loan company having the same directors and managers as a national bank and identity of stock interest, upon rescinding for fraud a sale to it by the bank of the notes and indebtedness of a borrower for their full face value, received full restitution from the bank, is not material as bearing either upon the bank's right, under U. S. Rev. Stat. §§ 5200 and 5239, to sue a director for having knowingly participated in, or assented to, an excessive loan to such borrower, or upon the question of damages. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) **64: 141**

BAR.

Of judgment, see Judgment, 2–4.

Of limitation, see Limitation of Actions.

BARRATRY.

Constitutionality of state statute punishing, see Constitutional Law, 15a.

BEER.

Character of, see War, 2–4, 10.

BILL.

See Pleading.

BILL OF EXCEPTIONS.

See Appeal and Error, 26, 27.

BILL OF LADING.

Limitation of liability in, see Carriers, 4.

BILLS AND NOTES.

Recovering back payment on forged draft, see Assumpsit.

BIRDS.

Validity of Migratory Bird Treaty, see Treaties.

BONA FIDE PURCHASERS.

Burden of proof by, see Evidence, 5.

BONDS.

Bail bonds, see Bail.

BOUNDARIES.

Between states.

1. The boundary between Arkansas and Mississippi adjudged to be the middle of the main channel of the Mississippi river as it existed just prior to the avulsion of 1848, and commissioners appointed to run such line. Arkansas v. Mississippi, 252 U. S. 344, 40 Sup. Ct. Rep. 333, **64: 605**

2. The mouth of the St. Louis river within the meaning of the provision in the Wisconsin Enabling Act of August 6, 1846, describing the state boundary in part as "thence [westwardly] through the center of Lake Superior to the mouth of the St. Louis river," is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin points,—"The Entry." Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. Rep. 313, **64: 558**

3. The middle of the principal channel of navigation—not necessarily the deepest channel—is commonly accepted as the boundary line where navigable water constitutes the boundary between two states. Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. Rep. 313, **64: 558**

4. The boundary line between Wisconsin and Minnesota in Upper and Lower St. Louis bays must be ascertained upon a consideration of the situation existing at the time of the enactment of the Wisconsin Enabling Act of August 6, 1846, and accurately disclosed by the Meade chart. Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. Rep. 313, **64: 558**

5. That part of the boundary line between Wisconsin and Minnesota described in the Wisconsin Enabling Act of August 6, 1846, as proceeding from the mouth of the St. Louis river "up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map," is adjudged to run midway between Rice's point and Connor's point and through the middle of Lower St. Louis bay to and with the deep channel leading into Upper St. Louis bay, and to a point therein immediately south of the southern extremity of Grassy point, thence westward along the most direct course, through water not less than 8 feet deep, eastward of Fisherman's island and approximately 1 mile to the deep channel and immediately west of the bar therein, thence with such channel north and west of Big island, upstream to the falls. Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. Rep. 313, **64: 558**

BUILDINGS.

Negligence as to condition of, see Negligence, 1–3.

BURDEN OF PROOF.

See Evidence, 5.

Demurrage.

1. No departure from the established policy manifested in the Uniform Demurrage Code to treat the single car as the unit in applying the allowance of free time and the charges for demurrage, just as in the making of carload freight rates, can be inferred from the declaration in such Code that no demurrage charges shall be collected when shipments are frozen while in transit so as to prevent unloading during the prescribed free time, provided a diligent effort to unload is made. If each car containing frozen shipments could have been unloaded, considered separately, within the free time, any relief from the hardship resulting from excessive receipts of such cars on the same day must be found, either under the so-called bunching rule, under which the shipper is relieved from demurrage charges if, by reason of the carrier's fault, the goods are accumulated and detention results, or under the average-agreement rule, under which a monthly debit and credit account is kept of detention, and the shipper is relieved of charges for detaining cars more than forty-eight hours by credit for other cars released within twenty-four hours. Pennsylvania R. Co. v. Kittaning Iron & Steel Mfg. Co. 253 U. S. 319, 40 Sup. Ct. Rep. 522, **64: 928**

Limiting liability.

2. The mental purpose of a railway employee traveling on an annual pass, good only over a line wholly within the state, to continue his journey into another state, using another carrier to a point still within the state, where he expected to find awaiting him another pass from the first carrier which would be good for the interstate part of his journey, does not make him an interstate passenger while traveling on the first pass, so as to validate, contrary to local public policy, a stipulation in such pass releasing the carrier from liability for negligence. New York C. R. Co. v. Mohney, 252 U. S. 152, 40 Sup. Ct. Rep. 287, **64: 502**

3. A carrier is liable to a person traveling on a pass who is wilfully or wantonly injured by the carrier's employees, notwithstanding a stipulation in such pass releasing the carrier from liability for negligence. New York C. R. Co. v. Mohney, 252 U. S. 152, 40 Sup. Ct. Rep. 287, **64: 502**

4. The stipulation in the uniform bill of lading that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment, including freight charges, if paid, which is sanctioned by the Interstate Commerce Commission as in no way limiting the carrier's liability to less than the value of the goods, but as merely offering the most convenient way of finding the value, but which does in fact prevent a recovery of the full actual loss, where the shipment would have been worth more at destination than at origin, is inconsistent with and invalidated by the provision of the Cummins Amendment of March 4, 1915, that carriers shall be liable to the holder of the bill of lading for the full actual loss, damage, or injury, notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value. Chicago, M. & St. P. R. Co. v. McCaull-Dinsmore Co. 253 U. S. 97, 40 Sup. Ct. Rep. 504, **64: 801**

State regulation.

5. A corporation which, in connection with its sawmill and lumber business, has operated a railroad on which it has done a small business as a common carrier, cannot be compelled to continue the operation of the railroad after it has ceased to be profitable, merely because a profit would be derived from the entire business, including the operation of the railroad. Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 40 Sup. Ct. Rep. 183, **64: 323**

6. A corporation carrying on a sawmill and lumber business, which has granted to the public an interest in a railroad operated in connection with its business by doing a small business as a common carrier thereon, may withdraw its grant by discontinuing the use of the road when such use can be kept up only at a loss. Brooks-

Scanlon Co. v. Railroad Commission, 251 U. S. 396, 40 Sup. Ct. Rep. 183, **64: 323**

Association with commodity carried.

7. The combination in a single corporation of the ownership of all of the stock of a carrier and of all of the stock of a coal company violates the commodities clause of the Act of June 29, 1906, making it unlawful for any railway company to transport in interstate commerce any article mined or produced by it or under its authority, or which it may own, or in which it may have any interest, direct or indirect, where all three companies have the same officers and directors, and it is under their authority that the coal mines are worked and the railway operated, and they exercise that authority in the one case in precisely the same character as in the other; viz., as officials of the holding company, the manner in which the stock of the three is held resulting, as intended, in the abdication of all independent corporate action by both the railway company and the coal company, involving, as it does, the surrender to the holding company of the entire conduct of their affairs. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, **64: 760**

8. While the ownership by a railway company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful, under the commodities clause of the Act of June 29, 1906, for the railway company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, **64: 760**

CERTIORARI.

To state courts.

Error or certiorari, see Appeal and Error, 11–14.

1. Non-Federal grounds put forward by the highest state court as the basis for its decision, but which are plainly untenable, cannot serve to bring the case within the rule that the Federal Supreme Court will not review the judgment of a state court where the latter has decided the case upon an independent ground not within the Federal objections taken, and that ground is sufficient to sustain the judgment. Ward v. Love County, 253 U. S. 17, 40 Sup. Ct. Rep. 419, **64: 751**

Broadwell v. Carter County, 253 U. S. 25, 40 Sup. Ct. Rep. 422, **64: 759**

To circuit courts of appeals.

Filing disclaimer on, see Patents, 6.

2. The Federal Supreme Court may, under the Judicial Code, § 240, bring up by certiorari directed to a circuit court of appeals a cause in which the decree of the latter court is made final by § 128, and may treat the cause as if on appeal. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, **64: 822**

3. Decrees of a circuit court of appeals which reversed decrees below for the recovery of the amounts awarded in a reparation order made by the Interstate Commerce Commission, and remanded the cause for a new trial, are reviewable in the Federal Supreme Court by certiorari under the Judicial Code, § 240, in the case of those of such decrees which are made final by the combined effect of §§ 128 and 241, because the requisite jurisdictional amount is not involved, and in the case of the other decrees by virtue of § 262, in aid of the ultimate jurisdiction of the Supreme Court to review such decrees by writ of error. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, **64: 810**

4. A decree of a circuit court of appeals which, upon a view of all relevant circumstances, reversed an order of the trial court granting a preliminary injunction, will not be disturbed by the Federal Supreme Court on certiorari except for strong reasons. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, **64: 822**

5. The Federal Supreme Court will not undertake, on certiorari sued out to review a decree of a circuit court of appeals which reversed a decree of a district court, granting a preliminary injunction, to decide which one of two conflicting views expressed by two circuit courts of appeals is the correct one, nor to decide the several issues involved upon the merits. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, **64: 822**

6. The Federal Supreme Court, on certiorari to review a judgment of a circuit court of appeals which reversed a judgment below in favor of plaintiffs and ordered a new trial, may deal only with the matter considered by the circuit court of appeals, and remand the cause for any needed action upon other questions, or it may proceed itself to a complete decision, where defendant does not rely entirely upon the ground of decision advanced by the circuit court of appeals, but urges that if it be not well taken, the record discloses other grounds not considered by that court for reversing the judgment and ordering a new trial, and that if its decision be right, it is not sufficiently comprehensive to serve as a guide to the court and the parties upon another trial, plaintiffs insisting that the judgments in the district court were right and should be affirmed. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, **64: 567**

CESSIONS AND COMPACTS.

Tribal cession, see Indians, 2.

CHALLENGES.

To jurors, see Jury, 2.

CHARTER PARTY.
See Shipping, 1, 2.

CHINESE.
Deportation of Chinese merchant, see Aliens.
Due process of law in Chinese exclusion, see Constitutional Law, 65.

CIRCUIT COURTS OF APPEALS.
Appellate jurisdiction of, see Appeal and Error, 1, 34, 51, 52.
Appellate jurisdiction of Supreme Court over, see Appeal and Error, II. a.
Revision of bankruptcy proceedings in, see Bankruptcy, 6.
Certiorari to, see Certiorari, 2–6.

CITIZENS.
Abridging privileges and immunities of, see Constitutional Law, II.

CITIZENSHIP.
As affecting jurisdiction, see Courts, 6.

CITY.
See Municipal Corporations.

CIVIL RIGHTS.
Separate coach law as affecting interstate commerce, see Commerce, 6, 7.

CLAIMS.
Scope of review on appeal from court of claims, see Appeal and Error, 32, 33.
Against bankrupt estate, see Bankruptcy, 3–5.
Compensation for property taken by United States, see Damages, 1.
Interest on claims against United States, see Interest, 1, 2.
Who may sue United States for infringement of patent, see Patents, 7, 8.
Rules for appeals from court of claims, see Rules of Courts.

Contract express or implied.
For compensation for carrying mails, see Postoffice.
Contracts of United States, generally, see United States, 7–10.

1. A cause of action ex contractu, based on the government use of a patented invention, is not presented by a petition, the allegations of which, taken together, not only do not show a contract of the parties, express or implied, to pay a royalty in any amount, but distinctly and in terms negative the making of any such contract as is necessary to give the court of claims jurisdiction. E. W. Bliss Co. v. United States, 253 U. S. 187, 40 Sup. Ct. Rep. 455, **64: 852**

2. No contract, express or implied, on the part of the United States, justiciable in the court of claims, to pay the annual subsidies provided for in a Spanish concession for the construction and operation of submarine cables in the Philippine Islands, can be deduced from the use of such cables by the United States government at the reduced rate prescribed in such concession for official despatches, where this was the full rate demanded by the cable company, nor from the acceptance by subordinate officials of the Philippine government of the tax on receipts from messages computed as required by such concession, nor from a statement of account showing a balance favorable to the United States which was paid to and accepted by the treasurer of the Philippine government, which statement was prepared without suggestion of demand from the government of the United States, or even from the Philippine government, and in which, in order to give it the form of an account, the company was obliged to treat as unpaid, charges for tolls over the Hongkong-Manila cable, all of which had been paid by the United States government and accepted by the company. Eastern Extension, A. & C. Teleg. Co. v. United States, 251 U. S. 355, 40 Sup. Ct. Rep. 168, **64:305**

Contracts for compensation of attorneys.
Limiting attorneys' fees as denying due process of law, see Constitutional Law, 49.
See also infra, 11.

3. An existing contract for the payment to an attorney for professional services to be rendered in the prosecution of a Civil War claim against the United States of a sum equal to 50 per cent of whatever might be collected was invalidated by the provision of the Omnibus Claims Act of March 4, 1915, which, after making an appropriation for payment of such claim, made it unlawful for any attorney to exact, collect, withhold, or receive, any sum which, in the aggregate, exceeds 20 per cent of the amount of any item appropriated in that act, on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Newman v. Moyers, 253 U. S. 182, 40 Sup. Ct. Rep. 478, **64: 849**
Calhoun v. Massie, 253 U. S. 170, 40 Sup. Ct. Rep. 474, **64: 843**

Indian claims.
Interest on, see Interest, 1, 2.
When action is barred by statute of limitations, see Limitation of Actions, 4.

4. No liability, legal or equitable, on the part of the United States to pay the value of horses belonging to Omaha Indians which were stolen in raids by the Sioux Indians, can be asserted to arise under the obligation the United States assumed in the Treaty of March 16, 1854, with the Omaha Indians, to protect them from the Sioux and other hostile tribes "as long as the President may deem such protection necessary," unless there was a failure on the part of the government to provide the protection deemed by the President to be necessary. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522. **64: 901**

5. Omaha Indians for whom the United States agreed, in the Treaty of March 6, 1865, by which the Indians ceded lands to the United States, to pay a specified sum to be expended for goods, provisions, cattle, horses, etc., for their benefit, are entitled to an allowance of the value of certain cattle delivered by the United States in pursuance of this agreement which the court of claims finds were in bad condition when they reached the reservation, and thereafter died, the necessary import of which finding is that the cattle either were in bad condition when purchased, or were badly cared for on the way to the reservation, and in either event, the fault lying with the agents of the United States, the Indians are entitled to credit. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522, **64: 901**

6. The United States was not obligated to pay for Omaha Indians killed in Sioux raids by its agreement in the Treaty of March 16, 1854, to protect them from the Sioux and other hostile tribes "as long as the President may deem such protection necessary," unless there was a failure by the government to provide the protection deemed by the President to be necessary. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522, **64: 901**

7. Expenditure by the United States of Indian moneys for a building not used by the Indians, and one which, because of its unfitness, they were not obliged to accept, is a misappropriation of funds of the tribe "for purposes not for its material benefit," within the meaning of the Act of June 22, 1910, conferring upon the court of claims jurisdiction to hear and determine claims which the Indians may have against the United States for such misappropriations. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522, **64: 901**

8. A claim for Indian depredations which was dismissed by the court of claims on the ground that the band committing the depredations was not in amity with the United States was not reinstated by the Act of January 11, 1915, amending the Act of March 3, 1891, so that in all claims for property of citizens or inhabitants of the United States taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States the alienage of the claimant will not be a defense, with a proviso that claims dismissed for want of proof of citizenship or alienage shall be reinstated. Rex v. United States, 251 U. S. 382, 40 Sup. Ct. Rep. 181, **64: 318**

Tort.

9. A suit to recover from the United States the losses incurred by a public contractor because of the misrepresentations by the government as to the character of the materials to be encountered cannot be said to be one sounding in tort, and hence not tenable against the United States, where there is no intimation of bad faith against the officers of the government, and the court of claims regarded the representation as in the nature of a warranty, and there was nothing punitive in its judgment, it being simply compensatory of the cost of the work of which the government received the benefit. United States v. Atlantic Dredging Co. 253 U. S. 1, 40 Sup. Ct. Rep. 423, **64: 735**

Assignment.

10. The restrictions imposed by U. S. Rev. Stat. § 3477, upon the assignment of claims against the United States, form no obstacle to a suit against Treasury officials to establish an equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress for payment to a specified person, also made a party defendant, in satisfaction of a finding of the court of claims. Houston v. Ormes, 252 U. S. 469, 40 Sup. Ct. Rep. 369, **64: 669**

11. A provision in a contract for the prosecution of a claim against the United States which purports to make the contingent attorney's fee therein provided for a lien upon any warrant which may be issued in payment of such claim is repugnant to U. S. Rev. Stat. § 3477, annulling assignments of such claims, or of any part or interest therein, made in advance of the allowance of the claim. Calhoun v. Massie, 253 U. S. 170, 40 Sup. Ct. Rep. 474, **64: 843**

CLASSIFICATION.

By statute, see Constitutional Law, II.

CLASS LEGISLATION.

See Constitutional Law, II.

CLERKS.

Bond of clerk of Federal Supreme Court approved, see ante, Appendix I., p. 1033.

Fees and commissions.

1. Fees and emoluments collected by a clerk of a Federal district court, and deposited by him in a bank at interest, were not public moneys of the United States, so as to entitle the United States to the interest as an increment of its ownership, even where such clerk was, by exceptional legislation, an officer whose salary was specifically appropriated, it not being disputed that he was under obligation to meet the expenses of his office from the fees and emoluments thereof, and to pay over to the United States only the resulting surplus. United States v. MacMillan, 253 U. S. 195, 40 Sup. Ct. Rep. 540, **64: 857**

2. Interest on the sum of the fees and emoluments deposited by the clerk of a Federal district court in a bank is not, in and of itself, an emolument for which he is liable to account to the United States. United States v. MacMillan, 253 U. S. 195, 40 Sup. Ct. Rep. 540, **64: 857**

3. The clerk of a Federal district court may properly deduct his poundage of 1 per cent, under U. S. Rev. Stat. § 828, from the amount allowed to the surety on a forfeited bail bond out of the impounded funds

of the principal in such clerk's hands, which are finally adjudged to have been held in trust primarily as security against liability on such bond. Leary v. United States, 253 U. S. 94, 40 Sup. Ct. Rep. 446, **64: 798**

CLOUD ON TITLE.

Remedy at law, see Equity, 3.
Injunction to remove, see Injunction, 2.

COAL.

Combination of carrier and coal company, see Monopoly, 5, 6.

COMBINATIONS.

See Monopoly.

COMITY.

Recognition of decree of other state, see Judgment, 5–7.

COMMERCE.

Powers of Interstate Commerce Commission, see Interstate Commerce Commission.
Conspiracy in restraint of, see Monopoly.

What is interstate commerce.

Transportation under railway pass, see Carriers, 2.
When railway employee is engaged in interstate commerce, see Master and Servant, 3–7.

1. The direct transmission of natural gas from the source of supply outside the state to local consumers in municipalities within the state is interstate commerce. Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 40 Sup. Ct. Rep. 279, (Annotated) **64: 434**

Conflicting state and Federal legislation.

2. Until Congress acts under its superior authority by regulating the subject-matter for itself, the exercise of authority conferred by a state upon a public service commission to regulate rates for natural gas transmitted directly from the source of supply outside the state to local consumers in municipalities within the state does not offend against the commerce clause of the Federal Constitution. Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 40 Sup. Ct. Rep. 279, (Annotated) **64: 434**

3. A narrow construction need not, in order to preserve the reserved power of a state, be given to the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission. Western U. Teleg. Co. v. Boegli, 251 U. S. 315, 40 Sup. Ct. Rep. 167, **64: 281**

4. Congress has so far taken possession of the field by enacting the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, as to prevent a state from thereafter penalizing the negligent failure of a telegraph company to deliver promptly an interstate telegram in that state. Western U. Teleg. Co. v. Boegli, 251 U. S. 315, 40 Sup. Ct. Rep. 167, **64: 281**

5. Congress has so far occupied the entire field of the interstate business of telegraph companies by enacting the provisions of the Act of June 18, 1910, respecting interstate telegraph rates, as to exclude state action invalidating a contract limiting the liability of a telegraph company for error in sending an unrepeated interstate message to the refunding of the price paid for the transmission of the message. Postal Teleg.-Cable Co. v. Warren-Godwin Lumber Co. 251 U. S. 27, 40 Sup. Ct. Rep. 69, **64: 118**

Regulating carriers and transportation.

Regulations in matters not affecting interstate commerce, see Carriers
See also supra, 1–5.

6. A Kentucky street railway may be required by a statute of that state to furnish either separate cars or separate compartments in the same car for white and negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands. South Covington & C. Street R. Co. v. Kentucky, 252 U. S. 399, 40 Sup. Ct. Rep. 378, (Annotated) **64: 631**

7. Interstate traffic over a Kentucky interurban electric railway may be subjected to the operation of a statute of that state requiring separate coaches, or separate compartments in the same coach, for white and negro passengers, without unlawfully interfering with interstate commerce. Cincinnati, C. & E. R. Co. v. Kentucky, 252 U. S. 408, 40 Sup. Ct. Rep. 381, **64: 637**

8. The transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, § 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes. United States v. Simpson, 252 U. S. 465, 40 Sup Ct. Rep. 364, **64: 665**

Licenses and taxes.

9. A state, when taxing a foreign interstate railway company, cannot take into account the property of such railway company situated outside the state unless it can be seen in some plain and fairly intelligible way that such property adds to the value of the railway and the rights exercised in the state. Wallace v. Hines, 253 U. S. 66 40 Sup. Ct. Rep. 435, **64: 782**

10. A state may not, consistently with the commerce and due process of law clauses of the Federal Constitution, fix the value of

the property of foreign interstate railway companies for the purpose of levying a special excise tax upon the doing of business in the state by taking the total value of the stock and bonds of each railway company and assessing the proportion of this value that the main track mileage bears to the main track of the whole line, where, by reason of topographical conditions, the cost of the lines in that state was much less than in other states, and the great and very valuable terminals of the railways are in other states, and where the valuations as made include such items as bonds secured by mortgage of lands in other states, a land grant in another state, and other property that adds to the riches of the corporation, but does not affect that part of the railway in the state. Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. Rep. 435. **64: 782**

11. A state income tax upon the net income of a nonresident from the business carried on by him in the state is not a burden on interstate commerce merely because the products of the business are shipped out of the state, since the tax, not being upon gross receipts, but only upon the net proceeds, is plainly sustainable even if it includes net gains from interstate commerce. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, (Annotated) **64: 445**

12. A state tax which is in effect a privilege tax upon the business of selling gasolene in the tank cars or other original packages in which the gasolene was brought into the state, and which provides for the levy of fees in excess of the cost of inspection, is invalid, as amounting to a direct burden on interstate commerce. Askren v. Continental Oil Co. 252 U. S. 444, 40 Sup. Ct. Rep. 355, **64: 654**

13. The business of selling gasolene at retail in quantities to suit customers, but not in the original packages, is properly taxable by the laws of the state, although, the state itself producing no gasolene, it must of necessity have been brought into the state in interstate commerce. Askren v. Continental Oil Co. 252 U. S. 444, 40 Sup. Ct. Rep. 355, **64: 654**

14. A nonresident manufacturer of "soft drinks" doing a business in a municipality in the state which largely consists in carrying a supply of such drinks from one retailer's place of business to another's upon the vehicle in which the goods were brought across the state line, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold in the original unbroken cases, may be required to take out the license required of all wholesalers in soft drinks without infringing the commerce clause of the Federal Constitution. Wagner v. Covington, 251 U. S. 95, 40 Sup. Ct. Rep. 93, (Annotated) **64: 157**
Gilligan v. Covington, 251 U. S. 104, 40 Sup. Ct. Rep. 93, **64: 168**

COMMON CARRIERS.
See Carriers.

COMMON LAW.
Abolishing defense of contributory negligence as denying due process of law, see Constitutional Law, 62.
Making contributory negligence a question for the jury as denying due process of law, see Constitutional Law, 63.

COMPLAINT.
In criminal proceeding, see Indictment and Information.
See also Pleading.

CONCURRENT POWER.
Of Congress and states to enforce Prohibition Amendment, see Constitutional Law, 8–10.

CONDITION.
To injunctive relief against infringement of copyright, see Injunction, 5.
Condition precedent to suit to recover back excessive tax, see Internal Revenue, 23, 24.
Protest as condition precedent to recovery back of illegal taxes, see Taxes, 3.

CONFISCATION.
See Constitutional Law.

CONGRESS.
Power over interstate commerce, see Commerce.
Validity of legislation by, generally, see Constitutional Law.
Relation of courts to, see Courts, 1, 2.
Power over insular possessions, see Territories.
War powers of Congress, see War.

CONSPIRACY.
Sufficiency of evidence to support conviction for, see Evidence, 12.
Sufficiency of indictment for, see Indictment and Information, 1.
Combinations in restraint of trade, commerce, or competition, see Monopoly.

1. The Espionage Act of June 15, 1917, § 3, makes criminal a conspiracy to obstruct the recruiting and enlistment service of the United States by inducement or persuasion. O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. Rep. 444, **64: 827**

2. A conspiracy to violate the Espionage Act of June 15, 1917, made criminal by § 4, provided one or more of the conspirators do any act to effect the object of the conspiracy, is none the less criminal, if thus attempted to be carried into effect, merely because the conspirators failed to agree in advance upon the precise method in which the law should be violated. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

3. While the averment of a conspiracy cannot be aided by allegations respecting the overt acts, and while under the Es-

of the principal in such clerk's hands, which are finally adjudged to have been held in trust primarily as security against liability on such bond. Leary v. United States, 253 U. S. 94, 40 Sup. Ct. Rep. 446, **64: 798**

CLOUD ON TITLE.

Remedy at law, see Equity, 3.

Injunction to remove, see Injunction, 2.

COAL.

Combination of carrier and coal company, see Monopoly, 5, 6.

COMBINATIONS.

See Monopoly.

COMITY.

Recognition of decree of other state, see Judgment, 5–7.

COMMERCE.

Powers of Interstate Commerce Commission, see Interstate Commerce Commission.

Conspiracy in restraint of, see Monopoly.

What is interstate commerce.

Transportation under railway pass, see Carriers, 2.

When railway employee is engaged in interstate commerce, see Master and Servant, 3–7.

1. The direct transmission of natural gas from the source of supply outside the state to local consumers in municipalities within the state is interstate commerce. Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 40 Sup. Ct. Rep. 279, (Annotated) **64: 434**

Conflicting state and Federal legislation.

2. Until Congress acts under its superior authority by regulating the subject-matter for itself, the exercise of authority conferred by a state upon a public service commission to regulate rates for natural gas transmitted directly from the source of supply outside the state to local consumers in municipalities within the state does not offend against the commerce clause of the Federal Constitution. Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 40 Sup. Ct. Rep. 279, (Annotated) **64: 434**

3. A narrow construction need not, in order to preserve the reserved power of a state, be given to the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission. Western U. Teleg. Co. v. Boegli, 251 U. S. 315, 40 Sup. Ct. Rep. 167, **64: 281**

4. Congress has so far taken possession of the field by enacting the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, as to prevent a state from thereafter penalizing the negligent failure of a telegraph company to deliver promptly an interstate telegram in that state. Western U. Teleg. Co. v. Boegli, 251 U. S. 315, 40 Sup. Ct. Rep. 167, **64: 281**

5. Congress has so far occupied the entire field of the interstate business of telegraph companies by enacting the provisions of the Act of June 18, 1910, respecting interstate telegraph rates, as to exclude state action invalidating a contract limiting the liability of a telegraph company for error in sending an unrepeated interstate message to the refunding of the price paid for the transmission of the message. Postal Teleg.-Cable Co. v. Warren-Godwin Lumber Co. 251 U. S. 27, 40 Sup. Ct. Rep. 69, **64: 118**

Regulating carriers and transportation.

Regulations in matters not affecting interstate commerce, see Carriers.

See also supra, 1–5.

6. A Kentucky street railway may be required by a statute of that state to furnish either separate cars or separate compartments in the same car for white and negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands. South Covington & C. Street R. Co. v. Kentucky, 252 U. S. 399, 40 Sup. Ct. Rep. 378, (Annotated) **64: 631**

7. Interstate traffic over a Kentucky interurban electric railway may be subjected to the operation of a statute of that state requiring separate coaches, or separate compartments in the same coach, for white and negro passengers, without unlawfully interfering with interstate commerce. Cincinnati, C. & E. R. Co. v. Kentucky, 252 U. S. 408, 40 Sup. Ct. Rep. 381, **64: 637**

8. The transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, § 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes. United States v. Simpson, 252 U. S. 465, 40 Sup. Ct. Rep. 364, **64: 665**

Licenses and taxes.

9. A state, when taxing a foreign interstate railway company, cannot take into account the property of such railway company situated outside the state unless it can be seen in some plain and fairly intelligible way that such property adds to the value of the railway and the rights exercised in the state. Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. Rep. 435, **64: 782**

10. A state may not, consistently with the commerce and due process of law clauses of the Federal Constitution, fix the value of

the property of foreign interstate railway companies for the purpose of levying a special excise tax upon the doing of business in the state by taking the total value of the stock and bonds of each railway company and assessing the proportion of this value that the main track mileage bears to the main track of the whole line, where, by reason of topographical conditions, the cost of the lines in that state was much less than in other states, and the great and very valuable terminals of the railways are in other states, and where the valuations as made include such items as bonds secured by mortgage of lands in other states, a land grant in another state, and other property that adds to the riches of the corporation, but does not affect that part of the railway in the state. Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. Rep. 435. **64: 782**

11. A state income tax upon the net income of a nonresident from the business carried on by him in the state is not a burden on interstate commerce merely because the products of the business are shipped out of the state, since the tax, not being upon gross receipts, but only upon the net proceeds, is plainly sustainable even if it includes net gains from interstate commerce. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, (Annotated) **64: 445**

12. A state tax which is in effect a privilege tax upon the business of selling gasolene in the tank cars or other original packages in which the gasolene was brought into the state, and which provides for the levy of fees in excess of the cost of inspection, is invalid, as amounting to a direct burden on interstate commerce. Askren v. Continental Oil Co. 252 U. S. 444, 40 Sup. Ct. Rep. 355, **64: 654**

13. The business of selling gasolene at retail in quantities to suit customers, but not in the original packages, is properly taxable by the laws of the state, although, the state itself producing no gasolene, it must of necessity have been brought into the state in interstate commerce. Askren v. Continental Oil Co. 252 U. S. 444, 40 Sup. Ct. Rep. 355, **64: 654**

14. A nonresident manufacturer of "soft drinks" doing a business in a municipality in the state which largely consists in carrying a supply of such drinks from one retailer's place of business to another's upon the vehicle in which the goods were brought across the state line, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold in the original unbroken cases, may be required to take out the license required of all wholesalers in soft drinks without infringing the commerce clause of the Federal Constitution. Wagner v. Covington, 251 U. S. 95, 40 Sup. Ct. Rep. 93, (Annotated) **64: 157**
Gilligan v. Covington, 251 U. S. 104, 40 Sup. Ct. Rep. 93, **64: 168**

COMMON CARRIERS.
See Carriers.

COMMON LAW.
Abolishing defense of contributory negligence as denying due process of law, see Constitutional Law, 62.
Making contributory negligence a question for the jury as denying due process of law, see Constitutional Law, 63.

COMPLAINT.
In criminal proceeding, see Indictment and Information.
See also Pleading.

CONCURRENT POWER.
Of Congress and states to enforce Prohibition Amendment, see Constitutional Law, 8–10.

CONDITION.
To injunctive relief against infringement of copyright, see Injunction, 5.
Condition precedent to suit to recover back excessive tax, see Internal Revenue, 23, 24.
Protest as condition precedent to recovery back of illegal taxes, see Taxes, 3.

CONFISCATION.
See Constitutional Law.

CONGRESS.
Power over interstate commerce, see Commerce.
Validity of legislation by, generally, see Constitutional Law.
Relation of courts to, see Courts, 1, 2.
Power over insular possessions, see Territories.
War powers of Congress, see War.

CONSPIRACY.
Sufficiency of evidence to support conviction for, see Evidence, 12.
Sufficiency of indictment for, see Indictment and Information, 1.
Combinations in restraint of trade, commerce, or competition, see Monopoly.

1. The Espionage Act of June 15, 1917, § 3, makes criminal a conspiracy to obstruct the recruiting and enlistment service of the United States by inducement or persuasion. O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. Rep. 444, **64: 827**

2. A conspiracy to violate the Espionage Act of June 15, 1917, made criminal by § 4, provided one or more of the conspirators do any act to effect the object of the conspiracy, is none the less criminal, if thus attempted to be carried into effect, merely because the conspirators failed to agree in advance upon the precise method in which the law should be violated. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

3. While the averment of a conspiracy cannot be aided by allegations respecting the overt acts, and while under the Es-

pionage Act of June 15, 1917, § 4, as under the Criminal Code, § 37, a mere conspiracy without overt act done in pursuance of it is not punishable criminally, yet the overt act need not be, in and of itself, a criminal act, still less need it constitute the very crime that is the object of the conspiracy. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

4. Nonofficial persons may be convicted of a conspiracy to violate the provisions of the Selective Service Act of May 18, 1917, § 6, that any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, shall be guilty of a misdemeanor. O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. Rep. 444, **64: 827**

CONSTITUTIONAL LAW.

I. Adoption and amendment.

Amendment.

Validity and construction of Federal Income Tax Amendment, see Internal Revenue, 5–9.

1. The two-thirds vote in each House of Congress, which is required in proposing an amendment to the Constitution, is a vote of two thirds of the members present, —assuming the presence of a quorum,—and not a two-thirds vote of the entire membership, present and absent. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, **64: 947**

2. The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, **64: 947**

3. Referendum provisions of state constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirement of article 5 of such Constitution, that such ratification shall be by the legislatures of the several states, or by conventions therein, as Congress shall decide. Hawke v. Smith, 253 U. S. 221, 40 Sup. Ct. Rep. 495, **64: 871**
Hawke v. Smith, 253 U. S. 231; 40 Sup. Ct. Rep. 498, **64: 877**

4. Referendum provisions of state constitutions and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirement of article 5 of such Constitution, that such ratification shall be by the legislatures of the several states, or by conventions therein, as Congress shall decide. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, **64: 946**

5. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th Amendment to the Federal Constitution, is within the power to amend reserved by the 5th article of such Constitution. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, **64: 946**

6. The Prohibition Amendment to the Federal Constitution by lawful proposal and ratification has become a part of that Constitution, and must be respected and given effect the same as other provisions of that instrument. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, **64: 946**

7. That part of the Prohibition Amendment to the Federal Constitution which embodies the prohibition is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state legislature, or by a territorial assembly, which authorizes or sanctions what the Amendment prohibits. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, **64: 946**

8. The declaration in the Prohibition Amendment to the Federal Constitution that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation" does not enable Congress or the several states to defeat or thwart the prohibition, but only to

enforce it by appropriate means. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, 64: 946

9. The words "concurrent power" in the declaration in the 18th Amendment to the Federal Constitution that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation" do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them, nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign or interstate commerce from intrastate affairs. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, 64: 946

10. The power confided to Congress by the provisions of the 18th Amendment to the Federal Constitution, that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation," while not exclusive, is territorially coextensive with the prohibition of that Amendment, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, 64: 946

11. The power of Congress to enforce the Prohibition Amendment to the Federal Constitution may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, 64: 946

12. Congress did not exceed its powers, under U. S. Const., 18th Amend., to enforce the prohibition therein declared against the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, by enacting the provisions of the Volstead Act of October 28, 1919, wherein liquors containing as much as ½ of 1 per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power. Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. Rep. 486, 64: 946

II. Equal protection of the laws; abridging privileges and immunities.

13. One against whom a judicial decision has been rendered can base no rights, under the equal protection of the laws clause of the Federal Constitution, upon a later decision between strangers which is asserted to be irreconcilable on a matter of law with the earlier decision. This constitutional provision does not assure uniformity of judicial decisions. Milwaukee Electric R. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U. S. 100, 40 Sup. Ct. Rep. 306, 64: 476

Discrimination against nonresidents.

In taxation, see infra, 22–28.

14. Constitutional privileges and immunities of a nonresident citizen are not denied by the exemption accorded to resident citizens by the provisions of Minn. Gen. Stat. 1913, § 7709, that "when a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued," where the foreign limitation, though shorter than that of Minnesota, is not unduly short. Canadian Northern R. Co. v. Eggen, 252 U. S. 553, 40 Sup. Ct. Rep. 402, 64: 713

Regulation of business.

See also infra, 16.

15. The equal protection of the laws is not denied to a street railway company by a municipal ordinance under which it is required to sprinkle the surface of the streets occupied by its railway between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation. Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22, 40 Sup. Ct. Rep. 79, 64: 112

15a. Rights under U. S. Const., 14th Amend., were not violated by a state statute which made it a criminal offense for any person by personal solicitation to seek employment to prosecute or collect claims, including unliquidated claims for personal injuries, although the state may have made causes of action in tort, as well as in contract, assignable. McCloskey v. Tobin, 252 U. S. 107, 40 Sup. Ct. Rep. 306, 64: 481

Excessive penalties.

16. The provisions of the Oklahoma laws for the enforcement by penalties of rate-fixing orders of the state Corporation Commission violate U. S. Const., 14th Amend., because the only judicial review of such orders possible under the state laws is that arising in proceedings to punish for contempts, in which the penalties imposed for a refusal to obey such an order may be $500 for each offense, each day's continuance of failure or refusal to obey the order constituting a separate offense. Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 Sup. Ct. Rep. 338, 64: 596

Oklahoma Gin Co. v. Oklahoma, 252 U. S. 339, 40 Sup. Ct. Rep. 341, 64: 600

Taxes and assessments.

See also infra, 51–54.

17. The consideration by assessing officers, conformably to state law, of the franchises of a railway company, when assessing for a public improvement the real estate of a railway company within the taxing district, does not, without more, justify invalidating the tax as a denial of the equal protection of the laws, on the theory that the franchises of the railway company were included as a separate personal-property value in the real property assessment, thus taxing the railway property at a higher

rate than other real property in the district. Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. Rep. 113, 64: 215

18. A state may, so far as the Federal Constitution is concerned, tax its own corporations in respect of the stock held by them in other domestic corporations, although unincorporated stockholders are exempt. Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532, 40 Sup. Ct. Rep. 304, 64: 396

19. Confining the recovery of back taxes to those due from corporations does not offend against the Federal Constitution. Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532, 40 Sup. Ct. Rep. 304, 64: 396

20, 21. The Federal Supreme Court will not interfere on constitutional grounds with sewer assessments merely because certain abutting property, a part of which might be drained into the sewer, was omitted from such district by the local authorities, where the state courts have upheld the assessments, and the action of the state authorities cannot be said to be arbitrary or wholly unequal in operation and effect. Goldsmith v. George G. Prendergast Constr. Co. 252 U. S. 12, 40 Sup. Ct. Rep. 273, 64: 427

22. There is no unconstitutional discrimination against citizens of other states in a state income tax law merely because it confines the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state. Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 40 Sup. Ct. Rep. 228, 64: 460

23. A state income tax law does not unconstitutionally discriminate against noncitizens merely because it confines the withholding at source to the income of nonresidents, since such provision does not in any way increase the burden of the tax upon nonresidents, but merely recognizes the fact that, as to them, the state imposes no personal liability, and hence adopts a convenient substitute for it. Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 40 Sup. Ct. Rep. 228, 64: 460

24. Nonresidents are not denied their constitutional privileges or immunities, nor the equal protection of the laws, by a state tax imposed upon the net income derived by them from property owned within the state, and from any business, trade or profession carried on within its borders, either on the theory that, since the tax is, as to citizens of the state, a purely personal tax, measured by their incomes, while, as applied to a nonresident, it is essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected, there was a discrimination against the nonresident, or because the taxing statute permits residents to deduct from their gross income not only losses incurred within the state, but also those sustained elsewhere, while nonresidents may deduct only those incurred within the state. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, (Annotated) 64: 445

25. Privileges and immunities of citizens of New York are unconstitutionally denied to citizens of Connecticut and New Jersey by the provision of the New York Income Tax Law which denies to all nonresidents, without special reference to citizenship, the exemptions accorded to residents, viz., $1,000 of the income of a single person, $2,000 in the case of a married person, and $200 additional for each dependent, although the nonresident, if liable to an income tax in his own state, including income derived from sources within New York, and subject to taxation under the New York act, is allowed a credit upon the income tax otherwise payable to New York by the same proportion of the tax payable to the state of his residence as his income subject to taxation by the New York act bears to his entire income taxed in his own state, provided that such credit shall be given only if the laws of said state grant a substantially similar credit to residents of New York subject to income tax under such laws, and although the New York act also excludes from the income of nonresident taxpayers annuities, interest on bank deposits, interest on bonds, notes, or other interest-bearing obligations, or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession, or occupation carried on in the state, subject to taxation under that act. Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 40 Sup. Ct. Rep. 228, 64: 460

26. The discrimination against citizens of Connecticut and New Jersey, produced by the provision of the New York Income Tax Law which denies to all nonresidents, without special reference to citizenship, the exemptions accorded to residents, viz., $1,000 of the income of a single person, $2,000 in the case of a married person, and $200 additional for each dependent, cannot be upheld on the theory that nonresidents have untaxed income derived from sources in their home states or elsewhere outside of the state of New York, corresponding to the amount upon which residents of the latter state are exempt from taxation under the act. Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 40 Sup. Ct. Rep 228, 64: 460

27. The exemption of domestic corporations doing business outside the state, but none within the state, except the holding of stockholders' meetings, from the payment of an income tax, while domestic corporations doing business both within and without the state are required to pay a tax on income derived from their business transacted outside the state as well as upon the income derived from that done within the state, which is the result of Va. Laws 1916, chap. 472, read in connection with Laws 1916, chap. 495, amounts to an arbitrary discrimination forbidden by the equal protection of the laws clause of the 14th Amendment to the Federal Constitu-

tion. F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 40 Sup. Ct. Rep. 560, 64: 989

28. A discrimination by the state of New York in its income tax legislation against citizens of adjoining states would not be cured were those states to establish like discriminations against citizens of the state of New York. Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 40 Sup Ct. Rep. 228, 64: 460

III. Due process of law; right to life, liberty or property.

Property rights generally; use and enjoyment of property.

Federal question respecting, see Appeal and Error, 10; Courts, 10.

Enforcement of Prohibition Amendment against sale of liquor previously manufactured, see supra, 11.

29. Railway companies may not, consistently with due process of law, be compelled by a state administrative order to install cattle-weighing scales at stations from which cattle are shipped. Great Northern R. Co. v. Cahill, 253 U. S. 71, 40 Sup. Ct. Rep. 457, (Annotated) 64: 787

30. The operation at a loss of a railroad used in connection with a sawmill and lumber business, on which a small amount of business as a common carrier has been done, cannot be compelled by the court or state Railroad Commission on the ground that the owner had failed to petition the Commission for leave to discontinue the business of the railroad, as required by a local law, where the compulsory operation of the railroad would amount to a taking of property without due process of law. Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 40 Sup. Ct. Rep. 183, 64:323

31. A street railway company's contractual duty to repave that part of a street which lies between its tracks and for 1 foot outside cannot be evaded on the theory that this additional burden will reduce its income below a reasonable return on the investment. Milwaukee Electric R. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U. S. 100, 40 Sup. Ct. Rep. 306, 64:476

32. A street railway company may, consistently with due process of law, be required by municipal ordinance to sprinkle the surface of the streets occupied by its tracks between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation. Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22, 40 Sup. Ct. Rep. 79, 64:112

33. A landlord's property is not taken without due process of law by the lien imposed upon the premises by a city charter for water supplied to a tenant by the city, since the landlord's consent may be implied from the leasing with knowledge of the law,—especially as the lease as made contemplated the use of the water by the tenant, and provided, so far as the landlord could, for the payment of the water charges; and it is of no consequence at whose request the water meters were installed. Dunbar v. New York, 251 U. S. 516, 40 Sup. Ct. Rep. 250, 64:384

34. A state statute under which conveyances to a foreign corporation of real property situated within the state are invalid, though executed and delivered in another state, if the grantee had not theretofore filed a copy of its charter with the secretary of state, does not take property without due process of law. Munday v. Wisconsin Trust Co. 252 U. S. 499, 40 Sup. Ct. Rep. 365, 64:684

35. A municipality may not, consistently with U. S. Const., 14th Amend., as a matter of public right, clear a space for the construction of its own street lighting system by removing or relocating the instrumentalities of a privately owned lighting system occupying the public streets under a franchise legally granted, without compensating the owner of such system for the rights appropriated. Los Angeles v. Los Angeles Gas & Electric Corp. 251 U. S. 32, 40 Sup. Ct. Rep. 76, 64:121

36. If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may, for a permitted purpose, impose a like restriction consistently with the 5th Amendment without making compensation. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, 64:194

37. Private property was not taken for public purposes without compensation, contrary to U. S. Const., 5th Amend., by the enactment by Congress, in the exercise of the war power, of the provisions of the War-time Prohibition Act of November 21, 1918, fixing a period of seven months and nine days from its passage, during which distilled spirits might be disposed of free from any restriction imposed by the Federal government, and thereafter permitting, until the end of the war and the termination of demobilization, an unrestricted sale for export, and, within the United States, sales for other than beverage purposes. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, 64:194

38. Congress could, consistently with the due process of law clause of U. S. Const., 5th Amend., make effective forthwith the provisions of the Volstead Act of October 28, 1919, extending the existing war-time prohibition against the manufacture and sale of intoxicating liquors to non-intoxicating malt liquors with alcoholic content of as much as ½ of 1 per cent by volume, without making any compensation to the owner of such intoxicating liquors acquired before the passage of the act, and which before that time he could lawfully

have sold. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. Rep. 141, **64:260**

Regulation of business; freedom to contract.

See also supra, 15a, 16.

39. The imposition of severe penalties as a means of enforcing railway passenger rates prescribed by statute is not a denial of due process of law in a case in which it does not appear that the carrier was not afforded an adequate opportunity for safely testing the validity of the rate, or that its deviation therefrom proceeded from any belief that the rate was invalid. St. Louis, I. M. & S. R. Co. v. Williams, 251 U. S. 63, 40 Sup. Ct. Rep. 71, **64:139**

40. So far as due process of law is concerned, the penalty imposed by a state statute upon a railway company which exacts more than the prescribed passenger fares may be given to the aggrieved passenger, to be enforced by private suit, and such penalty need not be confined or apportioned to his loss or damage. St. Louis, I. M. & S. R. Co. v. Williams, 251 U. S. 63, 40 Sup. Ct. Rep. 71, **64:139**

41. The penalties prescribed by a statute giving to a passenger aggrieved by a carrier's exaction of a fare in excess of the prescribed rate the right to recover in a civil suit not less than $50 nor more than $300 and costs of suit, including a reasonable attorney's fee, cannot be said to be so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable, and hence to amount to a denial of due process of law. St. Louis, I. M. & S. R. Co. v. Williams, 251 U. S. 63, 40 Sup. Ct. Rep. 71, **64:139**

42. A municipal ordinance, confessedly a valid exercise of the police power when adopted, under which each street car used in the city streets must be operated during designated hours by two persons, a motorman and a conductor, cannot be said to be so arbitrary and confiscatory as to deny due process of law when so applied as to prohibit the use on a line on which the travel is heavy at times, and which has at least one steep grade, of a new type of car still in the experimental stage, so equipped that it may plausibly be contended that if all the appliances work as it is intended that they shall, it may be operated at a reduced cost by one motorman, with a high degree of safety to the public in streets where the traffic is not heavy. Sullivan v. Shreveport, 251 U. S. 169, 40 Sup. Ct. Rep. 102, (Annotated) **64: 205**

43. An oil pipe line constructed solely to carry oil for particular producers under strictly private contacts, and never devoted by its owner to public use, could not, by mere legislative fiat or by any regulating order of a state commission, be converted by a state into a public utility, nor its owner made a common carrier, since that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment to the Federal Constitution. Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 40 Sup. Ct. Rep. 131, **64:239**

44. A corporation which has voluntarily devoted its oil pipe line to the use of the public may, consistently with due process of law, be subjected by a state to the regulatory powers of a state commission over the rates and practices of public utilities. Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 40 Sup. Ct. Rep. 131, **64:239**

45. Withholding from the courts power to determine the question of confiscation according to their own independent judgment, when the act of a state public service commission in fixing the value of a water company's property for rate-making purposes comes to be considered on appeal, as is done by the Pennsylvania Public Service Company Law of July 26, 1913, as construed by the highest state court, must be deemed to deny due process of law, in the absence of a ruling by that court that the remedy by injunction provided for by § 31 of that act affords adequate opportunity for testing judicially an order of the commission, alleged to be confiscatory. Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 40 Sup. Ct. Rep. 527, **64:906**

46. Any modification of the rights of an electric light and power company which it may suffer by the enactment, in the exercise of the police power, of a statute giving the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the probate court in case of disagreement with the company as to the mode of using the streets, does not constitute an impairing of the obligation of the company's contract with the state or municipality, and is not a taking of its property without due process of law. Hardin-Wyandot Lighting Co. v. Upper Sandusky, 251 U. S. 173, 40 Sup. Ct. Rep. 104, **64: 210**

47. Neither the guaranty of the Philippine Bill of Rights of due process of law nor its prohibition against the taking of private property for public use without compensation can be said to have been violated by a Philippine law which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch, in view of the plenary power which the Philippine government had always possessed and exercised, and which was recognized in the Act of Congress of April 15, 1904, to limit the right to engage in the coastwise trade to those who agree to carry the mails free. Public Utility Comrs. v. Ynchausti & Co. 251 U. S. 401, 40 Sup. Ct. Rep. 277, **64:337**

48. Congress could, as it did in the Act of March 4, 1915, § 4, make applicable to foreign seamen on foreign vessels when in American ports the provisions of that section authorizing seamen to demand and receive one half the wages earned at any

port where the vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, notwithstanding any contractual obligations to the contrary. Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 40 Sup. Ct. Rep. 350, **64:607**
Thompson v. Lucas, 252 U. S. 391, 40 Sup. Ct. Rep. 353, **64:612**

49. The limitation of the compensation of attorneys in the prosecution of claims against the United States to 20 per cent of the amount collected, any contract to the contrary notwithstanding, which was made by the Omnibus Claims Act of March 4, 1915, § 4, does not contravene U. S. Const., 5th Amend., when applied to invalidate a contingent-fee contract entered into and substantially performed before the passage of the statute,—especially where, at the time the contract was made, there was no legislation, general or special, which conferred upon the claimant any right of recovery, even if he should establish to the satisfaction of Congress that his claim was equitable, and where the attorney accepted and received from the United States Treasury a warrant for 20 per cent of the amount appropriated, although this was not accepted by him as a full settlement of his rights against the client. Calhoun v. Massie, 253 U. S. 170, 40 Sup. Ct. Rep. 474, **64: 843**

Taxation and public improvements.

See also supra, 18–20, 22.

50. State taxation to enable the state of North Dakota to carry out such enterprises as a state bank, a state warehouse, elevator, and flour mill system, and a state home building project, all of which have been sanctioned by united action of the people of the state, its legislature, and its courts, cannot be said to deny taxpayers the protection which the constitutional guaranty of due process of law affords against the taking of property for uses that are private. Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. Rep. 499, **64:878**

51. Nothing in U. S. Const., 14th Amend., prohibits a state from imposing double taxation. Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 40 Sup. Ct. Rep. 558, **64:931**

52. Nothing in the Federal Constitution or in the 14th Amendment prevents the states from imposing double taxation or any other form of unequal taxation so long as the inequality is not based upon arbitrary distinctions. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, **64:445**

53. The 14th Amendment to the Federal Constitution no more forbids double taxation than it does doubling the amount of the tax, short of confiscation or proceedings unconstitutional on other grounds. Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle, 251 U. S. 532, 40 Sup. Ct. Rep. 304, **64:396**

54. A state may, consistently with U. S. Const., 14th Amend., tax a corporation organized under its laws upon the value of its outstanding capital stock, although the corporation's property and business are entirely in another state. Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 40 Sup. Ct. Rep. 558, **64:931**

55. A state may, consistently with due process of law, impose an annual tax upon the net income derived by nonresidents from property owned by them within the state, and from any business, trade, or profession carried on by them within its borders. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, (Annotated) **64:445**

56. No violation of due process of law results from the exercise of the state of New York of its jurisdiction to tax incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, and to enforce payment so far as it can by the exercise of a just control over persons and property within the state, and by a garnishment of credits (of which the withholding provision of such law is a practical equivalent). Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 40 Sup. Ct. Rep. 228, **64:460**

57. A state may, without denying due process of law, tax the income received by a resident from securities held for her benefit by the trustee in a trust created and administered by the law of another state, and not directly taxable to the trustee. Maguire v. Trefry, 253 U. S. 12, 40 Sup. Ct. Rep. 417, (Annotated) **64:739**

58. The facts that it required the personal skill and management of a nonresident to bring his income from producing property within the state to fruition, and that his management was exerted from his place of business in another state, did not, by reason of the due process of law clause of the Federal Constitution, deprive the former state of jurisdiction to tax the income which arose within its own borders. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, (Annotated) **64:445**

59. A nonresident whose entire property within the state consists of oil-producing land, oil and gas mining leaseholds, and other property used in the production of oil and gas, and whose entire net income in the state was derived from his oil operations, which he managed in that and other states as one business, having proceeded, with notice of a law of the state taxing incomes derived by nonresidents from business carried on within its borders, to manage the property and conduct the business out of which arose the income taxed under such law, cannot claim that the state exceeded its power or authority so as to deny due process of law by treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process upon all the property employed by him within the state in the business. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, (Annotated) **64:445**

60. The legislative determination as to what lands within a local improvement district will be benefited by an improvement is conclusive upon the owners and the

courts, and can be assailed, under U. S. Const., 14th Amend., only where the legislative action is arbitrary, wholly unwarranted, a flagrant abuse, and, by reason of its arbitrary character, a confiscation of particular property. Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. Rep. 113, 64:215

61. The declaration by the legislature that the real property of a railway company within a road improvement district will be benefited by the construction of a contemplated road improvement in such district cannot be said to be so arbitrary, capricious, or confiscatory as to invalidate, under U. S. Const., 14th Amend., an assessment for benefits against such real property of the railway company, where there is evidence that the improved road, by making more accessible a village terminus where the railway company in question had the only line, and by developing the adjacent country, would increase the company's business and would divert business from a place where there was a competing railroad, and that before the road was completed a large gas-producing district was discovered not far from the improved road which was tributary to it. Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. Rep. 113, 64:215

Remedies and procedure.

62. A state may, consistently with due process of law, abolish the defense of contributory negligence. Chicago, R. I. & P. R. Co. v. Cole, 251 U. S. 54, 40 Sup. Ct. Rep. 68, 64:133

63. There is nothing in the 14th Amendment to the Federal Constitution that deprives a state from providing in its Constitution that the defense of contributory negligence shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury. Chicago, R. I. & P. R. Co. v. Cole, 251 U. S. 54, 40 Sup. Ct. Rep. 68, 64:133

64. No Federal constitutional right is violated because of the refusal to transfer a cause from the division of the highest court of the state which heard it to the court in banc. Goldsmith v. George G. Prendergast Constr. Co. 252 U. S. 12, 40 Sup. Ct. Rep. 273, 64:427

65. A decision of the Secretary of Labor denying the admission into the United States of a Chinaman claiming American citizenship was rendered without the fair hearing which due process of law demands, where the only form in which the recognition of the Chinese applicant by three white witnesses called by him and examined in his presence by the government inspector was placed before the Secretary was a letter which the acting commissioner of immigration, who did not himself render the decision, sent to applicant's counsel and placed with the record, and where apparently there was no record of such recognition before the immigration commissioner when he decided the case. Kwock Jan Fat v. White, 253 U. S. 454, 40 Sup. Ct. Rep. 566, 64:1010

66. Where the intended use of property taken by eminent domain is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate, these being legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment to the Federal Constitution. Bragg v. Weaver, 251 U. S. 57, 40 Sup. Ct. Rep. 62, 64:135

67. It is essential to due process of law that the mode of determining the compensation to be paid for property taken by eminent domain be such as to afford the owner an opportunity to be heard. Bragg v. Weaver, 251 U. S. 57, 40 Sup. Ct. Rep. 62, 64:135

68. A sufficient opportunity to be heard respecting the compensation to be paid for the taking, under legislative sanction, of earth from land adjoining a highway, to be used in repairing the road, is afforded to the owner of such land, where the law contemplates that, in the absence of the agreement, the compensation is to be assessed primarily by viewers, whose award is to be examined by the supervisors and approved or changed as to the latter may appear reasonable, and that from the decision of the supervisors an appeal may be taken as of right to a court of general jurisdiction, in which the matter may be heard de novo, and where, under such law, the proceedings looking to an assessment may be initiated by the owner as well as by the road officers, either of whom may apply to a justice for the appointment of viewers, and where, although there is no express provision for notice at the inception or during the early stages of the proceedings, the statute provides that the claimant, if not present when the supervisors' decision is made, shall be notified in writing and shall have thirty days after such notice within which to appeal, and that, if he be present when the decision is made, he is regarded as receiving notice at that time, the thirty days for taking the appeal beginning to run at once. Bragg v. Weaver, 251 U. S. 57, 40 Sup. Ct. Rep. 62, 64:135

69. Where adequate provision is made for the certain payment without unreasonable delay of compensation for property taken by eminent domain, the taking does not contravene due process of law in the sense of U. S. Const., 14th Amend., merely because it precedes the ascertainment of what compensation is just. Bragg v. Weaver, 251 U. S. 57, 40 Sup. Ct. Rep. 62, 64:135

70. The property rights, if any, of one contracting with the state for the construction of a waterway, cannot be said to have been taken without due process of law by state legislation vacating a portion of such waterway and vesting title thereto in a municipal corporation, where there was adequate provision in the state law for assured payment without unreasonable delay of any compensation due such contractor

on account of such taking. Hays v. Seattle, 251 U. S. 233, 40 Sup. Ct. Rep. 125, **64: 243**

71. The hearing by a board of supervisors, sitting as a board of equalization, of all complaints and objections respecting assessments for public improvements, which was provided for by a city charter, satisfies the requirement of due process of law, although such board apparently is given power only to make recommendations to the board of public works for relief, where such charter provision is construed by the state courts as not taking away the legislative power and discretion of the board of supervisors and vesting it in the board of public works, but as empowering the former board to pass an assessing ordinance charging property with the cost of an improvement which, according to its judgment, would be just and equitable. Farncomb v. Denver, 252 U. S. 7, 40 Sup. Ct. Rep. 271, **64: 424**

IV. Police power.

Judicial review of exercise of, see Courts, 5.

Police power of United States, see States, 1, 2.

See also supra, 35, 36, 42, 46; infra, 78.

72. The police power of a state extends to requiring street railway companies to sprinkle the surface of the streets occupied by their railways between the rails and tracks, and for a sufficient distance beyond the outer rails so as effectually to lay the dust and prevent the same from arising when the cars are in operation. Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22, 40 Sup. Ct. Rep. 79, **64: 112**

V. Freedom of speech or press.

73. The freedom of speech and press guaranteed by the Federal Constitution was not violated by the provisions of the Espionage Act of June 15, 1917, under which convictions may be had for publishing in the German language, during the war with Germany, articles derisively contemptuous of the war activities of the United States, and intended to convey the idea that the war was not demanded by the people, was the result of the machinations of the executive power, and which in effect justified the German aggressions. Schaefer v. United States, 251 U. S. 466, 40 Sup. Ct. Rep. 259, **64: 360**

74. The Selective Service Act of May 18, 1917, and the Espionage Act of June 15, 1917, are constitutional. O'Connell v. United States, 253 U. S. 142, 40 Sup. Ct. Rep. 444, **64: 827**

VI. Impairing contract obligations.

Federal question respecting, see Appeal and Error, 9, 10, 22; Courts, 10.

See also supra, 46.

75. The contract clause of the Federal Constitution applies only to legislation subsequent in time to the contract alleged to have been impaired. Munday v. Wisconsin Trust Co. 252 U. S. 499, 40 Sup. Ct. Rep. 365, **64: 684**

76. A statute that has the effect of violating or repudiating an incompleted contract previously made with the state does not impair the obligation of a contract. The obligation remains as before and forms the measure of the contractor's right to recover from the state the damages sustained. Hays v. Seattle, 251 U. S. 233, 40 Sup. Ct. Rep. 125, **64: 243**

77. A common carrier cannot, by making contracts for future transportation or business, mortgaging its property, or pledging its income, prevent or postpone the exertion by a state of the power to regulate the carrier's rates and practices, nor does the contract clause of the Federal Constitution interpose any obstacle to the exertion of such power. Producers Transp. Co. v. Railroad Commission, 251 U. S. 228, 40 Sup. Ct. Rep. 131, **64: 239**

78. The obligation of the contract right which a street railway company has under its franchises to operate its railway in the streets of a municipality is not impaired by an ordinance enacted in the exercise of the police power, requiring the street railway company to sprinkle the surface of the streets occupied by its railway between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation. Pacific Gas & Electric Co. v. Police Court, 251 U. S. 22, 40 Sup. Ct. Rep. 79, **64: 112**

79. The terms and conditions in a street railway franchise which require the street railway company under certain conditions to pave or pay for paving certain portions of occupied streets do not amount to a contract which prevents, on constitutional grounds, the imposition by the municipality upon a central strip in the highway owned in fee by the street railway company of its fair share, according to benefits, of the expense of paving such street. Oklahoma R. Co. v. Severns Paving Co. 251 U. S. 104, 40 Sup. Ct. Rep. 73, **64: 168**

80. A municipal ordinance requiring a street railway company to bear the cost of paving with asphalt upon a concrete foundation, like the rest of a newly paved street, that part of such street which lies between the tracks and for a distance of 1 foot ouside, does not, although theretofore the street had been paved from curb to curb with macadam, impair the obligation of the street railway company's franchise contract under which its duty extends to keeping "in good repair the roadway between the rails and for 1 foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous

to such repairs," unless the railway company and the city shall agree upon some other material. Milwaukee Electric R. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U. S. 100, 40 Sup. Ct. Rep. 306, 64: 476

81. The obligation of a municipal electric light and power franchise covering public and private uses, granted when the applicable statute then in force gave the municipality a qualified control over the erection of electric light and power appliances in the streets, was not impaired by subsequent legislation giving the municipality exclusive control, under which the light and power company, having removed and dismantled its street lighting system upon the expiration of a street lighting contract, may be restrained from erecting any poles or wires in the street until the consent of the municipality shall have been obtained, without prejudice to the company's right to maintain, repair, or replace such poles and wires as it is then using for commercial lighting. Hardin-Wyandot Lighting Co. v. Upper Sandusky, 251 U. S. 173, 40 Sup. Ct. Rep. 104, 64: 210

82. A foreign corporation doing business within the state and elsewhere has no just ground of complaint against a state income tax, in the absence of any contract limiting the state's power of regulation, by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfil the duty of deducting and withholding the tax from that part of the salaries and wages of its nonresident employees which was earned by them within the state, although the corporation asserts that the statute impairs the obligation of contracts between it and its employees, there being no averment, however, that any such contract, made before the passage of the statute, required the wages or salaries to be paid in the state of incorporation, where it has its principal place of business, or contained other provisions in any wise conflicting with the withholding requirement. Travis v. Yale & T. Mfg. Co. 252 U. S. 60, 40 Sup. Ct. Rep. 228, 64: 460

CONSTRUCTION.

Of statute, see Statutes.

CONTINGENT INTEREST.

Federal estate tax on, see Internal Revenue, 18-20.

CONTRACTS.

Rescission as affecting liability of bank director for excessive loan, see Banks, 12.

Limiting liability for negligence, see Carriers, 2-4.

Impairing contract obligations, see Constitutional Law, VI.

Combinations in restraint of trade or commerce, see Monopoly.

Charter party, see Shipping, 1, 2.

Sale or option.

A positive undertaking of the owners of mining stock to sell, and of the purchasers to buy, upon terms named, is not converted into an option to purchase, terminable at the will of the purchasers upon their failure to make the required payments, merely because the agreement further provides that the stock is to be deposited in a bank in escrow, to be delivered to the purchasers when the final payment agreed upon is made, and stipulates that, in the event of default in payment, the bank is authorized to deliver the stock to the sellers, all prior payments to be forfeited, and the rights of each of the parties to cease and determine, since this forfeiture provision is for the benefit of the sellers, and may be insisted upon or waived, at their election. Western U. Teleg. Co. v. Brown, 253 U. S. 101, 40 Sup. Ct. Rep. 460, 64: 803

CONTRIBUTORY NEGLIGENCE.

Abolishing common-law defense of contributory negligence as denying due process of law, see Constitutional Law, 62.

Making contributory negligence a question for the jury as denying due process of law, see Constitutional Law, 63.

COPYRIGHT.

Copyright practice and procedure, see Rules of Courts.

Injunction against infringement of, see Injunction, 5.

See also Patents, 6.

1. The five years' limitation in a grant by a playwright of the sole and exclusive license and liberty to produce, perform, and represent a copyrighted play within the territorial limits stated, subject to the other terms and conditions of the contract, one of which bound the licensee to produce the play for at least seventy-five performances in each ensuing theatrical season for five years, and another provided for a forfeiture in case the play should not have been produced for the stipulated number of performances in any one theatrical year, limits all the rights and obligations of both parties to the contract,—the license to produce as well as the licensee's obligation to perform. Manners v. Morosco, 252 U. S. 317, 40 Sup. Ct. Rep. 335, (Annotated) 64: 590

2. The right to represent a copyrighted play in moving pictures cannot be deemed to have been embraced in a grant by a playwright of the sole and exclusive license and liberty to produce, perform, and represent the play within the territorial limits stated, subject to the other terms and conditions of the contract, under which the play is to be continued for seventy-five performances for each ensuing theatrical season for five years, the royalties provided for are adapted only to regular stage presentation, and the play is to be presented

in first-class theaters with a competent company, and with a designated actress in the title role, there being stipulations against alterations, eliminations, or additions, and that the rehearsals and production of the play shall be under the direction of the author, and a further provision that the play may be released for stock if it fails in New York city and on the road, or in case the net profits fall below a stipulated amount. Manners v. Morosco, 252 U. S. 317, 40 Sup. Ct. Rep. 335, (Annotated) **64: 590**

3. There is implied a negative covenant on the part of the lessor of the right to use a copyright not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee's estate. Manners v. Morosco, 252 U. S. 317, 40 Sup. Ct. Rep. 335, (Annotated) **64: 590**

CORPORATIONS.

Matters as to banks, see Banks.
Transportation corporations, see Carriers.
Interstate business of corporation, see Commerce.
Taxation of foreign corporation as affecting interstate commerce, see Commerce, 9, 10.
Discrimination against, see Constitutional Law, 15, 18, 19.
Discrimination against corporation in taxation, see Constitutional Law, 18, 19, 27.
Regulation of conveyance to foreign corporation as denying due process of law, see Constitutional Law, 34.
Due process of law in taxation of, see Constitutional Law, 54.
Income tax on foreign corporation as impairing contract obligations, see Constitutional Law, 82.
Income tax on stock dividends, see Internal Revenue, 8, 9.
Federal corporation excise tax, see Internal Revenue, 10–17.
Federal income taxation of, see Internal Revenue, 11–17.
Illegal combinations in restraint of trade or commerce, see Monopoly.
Municipal corporations, see Municipal Corporations.
Compulsory production of corporate papers, see Search and Seizure.
Service of process on foreign corporations, see Writ and Process.

Officers.

Liability of officers of national bank, see Banks, 2–12.

1. A transfer between two corporations having identity of stock ownership and directorates, which transfer was fraudulent as to the transferee corporation, could be annulled by a dummy board of directors chosen by, and acting for, the controlling stockholders for this very purpose, though such a change in personnel was unnecessary, as similar action by boards having identical membership would have had the same effect, if done by the express authority of the stockholders. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, **64: 141**

2. In considering the practical effect of intercorporate dealings, especially as bearing upon the duties of common directors and the authority of stockholders to control them, identity of stock ownership ought not to be overlooked. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, **64: 141**

Corporate powers.

Of national bank, see Banks, 1.

3. A national bank and a loan company organized under state law must, notwithstanding identity of stock ownership and close affiliation in management, be regarded for some purposes as separate corporations; for instance, as being capable in law of contracting with each other. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, **64: 141**

COSTS AND FEES.

While the compensation of auditor and stenographer, in a reference of an action at law involving complicated issues of fact to such auditor to simplify and clarify the issues and make tentative findings of fact, may be taxed as costs, in the absence of any statute, Federal or state, or rule of court to the contrary, such costs must, in view of U. S. Rev. Stat. § 983, be taxed to the prevailing party, and may not be taxed in whole or in part against the prevailing party, in the discretion of the trial court. Re Peterson, 253 U. S. 300, 40 Sup. Ct Rep. 543, **64: 919**

COURT OF CLAIMS.

Scope of review on appeal from, see Appeal and Error, 32, 33.
Jurisdiction of, see Claims.

COURT RULES.

See Rules of Courts.

COURTS.

Jurisdiction of courts of admiralty, see Admiralty.
Appellate jurisdiction, see Appeal and Error.
Following decision of state courts on appeal, see Appeal and Error, 23–25.
Jurisdiction of bankruptcy proceedings, see Bankruptcy.
Jurisdiction on certiorari, see Certiorari.
Jurisdiction of court of claims, see Claims.
Clerk of court, see Clerks.
Inconsistent judicial decision as denial of equal protection of the laws, see Constitutional Law, 13.
Jurisdiction of courts of equity, see Equity.
Judicial notice by, see Evidence, 1, 2.
Jurisdiction of injunction cases, see Injunction.
As to judges, see Judges.

Mandamus to, see Mandamus.
Power of Federal court to appoint auditor, see Reference.
Rules of, see Rules of Courts.
Jurisdiction of suit against state, see States, 4.
Supreme Court of the United States, see Supreme Court of the United States.
Respective provinces of court and jury, see Trial.
Suit by Federal officer, see United States, 5.
Immunity of United States from suit, see United States, 6.

Relation to other departments of government.

Withholding judicial review of rate regulation as denying due process of law, see Constitutional Law, 45.
Judicial review of decision of Interstate Commerce Commission, see Interstate Commerce Commission, 2-4.
Judicial review of action of Land Department, see Public Lands, 7.
Following executive construction of statute, see Statutes, 4.

1. The Federal Supreme Court may not, in passing upon the validity of a Federal statute, inquire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64: 194**

2. It requires a clear case to justify a court in declaring that a Federal statute adopted to increase war efficiency has ceased to be valid, on the theory that the war emergency has passed and that the power of Congress no longer continues. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64: 194**

3. Judicial interference with state tax legislation, the purpose of which has been declared by the people of the state, the legislature, and the highest state court to be of a public nature and within the taxing power of the state, cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated. Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. Rep. 499, **64: 878**

4. When the constituted authority of the state undertakes to exert the taxing power, and the validity of its action is brought before the Federal Supreme Court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. Green v. Frazier, 253 U. S. 233, 40 Sup. Ct. Rep. 499, **64: 878**

5. Every intendment is to be made in favor of the lawfulness of the exercise of municipal power in making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. Sullivan v. Shreveport, 251 U. S. 169, 40 Sup. Ct. Rep. 102, **64: 205**

Insular courts.

6. Jurisdiction of the Federal district court for Porto Rico of a suit to which an alien domiciled in Porto Rico is a party is denied by the provision of the Act of March 2, 1917, § 41, which gives said court jurisdiction of controversies "where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico." The restriction of jurisdiction to cases where all the parties on either side of the controversy are "not domiciled in Porto Rico" applies to aliens as well as to American citizens. Porto Rico R. Light & P. Co. v. Mor, 253 U. S. 345, 40 Sup. Ct. Rep. 516, **64: 944**

District of Columbia courts.

7. Treasury officials joined with a nonresident claimant as defendants in a suit to establish an equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress to pay claimant, conformably to a finding of the court of claims, may not successfully challenge the jurisdiction of the District of Columbia courts on the ground that debts due from the United States have no situs in the District, where claimant voluntarily appeared and answered the bill without objection, since the decree will bind her, and constitute a good acquittance to the government. Houston v. Ormes, 252 U. S. 469, 40 Sup. Ct. Rep. 369, **64: 669**

Jurisdiction based on nature of case.

Sufficiency of jurisdictional averment, see Pleading 3, 4.

8. Jurisdiction over a subject-matter, limited by Federal law, for which recovery can be had only in the Federal courts, attaches only when the suit presents a substantial claim under an act of Congress. Blumenstock Bros. Advertising Agency v. Curtis Pub. Co. 252 U. S. 436, 40 Sup. Ct. Rep. 385, **64: 649**

9. The merely incidental relation to interstate commerce of transactions concerning advertising in periodicals which are to be circulated and distributed throughout the United States will not support the Federal jurisdiction of a suit brought under the provisions of the Sherman Anti-trust Act of July 2, 1890, § 7, creating a cause of action in favor of any person to recover by suit in any Federal district court in the district in which the defendant resides or is found threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act, on the theory that defendant's conduct in respect to such matters is forbidden by that act as a monopoly or attempted monopoly of interstate commerce. Blumenstock Bros. Advertising Agency v. Curtis

Pub. Co. 252 U. S. 436, 40 Sup. Ct. Rep. 385, 64: 649

10. The contention that a hydroelectric company, incorporated under the general laws of a state, which has adopted a resolution designating certain parcels of land as appropriated and necessary to carry out the corporate purpose, had acquired rights before appropriation was completed, as provided by the state condemnation laws, of which it was unconstitutionally deprived by the use of the designated parcels by other public utility companies,—is too unsubstantial to serve as the basis of Federal jurisdiction where, independently of the incorporation and resolution, the company had no rights or property to be taken, and there was no state legislative or other action against any charter rights which such corporation possessed. Whatever controversies or causes of action the corporation had were against other companies as rivals in eminent domain, or as owners of the land, over which a Federal court has no jurisdiction, diversity of citizenship not existing. Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co. 252 U. S. 388, 40 Sup. Ct. Rep. 404, 64: 626

Amount in controversy.

11. After final judgment entered by a Federal district court and affirmed by a circuit court of appeals, the trial court's jurisdiction will not ordinarily be denied on the theory that the requisite jurisdictional amount was not involved, where the action was in tort, the alleged damages exceeded the prescribed amount, the declaration discloses nothing rendering such a recovery impossible, and no bad faith appears. Chesbrough v. Northern Trust Co. 252 U. S. 83, 40 Sup. Ct. Rep. 237, 64: 470

12. The amount in controversy in a suit in a Federal district court by taxpayers to enjoin, on constitutional grounds, the payment of public funds out of the state treasury, and the issuing of state bonds, must equal the jurisdictional amount as to each complainant. Scott v. Frazier, 253 U. S. 243, 40 Sup. Ct. Rep. 503, 64: 883

Proper district for suit.

Removal to other Federal district for trial, see Criminal Law, 4–7.

13. A suit by a national bank to enjoin the Comptroller of the Currency from doing certain things under color of his office, declared to be threatened, unlawful, arbitrary, and oppressive, is one brought under the National Banking Law, within the true intendment of the provisions of the Judicial Code, §§ 24 and 49, which restrict suits, brought by national banking associations to enjoin the Comptroller under such law, to the district in which the bank is located, and such restriction operates pro tanto to displace the general provisions of § 51, respecting the proper district for suits, and authorizes service of process upon the Comptroller wherever found. First Nat. Bank v. Williams, 252 U. S. 504, 40 Sup. Ct. Rep. 372, 64: 690

Federal practice.

14. A state rule of law which forbids a district attorney, without first obtaining leave of court, to present to one grand jury charges which a previous grand jury has ignored, can have no application by virtue of U. S. Rev. Stat. § 722, to a prosecution in the Federal courts for a crime against the United States, committed within such state, in view of the existence of a controlling Federal rule which would be overthrown by applying the state rule. United States v. Thompson, 251 U. S. 407, 40 Sup. Ct. Rep. 239, (Annotated) 64: 333

COURTS-MARTIAL.

Exclusive jurisdiction of military tribunal, see War, 13.

COVENANTS AND CONDITIONS.

Implied covenant of copyright licensor, see Copyright.

Injunction against enforcement of covenant, see Injunction, 6.

CRIMINAL LAW.

Appellate review by government in criminal case, see Appeal and Error, I. b.

Discretion of trial judge as to venue and jury, see Appeal and Error, 37.

Validity of sentence under good count in indictment, see Appeal and Error, 43.

Prejudicial error in instruction in criminal prosecution under Espionage Act, see Appeal and Error, 46.

Harmless error in refusing challenge of juror for cause, see Appeal and Error, 47, 48.

Sufficiency of verdict, see Appeal and Error, 50.

Arrest without warrant, see Arrest.

Matters as to bail, see Bail.

Criminal conspiracy, see Conspiracy.

Following state practice forbidding second presentation of charge to grand jury, see Courts, 14.

District attorney, see District Attorney.

Sufficiency of evidence to support conviction, see Evidence, 12, 13.

Matters as to grand jury, see Grand Jury.

Matters as to indictment, see Indictment and Information.

Right to jury trial in criminal case, see Jury, 2.

Unreasonable searches and seizure, see Search and Seizure.

Criminal statute not extended by executive construction, see Statutes, 4.

Sufficiency of evidence in criminal prosecution as question for jury, see Trial, 2–4.

Various particular crimes, see Homicide; War.

1. Whether the statements contained in a pamphlet, the distribution of which is charged to amount to a violation of the Espionage Act of June 15, 1917, had a

natural tendency to produce the forbidden consequences as alleged, was a question to be determined, not upon demurrer, but by the jury at the trial. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

Former jeopardy.

2. A person found guilty of murder in the first degree by a verdict which, conformably to the Criminal Code, § 330, mitigates the punishment to life imprisonment, is not placed twice in jeopardy by an unqualified conviction for first-degree murder carrying the death penalty in a new trial had after the earlier conviction was reversed upon a writ of error sued out by the accused. Stroud v. United States, 251 U. S. 15, 40 Sup. Ct. Rep. 50, **64: 103**

Self-crimination.

3. The use in evidence in a criminal case of letters voluntarily written by the accused after the crime, while he was in prison, and which came into the possession of the prison officials under established practice reasonably demanded to promote discipline, did not infringe the constitutional safeguards against self-incrimination or unreasonable searches and seizures. Stroud v. United States, 251 U. S. 15, 40 Sup. Ct. Rep. 50, **64: 103**

Removal to other Federal district for trial.

Arrest without warrant, see Arrest.

Habeas corpus in proceedings for removal, see Habeas Corpus, 1.

4. The introduction in evidence of the indictment, together with the admission of the accused that he is the person named therein, establishes a prima facie case, in the absence of other evidence, for the removal of the accused to the district in which the indictment was returned. Gayon v. McCarthy, 252 U. S. 171, 40 Sup. Ct. Rep. 244, **64: 513**

5. Substantial evidence before the United States commissioner and the court, tending to show that a penal statute of the United States had been violated, and that there was probable cause for believing the accused guilty of conspiracy to compass that violation within the district in which the indictment charging such conspiracy was returned, justifies an order for the removal of the accused to that district. Gayon v. McCarthy, 252 U. S. 171, 40 Sup. Ct. Rep. 244, **64: 513**

6. The pendency of a habeas corpus proceeding raising the question of the legality of an arrest and detention to await preceedings for the removal to another Federal district of a person there charged with an offense against the United States did not deprive a United States commissioner of jurisdiction to entertain a subsequent application for the arrest of the accused on an affidavit of complaint setting forth the same offenses charged in the indictment. Stallings v. Splain, 253 U. S. 339, 40 Sup. Ct. Rep. 537, **64: 940**

7. Any reasonable doubt as to the validity of an indictment charging the commission of an offense against the United States is to be resolved, not by the committing magistrate in another Federal district, but by the court which found the indictment after the accused had been removed to that district for trial. Stallings v. Splain, 253 U. S. 339, 40 Sup. Ct. Rep. 537, **64: 940**

CRIMINATION OF SELF.

See Criminal Law, 3.

CUMMINS AMENDMENT.

See Carriers, 4.

CUSTOMS DUTIES.

See Duties.

DAMAGES.

State regulation penalizing delay in delivery of interstate telegram, see Commerce, 4.

Limitation of liability in charter party, see Shipping, 2.

1. The compensation recoverable in the court of claims for the taking by the government of private property in Alaska for a public use is the value of the property as of the date of the taking. It cannot include any amount for use and occupation between the time of the taking and the entry of judgment, where, except for an allegation in the petition that the United States is indebted in a specified amount for use and occupation, there was no request in the court of claims of any kind in respect to such allowance, and that court did not mention the subject in its opinion, and it is not referred to in the application for an appeal, since, if it is interest that the owner seeks, its allowance is forbidden by the Judicial Code, § 177, and, if it is not interest, the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. United States v. North American Transp. & Trading Co. 253 U. S. 330, 40 Sup. Ct. Rep. 518, **64: 935**

2. The entire sum loaned, plus interest and less salvage, should be treated as the damages sustained by a national bank through a director's knowing participation in or assent to an excessive loan, contrary to U. S. Rev. Stat. §§ 5200 and 5239, and not merely the excess above what lawfully might have been loaned, where the entire excess loan formed but a single transaction. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82,

(Annotated) **64: 141**

For death or personal injury.

3. Damages for physical pain could be allowed in a personal-injury action by the district court of the Canal Zone, irrespective of whether the law of the Republic of Panama, the lex loci, or that of the Canal Zone, the lex fori, controls. Panama R. Co. v. Toppin, 252 U. S. 308, 40 Sup. Ct. Rep. 319, **64: 582**

4. Shame and humiliation because of disfigurement may be an element in the recovery of damages for the injury. Erie

R. Co. v. Collins, 253 U. S. 77, 40 Sup. Ct. Rep. 450, 64: 790

DANGEROUS PREMISES.
See Negligence, 1-3.

DEBTOR AND CREDITOR.
Insolvency of debtor, see Bankruptcy.

DECLARATIONS.
Evidence of, see Evidence, 9.
See also Pleading.

DECREE.
See Judges.

DEEDS.
Regulation of conveyance to foreign corporation, as denying due process of law, see Constitutional Law, 34.
Validity of unstamped deed, see Internal Revenue, 22.

DEFENSE.
Burden of proving, see Evidence, 5.

DEGREES.
Of homicide, see Homicide.

DEMAND.
For wages, see Seamen.

DEMURRAGE.
See Carriers, 1.

DEMURRER.
Determination of sufficiency of indictment on demurrer, see Criminal Law, 1.

DEPORTATION.
Of alien, see Aliens.

DEPOSITIONS.

1. The objection that the deposition of a party could not be taken, if valid at all, is not fairly open where there is no attempt to fish for information, and an agreement was made that "time notice and copy are hereby waived," and that "the officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived." Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, 64: 286

2. Depositions of foreign witnesses are not inadmissible because the mode of return did not follow strictly the state statute, in that the officer to whom the commission was directed did not put the depositions into the mail and certify on the envelop that he had done so, where the course was impossible, owing to war, and the officer did transmit the depositions in the only practicable way, giving them to an American consul, and having them transmitted to the Department of State, and then through the mail to the clerk of court,—the integrity of the depositions not being questioned. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, 64: 286

DIRECTORS.
Liability of director in national bank, see Banks.
Of corporations, see Corporations.

DISCLAIMER.
Of descriptive words in trademark, see Trademark, 2.

DISCOUNT.
Usury in discount by national bank, see Usury, 2.

DISCOVERY.
As to depositions, see Depositions.
Of mining claim, see Mines, 1-3.

DISCRIMINATION.
Unconstitutionality of, see Constitutional Law, II.

DISFIGUREMENT.
Damages for, see Damages, 4.

DISMISSAL AND DISCONTINUANCE.
Reversal for dismissal of moot case see Appeal and Error, 29.
Remanding cause for dismissal, see Appeal and Error, 56-59.

DISTRICT ATTORNEY.
Following state practice forbidding second presentation of charge to grand jury, see Courts, 14.

1. A Federal district attorney may, without first obtaining leave of court, present to one grand jury charges which a previous grand jury has ignored. United States v. Thompson, 251 U. S. 407, 40 Sup. Ct. Rep. 289, (Annotated) 64: 333

2. The United States district attorney, in virtue of his official duty, and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court, and his duty to direct the attention of the grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges. United States v. Thompson, 251 U. S. 407, 40 Sup. Ct. Rep. 289, (Annotated) 64: 333

DISTRICT COURTS.
Appellate jurisdiction of Supreme Court over, see Appeal and Error, II. a.

DISTRICT OF COLUMBIA.
Jurisdiction of courts of, see Courts, 7.

DISTRICTS.
Of Federal courts, see Courts, 13.

DIVERSE CITIZENSHIP.
As affecting jurisdiction, see Courts, 6.

Drawback.

The Federal Supreme Court will follow the long-standing ruling of the Treasury Department under which the drawback provided for by the Act of August 27, 1894, § 22, upon the exportation of articles manufactured from imported dutiable materials, to be "equal in amount to the duties paid on the materials used," less 1 per cent, is computed, where linseed oil and oil cake have both been manufactured from imported linseed paying a specific duty and the oil cake has been exported, upon the basis of the value of the two products, and not in proportion to their respective weights. National Lead Co. v. United States, 252 U. S. 140, 40 Sup. Ct. Rep. 237, **64: 496**

An exclusive grant of the right to use the streets of a town for the distribution of electric current may not be deduced from the declaration in the paragraph of the franchise ordinance relating to the trimming of trees that the town warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes, etc. Piedmont Power & Light Co. v. Graham, 253 U. S. 193, 40 Sup. Ct. Rep. 453, **64: 855**

Multiplicity of suits.

Injunction against illegal tax, see Injunction, 4.

1. Equitable jurisdiction of a suit which presents one ground for equitable relief, with no adequate remedy at law, extends to the disposition of all the ques-

tions raised by the bill, since a court of equity does not do justice by halves, and will prevent, if possible, a multiplicity of suits. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, 64: 445

Doing complete justice.

See also supra, 1.

2. Jurisdiction of a Federal district court of a suit to enjoin, on constitutional grounds, the enforcement of rate-fixing orders made by a state Commission, should be retained for the purpose of making the equitable relief as full and complete as the circumstances of the case and the nature of the case and the nature of the proofs may require, although, since the suit was commenced, the state legislature has provided a direct judicial review of such orders theretofore only possible in contempt proceedings, and then only at the risk of severe penalties if unsuccessful, and such suits should therefore proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under the present conditions, confiscatory, and if found to be so injunction should issue to restrain their enforcement; if found not to be confiscatory, injunction should issue to restrain the enforcement of penalties accrued pendente lite, provided that it also be found that plaintiff had reasonable ground to contest the rates as being confiscatory. Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 Sup. Ct. Rep. 338, 64: 596

Oklahoma Gin Co. v. Oklahoma, 252 U. S. 339, 40 Sup. Ct. Rep. 341, 64: 600

Remedy at law.

Remedy at law as bar to injunction against illegal tax, see Injunction, 2-4.

Recovery in equity as bar to recovery at law, see Judgment, 4.

3. Statutes which may furnish an adequate legal remedy against taxes assessed under an unconstitutional law do not bar resort to equity by a taxpayer who avers that the tax lien asserted by virtue of the levy and tax warrant, itself attacked on constitutional grounds, creates a cloud on title, where there appears to be no legal remedy for the removal of a cloud on title cast by an invalid lien imposed for a tax valid in itself. Shaffer v. Carter, 252 U. S. 37, 40 Sup. Ct. Rep. 221, 64: 445

ERROR.

See Appeal and Error.

ESPIONAGE ACT.

Conspiracy to violate, see Conspiracy, 1-3.

Constitutionality of, see Constitutional Law, 73, 74.

Sufficiency of evidence to support conviction for violating, see Evidence, 12, 13.

Sufficiency of indictment charging conspiracy to violate Espionage Act, see Indictment and Information, 1.

Sufficiency of evidence in prosecution for violating Espionage Act as question for jury, see Trial, 2-4.

Construction of, see War, 11.

See also Criminal Law, 1.

ESTOPPEL.

Of new stockholder to enforce liability of bank director for making excessive loan, see Banks, 8.

By judgment, see Judgment, 2-4.

EVIDENCE.

Waiver of ruling on cross-examination, see Appeal and Error, 40.

Compelling accused to furnish, see Criminal Law, 3.

Use of evidence obtained by unreasonable search and seizure, see Search and Seizure.

Judicial notice.

Error in instruction respecting, see Appeal and Error, 46.

1. The Federal Supreme Court takes judicial notice that in 1901 4 per cent was very generally assumed to be the fair value or earning power of money safely invested. Simpson v. United States, 252 U. S. 547, 40 Sup. Ct. Rep. 367, 64: 709

2. The Federal Supreme Court cannot say as a matter of law that a beverage containing not more than ½ of 1 per cent of alcohol is intoxicating. United States v. Standard Brewery, 251 U. S. 210, 40 Sup. Ct. Rep. 139, 64: 229

Presumptions and burden of proof.

Presumption in favor of validity of statute, see Courts, 4, 5.

Prima facie case for removal to other Federal district for trial, see Criminal Law, 4.

3. Congress is presumed to have legislated with knowledge of an established usage of an executive department of the government. National Lead Co. v. United States, 252 U. S. 140, 40 Sup. Ct. Rep. 237, 64: 496

4. In a suit by a German agent against his American principal to recover the amounts of certain arbitration awards which the former had paid on the latter's account, the value of the German mark in which such payments were made will be taken at par, in the absence of evidence that it had depreciated at the time of such payments. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, 64: 286

5. The defense that defendant in a suit by the Federal government to cancel a patent for public lands as issued in violation of law is a bona fide purchaser is an affirmative one, which he must set up and establish. United States v. Poland, 251 U. S. 221, 40 Sup. Ct. Rep. 127, 64: 236

Documentary.

As to depositions, see Depositions.

Admissibility in evidence of unstamped deed, see Internal Revenue, 22.

6. The Interstate Commerce Commission is given a general degree of latitude in the investigation of reparation claims

by the Act of February 4, 1887, §§ 13, 16, 17, as amended by the Acts of March 2, 1889, and June 29, 1906, and June 18, 1910, and the resulting findings and order of the Commission may not be rejected as evidence in a suit to recover the amounts of the reparation awards merely because of errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, **64: 810**

7. Formal proof of the handwriting of the assignors of reparation claims by subscribing witnesses or otherwise was not necessary in a hearing before the Interstate Commerce Commission in the absence of objection or contradiction. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, **64: 810**

Admissions.

8. Placer claimants, by mistakenly posting a notice stating that they had relocated the ground as a lode claim, did not thereby admit the validity of a prior conflicting lode location, where the mistake was promptly corrected the next day by the substitution of another notice stating that the ground was located as a placer claim, and no one was misled by the mistake. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, **64: 567**

Hearsay; declarations; res gestæ.

Hearsay testimony before Interstate Commerce Commission, see Interstate Commerce Commission, 3.

9. Recitals of discovery in the recorded notices of location of lode mining claims are mere ex parte self-serving declarations on the part of the locators, and are not evidence of discovery. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321. **64: 567**

Weight and sufficiency.

Review of facts in appellate court, see Appeal and Error, 41.

Sufficiency of evidence to justify removal to other Federal district for trial, see Criminal Law, 4, 5.

Sufficiency of evidence as question for jury, see Trial.

10. An attempt to obtain a patent for lands within the indemnity limits of the Southern Pacific Railroad land grant of July 27, 1866, by representing that the lands were not mineral, when the railway company's officers believed the fact was otherwise, is shown by evidence that when the patent was sought and obtained the lands had no substantial value unless for oil mining; that the interest and anxiety displayed by the company's officers in securing the patent were wholly disproportionate to the value of the lands for any other purpose; that the lands lay within a recognized and productive oil region which the company's geologists had been systematically examining to determine in what lands oil was to be expected; and that upon the advice and recommendation of such geologists the company was treating and dealing with adjacent lands, of which it was the owner, as valuable for oil. United States v. Southern P. Co. 251 U. S. 1, 40 Sup. Ct. Rep. 47, **64: 97**

11. The denial by a director of a national bank, in an action against him for knowingly participating, contrary to U. S. Rev. Stat. §§ 5200 and 5239, in an excessive loan, that such loan was a single one, or that he knew it to be such, is not conclusive where there is substantial evidence inconsistent with such denial, tending to show facts and circumstances attendant upon the transaction of which he had knowledge, and subsequent conduct in the nature of admissions by him, also inconsistent with such denial. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, **64: 141**

12. Evidence that defendants, acting in concert, with full understanding of its contents, distributed publicly a highly colored and sensational pamphlet fairly to be construed as a protest against the further prosecution by the United States of the war with Germany, is sufficient to support convictions of conspiring, contrary to the Espionage Act of June 15, 1917, to cause insubordination, disloyalty, and refusal of duty in the military or naval forces, and to obstruct the recruiting and enlistment service of the United States. Pierce v United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

13. A conviction of making or conveying false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, contrary to the Espionage Act of June 15, 1917, is sustained by evidence which warranted the jury in finding that the statements in a pamphlet distributed by defendants during the war with Germany were false in fact, and known to be so by the defendants, or else were distributed recklessly without effort to ascertain the truth, and were circulated wilfully in order to interfere with the success of the forces of the United States. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

14. The evidence introduced in a criminal case need not have been sufficient as to all the counts in the indictment in order to support a judgment upon a verdict of guilty, where the sentence imposed does not exceed that which might lawfully have been imposed under any single count. It suffices that the evidence be sufficient to sustain any one of the counts. Schaefer v. United States, 251 U. S. 466, 40 Sup. Ct. Rep. 259, **64: 360**

EXCEPTIONS.

Sufficiency of, generally, see Appeal and Error, IV.

Bill of exceptions, see Appeal and Error, 26, 27.

EXECUTIVE DEPARTMENTS.

Following departmental construction of tariff act, see Duties.

The power and duty of the grand jury to investigate is original and complete, susceptible of exercise upon its own motion, and upon such knowledge as it may derive from any source which it may deem proper, and is not, therefore, dependent for its exertion upon the approval or

the claimant." Stallings v. Splain, 253 U. S. 339, 40 Sup. Ct. Rep. 537, 64: 940

INEQUALITY.

Of immunities, privileges, and protection, see Constitutional Law, II.

INFORMATION.

For criminal offense, see Indictment and Information.

INFRINGEMENT.

Of patent, see Patents.

INHERITANCE TAX.

Federal estate tax, see Internal Revenue, 18–21.

INITIATIVE AND REFERENDUM.

State referendum as applicable to amendment of Federal Constitution, see Constitutional Law, 3, 4.

INJUNCTION.

Discretion as to granting, see Appeal and Error, 36.

Entering final decree on merits on appeal from interlocutory order, see Appeal and Error, 52.

Review by certiorari of decision in injunction proceedings, see Certiorari, 4, 5.

Retention of jurisdiction of injunction suit in order to do complete justice, see Equity, 2.

Against officers or boards.

Proper district for suit to enjoin Comptroller of Currency, see Courts, 13.

1. A court of equity may grant relief against Treasury officials by way of mandatory injunction or a receivership to one who has an equitable right in a fund appropriated by Congress to pay a specified person, conformably to a finding of the court of claims, where such person is made a party so as to bind her, and so that a decree may afford a proper acquittance to the government. Houston v. Ormes, 252 U. S. 469, 40 Sup. Ct. Rep. 369, 64: 667

Against illegal tax.

2. Equity has jurisdiction, there being no adequate remedy at law, of a suit to enjoin state officials from enforcing an alleged unlawful tax upon foreign railway companies where such tax is made a first lien upon all the property of the railways in the state, thus putting a cloud upon their titles, and where delay in payment is visited with considerable penalties. Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. Rep. 435, 64:782

3. Equitable relief by way of injunction against the enforcement of state taxes alleged to be unlawfully assessed will not be denied on the ground that an adequate remedy at law exists under a local statutory provision that an action respecting the title to property, or arising upon contract, may be brought in the state courts against the state the same as against a private person. Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. Rep. 435, 64:782

4. The remedies afforded to individuals under the state law to correct errors in assessing taxes do not defeat the right of the United States, through its officers, to invoke equitable relief against the enforcement of state tax assessments on the surplus lands of noncompetent Osage Indians which are asserted to be based upon systematic, arbitrary, grossly excessive, discriminatory, and unfair valuations which amount to a perversion of the state laws, committed in order to defeat the property rights conferred by the Act of June 28, 1906, since the interposition of a court of equity to prevent the wrong complained of was essential in order to avoid a multiplicity of suits, and, in addition, such wrong was not a mere mistake or error committed in the enforcement of the state tax laws. United States v. Osage County Comrs. 251 U. S. 128, 40 Sup. Ct. Rep. 100, 64:184

Against infringement of copyright.

5. Injunctive relief to the owner of the copyright in a play against the unauthorized representation of such play by his licensee in moving pictures will only be granted upon condition that the former shall also abstain from presenting or authorizing the representation of the play in moving pictures during the life of the license agreement within the territorial limits therein stated. Manners v. Morosco, 252 U. S. 317, 40 Sup. Ct. Rep. 335, 64:590

Against monopolistic contract.

6. Attempts to enforce covenant in leases for the operation of coal-producing lands that the lessee shall ship all coal mined by rail routes which are named, or which are to be designated, are properly enjoined where such covenant was resorted to as part of a scheme in contravention of the Sherman Anti-trust Act to control the mining and transportation of coal. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64:760

INSOLVENCY.

As to bankruptcy, see Bankruptcy.

INSPECTION LAWS AND REGULATIONS.

Inspection law as regulation of interstate commerce, see Commerce, 12.

INSTRUCTIONS.

Harmless error in, see Appeal and Error, 44–46.

INSULAR POSSESSIONS.

Jurisdiction of insular courts, see Courts, 6.

See also Territories.

INSURANCE.

Federal taxation of insurance company, see Internal Revenue, 11–17.

The term "reserve" or "reserves" in the law of insurance means in general a sum of money variously computed or esti-

mated, which, with accretions from interest, is set aside, "reserved," as a fund with which to mature or liquidate either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued but contingent and indefinite as to amount or time of payment. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, 64:297

INTENT.

Sufficiency of averment as to criminal intent, see Indictment and Information, 1.

INTEREST.

On fees and emoluments deposited by clerk of court, see Clerks, 1, 2.

As element of damage, see Damages, 1, 2.

Judicial notice of interest rates, see Evidence, 1.

Interest rates in computing succession tax, see Internal Revenue, 21.

Usurious interest, see Usury.

1. The provision of the Judicial Code, § 177, against the allowance of interest upon any claim against the United States up to the time of the rendition of judgment thereon by the court of claims unless upon a contract expressly stipulating for the payment of interest, is applicable to the unpaid consideration due to Indians under a treaty which made a present cession of their lands to the United States for a consideration to be paid thereafter, with no mention made of interest. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522, 64:901

2. Claims by Indians against the United States cannot be regarded as taken out of the rule against the allowance of interest, prescribed by the Judicial Code, § 177, on the theory that because the Act of June 22, 1910, conferring jurisdiction of such claims upon the court of claims, calls for the consideration of equitable as well as legal claims, the ordinary rule of equity ought to be followed as to the allowance of interest. United States v. Omaha Tribe of Indians, 253 U. S. 275, 40 Sup. Ct. Rep. 522, 64:901

3. The reduced amount which a circuit court of appeals, modifying a decree of a district court, finds to be due the receiver of a national bank from its president on account of the latter's failure to guard against thefts by a teller and bookkeeper should bear interest from the date of the decree of the district court until the receiver interposed a delay by appealing to the Supreme Court from the decree of the circuit court of appeals. Bates v. Dresser, 251 U. S. 524, 40 Sup. Ct. Rep. 247, 64:388

INTERFERENCE.

In patent office, see Patents, 5.

INTERNAL REVENUE.

Munitions tax.

1. A corporation which, having contracted to manufacture and deliver to a foreign government high explosive shells, enters into contracts with others for the performance of the necessary operations to produce a completed shell, doing none of the work itself except the manufacturing of steel in bar form suitable for the shells, and the furnishing its subcontractors with certain other materials such as "transit plugs," "fixing screws," and "copper tubing," is subject to the munitions manufacturer's tax imposed by the Act of September 8, 1916, § 301, upon every person manufacturing projectiles, shells, or torpedoes of any kind. Carbon Steel Co. v. Lewellyn, 251 U. S. 501, 40 Sup. Ct. Rep. 283, 64:375

2. A corporation which, under inspection in behalf of the French government, made the steel for, and did the forging on, certain shell bodies under an order from another corporation, to enable the latter to carry out its contract with such government for certain explosive shells, was engaged in manufacturing a part of such shells within the meaning of the Munition Manufacturer's Tax Act of September 8, 1916, imposing a tax upon the profits of every person manufacturing projectiles, shells, or torpedoes, or any part of any of such articles. Worth Bros. Co. v. Lederer, 251 U. S. 507, 40 Sup. Ct. Rep. 282, 64:377

3. The net profits received by a corporation from the manufacture and sale of certain steel forgings to be used by the vendee to fulfil the latter's contract to supply a foreign government with high explosive shells are taxable under the Munition Manufacturer's Tax Act of September 8, 1916, imposing a tax on any person manufacturing shells or any part of them. Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511, 40 Sup. Ct. Rep. 285, 64:380

4. The question whether the subcontractors of a corporation which has contracted to manufacture and deliver to a foreign government high explosive shells were correctly assessed under the munitions tax imposed by the Act of September 8, 1916, § 301, does not concern the corporation in its efforts to resist such a tax on the profits made by it. Carbon Steel Co. v. Lewellyn, 251 U. S. 501, 40 Sup. Ct. Rep. 283, 64:375

Income tax.

Validity of state income tax, see Constitutional Law, 22–28, 55–59.

See also infra, 23, 24.

5. The income tax amendment to the Federal Constitution does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, from whatever source derived. Evans v. Gore, 253 U. S. 245, 40 Sup. Ct. Rep. 550, 64:887

6. The income tax amendment to the Federal Constitution should not be extended by loose construction so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. Rep. 189, **64:521**

7. A Federal district judge could not, consistently with the provision of U. S. Const. art. 3, that all Federal judges shall, at stated times, receive for their services a compensation "which shall not be diminished during their continuance in office," be subjected to an income tax imposed under the 16th Amendment in respect of his salary as such judge. Evans v. Gore, 253 U. S. 245, 40 Sup. Ct. Rep. 550, **64:887**

8. Congress was given no power by the income tax amendment to the Federal Constitution to tax, without apportionment, as income of a stockholder in a corporation, a stock dividend made lawfully and in good faith against accumulated profits earned by the corporation since the adoption of such amendment. Such dividends are not income. Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. Rep. 189, **64:521**

9. The constitutional inhibition against the taxation by Congress without apportionment of a stockholder's interest in the undivided accumulated earnings of a corporation is not removed by the adoption of the income tax amendment. Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. Rep. 189, **64:521**

10. With respect to domestic corporations no change was intended by the use in the Income Tax Act of October 3, 1913, of the expression income "arising or accruing" instead of income "received," as used in the Corporation Excise Tax Act of August 5, 1909, and the tax should be levied under both acts upon the income "received" during the year. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

11. Insurance premiums collected by the local agents of an insurance company, but which, conformably to the agency contracts, were not transmitted to the company's treasurer within the calendar year, were nevertheless a part of the gross income of the company received by it during such year within the meaning of the Corporation Excise Tax Act of August 5, 1909, and the Income Tax Act of October 3, 1913. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

12. An insurance company's "loss claims reserve," intended to provide for liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed, is one required by law to be maintained, within the meaning of the provision in both the Corporation Excise Tax Law of August 5, 1909, and the Income Tax Act of October 3, 1913, that "the net addition, if any, required by law to be made within the year to reserve funds" may be deducted from gross, in determining the amount of net, income to be taxed, where a state insurance department, pursuant to statute, has, at all times since and including 1909, required the company to keep on hand, as a condition of doing business in that state "assets as reserves sufficient to cover outstanding losses." Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

13. An insurance company's reserves required by rules or regulations of state insurance departments, promulgated in the exercise of an appropriate power conferred by statute, are "required by law," within the meaning of the provision in both the Corporation Excise Tax Act of August 5, 1909, and the Income Tax Act of October 3, 1913, that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net, income to be taxed. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

14. Unpaid taxes, salaries, brokerage, and reinsurance due other companies at the end of each tax year may not be deducted from the gross income of an insurance company, under the provision either in the Corporation Excise Tax Act of August 5, 1909, or the Income Tax Act of October 3, 1913, that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net, income to be taxed, although various state insurance departments require that "assets as reserves" be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," where these departments in these expressions plainly used the word "reserves" in a nontechnical sense as equivalent to "assets." Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

15. A decrease in the amount of reserves required by law of an insurance company for the year 1913, from the amount required in 1912, unless clearly shown to be due to excessive reserves in prior years, or to some other cause by which the free assets of the company were increased during the year 1913, cannot be treated by the government as "released reserve" and charged to the company as income for 1913, taxable under the Corporation Excise Tax Act of August 5, 1909, and the Income Tax Act of October 3, 1913. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

16. The amounts paid by a mutual legal reserve level-premium life insurance company in cash dividends to its policyholders during any taxable year, representing excess in premiums over actual cost of insurance, if not applied by such policyholders during that period of reduction of renewal premiums, may not be excluded from gross

income under the provision of the Income Tax Act of October 3, 1913, § II. G, that life insurance companies "shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder within such year." Penn Mut. L. Ins. Co. v. Lederer, 252 U. S. 523, 40 Sup. Ct. Rep. 397, **64:698**

17. The deduction from the gross income of a mutual legal reserve level-premium life insurance company of cash dividends to policyholders, representing excess in premiums over actual cost of insurance, is expressly forbidden by the clause of the Income Tax Act of October 3, 1913, § II. G, defining allowable deductions from gross income of insurance companies as "the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts," except in so far as such dividends are excluded from computation of gross income under the so-called noninclusion clause of such section, as having been applied in reduction of renewal premiums. Penn Mut. L. Ins. Co. v. Lederer, 252 U. S. 523, 40 Sup. Ct. Rep. 397, **64:698**

Succession tax.

18. The interest of legatees in legacies paid over to them or to a trustee for them by the executor prior to July 1, 1902, although not demandable by them as of right until after that date, because the time for proving claims against the estate had not expired, had become absolutely vested in possession of such legatees prior to such date, within the meaning of the Act of June 27, 1902, providing for the refunding of taxes collected on contingent beneficial interests not vested prior to July 1, 1902, notwithstanding the remote possibility that the amounts so paid might have to be returned to the executor for payment of debts. Henry v. United States, 251 U. S. 393, 40 Sup. Ct. Rep. 185, **64:322**

19. The interest in a fund transferred from an estate to a trustee for ascertained persons was vested in possession although they had received no income from it prior to July 1, 1902, within the provision of the Act of June 27, 1902, for the refunding of taxes collected on a contingent beneficial interest not vested prior to such date. Henry v. United States, 251 U. S. 393, 40 Sup. Ct. Rep. 185, **64:322**

20. Trust fund legacies which it was the legal duty of the executors to pay over to the trustee before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment within the meaning of the provision of the Act of June 27, 1902, for the refund of succession taxes collected on contingent beneficial interests not vested prior to July 1, 1902. Simpson v. United States, 252 U. S. 547, 40 Sup. Ct. Rep. 367, **64:709**

21. It is much too late to assail successfully the use of mortuary tables by the Internal Revenue Department in computing the present worth of life interests in personal property for the purpose of the succession tax imposed under the Spanish War Revenue Act of June 13, 1898, or the assumption that 4 per cent was then the fair value or earning power of money. Simpson v. United States, 252 U. S. 547, 40 Sup. Ct. Rep. 367, **64:709**

Stamp tax.

22. The absence of the internal revenue stamps required on deeds by the Act of October 22, 1914, § 22, neither invalidated the deeds nor made them inadmissible as evidence. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, **64:567**

Refunding taxes and recovery of taxes paid.

23. The right to recover back excessive corporation excise tax payments is barred where the corporation failed to appeal to the Commissioner of Internal Revenue, as required by U. S. Rev. Stat. § 3226, and also failed to observe the requirement of § 3227, that suit be begun within two years after the cause of action accrued. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

24. The filing by the government of amended returns for the assessment of an insurance company under the Corporation Excise Tax Act of August 5, 1909, cannot be said to constitute the beginning of new proceedings which so superseded the original returns as to release the company from its entire failure to observe the statutory requirement for review of the latter, where in each case the purpose and effect of such amended returns was to increase the payment which the company was required to make under the law, though in dealing with the same items the basis of computation was in some cases varied, and where the payments made on the original returns were credited on the amounts computed as due on the returns as amended. Maryland Casualty Co. v. United States, 251 U. S. 342, 40 Sup. Ct. Rep. 155, **64:297**

INTERSTATE COMMERCE.

See Commerce.

INTERSTATE COMMERCE COMMISSION.

Sufficiency of objections in reparation proceeding, see Appeal and Error, 28.

Assignment of reparation claim, see Assignment.

Constitutional questions respecting interstate commerce, see Commerce.

Admissibility of evidence on hearing before, see Evidence, 7.

Suit upon reparation claim by assignee of legal title, see Parties, 1.

1. The refusal of the Interstate Commerce Commission, when making the physical valuation of railway properties ordered by the Act of March 1, 1913, § 19a, to obey the command of that statute to investigate and find the present cost of condemnation and damages or of purchase in excess of original cost or present value of the railway company's lands, cannot be justified on the theory that such command involves a consideration by the Commission of matters "beyond the possibility of rational determination," and calls for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," even if it be conceded that the subject-matter of the valuations in question, which the statute expressly directed to be made, necessarily opened a wide range of proof, and called for the exercise of close scrutiny and of scrupulous analysis and application. United States ex rel. Kansas City Southern R. Co. v. Interstate Commerce Commission, 252 U. S. 178, 40 Sup. Ct. Rep. 187, 64: 517

Judicial review.

Final decrees in reparation suits, see Appeal and Error, 5.

Findings in reparation order as evidence, see Evidence, 6.

2. Whether a witness called before the Interstate Commerce Commission had shown such special knowledge as to qualify him to testify as an expert was for the Commission to determine, and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, 64:810

3. The Interstate Commerce Commission is not to be regarded as having acted arbitrarily in making a reparation order, nor may its findings and order be rejected as wanting in support, simply because hearsay evidence introduced without objection and substantially corroborated by original evidence clearly admissible against the parties to be affected was considered with the rest. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, 64:810

4. The refusal of the trial court in a suit for the recovery of amounts awarded in a reparation order made by the Interstate Commerce Commission to treat the award as void in toto is not erroneous if, to any substantial extent, the award was legally valid. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, 64:810

INTERVENTION.

Intervention of parties in actions, see Parties, 2, 3.

INTOXICATING LIQUORS.

Prohibiting carriage by private automobile for personal use, see Commerce, 8.

Validity and construction of Prohibition Amendment, see Constitutional Law, 1.

War-time Prohibition Act as denying due process of law, see Constitutional Law, 37, 38.

Judicial notice of intoxicating character of liquor, see Evidence, 2.

War-time prohibition, see War, 2–10.

INVENTIONS.

Patents for, see Patents.

JOINT CREDITORS AND DEBTORS.

Joint or several liability of director of national bank, see Banks, 7.

JUDGES.

Income tax on salary of Federal judges, see Internal Revenue, 7.

Mandamus to, see Mandamus.

The constitutional prohibition against the diminution of salaries of Federal judges during continuance in office is to be construed not as a private grant, but as a limitation imposed in the public interest. Evans v. Gore, 253 U. S. 245, 40 Sup. Ct. Rep. 550, 64: 887

JUDGMENT.

Finality of judgment for purpose of appeal, see Appeal and Error, I. a.

Of appellate court, see Appeal and Error, VII.

Interest on judgment, see Interest, 3.

Form.

1. A combination of competing interstate railway carriers and competing coal companies, found to violate both the Sherman Anti-trust Act and the commodities clause of the Act of June 29, 1906, must be so dissolved as to give each of such companies its entire independence, free from stock or other control. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep 425, 64: 760

Conclusiveness generally.

Following decision below as to, see Appeal and Error, 31.

Effect of reversal on former jeopardy, see Criminal Law, 2.

2. The denial by the California supreme court, without opinion, of the petition of a public service corporation for the review, conformably to the California Public Utilities Act, § 67, of an order of the state Railroad Commission, sought upon the ground that such order deprived the corporation of its constitutional rights, is the equivalent of a decision adverse to the claims asserted in such petition, and bars a subsequent suit by the corporation to enjoin the enforcement of such order on the same grounds. Napa Valley Electric Co. v. Railroad Commissioners, 251 U. S. 366, 40 Sup. Ct. Rep. 174, 64: 310

3. A judgment for plaintiff in a suit to recover the amounts of certain arbitration awards which he had paid on defendant's account, though limited to sums which plaintiff had then paid, must be regarded

as a conclusive adjudication as to the validity of the awards in a second suit to recover the sums paid by plaintiff, not embraced in the first judgment, where, in the first suit, the awards were dealt with as a whole, objections to them being general, and the objections were overruled, the court assuming that the awards were obligatory, but cutting down the amount to be recovered to the sum that had been paid. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, **64: 286**

4. The recovery of nominal damages in an equity suit to restrain a trespass does not bar the recovery at law of the statutory penalty for the same trespass, the claim for such penalty having been rejected in the equity suit because pursued in an action in which it could not be entertained. Ash Sheep Co. v. United States, 252 U. S. 159, 40 Sup. Ct. Rep. 241, **64: 507**

Full faith and credit.

5. The fact that the original cause of action could not have been maintained in the courts of a state is not an answer to a suit upon a judgment rendered by a court of another state. Kenney v. Supreme Lodge of the World, Loyal Order Moose, 252 U. S. 411, 40 Sup. Ct. Rep. 371, **64: 638**

6. The constitutional obligation of a state to give full faith and credit to the judgments of courts of other states cannot be escaped by the simple device of denying jurisdiction in such cases to courts otherwise competent. Kenney v. Supreme Lodge of the World, Loyal Order Moose, 252 U. S. 411, 40 Sup. Ct. Rep. 371, **64: 638**

7. A state statute providing that no action shall be brought or prosecuted in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct contravenes the full faith and credit clause of the Federal Constitution when construed by the state courts as forbidding the maintenance of an action upon a judgment recovered in a court of another state, in conformity with the laws of that state, for negligently causing the death of plaintiff's intestate in that state. Kenney v. Supreme Lodge of the World, Loyal Order Moose, 252 U. S. 411, 40 Sup. Ct. Rep. 371, **64: 638**

JUDICIAL NOTICE.

See Evidence, 1, 2.

JURISDICTION.

Of admiralty courts, see Admiralty.
Appellate jurisdiction, see Appeal and Error.
Of bankruptcy proceedings, see Bankruptcy, 1, 2.
Of referee in bankruptcy, see Bankruptcy, 1, 2.
Of court of claims, see Claims.
Of courts generally, see Courts.
Of United States commissioner, see Criminal Law, 6.
Of courts of equity, see Equity.
Of injunction cases, see Injunction.
Of mandamus proceeding, see Mandamus.
Sufficiency of jurisdictional averments, see Pleading, 3, 4.
Original jurisdiction of Federal Supreme Court, see Supreme Court of the United States.

JURISDICTIONAL AMOUNT.

See Courts, 11, 12.

JURY.

Discretion as to quashing jury panel, see Appeal and Error, 37.
Harmless error in refusing challenge of juror for cause, see Appeal and Error, 47, 48.
Matters as to grand jury, see Grand Jury.
Respective provinces of court and jury, see Trial.

Right to jury trial.

Reversal without remanding for new trial, see Appeal and Error, 38.

1. A Federal circuit court of appeals may not reverse the judgment below, entered on a verdict for plaintiff in a personal-injury action, without ordering a new trial. Fidelity Title & T. Co. v. Dubois Electric Co. 253 U. S. 212, 40 Sup. Ct. Rep. 514, **64: 865**

2. The constitutional rights of several defendants tried jointly are not infringed by the requirement of a Federal statute that, in cases where there are several defendants, they shall be treated as a single party for the purpose of peremptory challenges. Schaefer v. United States, 251 U. S. 466, 40 Sup. Ct. Rep. 259, **64: 360**

3. The constitutional right to trial by jury is not infringed by the compulsory appointment of an auditor, in an action at law involving long accounts with many disputed items, to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury, where the order of appointment, though directing the auditor to form and express an opinion upon facts and items in dispute, declares that he shall not finally determine any of the issues, and that the final determination of all issues of fact is to be made by the jury at the trial. Re Peterson, 253 U. S. 300, 40 Sup. Ct. Rep. 543, **64: 919**

4. State courts, when enforcing rights under the Federal Employers' Liability Act, may give effect to a local practice permitting a less than unanimous verdict. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275, **64: 430**

LABORERS.

In general, see Master and Servant.

LACHES.

Necessity of pleading, see Pleading, 6.

1. The six months' limitation prescribed by the German Civil Code, § 477, for claims for defect of quality, did not apply where the claims had been submitted to arbitration and passed upon. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, **64: 286**

When statute runs.

2. The taking of a placer mining claim as part of a site for an army post must, for the purpose of applying the Statute of Limitations to a suit against the government for compensation, be deemed to have been on the date of the approval or ratification by the Secretary of War of the unauthorized action of a military commander in taking possession, and not on the date of the latter's action, in view of the fact that the Secretary of War alone possessed the requisite authorization from Congress to determine whether the army post should be established and what land should be taken therefor, and the Secretary's action was none the less a taking of the mining claim because the President, when reserving the tract from sale and setting it aside for military purposes, had done so "subject to any legal rights which may exist to any land within its limits." United States v. North American Transp. & Trading Co. 253 U. S. 330, 40 Sup. Ct. Rep. 518, **64: 935**

When action barred.

3. The two years' limitation of Vernon's Sayles's Tex. Civ. Stat. 1914, art. 5687, is not applicable to a cause of action against a national bank director for knowingly participating in or assenting to an excessive loan, but such suit is governed by the four years' limitation prescribed by art. 5690 for actions for which no limitation is otherwise prescribed. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, (Annotated) **64: 141**

4. Considered as a new claim, a suit brought since the amendment of January 11, 1915, to the Act of March 3, 1891, to recover for depredations committed by a hostile band from an Indian tribe in amity with the United States, is barred by the three years' limitation in the original act. Rex v. United States, 251 U. S. 382, 40 Sup. Ct. Rep. 181, **64: 318**

MANDAMUS.

Abatement of mandamus proceedings by resignation of officer, see Abatement.

Existence of other remedy.

1. Resort may not be had to the extraordinary writ of mandamus or prohibition where the petitioner has the right to a writ of error or appeal. Re Tiffany, 252 U. S. 32, 40 Sup. Ct. Rep. 239, **64: 443**

2. The Federal Supreme Court has jurisdiction of a petition for writs of mandamus or prohibition directed to a district court judge, by which relief is sought against the appointment of an auditor to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury, where the petitioner asserts that, by the appointment of such auditor and proceedings thereunder, his constitutional right to trial by jury would be violated. Re Peterson, 253 U. S. 300, 40 Sup. Ct. Rep. 543, **64: 919**

3. Error in providing, in an order for the appointment of an auditor in an action at law, that the expense be paid by one or both of the parties, in accordance with the discretion of the trial court, does not require that the extraordinary remedies of mandamus or prohibition be granted, but, if petitioner deems himself prejudiced by the error, he may seek redress through application to the district court for a modification of the order, or, after final judgment, by writ of error from the circuit court of appeals. Re Peterson, 253 U. S. 300, 40 Sup. Ct. Rep. 543, **64: 919**

To control executive action.

4. The Secretary of the Interior cannot be compelled by mandamus to place upon the rolls of the Creek Nation the names of certain persons who, on the last day fixed by statute for the final completion of the rolls, he decided, reversing his prior decision without notice to the Indians, should be excluded from the rolls, with a direction that if they were already on the rolls, which was not the case, they should be stricken off. United States ex rel. Johnson v. Payne, 253 U. S. 209, 40 Sup. Ct. Rep. 513, **64: 863**

MANUFACTURE.

What is, see Internal Revenue, 1–4.

MARITIME LAW.

See Admiralty.

MARITIME LIENS.

A person furnishing supplies on the master's order to a chartered vessel in a domestic port on the credit of the vessel, although notified by the owner not to do so, is entitled to a lien therefor where the charter party recognizes that liens may be imposed by the charterers and allowed to stand for less than one month, in view of the Act of June 23, 1910, which in § 1 gives a maritime lien for such supplies, and in § 3 declares the presumption that a master appointed by a charterer has authority to procure them, although the statute further provides that nothing in it shall be considered to give a lien where the furnisher knew, or, by the exercise of reasonable diligence, could have ascertained, that, because of the terms of the charter party, or for any other reason, the person ordering necessaries was without authority to bind the vessel, since if the assumption expressed in the words of the charter party, that the charterers had power to authorize the master to impose the lien, was not equivalent to a grant of power, it at least cannot be taken to have excluded it, and there was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship. South Coast S. S. Co. v. Rudbach, 251 U. S. 519, 40 Sup. Ct. Rep. 233, **64: 386**

MARK.

Presumption as to value of German mark, see Evidence, 4.

MARSHAL.

Bond of, approved, see ante, Appendix II., p. 1033.

MASTER AND SERVANT.

State workmen's compensation laws as affecting maritime law, see Admiralty.

Limiting liability to employee riding on pass, see Carriers, 2, 3.

Wages of seamen, see Seamen.

Federal employees, see United States, 1–4.

Hours of labor.

1. Nothing in the provisions of the Adamson Act of September 3, 5, 1916, fixing a permanent eight-hour standard working day for employees engaged in the operation of trains upon interstate railway carriers, and temporarily regulating the wages of such employees, forbids the operation of an insolvent road under an agreement between receiver and employees for a lesser wage, which agreement the employees desire to keep. Fort Smith & W. R. Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. Rep. 526, **64: 862**

Employers' Liability Act.

Assumption of risk, see infra, 9–12.

Misjoinder of causes of action, see Action or Suit, 2.

Harmless error in instruction in action under, see Appeal and Error, 44.

Nonunanimous verdict in action under, see Jury, 4.

2. A brakeman in the general employ of an interstate railway company, which had a contract arrangement with a connecting railway company for through freight service without change of crews, was not in the employ of the latter company within the meaning of the Federal Employers' Liability Act while his train was on that company's line, where, under such contract, each company retained control of its own

train crews, what they did upon the line of the other railroad was done as a part of their duty to the general employer, and so far as they were subject, while upon the tracks of the other company, to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. Hull v. Philadelphia & R. R. Co. 252 U. S. 475, 40 Sup. Ct. Rep. 358, **64: 670**

3. A member of a train crew operating a train of loaded coal cars from colliery to freight yard, both within the state, is, although his duties never took him outside of the state, employed in interstate commerce within the meaning of the Federal Employers' Liability Act so as to exclude the operation of a state Workmen's Compensation Law, where the ultimate destination of some of the cars was a point outside the state, as appears from instruction cards or memoranda delivered to the conductor by the shipping clerk of the mine, each of which referred to a particular car by number, and contained certain code letters indicating that such car with its load would move beyond the state, the course followed being to haul the cars to the yard and place them upon appropriate tracks, when the duties of the train crew ended, then, having gathered them into a train, to move them with another crew some 10 miles to a place still within the state, where they were inspected, weighed, and billed to specifically designated consignees in another state, passing in due time to their final destinations over proper lines, freight charges being at through rates and paid for the entire distance, beginning at the mine. Philadelphia & R. R. Co. v. Hancock, 253 U. S. 284, 40 Sup. Ct. Rep. 512, **64: 907**

4. Generally, when the applicability of the Federal Employers' Liability Act is uncertain, the character of the employment in relation to commerce may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it. Southern P. Co. v. Industrial Acci. Commission, 251 U. S. 259, 40 Sup. Ct. Rep. 130, **64: 258**

5. An employee of an interstate railway company assigned to duty in a signaling tower and pumping station was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act while starting a gasolene engine at the pumping station, which was used to pump water into a tank from which water was to be supplied daily to locomotives in whatever commerce, interstate or intrastate, engaged. Erie R. Co. v. Collins, 253 U. S. 77, 40 Sup. Ct. Rep. 450, **64: 790**

6. A railway employee charged with the duty of sanding the locomotives of a railway company engaged both in intrastate and interstate commerce is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act when, having sanded the last locomotive and carried the ashes from the drying stove in the sand house to the ash pit across the tracks, he was struck by a passing locomotive on his way to get the ash pail, which he had left at the pit while he went for a drink of water, and it is immaterial in what kind of commerce the last locomotive sanded was engaged. Erie R. Co. v. Szary, 253 U. S. 86, 40 Sup. Ct. Rep. 454, **64: 784**

7. The work of an electric lineman in wiping insulators on one of the main electric cables of an interstate railway carrier running from a power house to a reduction and transforming station, whence the current ran to the trolley wires and thence to the motors of the carrier's cars engaged in both intrastate and interstate commerce, is so directly and intimately connected with interstate transportation as to render a state workmen's compensation law inapplicable, where the lineman was killed as the result of an electric shock received while so engaged. Southern P. Co. v. Industrial Acci. Commission, 251 U. S. 259, 40 Sup. Ct. Rep. 130, **64: 258**

Safety Appliance Act.

Review of concurrent findings as to employer's negligence, see Appeal and Error, 41.

8. Handholds or grab irons on all four outside corners of freight cars are not required by the provision of the Safety Appliance Act of March 2, 1893, making unlawful the use of any car in interstate commerce unless such car is provided with secure grab irons or handholds in the ends and sides for greater security to men in coupling and uncoupling cars. The commands of the statute are met by secure and adequate handholds at two diagonal corners of the car. Boehmer v. Pennsylvania R. Co. 252 U. S. 496, 40 Sup. Ct. Rep. 409, (Annotated) **64: 680**

Assumption of risk.

Harmless error in instruction respecting, see Appeal and Error, 45.

9. Assumption of risk is a defense to which a defendant sued under the Federal Employers' Liability Act is entitled, where the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employees. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275, **64: 430**

10. So far as extraordinary hazards are concerned, an interstate railway employee may assume that the employer and his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and dangers arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275, **64: 430**

11. The Federal Employers' Liability Act places a coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the

matter of the assumption of risk. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275, 64: 430

12. A switchman riding on a cut of freight cars which he was to check by applying a brake when these cars should be cut off from the engine does not assume the risk of sudden precipitation from the front end of a car by the abrupt checking resulting from the failure of the engine foreman to make the disconnection at the proper time. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct. Rep. 275, 64: 430

Liability of master to third person.

13. A railway company is not relieved from liability in damages under the law of the Republic of Panama for injuries resulting from the negligence of an employee merely because the negligent act was also punishable as a crime. Panama R. Co. v. Toppin, 252 U. S. 308, 40 Sup. Ct. Rep. 319, 64: 582

14. The exercise by a railway company of care in the selection of an employee does not relieve it, under the law of the Republic of Panama, from liability in damages for injuries resulting from the negligence of such employee. Panama R. Co. v. Toppin, 252 U. S. 308, 40 Sup. Ct. Rep. 319, 64: 582

MAXIMS.

Mobilia sequuntur personam. Maguire v. Trefry, 253 U. S. 12, 40 Sup. Ct. Rep. 417, 64: 739

MECHANICS' LIEN.

Maritime liens for supplies, see Maritime Liens.

MIGRATORY BIRDS.

Validity of Migratory Bird Treaty, see Treaties.

MILITARY TRIBUNALS.

Exclusive jurisdiction of, see War, 13.

MINERAL LANDS.

Sufficiency of fraudulent representation as to character of, see Evidence, 10.

MINES.

Indemnity selection of mineral lands by railroad, see Public Lands, 5.

Location; boundaries; work.

Admissions of locator of mining claim, see Evidence, 8.

Self-serving declarations by locator of mining claim, see Evidence, 9.

Location within monument reserve, see Public Lands, 6, 7.

1. To make a lode mining claim valid, or to invest the locator with a right to possession, it is essential that the lands be mineral in character, and that there be an adequate mineral discovery within the limits of the claim as located. Cameron v. United States, 252 U. S. 450, 40 Sup. Ct. Rep. 410, 64: 659

2. To support a lode mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. Cameron v. United States, 252 U. S. 450, 40 Sup. Ct. Rep. 410, 64: 659

3. The necessity of a discovery to sustain a lode mining location is not dispensed with nor may its absence be cured by virtue of the provisions of U. S. Rev. Stat. § 2332, that evidence of holding and working a mining claim for a period equal to the time prescribed by the Statute of Limitations for mining claims of the state or territory where the same may be situated shall be sufficient to establish a right to a patent thereto in the absence of any adverse claim. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

4. The Secretary of the Interior, by virtue of the general powers conferred by U. S. Rev. Stat. §§ 441, 453, 2478, may determine, after proper notice and upon adequate hearing, whether an asserted lode mining location which has not gone to patent, under which the locator is occupying and using a part of the public reserves, is a valid claim, and, if found to be invalid, may declare it void and recognize the rights of the public. Cameron v. United States, 252 U. S. 450, 40 Sup. Ct. Rep. 410, 64: 659

Adverse proceedings.

5. A party to an unrecorded contract executed by the locators of a placer mining claim which gave him a right to a specified share in the output or proceeds of such claim, and possibly a right to have it worked and thereby made productive, has no such interest as to make him an essential party to proceedings in the land office adverse to a conflicting lode location, but his interest is such as to make him an admissible party. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

6. The interest of a party to an unrecorded contract executed by the locators of a placer mining claim which gave him a right to a specified share in the output or proceeds of the claim, and possibly a right to have it worked and thereby made productive, though not such as to make him an essential party to a suit in support of such claim adverse to a conflicting lode location, is such as to make him an admissible party plaintiff. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

7. Attachment proceedings against a placer claimant, begun before he filed a claim adversing a conflicting lode location, but not resulting in a transfer of his title until after an adverse suit was begun, did not make him an inadmissible party plaintiff in the latter suit. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

8. The conveyance by a husband to his wife of his interest in a placer mining claim under such circumstances that by the local law such interest became community property which he could lease or convey without the wife's concurrence, and could sue in respect of it in his own name alone, did not make him an inadmissible party

plaintiff in suit in support of such claim adverse to a conflicting lode location. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

9. A mistake in the given name of a party to adverse proceedings in the land office is properly disregarded by the court in a suit in support of the adverse claims, where this was a mere inadvertence and did not mislead or prejudice anyone. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

MINNESOTA.

Boundary between Minnesota and Wisconsin, see Boundaries, 2–5.

MISJOINDER.

Of causes of action, see Action or Suit, 2.

MISREPRESENTATIONS.

Of conditions surrounding public improvement, see United States, 9, 10.

MISSISSIPPI.

Boundary between Arkansas and Mississippi, see Boundaries, 1.

MISTAKE.

Recovering back payment on forged draft, see Assumpsit.

In posting notice of location of mining claim, see Evidence, 8.

In name of party to adverse proceeding in land office, see Mines 9.

MONEY.

Presumption as to value of foreign money, see Evidence, 4.

MONOPOLY.

Dismissal without prejudice of suit to dissolve monopoly, see Appeal and Error, 54.

Federal jurisdiction of treble damage suit, see Courts, 9.

Injunction against enforcement of monopolistic contract, see Injunction, 6.

Extent of relief in suit to dissolve monopoly, see Judgment, 1.

1. A court, when asked to dissolve a corporation as an alleged violator of the Sherman Anti-trust Act, should consider, not what the corporation had power to do or did, but what it now has power to do and is doing. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64: 343

2. The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64: 343

3. The mere size of a corporation, or the existence of unexerted power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64: 343

4. A holding corporation which by its formation united under one control competing companies in the steel industry, but which did not achieve monopoly, and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act,—especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293. 64: 343

5. A covenant in a lease by a coal company of a railway owned by it to another railway company, which may be construed to require the coal company to ship to market over the leased line three fourths of all the coal it produces, cannot be said to impose an undue restriction upon the coal company in selecting its markets and in shipping its coal, in violation of the Sherman Anti-trust Act, where the lines of the two railway companies are in no sense competitive, the leased line serving as a natural extension of the lessee railway company's lines to the great tonnage producing coal districts, and where the rental to be paid is one third of the gross earnings of the railway. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64: 760

6. An undue and unreasonable restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and a monopolization of such trade and commerce, forbidden by the Sherman Anti-trust Act, and calling for dissolution of the combination, result from a scheme whereby a holding company was created and placed by stock control in a position to dominate, not only two great competing interstate railway carriers, but also two great competing coal companies engaged extensively in mining and selling anthracite coal which must be transported to interstate markets over the controlled interstate railway lines, which power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully, until the Federal Supreme Court condemned certain percentage coal contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation, the holding company continuing, up to the time the present dissolution suit was begun, in active dominating control of the carriers and coal companies, thus effectually suppressing all competition between the four

companies and pooling their earnings. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64: 760

7. A complaint issued by the Federal Trade Commission under the Act of September 26, 1914, § 5, is wholly insufficient to charge respondents with practising "unfair methods of competition in commerce" within the meaning of that section, and hence affords no foundation for an order of the Commission directing them to desist from using such prohibited method of competition, where it alleges that respondents, engaged in selling cotton ties and bagging, refused to sell any ties unless the purchaser will buy from them a corresponding amount of bagging, but contains no intimation that they did not properly obtain their ties and bagging as merchants usually do, does not state the amount controlled by them, nor does it allege that they held a monopoly of either ties or bagging, or had the ability, purpose, or intent to acquire one, averring nothing which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint. Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. Rep. 572, 64: 993

Price restrictions.

8. A manufacturer of patented automobile tire accessories violates the Sherman Anti-trust Act when it requires all tire manufacturers and jobbers to whom it sells to execute uniform contracts which obligate them to observe certain fixed resale prices; it would be otherwise if the manufacturer had merely specified the resale prices and refused to deal with anyone who failed to observe them, but had not entered into any contract or combination which would obligate the vendees to maintain such prices. United States v. A. Schrader's Son, 252 U. S. 85, 40 Sup. Ct. Rep. 251, 64: 471

MONUMENT RESERVE.

Location of mining claim within, see Public Lands, 6.

See also Public Lands, 1.

MOOT CASE.

Reversal for dismissal of, see Appeal and Error, 29.

MORTGAGE.

Compensation for carrying mails as affected by foreclosure of mortgage on railroad, see Postoffice, 10.

MORTUARY TABLES.

Use of, in computing succession tax, see Internal Revenue, 21.

MOTIONS AND ORDERS.

In appellate court, see Appeal and Error, V.

MOTIVE.

Sufficiency of averments in indictment as to, see Indictment and Information, 1.

MOVING PICTURES.

Moving picture rights under copyright license, see Copyright.

MUNICIPAL CORPORATIONS.

Relation of courts to municipal department of government, see Courts, 5.

Requiring street sprinkling by street railway company as denying equal protection of the laws, see Constitutional Law, 15.

Requiring street railway company to pave street as denying due process of law, see Constitutional Law, 31.

Requiring street railway company to sprinkle street as denying due process of law, see Constitutional Law, 32.

Municipal displacement of private lighting plant as denying due process of law, see Constitutional Law, 35.

Prohibiting use of one-man street car as denying due process of law, see Constitutional Law, 42.

Validity of municipal regulation of electric light company, see Constitutional Law, 46.

Police power over street railway sprinkling, see Constitutional Law, 72.

Compulsory street railway sprinkling as impairing contract obligation, see Constitutional Law, 78.

Requiring street railway company to pave street as impairing contract obligation, see Constitutional Law, 79.

Municipal regulation of electric company as impairing contract obligations, see Constitutional Law, 81.

Exclusive electric light and power franchise, see Electric Lights and Power.

Regulation of water rates, see Waters.

1. The construction of a municipal electric street lighting system was not done in the city's governmental capacity,—an exertion of police power,—but in its proprietary or quasi private capacity, and therefore the city is subordinate in right to a private corporation which was an earlier and lawful occupant of the field. Los Angeles v. Los Angeles Gas & Electric Corp. 251 U. S. 32, 40 Sup. Ct. Rep. 76. 64: 121

2. Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority to do so, nor does such authority arise from the power to regulate the opening and use of streets, nor from a grant of the general right to control and regulate the right to erect works and lay pipes in the city streets. Winchester v. Winchester

plaintiff in suit in support of such claim adverse to a conflicting lode location. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

9. A mistake in the given name of a party to adverse proceedings in the land office is properly disregarded by the court in a suit in support of the adverse claims, where this was a mere inadvertence and did not mislead or prejudice anyone. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

MINNESOTA.

Boundary between Minnesota and Wisconsin, see Boundaries, 2–5.

MISJOINDER.

Of causes of action, see Action or Suit, 2.

MISREPRESENTATIONS.

Of conditions surrounding public improvement, see United States, 9, 10.

MISSISSIPPI.

Boundary between Arkansas and Mississippi, see Boundaries, 1.

MISTAKE.

Recovering back payment on forged draft, see Assumpsit.

In posting notice of location of mining claim, see Evidence, 8.

In name of party to adverse proceeding in land office, see Mines 9.

MONEY.

Presumption as to value of foreign money, see Evidence, 4.

MONOPOLY.

Dismissal without prejudice of suit to dissolve monopoly, see Appeal and Error, 54.

Federal jurisdiction of treble damage suit, see Courts, 9.

Injunction against enforcement of monopolistic contract, see Injunction, 6.

Extent of relief in suit to dissolve monopoly, see Judgment, 1.

1. A court, when asked to dissolve a corporation as an alleged violator of the Sherman Anti-trust Act, should consider, not what the corporation had power to do or did, but what it now has power to do and is doing. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64: 343

2. The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64: 343

3. The mere size of a corporation, or the existence of unexerted power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64: 343

4. A holding corporation which by its formation united under one control competing companies in the steel industry, but which did not achieve monopoly, and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act,—especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade. United States v. United States Steel Corp. 251 U. S. 417, 40 Sup. Ct. Rep. 293, 64: 343

5. A covenant in a lease by a coal company of a railway owned by it to another railway company, which may be construed to require the coal company to ship to market over the leased line three fourths of all the coal it produces, cannot be said to impose an undue restriction upon the coal company in selecting its markets and in shipping its coal, in violation of the Sherman Anti-trust Act, where the lines of the two railway companies are in no sense competitive, the leased line serving as a natural extension of the lessee railway company's lines to the great tonnage producing coal districts, and where the rental to be paid is one third of the gross earnings of the railway. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, 64: 760

6. An undue and unreasonable restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and a monopolization of such trade and commerce, forbidden by the Sherman Anti-trust Act, and calling for dissolution of the combination, result from a scheme whereby a holding company was created and placed by stock control in a position to dominate, not only two great competing interstate railway carriers, but also two great competing coal companies engaged extensively in mining and selling anthracite coal which must be transported to interstate markets over the controlled interstate railway lines, which power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully, until the Federal Supreme Court condemned certain percentage coal contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation, the holding company continuing, up to the time the present dissolution suit was begun, in active dominating control of the carriers and coal companies, thus effectually suppressing all competition between the four

companies and pooling their earnings. United States v. Reading Co. 253 U. S. 26, 40 Sup. Ct. Rep. 425, **64: 760**

7. A complaint issued by the Federal Trade Commission under the Act of September 26, 1914, § 5, is wholly insufficient to charge respondents with practising "unfair methods of competition in commerce" within the meaning of that section, and hence affords no foundation for an order of the Commission directing them to desist from using such prohibited method of competition, where it alleges that respondents, engaged in selling cotton ties and bagging, refused to sell any ties unless the purchaser will buy from them a corresponding amount of bagging, but contains no intimation that they did not properly obtain their ties and bagging as merchants usually do, does not state the amount controlled by them, nor does it allege that they held a monopoly of either ties or bagging, or had the ability, purpose, or intent to acquire one, averring nothing which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint. Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. Rep. 572, **64: 993**

Price restrictions.

8. A manufacturer of patented automobile tire accessories violates the Sherman Anti-trust Act when it requires all tire manufacturers and jobbers to whom it sells to execute uniform contracts which obligate them to observe certain fixed resale prices; it would be otherwise if the manufacturer had merely specified the resale prices and refused to deal with anyone who failed to observe them, but had not entered into any contract or combination which would obligate the vendees to maintain such prices. United States v. A. Schrader's Son, 252 U. S. 85, 40 Sup. Ct. Rep. 251, **64: 471**

MONUMENT RESERVE.

Location of mining claim within, see Public Lands, 6.

See also Public Lands, 1.

MOOT CASE.

Reversal for dismissal of, see Appeal and Error, 29.

MORTGAGE.

Compensation for carrying mails as affected by foreclosure of mortgage on railroad, see Postoffice, 10.

MORTUARY TABLES.

Use of, in computing succession tax, see Internal Revenue, 21.

MOTIONS AND ORDERS.

In appellate court, see Appeal and Error, V.

MOTIVE.

Sufficiency of averments in indictment as to, see Indictment and Information, 1.

MOVING PICTURES.

Moving picture rights under copyright license, see Copyright.

MUNICIPAL CORPORATIONS.

Relation of courts to municipal department of government, see Courts, 5.

Requiring street sprinkling by street railway company as denying equal protection of the laws, see Constitutional Law, 15.

Requiring street railway company to pave street as denying due process of law, see Constitutional Law, 31.

Requiring street railway company to sprinkle street as denying due process of law, see Constitutional Law, 32.

Municipal displacement of private lighting plant as denying due process of law, see Constitutional Law, 35.

Prohibiting use of one-man street car as denying due process of law, see Constitutional Law, 42.

Validity of municipal regulation of electric light company, see Constitutional Law, 46.

Police power over street railway sprinkling, see Constitutional Law, 72.

Compulsory street railway sprinkling as impairing contract obligation, see Constitutional Law, 78.

Requiring street railway company to pave street as impairing contract obligation, see Constitutional Law, 79.

Municipal regulation of electric company as impairing contract obligations, see Constitutional Law, 81.

Exclusive electric light and power franchise, see Electric Lights and Power.

Regulation of water rates, see Waters.

1. The construction of a municipal electric street lighting system was not done in the city's governmental capacity,—an exertion of police power,—but in its proprietary or quasi private capacity, and therefore the city is subordinate in right to a private corporation which was an earlier and lawful occupant of the field. Los Angeles v. Los Angeles Gas & Electric Corp. 251 U. S. 32, 40 Sup. Ct. Rep. 76. **64: 121**

2. Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority to do so, nor does such authority arise from the power to regulate the opening and use of streets, nor from a grant of the general right to control and regulate the right to erect works and lay pipes in the city streets. Winchester v. Winchester

The power to remove an official is, in the absence of statutory provision to the contrary, an incident of the power to appoint, and the power of suspension is an incident of the power of removal. Burnap v. United States, 252 U. S. 512, 40 Sup. Ct. Rep. 374, 64: 692

1. An assignee of the legal title to reparation claims may claim an award of reparation by the Interstate Commerce Commission, and recover the amounts awarded by an action at law, brought in his own name, but for the benefit of the equitable holders of the claim,—especially where such is the real purpose of the assignments. Spiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 40 Sup. Ct. Rep. 466, 64: 810

Bringing in; intervention.

2. The trial court properly admitted as a party plaintiff before trial a person who had a real interest in the prosecution of the suit,—especially where the local statutes are very liberal in this regard, and there is no ground for believing that his presence as a party could have prejudiced the defendant. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, 64: 567

3. In a suit between states the motion of the United States for leave to intervene therein for an injunction and the appointment of a receiver was granted. Oklahoma v. Texas, 252 U. S. 372, 40 Sup. Ct. Rep. 353, 64: 619
Oklahoma v. Texas, 253 U. S. 465, 40 Sup. Ct. Rep. 580, 64: 1015
Oklahoma v. Texas, 253 U. S. 470, 40 Sup. Ct. Rep. 580, 64: 1017
Oklahoma v. Texas, 253 U. S. 471, 40 Sup. Ct. Rep. 582, 64: 1017

PASS.

Limiting liability for negligence toward passenger riding on pass, see Carriers, 2, 3.

PASSENGER.

Limiting liability for negligence to gratuitous passenger, see Carriers, 2, 3.

PATENTS.

Invention.

1. Patentable novelty cannot be asserted for a device which has been described in foreign printed publications. Bone v. Marion County Comrs. 251 U. S. 134, 40 Sup. Ct. Rep. 96, **64: 188**

2. In view of the prior art, the only originality that can be accorded to the Bone patent, number 705,732, for a steel reinforced concrete retaining wall with a heel and toe at the base, so constructed that the weight of the retaining material upon the heel of the inclosed metal structure will operate to retain the wall in a vertical position, is in its special form, and there can be no infringement except by a copy of that form or a colorable imitation of it. Bone v. Marion County Comrs. 251 U. S. 134, 40 Sup. Ct. Rep. 96, **64: 188**

Description.

3. A practical and useful invention is not disclosed by patent No. 1,057,397, for an improvement in photographing and developing apparatus, where the short reciprocating movement of the film-carrying rack, without which the machine confessedly cannot be successfully operated, is not disclosed in the patent, as it must be under U. S. Rev. Stat. § 4888, in order to render it valid. Beidler v. United States, 253 U. S. 447, 40 Sup. Ct. Rep 564, **64: 1006**

Construction.

4. The claim of invention embodied in patent No. 1,057,397, for an improvement in photographing and developing apparatus, must, in view of the prior art, be restricted to the disclosed construction and operation of the mechanism for carrying the exposed section of film through the developing and other solutions or liquids after it leaves the camera. Beidler v. United States, 253 U. S. 447, 40 Sup. Ct. Rep. 564, **64: 1006**

Interference.

5. An inventor whose parent application discloses, but does not claim, an invention which conflicts with that of a later unexpired patent, must, in the absence of laches, be deemed to have two years from the date of the conflicting patent in which to file a second application, making conflicting claims, in order to have the question of priority of invention between the two determined in an interference proceeding, in view of U. S. Rev. Stat. § 4886, as amended by the Act of March 3, 1897, which gives an inventor two years after patent has issued to another for his invention, in which he may file his own application, and the time cannot be cut down to one year on grounds of equity or public policy, or because of the one-year rule prescribed by § 4894, for further prosecution of an application after office action thereon. Chapman v. Wintroath, 252 U. S. 126, 40 Sup. Ct. Rep. 234, **64: 491**

Disclaimer.

6. Petitioner in a suit for infringement of a patent, for unfair competition, and for the infringement of a copyright, may not file a disclaimer as to the patent upon certiorari to a circuit court of appeals to review a decree which reversed an order of the trial court, granting a preliminary injunction. Meccano v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463, **64: 822**

Use by government.

Claim for government use of patented invention, see Claims, 1.

7. The suit against the United States for the infringement of a patent, given by the Act of June 25, 1910, to the "owner" of the infringed patent, may only be maintained by one who has at least such an interest in the patent as, without the statute, would support such a suit against a defendant other than the United States. E. W. Bliss Co. v. United States, 253 U. S. 187, 40 Sup. Ct. Rep. 455, **64: 852**

8. The licensee of a patent who has no such assignment, grant, or conveyance, either of the whole patent or of an undivided part of it, or of an exclusive right under it within and throughout a specified part of the United States as is necessary under U. S. Rev. Stat. § 4919, in order to enable him to sue in his own name for infringement at law or in equity without joining the owner of the patent, may not maintain a suit against the United States for infringement under the Act of June 25, 1910, which empowers the "owner" of an infringed patent to recover reasonable compensation in the court of claims, and reserves to the United States all defenses, general or special, which might be pleaded by a defendant in an action for infringement. E. W. Bliss Co. v. United States, 253 U. S. 187, 40 Sup. Ct. Rep. 455, **64: 852**

PEDDLERS.

Interstate business of, see Commerce, 14.

PENALTIES.

Excessive penalties as denying equal protection of the laws, see Constitutional Law, 16.

Penalty as denying due process of law, see Constitutional Law, 37, 38.

For breach of charter party, see Shipping, 2.

PEREMPTORY CHALLENGES.

In criminal case, see Jury, 2.

PERSONAL INJURIES.

Measure of damages, see Damages, 3, 4.

To employees, generally, see Master and Servant.

Defects waived or cured.
See also Appeal and Error, 39.

1. The failure of a complaint which states a cause of action in the nature of ejectment to aver with certainty that defendant was in possession is cured by an affirmative statement of such possession in the answer. Cole v. Ralph, 252 U. S. 286, 40 Sup. Ct. Rep. 321, **64: 567**

Pleading laws.

2. The allegation in the answer to a libel in admiralty, brought by a Danish against a Swedish corporation, that by the laws of both Denmark and Sweden an arbitration clause in the charter party is binding, and that arbitration is a condition precedent to the right to sue by reason of any dispute arising under the charter, means no more than that arbitration agreements will be enforced according to their intent. It does not extend the scope or affect the construction of an agreement which, if construed apart from that allegation, has no application to the present case. Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet, 252 U. S. 313, 40 Sup. Ct. Rep. 332, **64: 586**

Jurisdictional averments.

3. In any case alleged to come within the Federal jurisdiction, it is not enough to allege that questions of a Federal character arise in the case, but it must plainly appear that the averments attempting to bring the case within such jurisdiction are real and substantial. Blumenstock Bros. Advertising Agency v. Curtis Pub. Co. 252 U. S. 436, 40 Sup. Ct. Rep. 385, **64: 649**

4. Averments of a bill setting up alleged obligations of a contract between claimant and the state, and the contention that they were impaired by subsequent legislation, presented a controversy under the Federal Constitution and conferred jurisdiction (a sufficient amount being involved) upon a Federal district court irrespective of the citizenship of the parties. Hays v. Seattle, 251 U. S. 233, 40 Sup. Ct. Rep. 125, **64: 243**

Sufficiency of allegations.

5. An allegation in the amended petition in an action against a director of a national bank for knowingly participating, contrary to U. S. Rev. Stat. §§ 5200 and 5239, in an excessive loan, that the transaction set forth was a loan of that character, whether regarded as one loan to two persons designated as a "firm," as the plaintiff alleges the fact to be, or regarded as two loans, as contended for by the defendant in his pleadings theretofore filed, is sufficient if the proof tends to show a single and excessive loan made to such persons jointly in any capacity, or made in form one half to each, but in substance as a single loan. Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 Sup. Ct. Rep. 82, **64: 141**

What must be pleaded.

6. Laches is a defense that, in the equity practice of the Federal courts, need not be set up by plea or answer. It is for the complainant in his bill to excuse the delay in seeking equitable relief, where there has been such, and if it be not excused, his laches may be taken advantage of either by demurrer or upon final hearing. Hays v. Seattle, 251 U. S. 233, 40 Sup. Ct. Rep. 125, **64: 243**

1. Prior to the Act of July 28, 1916, railroads—with the exception of certain roads aided by land grants—were not required by law to carry the mails. New York, N. H. & H. R. Co. v. United States, 251 U. S. 123, 40 Sup. Ct. Rep. 67, **64: 182**

2. A railway company which voluntarily accepts and performs mail transportation service, with knowledge of what the United States intends to pay, cannot recover any greater compensation, even though it might have been driven to perform the service for an inadequate compensation by the fear that a refusal would incur the hostility of persons living along its line, since this does not amount to compulsion by the United States, and cannot constitute the basis of a justiciable

claim against it for taking property for public use under an implied contract to make adequate compensation. New York, N. H. & H. R. Co. v. United States, 251 U. S. 123, 40 Sup. Ct. Rep. 67, **64: 182**

3. There is nothing to prevent Congress, when fixing compensation for the carriage of the mails, from directing, as it did in the Act of May 27, 1908, that the empty mail bags shall be withdrawn from the mails and be transported by freight or express, the effect of which is to reduce the compensation for carrying the mails by excluding the weight of the empty bags in determining the average weight of the mails as the basis of fixing compensation. St. Louis, I. M. & S. R. Co. v. United States, 251 U. S. 198, 40 Sup. Ct. Rep. 120, **64: 225**

4. Congress, by directing, as it did in the Act of May 27, 1908, that empty mail bags be withdrawn from the mails and be transported by freight or express, thereby brought such bags when carried by freight on a land-grant-aided railway within the provision of the Land-Grant Acts that all property and troops of the United States shall be transported at the railway company's expense, although by a wholly separate provision it was declared that the mails should be transported over the railway company's lines at such prices as Congress might direct, and the price was later fixed by Congress at 80 per cent of the compensation that would otherwise have been received. St. Louis, I. M. & S. R. Co. v. United States, 251 U. S. 198, 40 Sup. Ct. Rep. 120, **64: 225**

5. Payments to a railway company for carrying the mails during each four-year term upon the basis of weights taken immediately prior to the beginning of such term instead of annually must be deemed to satisfy the requirement of U. S. Rev. Stat. § 4002, that payment of specified sums per mile be made per annum according to weights, since such action accords with prior practice followed for many years, and was permitted by the letter of the statute, the carrier having submitted with full knowledge. New York, N. H. & H. R. Co. v. United States, 251 U. S. 123, 40 Sup. Ct. Rep. 67. **64: 182**

6. Railway companies carrying the mails after the Postmaster General had, by a readjustment order, directed that compensation be based upon a calculation of average weight, made by taking the whole number of days included in the weighing period as a divisor for obtaining the average weight per day, instead of the number of working or week days, as was the former practice, are bound by such order, either because the Postmaster General had the discretionary power to make the order, as is held by four justices, or because, as is held by two justices, the railway companies by their conduct in fact accepted the terms offered by the Postmaster General by transporting the mails and accepting the stated compensation. Northern P. R. Co. v. United States, 251 U. S. 326, 40 Sup. Ct. Rep. 162, **64: 290**

7. The long-continued practice of the Postoffice Department to pay the full mail transportation rates to a certain railroad company, instead of the 80 per cent payable if the construction of the railroad was land-aided, will not be given effect by the courts under the rule of long-continued executive construction, where such practice was not due to any construction of the statute which the Department later sought to abandon, but to what is alleged to be a mistake of fact,—due, perhaps, to an oversight. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

8. The obligation of a land-aided railroad, under the Act of July 12, 1876, § 13, to carry the mails at 80 per cent of the rates otherwise payable, affects every carrier which may thereafter use the railroad, whatever the nature of the tenure, and it is immaterial that the railroad company which later carries the mail over such road received none of the land and obtained no benefit from the grant. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

9. Railroad construction cannot be said not to have been land aided, within the meaning of the Act of July 12, 1876, § 13, governing rates for mail transportation, because in fact it may have been completed without the aid either of funds or of credits derived from public lands, where, before the road had been fully completed, the railroad company asked that certain lands be granted to it in aid of construction, and accepted from the state a patent for the lands which recited that such was the purpose of the conveyance, and expressly assented to the terms and conditions of the grant which Congress imposed, and thereafter proceeded to dispose of the lands. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309. **64: 484**

10. The charge upon a railroad with reference to compensation for carrying the mails imposed by acceptance of a land grant with its terms and conditions may not be invalidated by any illegal act of the railroad under a mortgage foreclosure, although the mortgage was executed before the railroad company had applied for the grant, and it does not appear that the mortgage purported specifically to cover public lands, where the trustee under the mortgage classed these lands as after-acquired property, and the company's interest in them was, by special proceeding, made subject to the foreclosure proceedings. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

11. The requirement in a congressional grant of public lands to the state in aid of railroad construction that the railroad be completed within ten years was a condition subsequently annexed to an estate in fee, and the title remained valid until

the Federal government should take action by legislation or judicial proceeding to enforce a forfeiture of the estate. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

12. The burden of a land-aided railroad, under the Act of June 3, 1856, § 5, to carry the mails at a price to be fixed by Congress, attached upon the acceptance of any aid whatever, no matter how disproportionate to the cost of constructing the portion of the road so aided. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

13. The right to have the mails carried at a price to be fixed by Congress, which was acquired by the Federal government by way of charge upon a railroad under the Act of June 3, 1856, through the railroad company's acceptance of a tract of public land therein granted to the state in aid of railroad construction, could not be invalidated by any illegal act of the authorities of the state in issuing a patent for a wholly different tract. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

14. The Postmaster General, having satisfied himself that overpayments had been made to a railway company for carrying the mails, might, without establishing the illegality by suit, deduct the amount of such overpayments from the moneys otherwise payable to the railway company to which the overpayments had been made. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

15. The balances due to a railway company for carrying the mails, although arising under successive quadrennial contracts, are regarded as running accounts, and moneys paid in violation of law upon balances certified by the government accounting officers may be recovered by means of a later debit in these accounts. It does not matter how long a time elapsed before the overpayment was discovered, or how long the attempt to recover it was deferred. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

16. The long-continued failure of the Postmaster General to impose fines for delays of less than twenty-four hours in transporting the mails cannot be asserted as the equivalent of a departmental declaration that no such power existed in behalf of a railway company which had notice before it contracted to carry the mail that failure to maintain train schedules was regarded by Congress and by the Postoffice Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed that there was authority under the customary contracts and the law to impose such deductions. Kansas City Southern R. Co. v. United States, 252 U. S. 147, 40 Sup. Ct. Rep. 257, **64: 500**

17. Failure of the Postmaster General to exercise his power to impose fines for delays of less than twenty-four hours in transporting the mails does not make against the proper use of such power when, in the judgment of that official, adequate occasion for its use may arise. Kansas City Southern R. Co. v. United States, 252 U. S. 147, 40 Sup. Ct. Rep. 257, **64: 500**

POUNDAGE.
Of clerk of court, see Clerks, 3.

PREMATURITY.
Of suit, see Action or Suit, 1.
Of demand for wages, see Seamen.

PRESS.
Freedom of, see Constitutional Law, V.

PRESUMPTIONS.
See Evidence, 3. 4.

PRICES.
Conspiracy to control, see Monopoly.

PRINCIPAL AND AGENT.
Service of process on designated agent of foreign corporation, see Writ and Process.

PRINCIPAL AND SURETY.
Surety on bail bond, see Bail.

PRIVILEGE.
Of accused against self-crimination, see Criminal Law, 3.

PRIVILEGES AND IMMUNITIES.
Of citizens, see Constitutional Law, II.

PROCEDURE.
Due process of law in, see Constitutional Law, 62–71.

PROCESS.
See Writ and Process.

PROHIBITION.
See Mandamus, 1–3.

PROHIBITION AMENDMENT.
Validity of, see Constitutional Law, I.

PROPERTY.
Protection of rights in, see Constitutional Law.
Physical valuation of railway property, see Interstate Commerce Commission, 1.

PROSECUTING ATTORNEY.
See District Attorney.

PROTEST.
As condition precedent to recovery back of illegal taxes, see Taxes, 3.

PROVABLE CLAIMS.
In bankruptcy, see Bankruptcy, 3–5.

PUBLIC CORPORATIONS.
See Municipal Corporations.

claim against it for taking property for public use under an implied contract to make adequate compensation. New York, N. H. & H. R. Co. v. United States, 251 U. S. 123, 40 Sup. Ct. Rep. 67, **64: 182**

3. There is nothing to prevent Congress, when fixing compensation for the carriage of the mails, from directing, as it did in the Act of May 27, 1908, that the empty mail bags shall be withdrawn from the mails and be transported by freight or express, the effect of which is to reduce the compensation for carrying the mails by excluding the weight of the empty bags in determining the average weight of the mails as the basis of fixing compensation. St. Louis, I. M. & S. R. Co. v. United States, 251 U. S. 198, 40 Sup. Ct. Rep. 120, **64: 225**

4. Congress, by directing, as it did in the Act of May 27, 1908, that empty mail bags be withdrawn from the mails and be transported by freight or express, thereby brought such bags when carried by freight on a land-grant-aided railway within the provision of the Land-Grant Acts that all property and troops of the United States shall be transported at the railway company's expense, although by a wholly separate provision it was declared that the mails should be transported over the railway company's lines at such prices as Congress might direct, and the price was later fixed by Congress at 80 per cent of the compensation that would otherwise have been received. St. Louis, I. M. & S. R. Co. v. United States, 251 U. S. 198, 40 Sup. Ct. Rep. 120, **64: 225**

5. Payments to a railway company for carrying the mails during each four-year term upon the basis of weights taken immediately prior to the beginning of such term instead of annually must be deemed to satisfy the requirement of U. S. Rev. Stat. § 4002, that payment of specified sums per mile be made per annum according to weights, since such action accords with prior practice followed for many years, and was permitted by the letter of the statute, the carrier having submitted with full knowledge. New York, N. H. & H. R. Co. v. United States, 251 U. S. 123, 40 Sup. Ct. Rep. 67, **64: 182**

6. Railway companies carrying the mails after the Postmaster General had, by a readjustment order, directed that compensation be based upon a calculation of average weight, made by taking the whole number of days included in the weighing period as a divisor for obtaining the average weight per day, instead of the number of working or week days, as was the former practice, are bound by such order, either because the Postmaster General had the discretionary power to make the order, as is held by four justices, or because, as is held by two justices, the railway companies by their conduct in fact accepted the terms offered by the Postmaster General by transporting the mails and accepting the stated compensation. Northern P. R. Co. v. United States, 251 U. S. 326, 40 Sup. Ct. Rep. 162, **64: 290**

7. The long-continued practice of the Postoffice Department to pay the full mail transportation rates to a certain railroad company, instead of the 80 per cent payable if the construction of the railroad was land-aided, will not be given effect by the courts under the rule of long-continued executive construction, where such practice was not due to any construction of the statute which the Department later sought to abandon, but to what is alleged to be a mistake of fact,—due, perhaps, to an oversight. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

8. The obligation of a land-aided railroad, under the Act of July 12, 1876, § 13, to carry the mails at 80 per cent of the rates otherwise payable, affects every carrier which may thereafter use the railroad, whatever the nature of the tenure, and it is immaterial that the railroad company which later carries the mail over such road received none of the land and obtained no benefit from the grant. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

9. Railroad construction cannot be said not to have been land aided, within the meaning of the Act of July 12, 1876, § 13, governing rates for mail transportation, because in fact it may have been completed without the aid either of funds or of credits derived from public lands, where, before the road had been fully completed, the railroad company asked that certain lands be granted to it in aid of construction, and accepted from the state a patent for the lands which recited that such was the purpose of the conveyance, and expressly assented to the terms and conditions of the grant which Congress imposed, and thereafter proceeded to dispose of the lands. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

10. The charge upon a railroad with reference to compensation for carrying the mails imposed by acceptance of a land grant with its terms and conditions may not be invalidated by any illegal act of the railroad under a mortgage foreclosure, although the mortgage was executed before the railroad company had applied for the grant, and it does not appear that the mortgage purported specifically to cover public lands, where the trustee under the mortgage classed these lands as after-acquired property, and the company's interest in them was, by special proceeding, made subject to the foreclosure proceedings. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

11. The requirement in a congressional grant of public lands to the state in aid of railroad construction that the railroad be completed within ten years was a condition subsequently annexed to an estate in fee, and the title remained valid until

the Federal government should take action by legislation or judicial proceeding to enforce a forfeiture of the estate. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

12. The burden of a land-aided railroad, under the Act of June 3, 1856, § 5, to carry the mails at a price to be fixed by Congress, attached upon the acceptance of any aid whatever, no matter how disproportionate to the cost of constructing the portion of the road so aided. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

13. The right to have the mails carried at a price to be fixed by Congress, which was acquired by the Federal government by way of charge upon a railroad under the Act of June 3, 1856, through the railroad company's acceptance of a tract of public land therein granted to the state in aid of railroad construction, could not be invalidated by any illegal act of the authorities of the state in issuing a patent for a wholly different tract. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

14. The Postmaster General, having satisfied himself that overpayments had been made to a railway company for carrying the mails, might, without establishing the illegality by suit, deduct the amount of such overpayments from the moneys otherwise payable to the railway company to which the overpayments had been made. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309, **64: 484**

15. The balances due to a railway company for carrying the mails, although arising under successive quadrennial contracts, are regarded as running accounts, and moneys paid in violation of law upon balances certified by the government accounting officers may be recovered by means of a later debit in these accounts. It does not matter how long a time elapsed before the overpayment was discovered, or how long the attempt to recover it was deferred. Grand Trunk Western R. Co. v. United States, 252 U. S. 112, 40 Sup. Ct. Rep. 309. **64: 484**

16. The long-continued failure of the Postmaster General to impose fines for delays of less than twenty-four hours in transporting the mails cannot be asserted as the equivalent of a departmental declaration that no such power existed in behalf of a railway company which had notice before it contracted to carry the mail that failure to maintain train schedules was regarded by Congress and by the Postoffice Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed that there was authority under the customary contracts and the law to impose such deductions. Kansas City Southern R. Co. v. United States, 252 U. S. 147, 40 Sup. Ct. Rep. 257, **64: 500**

17. Failure of the Postmaster General to exercise his power to impose fines for delays of less than twenty-four hours in transporting the mails does not make against the proper use of such power when, in the judgment of that official, adequate occasion for its use may arise. Kansas City Southern R. Co. v. United States, 252 U. S. 147, 40 Sup. Ct. Rep. 257, **64: 500**

POUNDAGE.
Of clerk of court, see Clerks, 3.

PREMATURITY.
Of suit, see Action or Suit, 1.
Of demand for wages, see Seamen.

PRESS.
Freedom of, see Constitutional Law, V.

PRESUMPTIONS.
See Evidence, 3. 4.

PRICES.
Conspiracy to control, see Monopoly.

PRINCIPAL AND AGENT.
Service of process on designated agent of foreign corporation, see Writ and Process.

PRINCIPAL AND SURETY.
Surety on bail bond, see Bail.

PRIVILEGE.
Of accused against self-crimination, see Criminal Law, 3.

PRIVILEGES AND IMMUNITIES.
Of citizens, see Constitutional Law, II.

PROCEDURE.
Due process of law in, see Constitutional Law, 62–71.

PROCESS.
See Writ and Process.

PROHIBITION.
See Mandamus, 1–3.

PROHIBITION AMENDMENT.
Validity of, see Constitutional Law, I.

PROPERTY.
Protection of rights in, see Constitutional Law.
Physical valuation of railway property, see Interstate Commerce Commission, 1.

PROSECUTING ATTORNEY.
See District Attorney.

PROTEST.
As condition precedent to recovery back of illegal taxes, see Taxes, 3.

PROVABLE CLAIMS.
In bankruptcy, see Bankruptcy, 3–5.

PUBLIC CORPORATIONS.
See Municipal Corporations.

PUBLIC IMPROVEMENTS.

Assessment for public improvements as affording equal protection of the laws, see Constitutional Law, 17, 20.

Due process of law in assessment for public improvement, see Constitutional Law, 60, 61.

Sufficiency of hearing on assessment for public improvement, see Constitutional Law, 71.

Assessing street railway company for a public improvement as impairing contract obligations, see Constitutional Law, 79, 80.

Misrepresentation of conditions surrounding public improvements, see United States, 9, 10.

PUBLIC LANDS.

Mines on, see Mines.

As to lands of Indians, see Indians.

1. The Grand Canyon of the Colorado could be created as a monument reserve by the President under the power conferred upon him by the Act of June 8, 1906, to establish reserves embracing objects of historic or scientific interest. Cameron v. United States, 252 U. S. 450, 40 Sup. Ct. Rep. 410, **64: 659**

Grant to state for improvements.

2. The specific enumeration in the New Mexico Enabling Act of June 20, 1910, of the purposes for which the public lands therein granted to that state may be disposed of, and the further provision that the natural products and money proceeds of such lands shall be subject to the same trusts as the lands themselves, renders invalid state legislation authorizing the commissioner of public lands of that state to expend annually not to exceed 3 cents on the dollar from the annual income of his office from sales and leases of the public lands for making known the resources and advantages of the state generally, and particularly to home seekers and investors, and such a threatened breach of trust will be enjoined at the instance of the United States. Ervien v. United States, 251 U. S. 41, 40 Sup. Ct. Rep. 75, **64: 128**

Soldiers' additional homestead rights.

3. The prohibition in the Act of March 3, 1903, extending the homestead laws to Alaska, that not more than 160 acres of land shall be entered in a single body by means of soldiers' additional homestead rights, may not be evaded by a mere resort to two entries by the same person for two tracts separately surveyed, but contiguous to the extent of having a common boundary ½ mile in length, each containing 160 acres or less. United States v. Poland, 251 U. S. 221, 40 Sup. Ct. Rep. 127, **64: 236**

Railway land grants.

Adverse possession of railway right of way, see Adverse Possession.

Sufficiency of evidence of fraudulent representations, see Evidence, 10.

Compensation of land grant railroad for carrying mails, see Postoffice.

See also infra, 8.

4. Congress could and did, by the Act of July 1, 1862, granting a railway right of way over the public lands, include lands forming a part of the Pottawatomie Indian Reservation not actually allotted in severalty when the grant took effect, notwithstanding the agreement on the part of the United States in the Treaty of June 5 and 17, 1846, to grant to such Indians possession and title to a specified district, and to guarantee full and complete possession thereof as their land and home forever, and the stipulation in the Treaty of November 5, 1861, that land within the reservation designated in the earlier treaty should be allotted thereafter in severalty to tribe members. Nadeau v. Union P. R. Co. 253 U. S. 442, 40 Sup. Ct. Rep. 570, **64: 1002**

5. A report of a special agent of the General Land Office as to the nonmineral character of certain lands which were thereafter selected by the Southern Pacific Railway Company as within the indemnity limits of the land grant of July 27, 1866, did not relieve the railway company from showing before the Land Department that the lands selected were not mineral. United States v. Southern P. Co. 251 U. S. 1, 40 Sup. Ct. Rep. 47, **64: 97**

Lands open to entry.

6. To bring a lode mining claim within the saving clause in the withdrawal of public lands for a monument reserve, under the Act of June 8, 1906, in respect of any "valid" mining claim theretofore acquired, the discovery must have preceded the creation of that reserve. Cameron v. United States, 252 U. S. 450, 40 Sup. Ct. Rep. 410, **64: 659**

Review of action of Land Department.

7. Whether a part of a public reserve covered by an unpatented lode mining claim was mineral, and whether there had been the requisite discovery, were questions of fact the decision of which by the Secretary of the Interior was conclusive on the courts, in the absence of fraud or imposition. Cameron v. United States, 252 U. S. 450, 40 Sup. Ct. Rep. 410, **64: 659**

Forfeiture; avoidance; cancelation.

Burden of proof in suit to cancel patents, see Evidence, 5.

See also Postoffice, 11.

8. Lands within the indemnity limits of the Southern Pacific Railroad land grant of July 27, 1866, were known to the railway company to be valuable for oil when the patent therefor was sought and obtained, so as to justify cancelation of the patent at the suit of the government, where the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end. United States v. Southern P. Co. 251 U. S. 1, 40 Sup. Ct. Rep. 47, **64: 97**

1. The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations; but the 5th Amendment to the Federal Constitution imposes, in this respect, no greater limitation upon the national power than does the 14th Amendment upon state power. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, 64:194

War-time prohibition.

2. The war emergency had not passed so as to invalidate as new legislation the provision of the Volstead Act of October 28, 1919, extending the prohibition of the Act of November 21, 1918, against the manufacture and sale of intoxicating liquors, to malt liquors, whether in fact intoxicating or not, with an alcoholic content of as much as ½ of 1 per cent of alcohol by volume. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. Rep. 141, 64:260

3. The implied war power of Congress over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectually prevent their sale. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. Rep. 141, 64:260

4. Congress, in the exercise of the war power, could, in order to make effective the existing war-time prohibition against the manufacture and sale of intoxicating liquors, enact the provisions of the Volstead Act of October 28, 1919, extending such prohibition to malt liquors, whether in fact intoxicating or not, with alcoholic content of as much as ½ of 1 per cent of alcohol by volume. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. Rep. 141, 64:260

5. Assuming that the implied power of Congress to enact such a measure as the War-time Prohibition Act of November 21, 1918, must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, the power is not limited to victories in the field and the dispersion of the hostile forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, 64:194

6. The War-time Prohibition Act of November 21, 1918, cannot be said to have ceased to be valid prior to the limitation therein fixed, viz., "the conclusion of the present war and thereafter until the termination of demobilization," on the theory that the war emergency has passed, where the Treaty of Peace has not yet been concluded, the railways are still under national control by virtue of the war powers, other war activities have not been brought to a close, and it cannot even be said that the man power of the nation has been restored to a peace footing. Hamilton v.

RESTITUTION.
As affecting liability of bank director for excessive loan, see Banks, 12.

REVENUE.
See Internal Revenue; Taxes.

RISK.
Assumption of, by employees, see Master and Servant, 9–12.

RIVER.
As state boundary, see Boundaries.

RULES OF COURTS.
Admiralty rules, see Appendix, Vol. 6, Digest Sup. Ct. 1908.
General orders and forms in bankruptcy, see Appendix I., in Book 43 L. ed. U. S. p. 1189.
Amendments, see Appendix I., in Book 50 L. ed. U. S. p. 1177; Appendix I., in Book 60 L. ed. U. S. p. 1241; Appendix VI., in Book 61 L. ed. U. S. 1382.
Rules for appeals from court of claims, see Appendix, Vol. 6, Digest Sup. Ct. 1908.
Copyright practice and procedure, see Appendix III., in Book 53 L. ed. U. S. p. 1074.
Equity rules, see Appendix III., in Book 57 L. ed. U. S. p. 1632.
Supreme Court rules, see Appendix V., in Book 56 L. ed. U. S. p. 1295.
Amendments, see Appendices VI.; VII., in Book 56 L. ed. U. S. pp. 1306, 1307; Appendices V.; VII., in Book 60 L. ed. U. S. pp. 1261, 1262; Appendix IV., in Book 61 L. ed. U. S. p. 1381; Appendices I.; II., in Book 63 L. ed. U. S. p. 1205.

SAFETY APPLIANCE ACT.
See Master and Servant.

SALE.
Sale or option, see Contracts.

SCALES.
Requiring railway company to install scales as denying due process of law, see Constitutional Law, 29.

SEAMEN.
Invalidating wage contract as denying due process of law, see Constitutional Law, 48.

1. Foreign seamen on foreign vessels in American ports are entitled to the benefits of the provisions of the Act of March 4, 1915, § 4, authorizing seamen on American vessels to demand and receive one half of the wages earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, notwithstanding contractual obligations to the contrary, and declaring that such section shall apply to seamen on foreign vessels while in American harbors, and that the Federal courts shall be open to such seamen for its enforcement. Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 40 Sup. Ct. Rep. 350, **64: 607**
Thompson v. Lucas, 252 U. S. 391, 40 Sup. Ct. Rep. 353, **64: 612**

2. A foreign vessel need not have been five days in an American port before seamen thereon may make the wage demand provided for by the Act of March 4, 1915, § 4, authorizing seamen to demand and receive one half of the wages earned at any port where the vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, notwithstanding contractual obligations to the contrary, and declaring that such section applies to seamen on foreign vessels while in American harbors, "provided such a demand shall not be made before the expiration of, nor oftener than once in, five days." Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 40 Sup. Ct. Rep. 350, **64: 607**
Thompson v. Lucas, 252 U. S. 391, 40 Sup. Ct. Rep. 353, **64: 612**

SEARCH AND SEIZURE.
See also Criminal Law, 3.

1. The rights of a corporation against unlawful searches and seizures are to be protected, even if the same result might have been achieved in a lawful way, i. e., by an order for the production of its books and papers. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. Rep. 182, **64: 319**

2. The knowledge gained by the Federal government's own wrong in seizing papers in violation of the owner's constitutional protection against unlawful searches and seizures cannot be used by the government in a criminal prosecution by serving subpœnas upon such owners to produce the original papers, which it had returned after copies had been made, and by obtaining a court order commanding compliance with such subpœnas. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. Rep. 182, **64: 319**

SELECTIVE SERVICE ACT.
Conspiracy to violate, see Conspiracy, 4.
Constitutionality of, see Constitutional Law, 74.

SELF-CRIMINATION.
See Criminal Law, 3.

SERVANTS.
See Master and Servant.

SEWERS.
Constitutionality of sewer assessment, see Constitutional Law, 20.

SHAME.
As element of damage, see Damages, 4.

SHERMAN ANTI-TRUST ACT.
See Monopoly.

1. The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations; but the 5th Amendment to the Federal Constitution imposes, in this respect, no greater limitation upon the national power than does the 14th Amendment upon state power. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, 64:194

War-time prohibition.

2. The war emergency had not passed so as to invalidate as new legislation the provision of the Volstead Act of October 28, 1919, extending the prohibition of the Act of November 21, 1918, against the manufacture and sale of intoxicating liquors, to malt liquors, whether in fact intoxicating or not, with an alcoholic content of as much as ½ of 1 per cent of alcohol by volume. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. Rep. 141, 64:260

3. The implied war power of Congress over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectually prevent their sale. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. Rep. 141, 64:260

4. Congress, in the exercise of the war power, could, in order to make effective the existing war-time prohibition against the manufacture and sale of intoxicating liquors, enact the provisions of the Volstead Act of October 28, 1919, extending such prohibition to malt liquors, whether in fact intoxicating or not, with alcoholic content of as much as ½ of 1 per cent of alcohol by volume. Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. Rep. 141, 64:260

5. Assuming that the implied power of Congress to enact such a measure as the War-time Prohibition Act of November 21, 1918, must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, the power is not limited to victories in the field and the dispersion of the hostile forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, 64:194

6. The War-time Prohibition Act of November 21, 1918, cannot be said to have ceased to be valid prior to the limitation therein fixed, viz., "the conclusion of the present war and thereafter until the termination of demobilization," on the theory that the war emergency has passed, where the Treaty of Peace has not yet been concluded, the railways are still under national control by virtue of the war powers, other war activities have not been brought to a close, and it cannot even be said that the man power of the nation has been restored to a peace footing. Hamilton v.

Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

7. The existing restriction on the sale of distilled spirits for beverage purposes, imposed by the War-time Prohibition Act of November 21, 1918, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

8. The war with Germany cannot be said to have been concluded within the meaning of the War-time Prohibition Act of November 21, 1918, merely by reason of the actual termination of war activities. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

9. The provision of the War-time Prohibition Act of November 21, 1918, that it shall not cease to be operative until the "conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President," is not satisfied by passing references in various messages and proclamations of the President to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the Army, or with officials of the War Department. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

10. The use of grains, cereals, fruit, or other food products in the manufacture and production of beer for beverage purposes, which, while containing as much as ½ of 1 per cent of alcohol by weight and volume, is not alleged to be intoxicating, was not prohibited by the provisions of the War-time Prohibition Act of November 21, 1918, that to conserve the nation's man power and to increase efficiency in the production of war essentials no grains, cereals, fruit, or other food products shall, after May 1, 1919, until the conclusion of the war and until demobilization is proclaimed by the President be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. A different conclusion is not demanded because of Treasury Department rulings that all beer containing ½ of 1 per cent of alcohol is taxable, or of the determination of the Internal Revenue Department that a beverage containing that amount of alcohol is to be regarded as intoxicating within the intendment of the act. United States v. Standard Brewery, 251 U. S. 210, 40 Sup. Ct. Rep. 139, **64:229**

Espionage.

Prejudicial error in instruction in criminal prosecution under Espionage Act, see Appeal and Error, 46.

Conspiracy to violate Espionage Act, see Conspiracy, 1-3.

Constitutionality of Espionage Act, see Constitutional Law, 73, 74.

Determining, on demurrer, sufficiency of indictment, see Criminal Law, 1.

Sufficiency of evidence to support convictions under Espionage Act, see Evidence, 12, 13.

Sufficiency of indictment charging conspiracy to violate Espionage Act, see Indictment and Information, 1.

Sufficiency of evidence in prosecution for violating Espionage Act as question for jury, see Trial, 2-4.

11. A construction cannot be given to the provision of the Espionage Act of June 15, 1917, making it criminal, when the United States is at war, wilfully to make or convey false reports or false statements with intent to interfere with the success of the military or naval forces of the United States, or to promote the success of its enemies, which will exclude statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge, or will excuse statements, however false, and with whatever evil purpose circulated, if accompanied with a pretense of comment upon them as matters of public concern. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

Alien enemies.

12. The existence of war did not make it improper for a circuit court of appeals to affirm, with a modification that the sum recovered be paid over to the Alien Property Custodian, a money judgment in favor of an alien enemy, recovered in the district court before war was declared, the collection of which was delayed by defendant's act in carrying the case up to the higher court. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, **64: 286**

Military tribunals.

13. Congress, by re-enacting in the Act of August 29, 1916, the Articles of War, did not vest in the military courts in war time exclusive jurisdiction to try and punish a soldier for the murder of a civilian at a place within the jurisdiction of a state, and not within the confines of any camp or place subject to the control of the Federal civil or military authorities, despite the words in Art. 74, "except in time of war," qualifying the duty of a military commander, imposed by that article, to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, and the grant in Art. 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war, both of which provisions take their origin in the Act of March 3, 1863, and were drawn from the terms of that act as re-expressed in the Re-

Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

7. The existing restriction on the sale of distilled spirits for beverage purposes, imposed by the War-time Prohibition Act of November 21, 1918, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

8. The war with Germany cannot be said to have been concluded within the meaning of the War-time Prohibition Act of November 21, 1918, merely by reason of the actual termination of war activities. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

9. The provision of the War-time Prohibition Act of November 21, 1918, that it shall not cease to be operative until the "conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President," is not satisfied by passing references in various messages and proclamations of the President to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the Army, or with officials of the War Department. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

10. The use of grains, cereals, fruit, or other food products in the manufacture and production of beer for beverage purposes, which, while containing as much as ½ of 1 per cent of alcohol by weight and volume, is not alleged to be intoxicating, was not prohibited by the provisions of the War-time Prohibition Act of November 21, 1918, that to conserve the nation's man power and to increase efficiency in the production of war essentials no grains, cereals, fruit, or other food products shall, after May 1, 1919, until the conclusion of the war and until demobilization is proclaimed by the President be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. A different conclusion is not demanded because of Treasury Department rulings that all beer containing ½ of 1 per cent of alcohol is taxable, or of the determination of the Internal Revenue Department that a beverage containing that amount of alcohol is to be regarded as intoxicating within the intendment of the act. United States v. Standard Brewery, 251 U. S. 210, 40 Sup. Ct. Rep. 139, **64:229**

Espionage.

Prejudicial error in instruction in criminal prosecution under Espionage Act, see Appeal and Error, 46.

Conspiracy to violate Espionage Act, see Conspiracy, 1-3.

Constitutionality of Espionage Act, see Constitutional Law, 73, 74.

Determining, on demurrer, sufficiency of indictment, see Criminal Law, 1.

Sufficiency of evidence to support convictions under Espionage Act, see Evidence, 12, 13.

Sufficiency of indictment charging conspiracy to violate Espionage Act, see Indictment and Information, 1.

Sufficiency of evidence in prosecution for violating Espionage Act as question for jury, see Trial, 2-4.

11. A construction cannot be given to the provision of the Espionage Act of June 15, 1917, making it criminal, when the United States is at war, wilfully to make or convey false reports or false statements with intent to interfere with the success of the military or naval forces of the United States, or to promote the success of its enemies, which will exclude statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge, or will excuse statements, however false, and with whatever evil purpose circulated, if accompanied with a pretense of comment upon them as matters of public concern. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

Alien enemies.

12. The existence of war did not make it improper for a circuit court of appeals to affirm, with a modification that the sum recovered be paid over to the Alien Property Custodian, a money judgment in favor of an alien enemy, recovered in the district court before war was declared, the collection of which was delayed by defendant's act in carrying the case up to the higher court. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, **64: 286**

Military tribunals.

13. Congress, by re-enacting in the Act of August 29, 1916, the Articles of War, did not vest in the military courts in war time exclusive jurisdiction to try and punish a soldier for the murder of a civilian at a place within the jurisdiction of a state, and not within the confines of any camp or place subject to the control of the Federal civil or military authorities, despite the words in Art. 74, "except in time of war," qualifying the duty of a military commander, imposed by that article, to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, and the grant in Art. 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war, both of which provisions take their origin in the Act of March 3, 1863, and were drawn from the terms of that act as re-expressed in the Re-

Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

7. The existing restriction on the sale of distilled spirits for beverage purposes, imposed by the War-time Prohibition Act of November 21, 1918, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

8. The war with Germany cannot be said to have been concluded within the meaning of the War-time Prohibition Act of November 21, 1918, merely by reason of the actual termination of war activities. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

9. The provision of the War-time Prohibition Act of November 21, 1918, that it shall not cease to be operative until the "conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President," is not satisfied by passing references in various messages and proclamations of the President to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the Army, or with officials of the War Department. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

10. The use of grains, cereals, fruit, or other food products in the manufacture and production of beer for beverage purposes, which, while containing as much as ½ of 1 per cent of alcohol by weight and volume, is not alleged to be intoxicating, was not prohibited by the provisions of the War-time Prohibition Act of November 21, 1918, that to conserve the nation's man power and to increase efficiency in the production of war essentials no grains, cereals, fruit, or other food products shall, after May 1, 1919, until the conclusion of the war and until demobilization is proclaimed by the President be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. A different conclusion is not demanded because of Treasury Department rulings that all beer containing ½ of 1 per cent of alcohol is taxable, or of the determination of the Internal Revenue Department that a beverage containing that amount of alcohol is to be regarded as intoxicating within the intendment of the act. United States v. Standard Brewery, 251 U. S. 210, 40 Sup. Ct. Rep. 139, **64:229**

Espionage.

Prejudicial error in instruction in criminal prosecution under Espionage Act, see Appeal and Error, 46.

Conspiracy to violate Espionage Act, see Conspiracy, 1-3.

Constitutionality of Espionage Act, see Constitutional Law, 73, 74.

Determining, on demurrer, sufficiency of indictment, see Criminal Law, 1.

Sufficiency of evidence to support convictions under Espionage Act, see Evidence, 12, 13.

Sufficiency of indictment charging conspiracy to violate Espionage Act, see Indictment and Information, 1.

Sufficiency of evidence in prosecution for violating Espionage Act as question for jury, see Trial, 2-4.

11. A construction cannot be given to the provision of the Espionage Act of June 15, 1917, making it criminal, when the United States is at war, wilfully to make or convey false reports or false statements with intent to interfere with the success of the military or naval forces of the United States, or to promote the success of its enemies, which will exclude statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge, or will excuse statements, however false, and with whatever evil purpose circulated, if accompanied with a pretense of comment upon them as matters of public concern. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

Alien enemies.

12. The existence of war did not make it improper for a circuit court of appeals to affirm, with a modification that the sum recovered be paid over to the Alien Property Custodian, a money judgment in favor of an alien enemy, recovered in the district court before war was declared, the collection of which was delayed by defendant's act in carrying the case up to the higher court. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, **64: 286**

Military tribunals.

13. Congress, by re-enacting in the Act of August 29, 1916, the Articles of War, did not vest in the military courts in war time exclusive jurisdiction to try and punish a soldier for the murder of a civilian at a place within the jurisdiction of a state, and not within the confines of any camp or place subject to the control of the Federal civil or military authorities, despite the words in Art. 74, "except in time of war," qualifying the duty of a military commander, imposed by that article, to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, and the grant in Art. 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war, both of which provisions take their origin in the Act of March 3, 1863, and were drawn from the terms of that act as re-expressed in the Re-

Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

7. The existing restriction on the sale of distilled spirits for beverage purposes, imposed by the War-time Prohibition Act of November 21, 1918, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

8. The war with Germany cannot be said to have been concluded within the meaning of the War-time Prohibition Act of November 21, 1918, merely by reason of the actual termination of war activities. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

9. The provision of the War-time Prohibition Act of November 21, 1918, that it shall not cease to be operative until the "conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President," is not satisfied by passing references in various messages and proclamations of the President to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the Army, or with officials of the War Department. Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U. S. 146, 40 Sup. Ct. Rep. 106, **64:194**

10. The use of grains, cereals, fruit, or other food products in the manufacture and production of beer for beverage purposes, which, while containing as much as ½ of 1 per cent of alcohol by weight and volume, is not alleged to be intoxicating, was not prohibited by the provisions of the War-time Prohibition Act of November 21, 1918, that to conserve the nation's man power and to increase efficiency in the production of war essentials no grains, cereals, fruit, or other food products shall, after May 1, 1919, until the conclusion of the war and until demobilization is proclaimed by the President be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. A different conclusion is not demanded because of Treasury Department rulings that all beer containing ½ of 1 per cent of alcohol is taxable, or of the determination of the Internal Revenue Department that a beverage containing that amount of alcohol is to be regarded as intoxicating within the intendment of the act. United States v. Standard Brewery, 251 U. S. 210, 40 Sup. Ct. Rep. 139, **64:229**

Espionage.

Prejudicial error in instruction in criminal prosecution under Espionage Act, see Appeal and Error, 46.

Conspiracy to violate Espionage Act, see Conspiracy, 1-3.

Constitutionality of Espionage Act, see Constitutional Law, 73, 74.

Determining, on demurrer, sufficiency of indictment, see Criminal Law, 1.

Sufficiency of evidence to support convictions under Espionage Act, see Evidence, 12, 13.

Sufficiency of indictment charging conspiracy to violate Espionage Act, see Indictment and Information, 1.

Sufficiency of evidence in prosecution for violating Espionage Act as question for jury, see Trial, 2-4.

11. A construction cannot be given to the provision of the Espionage Act of June 15, 1917, making it criminal, when the United States is at war, wilfully to make or convey false reports or false statements with intent to interfere with the success of the military or naval forces of the United States, or to promote the success of its enemies, which will exclude statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge, or will excuse statements, however false, and with whatever evil purpose circulated, if accompanied with a pretense of comment upon them as matters of public concern. Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. Rep. 205, **64: 542**

Alien enemies.

12. The existence of war did not make it improper for a circuit court of appeals to affirm, with a modification that the sum recovered be paid over to the Alien Property Custodian, a money judgment in favor of an alien enemy, recovered in the district court before war was declared, the collection of which was delayed by defendant's act in carrying the case up to the higher court. Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. Rep. 160, **64: 286**

Military tribunals.

13. Congress, by re-enacting in the Act of August 29, 1916, the Articles of War, did not vest in the military courts in war time exclusive jurisdiction to try and punish a soldier for the murder of a civilian at a place within the jurisdiction of a state, and not within the confines of any camp or place subject to the control of the Federal civil or military authorities, despite the words in Art. 74, "except in time of war," qualifying the duty of a military commander, imposed by that article, to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, and the grant in Art. 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war, both of which provisions take their origin in the Act of March 3, 1863, and were drawn from the terms of that act as re-expressed in the Re-