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UNITED STATES REPORTS

VOLUME 242

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1916

ERNEST KNAEBEL

REPORTER

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1917

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
JOHN H. CLARKE, Associate Justice.[2]

THOMAS WATT GREGORY, Attorney General.
JOHN WILLIAM DAVIS, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

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

[2] On July 14, 1916, President Wilson nominated John H. Clarke of Ohio to succeed Mr. Justice Hughes, resigned; he was confirmed by the Senate on July 24, 1916; he took the oath of office August 1, 1916; the Judicial Oath was administered and he took his seat upon the bench at the opening of October Term, 1916.

RESIGNATION AND APPOINTMENT OF REPORTER.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, OCTOBER 10, 1916.

PRESENT: THE CHIEF JUSTICE, MR. JUSTICE MCKENNA, MR. JUSTICE HOLMES, MR. JUSTICE DAY, MR. JUSTICE VAN DEVANTER, MR. JUSTICE PITNEY, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, and MR. JUSTICE CLARKE.

THE CHIEF JUSTICE announced the following order of the court:

It is ordered that the letter of resignation of the reporter of this court, Charles Henry Butler, Esq., and the response of the court thereto, be entered upon the minutes of the court as follows, to wit:

WASHINGTON, D. C., *October 5, 1916.*

To THE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I hereby tender my resignation as reporter of this court, to take effect on the appointment of my successor.

I cannot do this without thanking you for the kindness and consideration which I have received from all the members of the court during the 14 terms I have had the honor of reporting their decisions.

Very respectfully, your obedient servant,

CHAS. H. BUTLER.

SUPREME COURT OF THE UNITED STATES,
October 9, 1916.

DEAR SIR: In informing you of the acceptance of your resignation, we desire to convey our abiding sense of the courtesy and consideration which you have so uniformly

manifested during the many years in which you have been reporter, and our appreciation of the zealous purpose to discharge fully your duty which has controlled you during that long period.

We can not refrain from hoping that the enlarged field of professional endeavor, the desire to enter upon which has caused you to sever your official relations with the court, may prove as fruitful in good results as you expect it to be, and that you may enjoy a long, happy, and useful life.

Very truly, yours,

EDWARD D. WHITE.
JOSEPH MCKENNA.
OLIVER WENDELL HOLMES.
WILLIAM R. DAY.
WILLIS VAN DEVANTER.
MAHLON PITNEY.
J. C. MCREYNOLDS.
LOUIS D. BRANDEIS.
JOHN H. CLARKE.

CHARLES HENRY BUTLER, Esq.

And it is further ordered that Mr. Ernest Knaebel, of Colorado, be, and he is hereby, appointed reporter of this court in the place of Charles Henry Butler, Esq., resigned, and is charged with the duty of reporting the decisions of the present term from its commencement.

Mr. Knaebel took the oath before the Clerk, October 31, 1916.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1916.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

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

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

For the Second Circuit, Louis D. Brandeis, Associate Justice.

For the Third Circuit, Mahlon Pitney, Associate Justice.

For the Fourth Circuit, Edward D. White, Chief Justice.

For the Fifth Circuit, J. C. McReynolds, Associate Justice.

For the Sixth Circuit, William R. Day, Associate Justice.

For the Seventh Circuit, John H. Clarke, Associate Justice.

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

For the Ninth Circuit, Joseph McKenna, Associate Justice.

October 30, 1916.

[1] For next previous allotment see volume 241 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1916.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, *v.* WARD.

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

No. 638. Motion to dismiss and for damages submitted October 9, 1916.—Decided October 30, 1916.

A writ of error will not lie from this court to review a judgment of the Circuit Court of Appeals in a case presenting neither diversity of citizenship nor federal question, which was taken to that court from the Supreme Court of Hawaii, pursuant to Judicial Code, § 246, as amended by the Act of January 28, 1915, 38 Stat. 803, c. 22, upon the basis of pecuniary amount alone.

Judicial Code, § 241, empowering this court to review judgments of Circuit Courts of Appeals "not made final by the provisions of this Title," etc., held inapplicable.

THE case is stated in the opinion. For the opinion of the Circuit Court of Appeals see 232 Fed. Rep. 809.

Mr. E. A. Douthitt for defendant in error, in support of the motion.

Mr. E. W. Sutton and *Mr. William O. Smith* for plaintiff in error, in opposition to the motion.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On writ of error prosecuted from the court below to a judgment of the Supreme Court of Hawaii rendered in a case where there was no federal question and no diversity of citizenship, the judgment was affirmed and the case was brought here. By a motion to dismiss, our jurisdiction is disputed and to dispose of it requires a consideration of § 246 of the Judicial Code as amended by the Act of January 28, 1915, 38 Stat. 803, c. 22.

That amendment provides, first, that "Writs of error and appeals from the final judgments and decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico may be taken and prosecuted to the Supreme Court of the United States . . . in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States . . ." And this is immediately followed by a provision giving power to this court to review by certiorari "in all other cases, civil or criminal, in the Supreme Court of the Territory of Hawaii or the Supreme Court of Porto Rico." The next and separate sentence which follows these provisions and which concludes the amendment is this: "Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, . . . exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals."

The argument supporting jurisdiction is that as by the

general provisions of the Judiciary Act of 1891, now embraced in § 241 of the Judicial Code, power exists in this court to review by error or appeal the final decisions of the circuit courts of appeals in all cases where the jurisdiction of the trial court did not depend upon diversity of citizenship or where the case was not otherwise by provisions of law expressly made final in the circuit courts of appeals, therefore power to review exists since this case is not in one of the excepted classes. But the contention overlooks the fact that from the beginning and continuously up to the adoption of the Amendment of 1915 appeals and writs of error to the supreme courts of Hawaii and of Porto Rico were not left to be controlled by the law generally applicable to courts of the United States as expressed in the Judiciary Act of 1891 or as found in the provisions of the Judicial Code re-adopting that act, but were governed by special provisions controlling the subject—a purpose which is exemplified by the terms of the Amendatory Act of 1915. This is plain when it is considered that the two classes of cases enumerated in the Amendment of 1915 were practically in the same terms expressed in the prior acts which conferred reviewing jurisdiction in both classes exclusively upon this court and that the only substantial change made by the amendatory act was to take from this court the jurisdiction to review in the second enumerated class and confer it upon the Circuit Court of Appeals to which Hawaii belonged. And indeed there is nothing in the context of the statute which countenances the view that the statute intended to merely take away the jurisdiction of this court in one class of cases and at the same time to restore jurisdiction as to the same class by means of a power conferred or contemplated to exist to review on error or appeal the judgments and decrees of the Circuit Court of Appeals. Besides, as the remedy intended to be afforded by the Amendment of 1915 was evidently the restricting of the jurisdiction

of this court to the end that the burden on its docket might be lightened, we cannot construe that amendment as frustrating the purpose which it was adopted to accomplish. *American Security Co.* v. *District of Columbia,* 224 U. S. 491, 495.

Dismissed for want of jurisdiction.

CROSS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 78. Submitted October 23, 1916.—Decided November 13, 1916.

Under the Naturalization Act of June 29, 1906, 34 Stat. 596, c. 3592, fees may not rightfully be charged against the United States by a clerk of a federal court for making triplicate copies of declarations of intention, or for attaching the seal of the court thereto, pursuant to the direction of the Bureau of Immigration and Naturalization.

The Naturalization Act, by the affirmative provisions of §§ 12 and 13 defining duties and fees, and by the express prohibition against additional charges, contained in § 21, precludes any right of the clerk which might otherwise exist under Revised Statutes, § 828, to charge fees against the United States for the services here in question.

50 Ct. Clms. 413, affirmed.

The case is stated in the opinion.

Mr. Frank B. Crosthwaite and *Mr. E. F. Colladay* for appellant.

Mr. Assistant Attorney General Thompson for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The question for decision is, did the court below err in rejecting the claim of the plaintiff, who is the appellant,

to recover an amount based upon his asserted right as clerk of the United States District and Circuit Courts for the District of Rhode Island to be paid fees for making on the direction of the Bureau of Immigration and Naturalization triplicate copies of original declarations of intention for naturalization and attaching the seal of the court to the same?

The solution of the inquiry depends upon a consideration of §§ 12, 13 and 21 of the Naturalization Act of June 29, 1906, 34 Stat. 596, c. 3592, and the relation to those provisions of § 828, Rev. Stat.

By § 12 it is provided that it shall be the duty of the clerk of every court exercising jurisdiction in naturalization matters "to keep and file a duplicate of each declaration of intention made before him and to send to the Bureau of Immigration and Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him. . . . It shall also be the duty of the clerk of each of said courts to report to the said Bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said Bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau."

By § 13 provision is made for the following fees: "For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar. For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issu-

ance of the certificate of citizenship thereunder, if granted, two dollars."

In their ultimate analysis all the arguments for reversal must come to one or the other or both of the following propositions: (a) That the declarations of intention were not proceedings in naturalization covered by § 12 and therefore the services rendered were outside of that section and governed, not by the enumeration of fees in § 13, but by the general provisions of § 828, Rev. Stat., authorizing a charge by clerks of ten cents per folio "for a copy of any entry or record, or of any paper on file" and a fee of twenty cents "for affixing the seal of the court to any instrument, when required." Or (b) if the declarations of intention of which triplicate copies were furnished were proceedings in naturalization and within the requirements of § 12, payment for such copies was not embraced by the fees enumerated in § 13 and therefore the charge for them must be considered as being provided for in § 828, Rev. Stat.

But we are of opinion that both of these propositions are incompatible with §§ 12 and 13 and moreover that to sanction them would disregard the express prohibition of § 21, which is as follows:

"That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified."

We are of opinion the conclusion stated clearly follows from the prohibition of this section for the following reasons: First, if on the one hand it be assumed that the duty to furnish the copies charged for was expressly commanded by § 12, the right to charge for them would be clearly prohibited by § 21 even if no provision for payment was embraced in the fees enumerated in § 13,

since it is apparent from the text that the purpose of the statute was to permit fees to be charged for the services expressly provided for in § 12 only when such fees were enumerated and authorized by § 13,—a conclusion which is additionally apparent since § 12 unmistakably imposes duties for which no fees are provided in § 13, but which are covered by the prohibition of § 21. Second: If on the other hand it be assumed that there is no express provision for furnishing the copies in § 12, but that such duty only arose in consequence of the general provision of that section requiring clerks to furnish "certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau," it is equally clear that the prohibition of § 21 would be applicable, since it was plainly intended to prevent resort to extraneous legislation for the purpose of supporting the right to charge a fee for services embraced within the general terms of § 12 when no fee was provided for such services by § 13.

Affirmed.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO *v.* WELLES.

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

No. 45. Argued October 27, 1916.—Decided November 13, 1916.

A provision in a contract between the City of San Francisco and a construction company declaring that the company shall not, either legally or equitably, assign any moneys payable thereunder or its claim thereto, unless with the consent of the Board of Public Works,

does not render absolutely void an assignment of money due and payable under the contract, made by the contractor to a bank for valuable consideration but without such consent; nor prevent the passing of a prior title as against the right of a subcontractor who subsequently took the steps prescribed by § 1184 of the California Code of Civil Procedure for the sequestration of the same indebtedness—it appearing that the city did not object to the assignment or favor either claimant. *Burck* v. *Taylor*, 152 U. S. 634, distinguished. 211 Fed. Rep. 561; 215 Fed. Rep. 81, reversed.

The case is stated in the opinion.

Mr. William R. Harr, with whom *Mr. George A. Knight*, *Mr. Charles J. Heggerty*, *Mr. James B. Feehan*, *Mr. Joseph W. Beretta* and *Mr. Charles H. Bates* were on the briefs, for appellant.

Mr. Harold Remington, with whom *Mr. F. H. Dam*, *Mr. R. T. Devlin*, *Mr. W. H. Devlin*, *Mr. A. F. Morrison*, *Mr. P. F. Dunne*, *Mr. W. I. Brobeck*, *Mr. Milton J. Green* and *Mr. George J. Hatfield* were on the brief, for appellees:

I. The provision in the contract to control assignments of moneys due was valid. *Burck* v. *Taylor*, 152 U. S. 634, and many other cases were cited to the general proposition that parties to contracts may prohibit assignment. The prohibition may extend to the assignment of moneys due under the contract. *Tabler* v. *Sheffield Land, Iron & Coal Co.*, 79 Alabama, 377; *Stanley* v. *Sheffield Land, Iron & Coal Co.*, 83 Alabama, 261; *Barringer* v. *Bes Line Construction Co.*, 23 Oklahoma, 131; *Zetterlund* v. *Texas Land &c. Co.*, 55 Nebraska, 355; *Omaha* v. *Standard Oil Co.*, 55 Nebraska, 337; *Murphy* v. *Plattsmouth*, 78 Nebraska, 163; *State ex rel. Kansas City Loan Guarantee Co.* v. *Kent*, 98 Mo. App. 281. The assignment, when so forbidden, merely creates a personal obligation between assignor and assignee.

Such provisions are not invalid as restraining alienation.

California Civil Code, § 711, which is but declaratory of the common law (*Murray* v. *Green*, 64 California, 363), merely discountenances such restraints as are inconsistent with the interest created. The restraints which are obnoxious concern real estate (*Murray* v. *Green, supra*), or other tangible property (*Bradley* v. *Piexotto*, 3 Ves. Jr. 324). The rule against restraint is never applied to avoid provisions against assigning contracts contained in the contracts themselves. *La Rue* v. *Groezinger*, 84 California, 281. Cases in which claims against insurance companies after loss have been held assignable despite stipulations to the contrary are to be distinguished upon the ground that insurance contracts are in a peculiar way construed in favor of the insured. Otherwise, such decisions are clearly contrary to the general rule and great weight of authority.

There are especial reasons for upholding such prohibitions in favor of municipalities. On grounds of public policy they are exempted from garnishment and judicial seizure of municipal revenues for debts, 1 Dillon Municipal Corporations, 5th ed., §§ 248, 249; with equal or better reason should they be exempted from suits on assigned obligations. *Omaha* v. *Standard Oil Co., supra; Murphy* v. *Plattsmouth, supra; State ex rel. Kansas City Loan Guarantee Co.* v. *Kent, supra.*

II. The provision against assignment was not merely for the benefit of the city, but rendered the assignment absolutely void unless the city consented. *Burck* v. *Taylor, supra.*

The interest of the municipality demands that subcontractors be protected against assignments.

Mr. Justice Holmes delivered the opinion of the court.

This is a suit brought by the appellee Welles to establish a lien upon a debt of $6,830.85 due under a construction

contract from the City of San Francisco, represented by the appellee Boyle, to the bankrupt, Metropolis Construction Company. The District Court approved the report of the referee against the claim and in favor of the appellant, but this decree was reversed by the Circuit Court of Appeals. 211 Fed. Rep. 561. 215 Fed. Rep. 81. 128 C. C. A. 161. 131 C. C. A. 389. The subject-matter is the fourth progress payment, which on December 5, 1910, had been authorized by the Board of Public Works of the city. On that day the Construction Company applied to the appellant bank for a loan of $30,000 secured by an order on the auditor of the city authorizing the bank to draw from the city for the above and other amounts not in controversy here. The bank declined until the order should be accepted by the auditor whereupon on the next day the order was presented to the auditor's office and stamped as received on December 6. The order was intended and taken as an assignment and after it had been stamped was accepted by the bank as security and the money was advanced. The next day $5,000 more was advanced on the same security, notes being given for each sum. The appellee Welles was a subcontractor, and on December 12 and 16 served notice on the city to withhold payment, as permitted by § 1184 of the Code of Civil Procedure of the State of California. It is admitted by Welles that if the assignment was valid his rights are subordinate to it, *Newport Wharf & Lumber Co.* v. *Drew*, 125 California, 585, and the only question argued on his behalf is whether the terms of the contract between the bankrupt and the city made the assignment void.

The contract provided that the contractor should keep the work under his personal control and should not assign or sublet the whole or any part thereof without the consent of the Board of Public Works. It further declared that no subcontract should relieve the contractor of any

of his obligations and that he should not "either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent." The city has made no objection to the assignment to the bank and the money now awaits the decision of this court as between the claimant of the lien and the prior assignee.

There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course a covenantor is not to be held beyond his undertaking and he may make that as narrow as he likes. *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, 127 U. S. 379. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that as between the creditor and a third person the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies the principle recognized by the statute of California that a debt is to be regarded as a thing and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal. Civil Code, §§ 954, 711. The debtor does not complain, but stands

indifferent, willing that the common law should take its course.

The Circuit Court of Appeals relied largely upon *Burck* v. *Taylor*, 152 U. S. 634, some expressions in which, at least, seem to warrant the conclusion reached. But that case as understood by the majority of the court was quite different from this. A contract for the building of the Capitol of Texas was made not assignable without the consent of the Governor and certain others. The contractor assigned an undivided three-fourths interest to Taylor, Babcock & Co., with the required assent and then three-sixteenths without assent to three others severally, one of whom conveyed one thirty-second to the plaintiff. The contractor made another conveyance of all his rights under the contract to Taylor, Babcock & Co., and Taylor, Babcock & Co. made what purported to be a transfer of the entire contract to Abner Taylor, the defendant. Both of these transfers were assented to. In the latter Taylor purported to bind himself to the State to perform the original contract and in the assent to the same the Governor and other authorities stated that they recognized Taylor as the contractor, bound as the original contractor was bound. The court held that there was a novation, p. 650, and that Taylor acted without notice of the plaintiff's claim, p. 653. Upon those facts it would be hard to make out any right of the plaintiff to proceeds of the new contract that Taylor had performed.

The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated, hardly is material here. It is enough to say that we are of opinion that upon the facts stated the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles and con-

sequently that the decree must be reversed. See *Hobbs* v. *McLean*, 117 U. S. 567. *Burnett* v. *Jersey City*, 31 N. J. Eq. 341. *Fortunato* v. *Patten*, 147 N. Y. 277.

Decree reversed.

MR. JUSTICE MCKENNA dissents for the reasons stated by the Circuit Court of Appeals.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* PARKER, ADMINISTRATOR OF PARKER.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 330. Submitted November 1, 1916.—Decided November 13, 1916.

Plaintiff's intestate was killed while moving an engine with attached intrastate car. There was evidence, strong but not conclusive, that the purpose of the movement was to reach and move another car in interstate commerce. Not asking to have this considered by the jury, defendant unsuccessfully insisted that the trial judge deal with the case as a case of interstate commerce governed by the Federal Employers' Liability Act. The case went to the jury as one dependent on the state law, and there was a money verdict which admittedly could not be sustained if the federal act applied.

Held that not the intrastate character of the moving car, as erroneously held by the court below, but the purpose of the operation involving the movement, must determine whether deceased was engaged in interstate commerce.

That the purpose was for the jury to determine; and defendant, not having sought the jury, or made any request or objection in the trial court which was not rightly overruled, could not complain of the verdict.

165 Kentucky, 658, affirmed.

THE case is stated in the opinion.

Mr. Benjamin D. Warfield for plaintiff in error.

Mr. Edward C. O'Rear, with whom *Mr. J. M. Robsion* and *Mr. B. G. Williams* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff's intestate was a fireman upon a switching engine which was moving upon a switch track. A caboose stood upon the main track so near to where the engine moved that the deceased struck it and was killed. His administrator brought this action against the Railroad, the plaintiff in error, for causing the intestate's death and got a verdict which, it is admitted, cannot be sustained if the deceased was engaged in interstate commerce. The dealings of the state courts with that question are the ground for the present writ of error. The judgment for the plaintiff was affirmed by the Court of Appeals, 165 Kentucky, 658.

The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the Court of Appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478, and doing the act for

the purpose of furthering the later work. See *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 263. *Pennsylvania Company* v. *Donat*, 239 U. S. 50. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55, 62, 63.

But it is necessary to see how the case was dealt with in the trial court. The Railroad Company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict, on the ground among others, that it appeared as matter of law that he was so engaged. But if the question had been left to the jury and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce there would have been no error of law in allowing a verdict for the plaintiff to stand. It is true that the Judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary and as the Railroad did not ask to go to the jury and the only ruling requested was properly denied the judgment must stand.

Judgment affirmed.

SEABOARD AIR LINE RAILWAY *v.* CITY OF RALEIGH.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

No. 59. Argued November 1, 1916.—Decided November 20, 1916.

Herein the action of the Board of Aldermen of the City of Raleigh in assuming to grant to a railroad company "permission to occupy" a sidewalk with a spur track is *held*, in the circumstances stated in the opinion, to have amounted at most to the conferring of a mere revocable license.

The general principle reiterated that what seems on its face a mere license by a municipality may not be converted into a contract by resort to general implications.

The exception which allows duration and contractural quality to be attributed by implication alone to particular privileges, whose continued enjoyment is vitally and essentially related to enduring powers and duties of a corporate grantee, has no application to a case like this, where the action of the city, concerning a mere permission to exercise a facility as a license, occurred long after the railway corporation was created and established in business and was in no way necessary for the discharge of its corporate functions.

Long occupation and use of the spur track for railroad purposes, with the assent of the city, could not create a permanent right.

219 Fed. Rep. 573, affirmed.

THE case is stated in the opinion.

Mr. Murray Allen for appellant.

Mr. Jno. W. Hinsdale, Jr., for appellees.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Upon the assumption that contract rights protected by the Constitution of the United States would be violated, the bill sought to restrain the enforcement of an ordinance which directed the removal of a spur track on a sidewalk on a designated street and block. On the bill, answer and on agreed facts the court refused an injunction on the ground that there was no contract right in existence and, treating this conclusion as going to the vitals of the whole case, dismissed the bill, and a direct appeal was taken.

Although there are fourteen assignments of error, but one question arises, Was there a contract, since leaving out mere forms of statement all the assignments concern this single question and we come to its solution. In doing

so, to avoid that which is superfluous, we concede for the sake of the argument only that the city had the lawful authority to make a contract concerning the track on the street and sidewalk in question. With this argumentative concession the question then is, not what there was power to do, but what was done, and to solve it requires a brief statement.

In 1835 the Raleigh & Gaston Railroad Company, to whose rights it is conceded the complainant and appellant succeeded, was authorized to and shortly afterwards built a railroad from Gaston to Raleigh, North Carolina. Entering the latter city through its streets with its consent and building therein machine shops, a railroad yard and other facilities, the main tracks of the railroad curved into a block which the company had bought and upon which it established its terminals, bounded on the front or west by Salisbury street, on the rear or east by Halifax street, and on the north and south by North and Lane streets. Many years subsequently, in 1881, on the block just below and on the same side of Salisbury street a cotton compress had been built fronting on Salisbury street and abutting on the sidewalk on that street. In that year the railroad company asked permission of the city authorities to extend a track to and along the sidewalk on the block in front of the compress, which was granted, the official record of the consent of the city having been manifested by the following entry in the minutes of the Board of Aldermen: "Upon application of John C. Winder, General Superintendent, the Raleigh and Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury street, between Jones and Lane streets, for the purpose of running a track." In virtue of this consent a spur track projecting from the main tracks as they curved into the terminal block, was built which ran down to and upon the sidewalk in front of the compress. For

many years this track was used for business going in and out of the compress, as well as for the general purposes of the railroad. In 1906, however, the compress ceased to be operated, and subsequently (about 1910 or 1911) the railroad company, owning the block on which the compress was situated, removed the same and built upon the block a warehouse. It was not possible, however, from the track on the sidewalk to directly reach such warehouse, as along the block where it fronted on Salisbury street tracks were laid between the warehouse and the spur track which for the purposes of the railroad were depressed below the level of the street and sidewalk, and thus the spur track on the sidewalk was only available for parking cars or as a team track and was alternately in use for one or the other of these purposes when the city adopted the assailed ordinance directing the removal of the spur track.

Under this statement it becomes at once apparent that the court below rightly decided that the contract right asserted had no existence since on the very face of the consent which was given a mere right to occupy was conveyed without any contract as to time and which therefore, taking the best view for the railroad, amounted to conferring upon it a mere license to put and use a track upon the sidewalk and therefore subject to the power of the city to revoke whenever it deemed the municipal interest required it to do so.

But the contention is that although it be conceded that the well-settled rule is that general implications may not be resorted to for the purpose of converting a grant of a municipality which is upon its face a mere license into a contract for a stated period or in perpetuity, nevertheless that rule is subject to a well-defined limitation or exception which as presented in the argument in various forms may be stated as follows: That where general powers are conferred and duties are imposed upon

a corporation which from their nature and essential character presuppose the right to exert them or the duty to perform them during a specified time or in perpetuity, and a particular power or right is conferred on the corporation which has a necessary relation thereto or an essential connection therewith, although such particular power or right may not have expressly taken the form of contract or grant for a stated time or in perpetuity, nevertheless such result may be implied by considering the essential relation which the particular power or right granted bears to the general powers and duties possessed and the necessary connection between the two for the purpose of giving a common duration to both. *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 663; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65–66; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 91; *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179, 191–194.

But while the general rule is well founded and the exception or limitation by which it is asserted to be qualified is well settled, it has no relation to the case in hand, since the particular action of the city in question concerned a mere permission to exercise a facility as a license given long after the creation of the railway corporation and not inherently or in any degree necessarily controlling its power to discharge its corporate attributes. Indeed so much is this the case on the face of the situation here presented that it becomes apparent that to apply the limitation to a case like this would destroy the general rule itself.

The contention that even though this be the case, in as much as the railroad had for a long time operated the spur track on the sidewalk and used it for its general railroad purposes with the assumed knowledge and assent of the city, thereby the existence of a contractual and permanent right must be inferred, is manifestly without

merit. Indeed it amounts to saying that possession under a mere license was capable of causing that which was revocable and precarious to become contractual and permanent.

Affirmed.

O'NEIL *v.* NORTHERN COLORADO IRRIGATION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 68. Argued November 6, 1916.—Decided November 20, 1916.

Under the laws of Colorado here applicable, as construed by her highest court, a suit by a claimant of a water right in one water district to contest a water priority defined by a general adjudication in another, is barred if not brought within four years from the rendition of the decree.

A state law, which provides for a public adjudication of property rights in a given subject-matter and declares that even persons who are not entitled to be heard in the proceeding shall ultimately be bound, does not violate the Fourteenth Amendment *quoad* such persons if it allows them an adequate opportunity, including a reasonable time, to assert their rights in other judicial proceedings.

A judicial construction of a statute, supportable by frank reasoning, and not subversive of any earlier judicial construction upon which a party might be held to have relied, does not deprive him of due process, though it take him by surprise and come too late for him to act upon it and thus save his rights.

A departure by state decision from a rule of property established by earlier state decisions may not be relied on, without more, as a violation of the Fourteenth Amendment. *Sauer* v. *New York*, 206 U. S. 536; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67.

56 Colorado, 545, affirmed.

THE case is stated in the opinion.

Mr. Fred R. Wright, with whom *Mr. Charles D. Hayt*, *Mr. Clyde C. Dawson*, and *Mr. G. K. Hartenstein* were on the briefs, for plaintiff in error:

The effect of the construction placed upon the Colorado irrigation acts by the court below was to take the plaintiff's property without due process and deprive him of the equal protection of the laws. Plaintiff had a right to take water from a tributary of the South Platte River in Water District No. 23. By the constitution and laws of Colorado such a right is recognized as a right of real property. *Nichols* v. *McIntosh*, 19 Colorado, 22; *Gutheil Park Inv. Co.* v. *Montclair*, 32 Colorado, 420. By a decree of the District Court for Park County, determining the water priorities for Water District No. 23, entered in October, 1889, this right was given a priority as of May 10, 1879. The right of the defendant Irrigation Company to take water from the South Platte lower down was defined by the District Court for Douglas County, by a similar decree for Water District No. 8, in December, 1889, and assigned a priority as of January, 1879. Under the irrigation laws of 1879 and 1881, which governed these adjudications, plaintiff had no right to appear and assert his claim in the proceeding in District No. 8. Jurisdiction there was confined to the adjudication of claims in that particular district. *Irrigation Co.* v. *Downer*, 19 Colorado, 595; *Independent Ditch Co.* v. *Agricultural Ditch Co.*, 22 Colorado, 513. Plaintiff, therefore, was neither actually nor constructively a party to that proceeding, and as to him the decree was *res inter alios*. After an enjoyment, uninterrupted and unchallenged for thirty years, his right is now sought to be destroyed by a decision which would render this old decree conclusive against him. This is not due process of law. *Brown* v. *Denver*, 7 Colorado, 305; *Scott* v. *McNeal*, 154 U. S. 34; *Davidson* v. *New Orleans*, 96 U. S. 107; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Holden* v. *Hardy*, 169 U. S. 366. He has never been al-

lowed an opportunity to contest either the date or the measure of water assigned to the company's priority.

To apply this decree indirectly, by resort to the four year limitation provision contained in §§ 34 and 35 of the law of 1881, would be wholly indefensible. The act shows on its face that the limitation was intended to apply only as between claimants in the same water district. *Irrigation Co.* v. *Downer, supra; Nichols* v. *McIntosh, supra; Crippen* v. *X. Y. Irrigating Ditch Co.*, 32 Colorado, 447; *Broad Run Investment Co.* v. *Deuel and Snyder Improvement Co.*, 47 Colorado, 573. The *Nichols Case* establishes that a claimant in the district of adjudication who is not made a party and served is not bound even after the four years. How, then, could such a decree apply to an outsider who could not have been made a party if he chose? An owner who, like the plaintiff, is in full possession and enjoyment, has no occasion or legal opportunity to bring suit until his right is challenged. *Saint* v. *Guerrerio*, 17 Colorado, 448; *Wheeler* v. *Northern Colorado Irrigation Co.*, 10 Colorado, 587. One who is in actual or constructive possession of property cannot be compelled to take measures against a mere claimant, and a law destroying his right if he fails to do so "is in no sense a limitation law but an unlawful confiscation." *Grosbeck* v. *Seeley*, 13 Michigan, 329. See also Cooley, Constitutional Limitations, 4th ed., p. 455, 7th ed., p. 523; Tiedeman, State & Federal Control of Persons and Property (1900), p. 871; *Farrar* v. *Clark*, 85 Indiana, 449; *Eldridge* v. *Kruhl*, 27 Iowa, 160; *Baker* v. *Kelly*, 11 Minnesota, 358; *Buty* v. *Goldfinch*, 74 Washington, 532; 46 L. R. A. (N. S.), 1065, and footnotes; *Lewis* v. *Soule*, 56 Iowa, 13; 2 N. W. Rep. 401, and footnotes; *Monk* v. *Carbin*, 58 Iowa, 13; *Pinkham* v. *Pinkham*, 60 Nebraska, 600; *Nind* v. *Myers*, 15 N. Dak. 400; *Foster* v. *Clark*, 21 Colo. App. 192; *Dimpfel* v. *Beam*, 41 Colorado, 25; *Clark* v. *Hough*, 49 Colorado, 197.

As construed by the court below in *Fort Lyon Canal*

Co. v. *Arkansas Valley Co.*, 39 Colorado, 332, and in the case at bar, this is not a statute of repose, but an unjust attempt to fasten a void judgment upon one who had no notice and could not even have been heard in opposition to it. See *Keyser* v. *Lowell*, 117 Fed. Rep. 400; *East Kingston* v. *Towle*, 48 N. H. 57.

Prior to the *Fort Lyon Company Case, supra*, it had been directly adjudicated in *Nichols* v. *McIntosh, supra*, that neither the two year nor the four year statute applied to anyone but a party to the action. This was a rule of property which could not constitutionally be altered by later decisions to the prejudice of plaintiff's right. *Gelpcke* v. *Dubuque*, 1 Wall. 222.

None of the cases from this court cited by defendant in error is applicable. They are mostly cases of actions *in rem*, where constructive service was upheld, as in the California "burnt-record" case, *American Land Co.* v. *Zeiss*, 219 U. S. 47, or cases dealing with the recording acts, such as *Vance* v. *Vance*, 108 U. S. 514. In all of them notice and an opportunity to act were given, by constructive service, statute, or in some other manner. In no case was a decree, rendered without jurisdiction of person or subject, made effective through a statute of limitations. *Barker* v. *Harvey*, 181 U. S. 481, is similar. It is one of a series of cases holding that the Federal Government, on taking over territory from another power, may by act of Congress require all persons claiming under grants from such power to submit their claims to a court or other body for confirmation. This was said by this court to be a constitutional method of separating public from private lands. Here again was notice and an opportunity to act before the statute attached; and where the question of title is one directly between the sovereign and a private party, the former may well have the right to compel the latter to prove his claim.

Appellant also argued that Colorado Laws of 1887,

pp. 297 *et seq.*, §§ 7–9, as amended in 1903, Rev. Stats. 1908, §§ 3349, 3350, which direct that all adjudicated priorities in each irrigation division be tabulated and administered in the order of their dates, without reference to their order in the respective component water districts, would be unconstitutional if construed to apply to his case retroactively.

Mr. L. F. Twitchell, with whom *Mr. Fred Farrar,* Attorney General of the State of Colorado, *Mr. Luther M. Goddard* and *Mr. Paul M. Clark* were on the brief, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a complaint brought by the plaintiff in error to quiet his title to alleged water rights on Tarryall Creek, a tributary of the South Platte River, and to enjoin the defendant Irrigation Company and the state officials from closing the plaintiff's ditch under an assertion of the Irrigation Company's superior right. The defendants justified under a decree establishing the Irrigation Company's priority and a statute making the decree conclusive after four years. The plaintiff replied and argued that the statutes if construed to have the alleged effect took his property without due process of law contrary to the Fourteenth Amendment. The defendants demurred and the state courts upheld the defence. 56 Colorado, 545.

The case is this: In 1879 the State established water districts, the plaintiff's water rights being in district 23 and the defendant's in district 8 directly below 23 upon the South Platte. Jurisdiction was conferred upon the District Courts for the proper county to adjudicate all questions concerning priority of appropriation and other questions of right between "owners of ditches drawing

water for irrigation purposes from the same stream or its tributaries within the same water district." Laws of 1879, Feb. 19, § 19, p. 99. Rev. Stats. 1908, § 3276. The provisions were enlarged by an Act of February 23, 1881, p. 142, but still seemingly confined to controversies between parties in the same district, until they came to the sections of limitation. By § 34 the act was not to prevent suits within four years, and by § 35 after "four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same . . . and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree." Laws of 1881, pp. 159, 160. Rev. Stats. 1908, §§ 3313, 3314. Later statutes were enacted in 1887 and 1903 creating divisions and requiring the Irrigation Division Engineers to tabulate the priorities and rights as established by decree in the different districts of their divisions and to administer the use of water accordingly. But these statutes are not material. The parties' rights were held to be fixed under the Act of 1881.

On December 10, 1883, the proper court for the defendant company's district made a decree that the company was entitled to a priority of right to the use of water for irrigation purposes of 1184 cubic feet of water per second from the South Platte and its tributaries, dated January 18, 1879, which was prior to the date of the plaintiff's rights. It will be observed that the Act of 1881 was in force when this decree was made. The plaintiff contends that the construction of § 35 of the act, as applying to parties in a different district, this construction having been first announced after the period of limitation had gone by, had the effect of a new statute declaring his rights barred by time already elapsed, and attempted to

make conclusive against him a proceeding to which he was not a party and in which he would not have been heard.

So far as the last objection goes the answer is that if it be true that the plaintiff was not entitled to be heard on the defendant's decree, still there was nothing to hinder the State from providing that if he took no step to assert his rights within a reasonable time after the judicial assertion of an adverse title, the decree being a public fact, he should lose those rights. See *Barker* v. *Harvey*, 181 U. S. 481. *Soper* v. *Lawrence Brothers Company*, 201 U. S. 359, 367, 368. *American Land Co.* v. *Zeiss*, 219 U. S. 47, 60. *Montoya* v. *Gonzales*, 232 U. S. 375, 378. The answer to the first half of the plaintiff's contention is no less plain. It is that the construction of a statute does not take a party's property without due process of law simply because it takes him by surprise and when it is too late for him to act on the construction and save his rights. That is all that the plaintiff has to complain of. There was no different construction of the statute by the court before the limitation had run, that might have lulled him to repose. The only decisions relied upon by the plaintiff as tending to favor him are *Nichols* v. *McIntosh*, 19 Colorado, 22 and *Sterling Irrigation Co.* v. *Downer*, 19 Colorado, 595, which were not rendered until 1893 and 1894, and both of which are consistent with *Fort Lyon Canal Co.* v. *Arkansas Valley Sugar Beet & Irrigated Land Co.*, 39 Colorado, 332, establishing the construction followed in this case. It should be added that however strong the argument for a different interpretation, the one adopted also was strongly supported, so that there can be no pretence that a perverse reading of the law was used as an excuse for giving a retrospective effect to the law of 1903. The decision was absolutely entitled to respect.

It is suggested that the cases cited established a rule of

property and that any departure from it violated the plaintiff's rights under the Fourteenth Amendment. But we already have said that the cases do not establish the rule supposed, and if they did something more would be necessary before the plaintiff could come to this court. *Sauer* v. *New York*, 206 U. S. 536, 547, 548; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76.

Judgment affirmed.

EX PARTE UNITED STATES, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 11, Original. Argued January 10, 11, 1916.—Decided December 4, 1916.

Mandamus, out of this court, is a proper remedy for enforcing a criminal sentence where the District Court which passed it has defeated its execution by an *ultra vires* order of suspension.

The proceeding should be directed to the District Judge, with a view to the annulment of the order of suspension; not to the clerk with a view to the issuance of a commitment in spite of it.

An accused person was duly sentenced in a District Court of the United States pursuant to an act of Congress, and the court then immediately made an order that execution of the sentence be suspended "during the good behavior of the defendant," the effect of which, if sustained, would have been to exempt him permanently and absolutely from the punishment provided by the act and reflected in the sentence. *Held*, that such a suspension—the legal equivalent of an absolute and permanent refusal to impose any sentence under the statute—was beyond the power of the court.

The Constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment; to the judiciary the power to try offenses under those laws and impose punishment within the limits and according to the methods therein provided; to the executive the power to relieve from the punishment so fixed by law and so judicially ascertained and imposed.

The power of Congress to fix punishment for crime includes the power, by probation or other suitable legislation, to equip the courts in advance with such latitude of discretion as will enable them to vary and control the application of punishment to suit the exigencies of each case, in accord with obvious considerations of humanity and public well-being;

But the courts, albeit under the Constitution they are possessed inherently of a judicial, discretionary authority which is ample for the wise performance of their duties in the trying of offenses and imposing of penalties as the laws provide, have no inherent constitutional power to mitigate or avert those penalties by refusing to inflict them in individual cases.

Semble, that, at common law, while the courts exercised a discretion to suspend either imposition or execution of sentence temporarily for purposes and in ways consistent with the due enforcement of the penal laws, so as to facilitate action by the pardoning power and avoid miscarriages of justice, they neither possessed nor claimed the power of permanent refusal to enforce them.

In weight and reason the decisions of the state courts deny the power of suspension here in question.

The order of suspension, being essentially unconstitutional, may not be sustained because it accords with a practice (of long standing though intermittent and not universal) indulged for the highest motives by many federal judges in Ohio and elsewhere.

The hardships and wrongs resulting from this practice and its annulment address themselves to the pardoning power; the evils which the practice was designed to avoid may be remedied for the future by appropriate legislation.

Under the exceptional circumstances of the case, this court, exercising its discretion, to the end that ample time may be afforded for executive clemency or such other action as the situation may require, directs that the writ of mandamus do not issue until the end of the term, unless earlier requested by the United States.

Upon application of the Government, presented by the Attorney General, a rule was made upon Honorable John M. Killits, Judge of the District Court of the United States for the Northern District of Ohio, directing that he show cause why a writ of mandamus should not issue requiring him to set aside the order described in the opinion. The case was heard upon the Government's

petition, the respondent's return, and the Government's reply. The facts are stated in the opinion.

The Attorney General and *Mr. Assistant Attorney General Wallace*, with whom *The Solicitor General* was on the briefs, for the United States:

It is the function of the judiciary to hear and determine cases and enforce determination by judicial process. The District Courts and Judges derive their power from the Constitution and the acts of Congress and from them alone. Article III, § 2, limits it to "cases" and "controversies." Federal judges are sworn to "administer justice" (Rev. Stat., § 712); and many sections of the Revised Statutes and the Judicial and Penal Codes prove by plain words that Congress expects the court and judge to hear and determine, and enter final judgments, and to carry those judgments into effect. The penal laws are mandatory. In varying expression they prescribe that punishment *shall* be inflicted. This direction is not obeyed until the punishment has been actually enforced.

The power to pardon, including the power to reprieve or commute, belongs to the Executive alone. *United States* v. *Klein*, 13 Wall. 128; *Ex parte Wells*, 18 How. 307; *Ex parte Garland*, 4 Wall. 333. *The Laura*, 114 U. S. 411, concerns only fines. If the power here in question appertain to the pardoning power, it cannot belong to the court; if it be not a power of pardon, the court could only acquire it through act of Congress or common law. See Blackstone, Tucker's ed., Book IV, ch. xxxi, p. 397. Congress has never attempted to bestow such a power on the District Courts or Judges. It has merely conferred a limited power of parole on judges in the District of Columbia (36 Stat. 864). If it had ever meant to confer so wide a power, it would have said so plainly. There are laws which provide for stay of execution on fines and

penalties in certain specific instances; for avoiding indefinite imprisonment on account of fines and costs; for motions for new trials, motions in arrest of judgment, and writs of error. Otherwise, the federal statutes evince a plain intention that sentence must be prompt and execution likewise.

Section 722 of the Revised Statutes, even if applicable to supply power, only operates where the federal laws are deficient in details. And the common law, as modified, may only be resorted to under that section to govern in the disposition of the case and the infliction of punishment. To resort to the local law for means to avoid inflicting punishment would offend § 722 as well as the related federal laws generally. But even if resort were to be had to the common law as modified, there is neither a common law nor any statute of Ohio conferring the power here involved. Courts have inherent power to suspend sentence while awaiting determination of some question upon the event of which depends the legal propriety of enforcing sentence, this being essential to due administration of the law. Arbitrary, capricious or indefinite suspension, on the other hand, destroys the due administration of the law, and transcends all inherent power. *Cf. Kendall* v. *United States*, 12 Pet. 524; *Porto Rico* v. *Rosaly*, 227 U. S. 270; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 479. A capricious suspension of the imposition of sentence is essentially a nonjudicial act, for it leaves the convict enjoying all his civil rights as well as immunity from punishment. Though in a less degree, the same is true of a capricious suspension of execution. Each, in effect, involves an exercise of the pardoning power; for while civil rights are not preserved or restored by a suspension of execution, no more are they by a commutation of sentence by the President. Of course, if a judge (after sentence and commitment) were to grant a parole under authority of some valid act of Congress, he would then

be enforcing the law, because the parole would be a statutory element of every punishment.

This court has frequently intimated that it does not consider it an inherent power of federal courts to capriciously stay proceedings upon their judgments or sentences. *Ex parte Gordon*, 1 Black, 503; *United States* v. *Mayer*, 235 U. S. 55.

In *Pointer* v. *United States*, 151 U. S. 396, the question whether authority existed to suspend sentence indefinitely was mooted but not decided. The common law did not allow it, and in this country the reasoning and the great weight of the state decisions condemn it.

The contrary state decisions are based on misconceptions of the common law or for other reasons are unsatisfactory. They relate almost entirely to delays in imposing sentence rather than suspension of execution. Of the cases usually referred to as supporting the power [citing decisions from New York, Michigan, New Jersey, New Hampshire, North Carolina, Florida, Massachusetts, Maine, California, Pennsylvania and Ohio] all save *Weber* v. *State*, 58 Ohio St. 616, and *State* v. *White*, 117 N. Car. 806, involve only postponement of the imposition of sentence. The expression in *Weber* v. *State*, *supra*, is a *dictum*.

Even a decision by the Ohio court would not bind this court upon a question of inherent or common-law powers. See Wells on Jurisdiction of Courts, §§ 208, 304; *Smith* v. *Alabama*, 124 U. S. 465; *Ex parte Wells*, 18 How. 310. Further as to the Ohio view see *State* v. *Baker*, 3 Ohio N. P. Rep. N. S. 624; 6 Page & Adams Anno. Ohio General Code, note, § 13698, p. 644; *Sterling* v. *Drake*, 29 Ohio St. 457; *Ohio* v. *Radcliffe* (Ct. Common Pleas, Franklin County), Ohio Law Bulletin, November 15, 1915.

The court may not judicially notice what the lower federal courts have done in similar cases. From the return and reply thereto, however, enough conceded facts

appear to show that (1) the practice never was alike in all parts of the United States; (2) within single States, the practice, in some cases, differed in different districts; (3) within a single district the practice at one period would be one way and at another period the other way; (4) many judges exercised the function without any claim of right other than the right of necessity, some even admitting their lack of power; (5) after 1891 and 1894, respectively, whenever exercised, it was in the face of the *Wilson Case*, 46 Fed. Rep. 748, and the *Pointer Case*, 151 U. S. 396, 420; and (6) it was always done in the face of statutes prescribing the punishment for crimes, and the established principle of public policy that offenders against the law should suffer its penalties. This practice being neither general nor consistent nor conformable to statutes or constitution, cannot be considered. *United States* v. *Buchanan*, 8 How. 82; *Thompson* v. *Riggs*, 5 Wall. 663; *United States* v. *Macdaniel*, 7 Pet. 1; *Basey* v. *Gallagher*, 20 Wall. 670. The *Midwest Oil Company Case*, 236 U. S. 459, is readily distinguished.

Humanitarian arguments do not touch the question of power or affect the necessity of preserving the Constitution. Ample relief may be afforded by enlarging the general parole law (36 Stat. 819). Judicial suspension opposes teachings of advanced criminology, with which the Government is in entire sympathy.

The respondent, *Hon. John M. Killits*, in his return to the rule to show cause and in a memorandum prepared by him in support thereof claimed: That the power of the court may be exercised broadly either by deferring the imposition or suspending the execution of sentence if such step seems consonant with the best interests of society—as where the minimum penalty named in a statute is disproportionate to the criminality involved in the particular offense, or where the law may be vindicated

and the individual saved, consistently. In a detailed statement, accompanied by much argument and illustration, the benefits accruing from the practice, in convenience of administration, in justice to the offender, and in the upbuilding of society, were eloquently set forth, together with reasons for believing that no adequate substitute may be provided.

In discussing the question in its legal and constitutional aspects, he dwelt particularly upon the practice of many federal courts and judges and the acquiescence of the Government generally. Also upon the common law and the practice in Ohio.

Local practice is significant of the common-law power. In Ohio the inherent power of the state court to suspend execution is no longer open to question. *Weber* v. *State*, 58 Ohio St. 616; *State* v. *Whiting*, 83 Ohio St. 447. In all discussion of the subject, judicial and lay, it is conceded that the power in both aspects existed in the common-law courts in 1787. See 49 American Law Review, 709, 713; *Gehrmann* v. *Osborne*, 79 N. J. Eq. 430, 441.

Mr. Edwin J. Marshall for respondent:

The power existed at common law. Hale's Pleas of the Crown, Vol. I, pp. 367, 19, 26; Vol. II, pp. 412, 401, 309, 35; Hawkins' Pleas of the Crown, Vol. II, ch. 51, § 8; ch. 33, § 144; ch. 6, § 8; ch. 15, §§ 40, 65; 1 Chitty's Crim. Law, ch. xix, p. 757; 2 Dyer, 235a; 2 Dyer, 205a; 2 Dyer, 165a. Although these authorities, confessedly, leave in some doubt whether indefinite suspension was a common-law power, they tend strongly to uphold it. Reprieves were either *ex arbitrio judicis* or *ex necessitate legis*. The latter covered all cases now dealt with by temporary suspensions, as for insanity, pregnancy, etc. The former seem to have applied whenever it appeared that injustice would result from conviction or execution. This power was an implied common-law exception to the statutory

duty to punish. Courts reprieved before and after judgment, to allow opportunity to apply for pardon and for other reasons inconsistent with a strict and invariable duty to punish. If sentences could be suspended for limited times in avoidance of injustices, why not indefinitely? Hale says reprieves were granted after conviction of small felonies as well as on capital convictions, and the cases in Dyer show that the justices controlled the execution of judgments. See further *Queen* v. *Richardson*, 8 Dowling's Practice Cases, 511 (1840); *Regina* v. *Ryan*, 7 Cox Crim. Cas. 109 (1855); 9 American Law Review, 600 (1875); *King* v. *Inhabitants of Wandsworth*, 1 Barn. & Ald. 63 (1817); *Rex* v. *Inhabitants of Southampton*, 2 Chitty, 215 (1818). But see also *King* v. *Inhabitants of the County of Oxford*, 13 East. 411 (1811). The power might have had its origin in the "law of nature" conception (Blackstone Comm., Intro., § 2). It is consistent with the duty to "administer justice." While modern decisions, based on these common-law authorities, disagree in their interpretations (see *Gehrmann* v. *Osborne*, 79 N. J. Eq. 430 (1911); *People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288 (1894)), long and continuous exercise by state and federal judges affords the best reason for believing that the power existed at common law. *State* v. *Crook*, 115 N. Car. 760 (1894). The exercise may have been common in England and yet no records made in the ancient reports, just as it has been frequent here in the federal practice though evidenced by barely a reported case.

Analysis of the decisions of the various States and Territories shows that some courts affirm the power broadly, others only as to imposition of sentence, others deny it *in toto*, and some, while they disown it in words, have applied it indirectly where justice demanded. Some base the denial on the executive power of pardon. The distinction between the power to delay imposing sentence and the power to suspend execution is illusory in reason,

and not recognized at common law. Many state decisions uphold the one power and some uphold the other also. The following cases in this court have some bearing: *United States* v. *Pile*, 130 U. S. 280; *Pointer* v. *United States*, 151 U. S. 396; *Ex parte Wells*, 18 How. 307; *United States* v. *Wilson*, 7 Pet. 150; *Whisky Cases*, 99 U. S. 594; *Nobles* v. *Georgia*, 168 U. S. 398. The power was exercised in *United States* v. *Gilbert*, Fed. Cas. No. 15,205; and (in principle) in *United States* v. *Blaisdell*, 3 Benedict, 132.

If the power does not exist in the courts, by parity the District Attorneys may not *nolle* indictments, the courts may not impose concurrent sentences, and neither may grant immunity to accomplices who testify. None of these court powers is derived from statute. All rest on practice and general acquiescence and the judicial duty to administer justice with humanity. If it be true that the power of suspension was limited at common law, it has grown with the changes in our institutions, and in our attitude toward the criminal. Its origin was judicial, not regal, as some courts say. In either event it inheres in the common-law conception of "courts," intended when that word appears in constitution and statute. If the practice has become a custom, the custom may become law even to the enlargement of judicial powers through its influence on the construction of statutes. The acquiescence of the executive and legislative branches, and the great evils which this power alone can properly mitigate, should be considered.

The power is inherent in the federal courts. The word "courts" in the Constitution carries the power if it existed at common law. That law (perhaps as modified) grafts the exception on all statutes imposing penalties. See also Rev. Stat., § 722. If not inherent, it is at least part of the courts' equipment until withdrawn by statute. *Howard* v. *United States*, 75 Fed. Rep. 986; *In re Henry*, 123 U. S. 372. In no other way these courts have acquired

power to impose concurrent sentences. *United States* v. *Patterson*, 29 Fed. Rep. 775; *Kirkman* v. *McClaughry*, 152 Fed. Rep. 255; *Ex parte Peake*, 144 Fed. Rep. 1016. Where Congress is silent federal courts are under common-law rules in administering criminal law. *Howard* v. *United States*, 75 Fed. Rep. 986; *United States* v. *Nye*, 4 Fed. Rep. 888; *Erwin* v. *United States*, 37 Fed. Rep. 470; *United States* v. *Maxwell*, 3 Dill. 275. [See also *United States* v. *Reid*, 12 How. 361, 365, and *Withaup* v. *United States*, (C. C. A.) 127 Fed. Rep. 530. REPORTER.] The power to *nolle* comes in the same way.

The continuous exercise amounts to a construction of the federal statutes supporting the power. *Stuart* v. *Laird*, 1 Cranch, 299; *McKeen* v. *Delancy's Lessee*, 5 Cranch, 22; *Fairbank* v. *United States*, 181 U. S. 283; *The Laura*, 114 U. S. 411; *Bank of United States* v. *Halstead*, 10 Wheat. 51; *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. 272, and other cases. The same principle sustains developments of the practice, for, if practice can construe, it may also modify the constructions of, the statutes.

There is no intrusion on the pardoning power. The two powers, judicial and regal, existed at common law and we inherited the duality. *Ex parte Wells*, 18 How. 307; *United States* v. *Wilson*, 7 Pet. 150. Civil disabilities are not removed by the court's action. *People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288; *People* v. *Stickle*, 156 Michigan, 557; *Spencer* v. *State*, 125 Tennessee, 64; *State* v. *Addy*, 43 N. J. L. 113. The two powers are harmonious. All branches of the Government have acquiesced. *Brown* v. *Walker*, 161 U. S. 591, holds that general amnesty laws are allowable, and *The Laura*, 114 U. S. 411, that fines and penalties may be remitted by subordinate officers under sanction of statute and long practice and acquiescence.

The defendant may even have a right to a suspension of sentence to apply for a pardon. *Ex parte Wells*, 18

How. 307; *Allen* v. *State,* Martin & Yerger, 294; *Crane* v. *State,* 94 Tennessee, 98; *State* v. *Chitty,* 1 S. Car. (Bailey) 379; *State* v. *Abbott,* 87 S. Car. 466. It then becomes a judicial duty to suspend sentence until pardon is refused.

By leave of court, a memorandum was submitted by the *New York State Probation Commission,* and a brief explaining and supporting the practice in the First Circuit, by *Mr. Richard W. Hale* and *Mr. Frank W. Grinnell.*

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

The accused pleading guilty to an indictment charging him in several counts with embezzling the money of a national bank of which he was an officer and making false entries in its books in violation of § 5209, Revised Statutes, was sentenced to imprisonment in the penitentiary for five years, the shortest term which under the statute could have been imposed upon him. At once at his request over the objection of the United States District Attorney the court ordered "that the execution of the sentence be, and it is hereby suspended during the good behavior of the defendant, and for the purpose of this case this term of this court is kept open for five years." The United States moved to set this order aside on the ground that as it was not a mere temporary suspension of the sentence to enable legal proceedings pending or contemplated to revise it to be taken, or application for pardon to be made, or any other legal relief against the sentence to be resorted to, but on the contrary as it was a permanent suspension based upon considerations extraneous to the legality of the conviction or the duty to enforce the sentence, the order of suspension was void as it was equivalent to a refusal to carry out the statute. The motion was denied. In the opinion giving its reasons for so doing the court, conceding that the suspension was permanent, stated the

general considerations which it deemed it was required to take into view in deciding whether the sentence should be enforced, conceding the legality of the conviction and sentence and their finality, as follows:

"Modern notions respecting the treatment of law breakers abandon the theory that the imposition of the sentence is solely to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of sentence, but affecting its extent and character we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies."

After pointing out the peculiar aptitude possessed by a trial judge for the appreciation of such conditions and the imperative duty which rested upon such judge to consider and weigh the matters stated and to determine as an inherent attribute of judicial power whether a permanent suspension of the term of imprisonment fixed by the statute should be ordered, the circumstances upon which it was concluded that a permanent suspension should be directed were stated in part as follows:

"We took into account the peculiar circumstances under which his crime was committed, having regard to the temptations which from time to time encompassed him, and his personal necessities, and the purposes for which his appropriations were made. Also, the fact that his friends made his employers whole, and that otherwise he had so commended himself to the favor of his employers suffering by his crime, that they at all times as well as now evince a disposition to forgive his abuse of their confidence, and to support him against the punishment which the law provides. We find that otherwise than for this crime, his disposition, character and habits have so strongly com-

mended him to his friends, acquaintances and persons of his faith, that they are unanimous in the belief that the exposure and humiliation of his conviction are a sufficient punishment, and that he can be saved to the good of society if nothing further is done with him."

After further elaborating considerations of a like nature and stating very many circumstances confirming those mentioned, to leave no room for doubt that its action was intended to be permanent and was based alone on the extraneous circumstances stated, the court said:

"Passing now to the concrete case, we observe for the benefit of the United States that nothing exists in this case which moved the court to suspend the execution of sentence to prevent 'an abuse of the court's process, or to prevent an injustice being done to the defendant' so far as it may be said that abstract justice required defendant to suffer for his crime. However, we considered the defendant from many standpoints to be as worthy of the benefit of the discretion to suspend the execution of his sentence as any other convict upon whom that favor has hitherto been bestowed."

Following a written demand which was thereafter made upon the clerk to issue a commitment which was refused by him on the ground that the sentence had been suspended and the further refusal of the judge to direct the clerk to issue such commitment, the United States sought and obtained a rule to show cause why a mandamus should not be awarded directing the judge to vacate the order of suspension, under which the subject is now before us for consideration.

The remedial appropriateness of the writ of mandamus is at the threshold questioned, but we dispose of the subject by a mere reference to adjudged cases conclusively establishing the want of foundation for the contention. *Ex parte Bradley*, 7 Wall. 364; *Life & Fire Insurance Company* v. *Wilson*, 8 Pet. 291; *In re Winn*, 213 U. S.

458; *In re Metropolitan Trust Co.*, 218 U. S. 312; *Ex parte Metropolitan Water Company*, 220 U. S. 539. In addition, however, it is urged that as the right to resort to the extraordinary remedy by mandamus must rest upon the assumption that the order of suspension was absolutely void, therefore the rule for the writ should have been directed not against the judge, but against the clerk to compel him to issue the commitment. But we pass from its consideration, as we are of opinion that its want of merit will be completely demonstrated by the slightest appreciation of the judicial duties of the court below and the ministerial relation of the clerk of the court to the same.

The return to the rule and the statement in support of the same lucidly portray the contentions involved in the question of power to be decided and the subject in all its aspects has been elaborately discussed, not only by the printed arguments of the parties, but in addition light has been thrown on the general question by an argument submitted by the New York State Probation Commission, explaining the statutory system of parole prevailing in that State, and by an able argument presented by members of the Bar of the First Circuit in behalf of a practice of mitigating or pretermitting, when deemed necessary, the statutory punishment for crimes which it is declared has prevailed in the United States courts in that circuit for many years.

The argument on behalf of the respondent concedes that the order of suspension was permanent and absolutely removed the accused from the operation of the punishment provided by the statute; and it is further conceded that a suspension of this character was the equivalent of an absolute and permanent refusal to impose under the statute any sentence whatever. However absolute may be the right thus asserted, it is nevertheless said it is not without limitation, since it may not be capriciously called

into play. Passing the question whether this assumed restriction is not in the nature of things imaginary as the result of the scope of the authority asserted, let us come to dispose of the contention made by examining the propositions relied upon to sustain it.

They are: 1. That the right to refuse to impose a sentence fixed by statute or to refuse to execute such a sentence when imposed, is a discretion inhering in the judicial power to try and punish violations of the criminal law. 2. That even if there be doubt on this subject as an original proposition, such doubt is dispelled as the right was recognized and frequently exerted at common law. 3. That the power claimed has also been recognized by decisions of state courts and of United States courts of original jurisdiction to such an extent that the doctrine is now to be considered as not open to controversy. 4. That whatever may be the possibility of dispute as to this last view, at least it cannot be denied that in both the state and federal courts, over a very long period of time, the power here asserted has been exercised often with the express, and constantly with the tacit, approval of the administrative officers of the state and federal governments, and has been also tacitly recognized by the inaction of the legislative department during the long time the practice has prevailed, to such an extent that the authority claimed has in practice become a part of the administration of criminal law both state and federal, not subject to be now questioned or overthrown because of mere doubts of the theoretical accuracy of the conceptions upon which it is founded.

1. *The contention as to inherent judicial power.*

Indisputably under our constitutional system the right to try offences against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess

ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department.

The proposition might well be left with the demonstration which results from these considerations, but the disregard of the Constitution which would result from sustaining the proposition is made if possible plainer by considering that, if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.

2. *The contention as to support for the proposition at common law.*

The common law is thus stated in Hale's Pleas of the Crown, vol. 2, chap. 58, p. 412:

"Reprieves or stays of judgment or execution are of three kinds, viz:

"I. *Ex mandato regis.* . . .

"II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transportation. Crompt. Just. 22, b. and these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery, altho their sessions be adjourned or finished, and this by reason of common usage. Dy. 205 a.

"III. *Ex necessitate legis*, which is in case of pregnancy, where a woman is convict of felony or treason."

Blackstone thus expresses it:

"The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon; whereof the former is temporary only, the latter permanent.

"I. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis;* either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right.

"Reprieve may also be *ex necessitate legis:* as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis.*" (Book IV, ch. xxxi, pp. 394–395.)

While it may not be doubted under the common law as thus stated that courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured or that a violation of law in other respects might be prevented, we are unable to perceive any ground for sustaining the proposition that at common law the courts possessed or claimed the right which is here insisted upon. No elaboration could make this plainer than does the text of the passages quoted. It is true that, owing to the want of power in common law courts to grant new trials and to the absence of a right to review convictions in a higher court, it is we think to be conceded: (a) That both suspensions of sentence and suspensions of the enforcement of sentence, temporary in character, were often resorted to on grounds of error or miscarriage of justice which under our system would be corrected either by new trials or by the exercise of the power to review. (b) That not infrequently, where the suspension either of the imposition of a sentence or of its execution was made for the purpose of enabling a pardon to be sought or bestowed, by a failure to further proceed in the criminal cause in the future, although no pardon had been sought or obtained, the punishment fixed by law was escaped. But neither of these conditions serves to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary judicial power to permanently refuse to enforce the law.

And we can deduce no support for the contrary contention from the rulings in 2 Dyer, 165a, 205a and 235a, since those cases but illustrate the exercise of the conceded, reasonable, discretionary power to reprieve to enable a lawful end to be attained. Nor from the fact that common law courts possessed the power by recognizances to secure good behavior, that is, to enforce the law, do we think any support is afforded for the proposition that those courts possessed the arbitrary discretion to permanently decline to enforce the law. The cases of *Rex* v. *Hart*, 30 How. State Trials, 1344, and *Regina* v. *Dunn*, 12 Q. B. 1026, 1041, certainly do not tend to so establish, since they simply manifest the exertion of the power of the courts after a conviction and the suffering of the legal penalty to exact from the convicted person a bond for his good behavior thereafter.

3. *The support for the power asserted claimed to be derived from the adjudication of state and federal courts.*

Coming first to the state courts, undoubtedly there is conflict in the decisions. The area, however, of conflict will be narrowed by briefly stating and contrasting the cases. We shall do so by referring chronologically to the cases denying the power, and then to those relied upon to establish it.

In 1838 the Supreme Court of North Carolina in *State* v. *Bennett*, 4 Dev. & Battle's Law, 43, was called upon to decide whether a trial court had the right to permanently remit upon condition a part of a criminal sentence fixed by statute. The court said:

"We know that a practice has prevailed to some extent of inflicting fines with the provision that they should be diminished or remitted altogether upon matter thereafter to be done, or shown to the Court by the person convicted. But we can find no authority in law for this practice, and feel ourselves bound, upon this first occasion when it is brought judicially to our notice, to declare it illegal."

In 1860 in *People* v. *Morrisette*, 20 How. Pr. 118, an accused after pleading guilty asked a suspension of sentence and to be then discharged from custody. The court said:

"I am of the opinion the court does not possess the power to suspend sentence indefinitely in any case. As I understand the law, it is the duty of the court, unless application be made for a new trial, or a motion in arrest of judgment be made for some defect in the indictment, to pronounce judgment upon every prisoner convicted of crime by a jury, or who pleads guilty. An indefinite suspension of the sentence prescribed by law is a quasi pardon, provided the prisoner be discharged from imprisonment. No court in the state has any pardoning power. That power is vested exclusively in the governor."

In *People* v. *Brown*, 54 Michigan, 15, in deciding that no power to permanently suspend a sentence existed, speaking through Mr. Chief Justice Cooley, the court said:

"Now it is no doubt competent for a criminal court, after conviction, to stay for a time its sentence; and many good reasons may be suggested for doing so; such as to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be: *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133; but it was not a suspension of judgment of this sort that was requested or desired in this case; it was not a mere postponement; it was not delay for any purpose of better advising the judicial mind what ought to be done; but it was an entire and absolute remission of all penalty and the excusing of all guilt. In other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and, by postponing indefinitely the performance of this duty indirectly but to complete effect grant to the respondent a pardon for his crime."

And, considering the doctrine as to the want of power

thus expounded from the point of view of the common law and of every argument here relied upon, state courts have in the cases which are in the margin in careful opinions denied the existence of the power now claimed.[1]

The cases to the contrary are these, omitting one in a court of original jurisdiction in Massachusetts referred to by counsel but in which there is no written opinion:

In 1874 in *Commonwealth* v. *Dowdican's Bail*, 115 Massachusetts, 133, the right in a criminal case "to lay the case on file" and postpone the sentence was sustained, the court declaring that the practice had long existed, and was recognized by statutes one of which regulated the granting of parole by courts in liquor cases.

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[1] *People* v. *Kennedy*, 58 Mich. 372 (1885); *Gray* v. *State*, 107 Ind. 177 (1886); *People* v. *Blackburn*, 6 Utah, 347 (1890); *State* v. *Voss*, 80 Ia. 467 (1890); *People ex rel. Benton* v. *Court*, 8 N. Y. Crim. Rep. 355 (1892), affirmed in 66 Hun, 550 (1893); *In re Strickler*, 51 Kans. 700 (1893); *People ex rel. Smith* v. *Allen*, 155 Ill. 61 (1895); *In re Markuson*, 5 N. Dak. 180 (1895); *In re Webb*, 89 Wis. 354 (1895); *United States* v. *Folsom*, 8 N. Mex. 651 (1896); *State* v. *Murphy*, 23 Nev. 390 (1897); *Neal* v. *State*, 104 Ga. 509 (1898); *Hawaii* v. *Pedro*, 11 Haw. 287 (1898); *In re Beck*, 63 Kans. 57 (1901); *Miller* v. *Evans*, 115 Ia. 101 (1901); *People* v. *Barrett*, 202 Ill. 287 (1903); *In re Flint*, 25 Utah, 338 (1903); *State* v. *Dalton*, 109 Tenn. 544 (1902); *Grundel* v. *People*, 33 Colo. 191 (1905); *Tuttle* v. *Lang*, 100 Me. 123 (1905); *McCampbell* v. *State*, 116 Tenn. 98 (1905); *Ex parte St. Hilaire*, 101 Me. 522 (1906); *Tanner* v. *Wiggins*, 54 Fla. 203 (1907); *State* v. *Hockett*, 129 Mo. App. 639 (1908); *Ex parte Clendenning*, 22 Okla. 108 (1908); *Ex parte Cornwall*, 223 Mo. 259 (1909); *Wall* v. *Jones*, 135 Ga. 425 (1910); *State* v. *Smith*, 173 Ind. 388 (1910); *State ex rel. Cary* v. *Langum*, 112 Minn. 121 (1910); *Ex parte Peterson*, 19 Ida. 433 (1911); *State* v. *Abbott*, 87 S. Car. 466 (1911); *Spencer* v. *State*, 125 Tenn. 64 (1911); *State* v. *Sapp*, 87 Kans. 740 (1912); *Daniel* v. *Persons*, 137 Ga. 826 (1912); *State* v. *Sturgis*, 110 Me. 96 (1912); *State* v. *Talberth*, 109 Me. 575 (1912); *Fuller* v. *State*, 100 Miss. 811 (1911); *Ex parte Bugg*, 163 Mo. App. 44 (1912); *Snodgrass* v. *State*, 150 S. W. (Texas) 162 (1912); *Roberts* v. *Wansley*, 137 Ga. 439 (1912); *Hancock* v. *Rogers*, 140 Ga. 688 (1913); *Brabandt* v. *Commonwealth*, 157 Ky. 130 (1914); *Ex parte Hart*, 29 N. Dak. 38 (1914); *Reese* v. *Olsen*, 44 Utah, 318 (1914).

The case just cited was approvingly referred to in *Sylvester* v. *State*, 65 N. H. 193, and declared to express the practice long prevailing in New Hampshire.

In 1894, in *People ex rel. Forsyth* v. *Court of Sessions*, 141 N. Y. 288, in holding that a trial court had power to permanently suspend a sentence for reasons dehors the legality of the conviction, it was declared that such power existed at common law and hence prevailed in the State, this being supported by a quotation from Hale's Pleas of the Crown. In addition it was said, referring to a state parole statute enacted subsequent to the conviction, that such statute, while it conferred no new or other power than that possessed at common law, nevertheless imposed the duty to see to it that the power was not lost to impose future punishment after the release if the condition of suspension was violated.

In the cases cited in the margin the power was upheld upon the rulings in *Commonwealth* v. *Dowdican's Bail*, *supra*, and the *Forsythe Case*, *supra*, or because of a practice long prevailing.[1]

Leaving aside the question of the asserted duty to sustain the doctrine because of the long established prac-

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[1] *State* v. *Addy*, 43 N. J. L. 113 (1881); *People* v. *Mueller*, 15 Chicago Legal News, 364 (1883); *Commonwealth* v. *Maloney*, 145 Mass. 205 (1887); *Ex parte Williams*, 26 Fla. 310 (1890); *State* v. *Crook*, 115 N. Car. 760 (1894); *State* v. *Whitt*, 117 N. Car. 804 (1895); *People ex rel. Dunnigan* v. *Webster*, 14 Misc. (N. Y.) 617 (1895); *Weber* v. *State*, 58 Ohio St. 616 (1898); *Shaefer* v. *Ohio*, 7 Ohio Cir. Ct. (N. S.) 292 (1905); *In re Clara Lee*, 3 Ohio N. P. (N. S.) 533 (1905); *State* v. *Hilton*, 151 N. Car. 687 (1909); *State* v. *Drew*, 75 N. H. 402 (1909); *State* v. *Drew*, 75 N. H. 604 (1910); *Ex parte Hinson*, 156 N. Car. 250 (1911); *Gehrmann* v. *Osborne, Warden*, 79 N. J. Eq. 430 (1911); *People* v. *Goodrich*, 149 N. Y. Supp. 406 (1914); *State* v. *Tripp*, 168 N. Car. 150 (1914); *State* v. *Johnson*, 169 N. Car. 311 (1915). See *Green* v. *State*, 88 Ark. 290 (1908); *Joiner* v. *State*, 94 Ark. 198 (1910); *People* v. *Patrich*, 118 Cal. 332 (1897); *Commonwealth* v. *Nuber*, 6 Pa. Super. Ct. Rep. 420 (1898); *Commonwealth* v. *Dunleavy*, 16 Pa. Super. Ct. Rep. 380 (1901).

tice, which we shall hereafter consider, we think it clear that the long and settled line of authority to which we have previously referred denying the existence of the power is in no way weakened by the rulings which lie at the basis of the cases relied upon to the contrary. In the first place, on the face of the opinion in *Commonwealth* v. *Dowdican's Bail*, *supra*, it would seem certain that that case treated the power as being brought by the state legislation which was referred to within the domain of reasonable discretion, since by the effect of that legislation the right to exert such power, if not directly authorized, was at least by essential implication sanctioned by the state law. In the second place, in so far as the *Forsyth Case*, *supra*, is concerned and its declaration as to what was the common law upon the subject, the error thus fallen into is not only demonstrated by what we have said as to the common law, but is additionally shown by the fact that the quotation from Hale's Pleas of the Crown made in the opinion contains clauses supporting the opinion expressed as to the common law when in fact the clauses in question, it would seem, were by some error of citation mistakenly attributed to Hale. We say this because the clauses referred to and attributed to Hale in the quotation are not found in any edition of the Pleas of the Crown which we have been able to examine, and it is stated by counsel for the United States that after diligent search no passage containing the clauses has been discovered, and the existence of any edition of the work containing them is not pointed out by opposing counsel. But whether this be well founded or not, as the conclusion concerning the common law which the case expressed is we think obviously unsound, we are unable on the authority of such a mistaken view to disregard the long established and sound rule laid down in the many state cases which we have quoted.

So far as the courts of the United States are concerned,

it suffices to say that we have been referred to no opinion maintaining the asserted power, and on the contrary in the opinion in the only case in which the subject was considered it was expressly decided the power was wanting. *United States* v. *Wilson*, 46 Fed. Rep. 748 (1891). It is true that in the District of Columbia the existence of the power was maintained. *Miller* v. *United States*, 41 App. D. C. 52 (1913). But the unsoundness of the grounds upon which the conclusion was based is demonstrated by what we have previously said; and aside from this, as the subject was covered by an Act of Congress conferring power of parole (Act of July 25, 1910, 36 Stat. 864), the case requires no further consideration.

4. *The duty to recognize the power as lawful because of its exertion in practice by the state and federal courts and the implications arising therefrom.*

There is no doubt that in some States, without reference to probation legislation or an affirmative recognition of any doctrine supporting the power, it was originally exerted and the right to continue to do so came to be recognized solely as the result of the prior practice. *Gehrmann* v. *Osborne, Warden*, 79 N. J. Eq. 430.

As to the courts of the United States, in one of the circuits, the first, especially in the Massachusetts district, it is admitted the practice has in substance existed for probably sixty years as the result of a system styled "laying the case on file." The origin of this system is not explained, but it is stated in the brief supporting the practice that courts of the United States have considered the existing state laws as to probation and have endeavored in a certain manner to conform their action thereto. It is true also, that in the courts of the United States, sometimes in one or more districts in a circuit and sometimes in other circuits, in many instances the power here asserted was exerted, it would seem without any question, there being no objection raised by the representatives of

the United States; indeed it is said that in Ohio where the power, as we have seen, was recognized as existing, it was exerted by Mr. Justice Matthews of this court when sitting at circuit, and there and elsewhere, it is pointed out, the power was also exerted in some instances by other judges then or subsequently members of this court. But yet it is also true that, numerous as are the instances of the exertion of the power, the practice was by no means universal, many United States judges, even in a district where the power had been exerted, on a change of incumbency persistently refusing to exert the power on the ground that it was not possessed. Indeed so far was this the case that we think it may be said that the exertion of the power under the circumstances stated was intermittent and was not universal but partial.

As amply shown by the case before us, we think also it is apparent that the situation thus described was brought about by the scrupulous desire of judges not to abuse their undoubted discretion as to granting new trials, and yet to provide a remedy for conditions in cases where a remedy was called for in the interest of the administration of the criminal law itself, as well as by the most obvious considerations of humanity and public well-being,—conditions arising in the nature of things from the state of proof in cases coming before them which could not possibly have been foreseen and taken into consideration by the law-making mind in fixing in advance the penalty to be imposed for a particular crime. And the force of this conclusion will become more manifest by considering that nowhere except sporadically was any objection made to the practice by the prosecuting officers of the United States, who indeed it is said not infrequently invoked its exercise. Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise in the very nature of things

amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal, presents a grave situation. But we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future. On the contrary, so far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; and so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject, by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete.

While the conclusions just stated inevitably exact that the rule which is before us be made absolute and that the mandamus issue, nevertheless we are of opinion that the exceptional conditions which we have described require that we exercise that reasonable discretion with which we are vested to temporarily suspend the issue of the writ, so as to afford ample time for executive clemency or such other action as may be required to meet the sit-

uation. And for this purpose the issue of the writ will be stayed until the end of this term, unless the United States otherwise requests, when it will go as a matter of course.

Rule made absolute.

LEHON *v.* CITY OF ATLANTA.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 103. Submitted November 14, 1916.—Decided December 4, 1916.

Ordinances of a city which subject the business of private detectives and detective agencies to police supervision, and provide that no person shall engage in such business without first obtaining recommendation by the Board of Police Commissioners, taking the oath prescribed for city detectives and giving a bond in the sum of $1,000 to secure proper conduct, do not violate the Fourteenth Amendment.

A contention to the contrary is not, however, frivolous.

A State, under her police power, may supervise and regulate the police business within her limits and all that pertains to it, and this as regards the citizens of other States as well as her own.

Even though the ordinances were construed by local officials, in other cases, as excluding nonresidents from the detective business in Georgia, one who made no application to comply with them and thus failed to obtain a construction of them in his own case, is not entitled to raise in this court the question whether they discriminate against him as a citizen of another State. *Gundling* v. *Chicago*, 177 U. S. 183.

16 Ga. App. 64, affirmed.

THE case is stated in the opinion.

Mr. John D. Little, Mr. Arthur G. Powell, Mr. Marion Smith and *Mr. Max F. Goldstein* for plaintiff in error.

Mr. Samuel D. Hewlett and *Mr. James L. Mayson* for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is the validity of ordinances of the City of Atlanta, Georgia, which subject the business of a private detective or detective agency to police supervision and provide that no person shall carry on such business without being first recommended by the Board of Police Commissioners and taking the oath of a city detective and giving a bond in the sum of $1,000 as prescribed by the ordinances.

Plaintiff in error was convicted in the recorder's court of the city of a violation of the ordinances and sentenced to pay a fine, with the alternative of imprisonment. Under the local procedure a petition for certiorari was presented to the judge of the superior court of the county to review the conviction, and was refused "sanction," to use the local word. This action was approved by the Court of Appeals and the judgment affirmed.

The Court of Appeals rejected the contention that the ordinances were unreasonable and void under the constitution of the State, to review which decision we, of course, have no power; and it also sustained the ordinances against the contention that they offended the clauses of the Fourteenth Amendment to the Constitution of the United States. The latter contention is repeated here.

His contention, in its most general form, is that the ordinances abolish the occupation of private detective by the requirements of application for a permit to the police commission of the city, the approval of the chief of police, oath of office and to work under police supervision. These requirements, it is insisted, offend the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The contention makes a federal question, and, as we are

not disposed to consider it frivolous, a motion to dismiss which is made will be denied.

In passing upon the merits we assume the facts of the complaint were established; that is, that plaintiff in error was proved to have acted as a private detective, though he denied and denies it, and that his services were those of a "sleuth," though he asserts they were only those of a clerk. We make these assumptions against the denials of plaintiff in error because to sustain the denials he selects parts of the testimony only and ignores also the deduction that it was possible to make even from that testimony.

The only question for our decision is the validity of the law, and of that we have no doubt. Nor are we disposed to take much time in its discussion, notwithstanding the earnest argument of plaintiff in error. The extent of the police power of the State has been too recently explained to need further enunciation. The present case is easily within its principle. It would be very common-place to say that the exercise of police is one of the necessary activities of government and all that pertains to it may be subjected to regulation and surveillance as a precaution against perversion. The Atlanta ordinances do no more. They provide in effect that all who engage in it or are connected with it as a business shall have the sanction of the State, have the stamp of the State as to fitness and character, take an oath to the State for faithful execution of its duties and give a bond for their sanction. This the State may do against its own citizens and may do against a citizen of Louisiana, which plaintiff in error is, or against a citizen of any other State.

But the ruling of the local officers in refusing approval of applications of nonresidents of Georgia is urged as a construction of the ordinances or laws of the State and, it is contended, makes them discriminatory against citizens of other States. Plaintiff in error, however, ad-

mits he made no effort to comply with the ordinances. The Court of Appeals, therefore, was of opinion that, whether certain sections of the Penal Code of the State did or did not exclude citizens of other States from engaging as private detectives, plaintiff in error was deprived of no constitutional right, for "as to him, the ordinances were never construed at all." In other words, that he had not asserted a right, and in the absence of assertion could not have it judicially passed on. We concur in the ruling. It is within the principle of *Gundling* v. *Chicago*, 177 U. S. 183. To complain of a ruling one must be made the victim of it. 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.

Judgment affirmed.

ATLANTIC CITY RAILROAD COMPANY *v.* PARKER.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 111. Argued November 16, 1916.—Decided December 4, 1916.

In this action for personal injury, governed by the Safety Appliance and Employers' Liability Acts, it is *held*, that the evidence concerning the fitness and efficiency of the automatic couplers in question, and concerning the special condition which existed, as a result of the train's being on a curve when the couplers failed and the accident occurred, did not preclude a reasonable inference that the Safety Appliance Act was not complied with.

When couplers fail to couple automatically on a straight track because of lateral play of the drawheads, the jury may properly infer that such a degree of play was unnecessary and violative of the Safety Appliance Act, in the absence of any satisfactory explanation.

The case is not different where the failure to couple occurs on a curve if the effect of the curvature may have been negligible.
87 N. J. L. 148, affirmed.

THE case is stated in the opinion.

Mr. Thomas E. French, with whom *Mr. Samuel H. Richards* and *Mr. Charles Heebner* were on the brief, for plaintiff in error:

The failure of the couplers to couple when the cars are on a curve and the couplers are not in line will not support a finding that the Safety Appliance Act has been violated. Congress did not intend to require the impossible. *Baugham* v. *New York, Philadelphia & Norfolk R. R. Co.*, 241 U. S. 237; *Morris* v. *St. Louis S. W. Ry. Co.*, 158 S. W. Rep. 1055. The question here was left open in *San Antonio & Aransas Pass Railway Co.* v. *Wagner*, 241 U. S. 476. The case of *St. Louis & San Francisco R. R. Co.* v. *Brown*, 241 U. S. 223, is distinguishable because there the engineer was negligent and the plaintiff did not assume that risk.

Here there was no negligence of the engineer, plaintiff himself directed the movements of the engine, the couplers admittedly were in no way defective, and there was no evidence that defendant could have provided better or safer appliances. Therefore the court should have granted a nonsuit, under the New Jersey practice, or directed a verdict.

As the evidence stood, the real question concerned the meaning of the Act. The court should not have submitted this to the jury.

The court erred in not granting defendant's request for instructions to the effect that if the jury found the coupler such as would couple automatically by impact and that it was in order, then plaintiff assumed the risk and could not recover, and to the effect that if they found the defendant could have reasonably anticipated the result of

putting his hand on the coupler while the engine was coming back under signal, it was a risk of his employment known to him which he assumed and the verdict must be for the defendant.

Mr. David O. Watkins for defendant in error:

The duty to supply automatic couplers (including proper drawheads), which comply with the standard of the Safety Appliance Act, is absolute. *St. Louis & Iron Mountain Ry. Co.* v. *Taylor*, 210 U. S. 282; *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559. The couplers must work at all times and under all conditions. It is not an excuse that they will operate properly on straight track; they must operate on curves as well. *Chicago, Rock Island & Pacific Ry. Co.* v. *Brown*, 229 U. S. 317; *Dilk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580; *United States* v. *Illinois Central R. R. Co.*, 177 Fed. Rep. 801; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Norfolk & Western R. R. Co.* v. *Hazelrigg*, 184 Fed. Rep. 828.

The evidence shows conclusively that the couplers did not work at the time of the attempted coupling. It was for the jury to determine whether the couplers would couple automatically.

It was negligence for defendant's employés to leave the uncoupled train in such position that the couplers would not operate.

Under the Liability Act contributory negligence is but a partial defence.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the defendant in error to recover for the loss of an arm crushed while he was coupling a tender to a car. There is no dispute that the case is governed by the Acts of Congress—the Safety Appliance Act of March 2, 1893, c. 196, §§ 2, 8; 27 Stat. 531,

and the Employers' Liability Act of April 22, 1908, c. 149, §§ 3, 4; 35 Stat. 65. The facts material here are few. The engine had backed for the purpose of coupling with the car and had failed to couple automatically by impact. Thereupon the plaintiff, noticing that the drawhead was not in line with the one on the engine, put in his arm for the purpose of straightening it and thus making the coupling possible, and was caught. An exception was taken to the refusal of a ruling that no negligence was shown on the part of the Railroad Company, but the Court of Errors and Appeals affirmed the judgment of the court below. 87 N. J. L. 148.

If there was evidence that the railroad failed to furnish such "couplers coupling automatically by impact" as the statute requires (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18, 19), nothing else needs to be considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and further, the car was on a curve, which of course would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law. *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559, 571. *Chicago, Rock Island & Pacific Ry. Co.* v. *Brown*, 229 U. S. 317, 320, 321. *San Antonio & Aransas Pass Ry. Co.* v. *Wagner*, 241 U. S. 476, 484.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL. *v.* UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 290. Argued October 13, 16, 1916.—Decided December 4, 1916.

Under circumstances which induce the court to say that there could have been no purpose to discriminate against the Tennessee Central, the two appellant railroad companies planned and matured an arrangement for the interchange of traffic at Nashville which, stated generally, took the following form, *viz:* The terminal, connecting their main lines and consisting of tracks, yards, depots and other railroad property, owned in part by the appellant railroad companies in severalty, and in part held as to title by appellant Terminal Company, but leased by it to them in joint tenure, was placed under the management of an unincorporated organization called the "Nashville Terminals," along with additional connecting trackage contributed by the two railroads from their respective main and side tracks. The "Nashville Terminals," under control of the two appellant railroad companies, maintained and operated this collective property and thus served, within the switching limits so constituted, to interchange the traffic of the two roads at Nashville. The total expense of maintenance and operation was apportioned between the two constituent railroad companies on the basis of the total number of cars and locomotives handled for each, and no switching charges were made against either. The appellant Terminal Company was, in origin, a creature of the other two appellants; the property which it held in and about the terminal was obtained directly or indirectly through their financial aid, and the Louisville & Nashville owned all its stock, as well as 71% of the stock of the Nashville & Chattanooga. The Interstate Commerce Commission directed appellants to abstain from refusing to switch interstate competitive traffic for the Tennessee Central on the same terms as noncompetitive, while exchanging both kinds on the same terms for each other, and ordered them to establish rates for the switching of all interstate traffic for the Tennessee Central the same as they contemporaneously maintained between themselves.

Held, under these circumstances, as more fully developed in the opinion:

(1) That for all practical purposes the effect of the arrangement was to make the two appellant railroad companies the joint owners of the terminal.

(2) That by § 3 of the Interstate Commerce Act they were as such joint owners protected in the same degree as would be an owner in severalty from being required to give the use of their terminal facilities to another carrier engaged in like business.

(3) That their mere refusal to switch for the Tennessee Central would not be an unlawful discrimination.

(4) That the method of switching through a single agency, as described, did not involve unlawful discrimination against that railroad.

(5) That, consequently, the order of the Commission was erroneous and must be enjoined.

(6) But that appellants might not lawfully discriminate between competitive and noncompetitive goods; and, so long as they received the latter the Commission could require them to receive the former upon being paid reasonable compensation, taking into account their pecuniary outlay on the terminal.

227 Fed. Rep. 258; *id.* 273, reversed.

THE case is stated in the opinion.

Mr. Edward S. Jouett, with whom *Mr. Henry L. Stone*, *Mr. W. A. Colston* and *Mr. Jno. B. Keeble* were on the briefs, for the Louisville & Nashville Railroad Company:

Each plaintiff pays for, and through the joint agency performs, the service incident to switching its car between the point of interchange and the industry, in the case of every car which is hauled inbound or outbound over its tracks. Accordingly neither switches for the other nor discriminates against the Tennessee Central in refusing to switch for it.

If the arrangement should be held to constitute any sort of switching service, rendered by one of the constituent companies to the other, it would not constitute an unjust or undue discrimination for the reason that the circumstances and conditions under which the service is rendered are totally dissimilar from those necessarily existing in

connection with the handling of cars for the Tennessee Central. In pursuing its discrimination theory the Commission is led into declaring, and logically so, that the plaintiffs must switch for the Tennessee Central at confiscatory rates, that is for cost, without any return on the property used. This is illegal because the constituent companies would get nothing to equalize the interest or return on their property, and nothing for overhead expenses. The necessity for the charge being indefinite—the cost of service—is another demonstration of the impracticability, in addition to the illegality, of the Commission's theory of discrimination.

Certainly no reason or authority can be found for allowing the Commission to substitute something else for the facility which a carrier gives to one and refuses to give to another. If the joint arrangement of plaintiffs be a facility, the denial of which to the Tennessee Central constitutes a discrimination under § 3 of the Commerce Act, then the way to remove the discrimination is to order plaintiffs to discontinue the arrangement or else to admit the Tennessee Central to it upon proper terms. But there are two things, either of which will prevent the Commission from validly making this latter requirement: (1) a dissimilarity of conditions and circumstances, in which case there is no unjust or undue discrimination; or (2) the prohibition of some law. While either of these two barriers is sufficient for us, it happens that both exist in this case. The dissimilarity in conditions is fully established, and hence the Commission's finding of discrimination as a fact is unsupported by substantial evidence. The proviso at the end of § 3 is the law that conclusively forbids the Commission to order plaintiffs to admit the Tennessee Central to the physical use of their terminal tracks.

This proviso is an express limitation imposed upon the Commission's power in the matter of ordering equal facil-

ities. It must always stop short of requiring one road to afford another road physical access to its "tracks and terminal facilities." In other words, the right of a railroad to sell to another railroad (whether for money or other trackage rights or other thing) the physical use of its road, that is trackage rights, and that without incurring a similar obligation to other railroads, is thereby ratified and preserved. *K. & I. Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 567; *Oregon Short Line & U. N. Ry. Co.* v. *Northern Pacific Ry. Co.*, 51 Fed. Rep. 465 (affirmed by the C. C. A. in 61 Fed. Rep.); *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 59 Fed. Rep. 400.

This proviso to § 3, construed in the foregoing cases, has never been amended. We are aware that it is a mooted question whether the proviso serves to prevent the Commission ordering switching, independent of the question of discrimination, but no such question is here presented. This is a discrimination case, that being the sole ground of the Commission's order. Besides, the Commission decided in the *Louisville Switching Case*, 40 I. C. C. 679, that it had no power to order switching, except in the case of discrimination; and in that case the discriminatory act was switching, not granting trackage rights.

The joint arrangement of plaintiffs is not a "device" to evade the Act to Regulate Commerce.

This court can review the Commission's order where its ultimate conclusion from undisputed facts is wrong. *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91.

The decision in the *Nashville Coal Case* (*L. & N. R. R. Co.* v. *United States*, 238 U. S. 1) does not affect this case.

This court has distinctly declared the right of two companies to unite their terminals for their "common but exclusive use." *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383.

Mr. Claude Waller, Mr. R. Walton Moore and *Mr. Frank W. Gwathmey* filed a brief for Nashville, Chattanooga & St. Louis Railway:

These appellants are not interchanging traffic; each is handling its own traffic and delivering it to each industry within the terminal district through a joint agent to be sure, but at its own expense; neither has switching charges against the other; no switching charge has been filed with the Interstate Commerce Commission; and the plan of operation does not bear the slightest relationship to a reciprocal switching arrangement, in which case one road performs a service for another at its own expense, on its own track, through its own switching crew for a switching charge which is either paid by the shipper or consignee or by the carrier for which the switching is done. The case does not come within the principle announced in *Pennsylvania Co.* v. *United States*, 236 U. S. 351, that where a railroad company has opened its terminals to one carrier it is unjustly discriminatory not to open its terminals on the same terms to another carrier similarly situated.

The arrangement is essentially the same as both roads acquiring and operating jointly the entire terminals, or the same as each having exchanged trackage rights with the other. Such an arrangement is not contrary to law, nor is it unjustly discriminatory towards a third railroad to deny it participation in such an arrangement.

There is no illegality in the two railroad companies acquiring and operating jointly, at a given point, terminal facilities for their common, but exclusive, use. *United States* v. *Terminal R. R. Association of St. Louis*, 224 U. S. 383, 405.

The amendment to the Interstate Commerce Act does not prevent a railroad company from giving trackage rights to one road and denying it to another. *Pennsylvania Co.* v. *United States*, *supra*.

If the arrangement is a legal one, not prohibited by any

of the provisions of the Act to Regulate Commerce, then there is no unjust discrimination in the sense of § 3 of the Act.

The argument then dealt with the impossibility of complying with the order without destroying the terminal arrangement entirely, and affirmed that the circumstances surrounding the Tennessee Central Company are entirely dissimilar to those existing between appellants.

Mr. Assistant Attorney General Underwood for the United States:

This court has not only (*a*) settled the principles involved (*Pennsylvania Company* v. *United States*, 236 U. S. 351), but has also (*b*) applied those principles to the facts presented by this record. *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1.

(*a*) In the former case, it is again announced, with citation of numerous cases, that discrimination is a question of fact for the determination of the Commission (p. 361); that transportation similar to that involved in this case comes within § 3 of the Act to Regulate Commerce as amended (pp. 363–364); that to require such interchange is not a taking of property without due process of law (p. 369), and does not require the carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business (pp. 366, 369).

(*b*) In the case of the *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1, the record and the issues before the court were substantially the same as presented in this case, and the judgment there is decisive here. It is true that in the former case only the reports of the Commission were before this court, while the record now contains both the reports of the Commission and the evidence taken before it. Nevertheless, the evidence be-

fore the Commission and its findings of fact were substantially the same in both cases. Not only was the issue now advanced made and insisted upon by appellants in the former case, but, as will be seen from an examination of the record, was given careful consideration by the Commission, the District Court, and this court.

The respective interests of appellants in the terminal property the joint agency and its method of operation were described in detail in both the report of the Commission and the decision of the District Court. *Louisville & Nashville Railroad Company* v. *United States*, 216 Fed. Rep. 672, 683.

This court adopted the statements of facts of the Commission and the District Court, using them as the basis of its decision.

Mr. Charles W. Needham, with whom *Mr. Joseph W. Folk* was on the brief, for the Interstate Commerce Commission:

The Commission's findings of fact, if based upon substantial evidence, are conclusive. The question of unjust discrimination, as presented in this case, is one of fact, even though the evidence may be undisputed. *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314; *Pennsylvania Co.* v. *United States*, 236 U. S. 351.

Section 15 of the act, as amended, empowers the Commission to deal with preferential and discriminatory regulations of carriers, as well as with rates. *Int. Com. Com.* v. *Illinois Central R. Co.*, 215 U. S. 452.

The finding of the Commission that the Louisville Company and the Nashville Company were in effect switching for each other was supported by substantial evidence.

It is apparent that, while the Louisville Company and the Nashville Company, after the inauguration of the joint arrangement, continued as theretofore to perform a

switching service for each other, that service, after the establishment of the Nashville Terminals, was rendered by the common agency of both, instead of individually by each for the other, as previously.

Appellants contend that the Nashville Terminals acts in every instance as the agent of the carrier performing the line service, and cite, in support of that contention, the practice observed by the Terminals in the apportionment of its operating expenses. But if the joint agency did not exist, the carrier switching the traffic to or from the industry on its line would bill that service against the carrier making the road haul. In other words, the line carrier merely pays its proportion of the switching service performed by the Nashville Terminals instead of the switching charge which it otherwise would pay to the carrier performing that service. The joint agent, then, must be held to act for the carrier which would perform the switching service in the absence of the joint arrangement.

The finding of the Commission that the Louisville Company and the Nashville Company were in effect switching for each other was supported by the decision of this court in *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1, 17–20. The material facts of record in the two cases are essentially the same, although more in detail in this record. But so far as the question here involved is concerned the Commission says that it "discloses nothing to change our former conclusion."

Appellants virtually admit that if they were individually switching for each other, and at the same time and under like conditions refusing to perform a similar service for the Tennessee Central, their discrimination against the latter carrier would constitute a violation of the act. How, then, can they justify such a discrimination when effected by their common agent?

Again, if the Nashville Terminals were in fact a ter-

minal company, as that expression is generally understood, it could scarcely deny that its exclusion of the Tennessee Central from privileges extended to the Louisville Company and the Nashville Company would constitute an unlawful discrimination. *St. Louis, S. & P. R. Co.* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226, 235–236.

Appellants may not reasonably complain if the joint agency created by them for the purpose of performing terminal services is required to provide without discrimination reasonable, proper, and equal facilities to all carriers requesting of it the performance of such services. The fiction of a separate corporate entity will be disregarded whenever it is insisted upon as a protection to an illegal transaction. *In re Rieger, Kapner & Altmark*, 157 Fed. Rep. 609; *Miller & Lux* v. *East Side Canal & Irrigation Co.*, 211 U. S. 293; *Lehigh Mining & Mfg. Co.* v. *Kelley*, 160 U. S. 327; *Gas Co.* v. *West*, 50 Iowa, 16; *Booth* v. *Bunce*, 33 N. Y. 139.

The Nashville Terminals, if given the effect appellants claim for it, would constitute a monopoly; and the Commission properly refused to give it that effect.

This is not a proceeding involving the establishing of a through route. The issue here is one of discrimination only. And this court clearly decided that the provision in § 15 did not apply in such a case. *L. & N. R. Co.* v. *United States*, 238 U. S. 1.

The Commission has power to require the removal of discrimination in whatsoever guise it may appear.

The discrimination is also a discrimination against the shippers served by the Tennessee Central and against the City of Nashville. *Michigan Central R. Co.* v. *Michigan Railroad Commission*, 236 U. S. 615, 632.

In *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1, this court held that the joint arrangement between appellants did not take the case out of the principle announced in

Pennsylvania Co. v. *United States,* 236 U. S. 351, and that the order of the Commission there under consideration, which was substantially the same as the order here involved, did not require appellants to give the use of their terminals to the Tennessee Central.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree, made by three judges sitting in the District Court, which denied a preliminary injunction against the enforcement of an order of the Interstate Commerce Commission and dismissed the appellants' petition. 227 Fed. Rep. 258, *id.* 273. See 33 I. C. C. 76, for the report of the Interstate Commerce Commission. The order complained of required the appellants, the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Terminal Company to desist and abstain "from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., on the same terms as interstate non-competitive traffic, while interchanging both kinds of said traffic on the same terms with each other, as said practice is found by the Commission in its said report to be unjustly discriminatory." It was further ordered, that "The Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby notified and required to establish, on or before May 1, 1915, upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the switching of interstate traffic to and from the

tracks of the Tennessee Central Railroad Company at said Nashville, rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city, as said relation is found by the Commission in its said report to be nondiscriminatory." The appellants contend as matter of law that the relations between them exclude any charge of discrimination that is based only upon a refusal to extend to the Tennessee Central road the advantages that they enjoy.

The order is based upon discrimination and is limited by the duration of the interchange between the appellants found to be discriminatory, and the question argued by the appellants is the only question in the case. Therefore it is necessary to consider relations between the appealing railroads that were left on one side in *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 18.

The Louisville & Nashville traverses Nashville from north to south, the Nashville & Chattanooga from west to southeast, the Tennessee Central from northwest to east. They all are competitors for Nashville traffic. In 1872, contemplating a possible Union Station, the Louisville & Nashville acquired trackage rights from the Nashville & Chattanooga that connected its northern and southern terminals in the city (previously separate), and the terminal of the Nashville & Chattanooga. It now owns seventy-one per cent. of the stock of the latter. In 1893 these two roads caused the appellant Terminal Company to be organized under the general laws of Tennessee, with the right to let its property. The Louisville & Nashville owns all the stock of this company. In 1896 the two roads respectively let to the Terminal Company their several properties in the neighborhood of the original depot grounds of the Nashville & Chattanooga for 999 years, and shortly afterwards the Terminal made what is termed

a lease of the same and subsequently acquired property to the two roads jointly for a like term. It covenanted to construct all necessary passenger and freight buildings, tracks and terminal facilities, the roads to pay annually as rental four per cent. of the actual cost, and to keep the properties in repair. The Terminal Company then made a contract with the city for the construction of a Union Station, the two roads guaranteeing the performance, and the construction was completed in 1900; the tracks connecting with those of the two roads but not with those of the Tennessee Central. The Terminal Company as part of the improvements purchased large additional properties, the two roads advancing the funds, and the company executing a mortgage for three million dollars guaranteed by the roads. $2,535,000 of the bonds were issued and the proceeds used to repay the roads.

On August 15, 1900, the two roads, at that time being the only two roads entering Nashville, made the arrangement under which they since have operated. They made an unincorporated organization called the Nashville Terminals which was to maintain and operate the property let to the two roads jointly by the Nashville Terminal Company and also 8.10 miles of main track and 23.80 miles of side track contributed by the Louisville & Nashville and 12.15 miles of main and 26.37 miles of side track contributed by the Nashville & Chattanooga. The agreement between the roads provided a board of control consisting of a superintendent and the general managers of the two roads, the superintendent having the immediate control and appointing under officers, &c. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives handled for each. There is no switching charge to or from locations on tracks of the Nashville terminals within the switching limits on freight from or to Nashville over either road. The Ten-

nessee Central tracks now connect with those of the Nashville & Chattanooga at Shops Junction in the western section of the city, within the switching limits, and with those of the Louisville & Nashville at Vine Hill, outside the switching limits and just outside the city on the south.

It should be added that in December, 1902, a further agreement was made purporting to modify the lease to the railroads jointly by excluding from it the property that came from them respectively, and remitting the roads to their several titles as they stood before the lease, subject only to the mortgage, with some other changes that need not be mentioned. This partial change from joint tenancy back to several titles does not affect the substantial equality of the contribution of the two roads, and the joint tenure of the considerable property purchased by the Terminal Company was left unchanged.

Another matter that seems immaterial to the case before us is that since the connection between the Tennessee Central and the appellant roads the latter have interchanged noncompetitive traffic with the former, but the Louisville & Nashville has refused to switch competitive traffic and coal except at its local rates and the Nashville & Chattanooga has refused to switch it at all. The switching of coal was dealt with by this court in *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1. But the case now before us is not concerned with the effect of the carriers having thrown the terminals open to many branches of traffic. 238 U. S. 18. It arises only upon the question of the discrimination supposed to arise from the appellants' relations to each other, as we have explained—a question grazed but not hit by the decision in 238 U. S. See p. 19.

If the intent of the parties or purpose of the arrangement was material in a case like this, obviously there was none to discriminate against the Tennessee Central road. That

road did not enter Nashville when the plan was formed, and the two appellants had a common interest although competitors—an interest that also was public and in which the City of Nashville shared. By § 3 of the Act to Regulate Commerce as it now stands, the Act "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." Therefore if either carrier owned and used this terminal alone it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it, that is to move a car to or from a final or starting point from or to a point of interchange. We conceive that what is true of one owner would be equally true of two joint owners, and if we are right the question is narrowed to whether that is not for all practical purposes the position in which the appellants stand. They do still hold jointly a considerable portion of the terminals, purchased with their funds. They manage the terminals as a whole and in short deal with them in the same way that they would if their title was joint in every part. Of course they do not own their respective original tracks jointly and it is matter for appreciation that perhaps defies more precise argument whether the change back to a several tenure of those tracks changed the rights of the parties. We cannot see in this modification of the paper title any change material to the point in hand. Neither road is paid for the use of its tracks, but the severally owned and the jointly held are brought into a single whole by substantially equal contributions and are used by each as occasion requires.

The fact principally relied upon to uphold the order of the Commission is that instead of each road doing its own switching over the terminals used in common they switch jointly, and it is said that therefore each is doing for the other a service that it cannot refuse to a third. We cannot believe that the rights to their own terminals reserved by

the law are to be defeated by such a distinction. We take it that a several use by the roads for this purpose would open no door to a third road. If the title were strictly joint throughout in the two roads, we can see no ground for prejudice in the adoption of the more economical method of a single agency for both, each paying substantially as it would if it did its own work alone. But, as we have indicated, a large part of the terminals is joint property in substance and the whole is held and used as one concern. What is done seems to us not reciprocal switching but the use of a joint terminal in the natural and practical way. It is objected that upon this view a way is opened to get beyond the reach of the statute and the Commission. But the very meaning of a line in the law is that right and wrong touch each other and that anyone may get as close to the line as he can if he keeps on the right side. And further, the distinction seems pretty plain between a *bona fide* joint ownership or arrangement so nearly approaching joint ownership as this, and the grant of facilities for the interchange of traffic that should be extended to others on equal terms. The joint outlay of the two roads has produced much more than a switching arrangement, it has produced a common and peculiar interest in the station and tracks even when the latter are not jointly owned. In our opinion the order was not warranted by the law; but in overturning it upon the single point discussed we do so without prejudice to the Commission's making orders to prevent the appellants from discriminating between competitive and noncompetitive goods, so long as they open their doors to the latter, the appellants being entitled to reasonable compensation, taking into account the expense of the terminal that they have built and paid for.

Decree reversed. Injunction to issue, without prejudice to further orders by the Interstate Commerce Commission as stated in the opinion.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE DAY, MR. JUSTICE BRANDEIS, and MR. JUSTICE CLARKE, dissenting.

I am unable to concur in the opinion of the court, and, in view of the far-reaching effect of the decision upon the commercial interests of the country, deem it a duty to set forth the grounds of my dissent.

The Interstate Commerce Commission found as matter of fact (33 I. C. C. 76, 84): "Defendants [the two railroad companies, now appellants] unquestionably interchange traffic with each other and without distinction between competitive and noncompetitive traffic. The cars of both roads are moved over the individually owned terminal tracks of the other to and from industries on the other, and both lines are rendered equally available to industries located exclusively on one. The movement, it is true, is not performed immediately by the road over whose terminal tracks it is performed, but neither is it performed immediately by the road whose cars are moved. It is performed by a joint agent for both roads, and that being so, we are of the opinion that the arrangement is essentially the same as a reciprocal switching arrangement and accordingly constitutes a facility for the interchange of traffic between, and for receiving, forwarding, and delivering property to and from defendants' respective lines, within the meaning of the second paragraph of section 3 of the act. [Interstate Commerce Act.] . . . We can not agree with defendants' contention that they have merely exchanged trackage rights. But even if they have, we think the term 'facility,' as used in section 3 of the act, also includes reciprocal trackage rights over terminal tracks, the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements."

The District Court, three judges sitting (227 Fed. Rep.

258, 269), after careful consideration, reached the following conclusions: "The operation jointly carried on by the Louisville & Nashville and the Nashville & Chattanooga under the Terminals agreement is not a mere exchange of trackage rights to and from industries on their respective lines at Nashville, under which each does all of its own switching at Nashville and neither switches for the other. It is, on the contrary, in substance and effect, an arrangement under which the entire switching service for each railroad over the joint and separately owned tracks is performed jointly by both, operating as principals through the Terminals as their joint agent, each railroad, as one of such joint principals, hence performing through such agency switching service for both itself and the other railroad. . . . And, viewed in its fundamental aspect, and considered with reference to its ultimate effect, we entirely concur in the conclusion of the Commission that such joint switching operation 'is essentially the same as a reciprocal switching arrangement,' constituting a facility for the interchange of traffic between the lines of the two railroads, within the meaning of the second paragraph of section 3 of the Interstate Commerce Act. That each railroad does not separately switch for the other, but that such switching operations are carried on jointly, is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers could be easily put beyond the reach of the act, and its remedial purpose defeated, by the simple device of employing a joint agency to do such reciprocal switching. The controlling test of the statute, however, lies in the nature of the work done, rather than in the particular device employed or the names applied to those engaged in it."

With these views I agree. Elaborate argument is made in behalf of appellants in the effort to show that the method of operating the Nashville Terminals is not "re-

ciprocal switching" within a certain narrow definition of that term. This is an immaterial point; the real question being whether it constitutes a facility for the interchange of traffic between the respective lines of appellants, and for the receiving, forwarding and delivering of property between connecting lines, within the meaning of § 3 of the Interstate Commerce Act (c. 104; 24 Stat. 380), so that it must be rendered to the patrons of the Tennessee Central upon equal terms with those of the Louisville & Nashville and the Nashville & Chattanooga. I cannot doubt that it bears this character.

The section reads as follows: "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

It is clear, I think, that in the second paragraph of this section the word "facilities" is employed in two meanings. Where it first occurs, it means those acts or operations that facilitate or render easy the interchange of traffic;

while, in the final clause, "to give the use of its tracks or terminal facilities," the words "terminal facilities" are employed in a figurative sense and as equivalent to "terminal properties." This is obvious from the association together of tracks and terminal facilities as things subject to use. And the same words are used in the same sense in the 1906 amendment to § 1 of the Act (c. 3591; 34 Stat. 584), by which the definition of the term "railroad" was expanded so as to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein."

There is nothing in the order of the Commission now under review that requires appellants or either of them, or their agency, the Nashville Terminals, to give the use of tracks or terminal facilities to the Tennessee Central, either physically or in any other sense, within the meaning of the final clause of § 3. It requires them merely to interchange interstate competitive traffic to and from the tracks of the Tennessee Central on the same terms as interstate noncompetitive traffic so long as they interchange both kinds of traffic with each other on the same terms; and also to establish and apply to the switching of interstate traffic to and from the Tennessee Central rates and charges not different from those that they contemporaneously maintain with respect to similar shipments as between themselves. Undoubtedly the expenditures made by appellants in the construction of the joint terminal property, so far as that property is used in interchange switching, is an element to be taken into consideration in fixing the amount of the switching charges. And the same is true with respect to the value of the separately owned tracks of appellants, so far as necessarily used in mutual interchanges.

The practice of the Louisville & Nashville and the Nashville & Chattanooga in refusing to interchange competi-

tive on the same terms as noncompetitive traffic with the Tennessee Central, while interchanging both kinds of traffic as between themselves, was found by the Commission to be unduly discriminatory, there being no substantial difference in the conditions of the interchange, nor any increased cost of interchanging competitive as compared with noncompetitive traffic.

The tracks included in the joint terminal arrangement of appellants include 8.10 miles of main and 23.80 miles of side tracks separately owned by the Louisville & Nashville, 12.15 miles of main and 26.37 miles of side tracks separately owned by the Nashville & Chattanooga, and some yard tracks owned by the Louisville & Nashville Terminal Company, whose entire stock is owned by the Louisville & Nashville R. R. Co. It may be conceded that by virtue of the lease from the Terminal Company to the appellant railroads, even as modified in December, 1902, there remains in some sense a joint tenure of the property of the Terminal Company. But, in my view, the question of the ownership of the property is entirely aside from the real point. The discrimination charged and found by the Commission is not so much in the use of terminal property as in the performance of interchange services; and for such discrimination a community of interest in the property affords neither justification nor excuse.

So far as the non-discriminatory performance of those services requires that cars from the Tennessee Central shall be admitted to the terminal tracks of the Louisville & Nashville and the Nashville & Chattanooga and to tracks in which these companies have a joint interest, this is so only because appellants have, as between themselves, and also as regards traffic from the Tennessee Central, thrown their terminals open to the public use. The argument for appellants rests upon the essential fallacy that the terminal facilities are, in an absolute sense, and for all purposes, private property. But they, like all

other parts of the railroad line, are, with respect to their use, devoted to the benefit of the public. And the final clause of § 3, while it protects each carrier to a certain extent in the separate use of its terminal property, does so not otherwise than it protects its particular use of the main line of railroad. "Tracks" are mentioned together with "terminal facilities," and the same rule is applied to both. The fact that a carrier owns its own terminals is no more an excuse for discriminatory treatment of its patrons with respect to services performed therein than its ownership of the main line is an excuse for discrimination with respect to transportation thereon.

It is said that if either of the appellants were the sole owner of the terminal properties in question and used them alone, it could not be deemed to discriminate against the Tennessee Central because of a mere refusal to switch for it in the interchange of traffic. Of course if it refused all connecting carriers alike it could not be held for discrimination. But whether it would be at liberty to refuse to switch for the Tennessee Central would depend upon circumstances; for instance, upon whether the Interstate Commerce Commission, pursuant to its authority under § 15 of the Act as amended in 1910 (c. 309; 36 Stat. 552), should establish the two lines as a through route, or (without that) should determine upon adequate evidence that the refusal of switching privileges was a failure to afford reasonable and proper facilities for the interchange of traffic between the connecting lines under § 3. Car interchange between connecting lines was made by the 1910 amendment of § 1 of the Act a positive duty on the part of the carrier, even without action by the Commission. 36 Stat. 545.

I deem it a most material fact that the appellants already interchange noncompetitive traffic with the Tennessee Central, upon terms like those upon which they interchange both competitive and noncompetitive traffic

between themselves. So far as their method of doing this amounts to an interchange of trackage rights they have by their voluntary action thrown open the use of their terminals to all branches of traffic, excepting so far as they discriminate against competitive traffic over the Tennessee Central. Not only so, but the Commission has expressly found (33 I. C. C. 82) that the Louisville & Nashville will switch competitive coal and other competitive traffic to and from the Tennessee Central, the interchange being usually effected at Shops Junction and over the rails of the Nashville & Chattanooga. But the Louisville & Nashville insists upon charging local rates as if for transportation between Nashville and Overton, Tennessee, which amount to from $12 to $36 per car, and are therefore in effect prohibitory. For a time the Nashville & Chattanooga in like manner offered to perform the same switching service to and from the Tennessee Central at its local rates, and published a terminal tariff December 14, 1913, expressly providing that such local rates would apply to competitive traffic from and destined to the Tennessee Central. This, however, was revoked shortly after the complaint in the present case was filed. There is here a very plain discrimination, found by the Commission to be an undue discrimination, not merely against the Tennessee Central but against a "particular description of traffic," which is distinctly prohibited by § 3. The conduct of appellants is quite analogous to the making of a discrimination in the charge for carriage not because of any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere basis of the ownership of the goods; a discrimination condemned by this court in *Int. Com. Comm.* v. *Del., Lack. & Western R. R.*, 220 U. S. 235, 252.

The present system of interchanging traffic between appellants was established in August, 1900, a year or two before the line of the Tennessee Central was constructed

into Nashville. Emphasis was laid upon this, in argument, as refuting the suggestion that the arrangement could be deemed a "device" to avoid the discrimination clause of § 3 of the Interstate Commerce Act. The findings of the Commission show, however (33 I. C. C. 81), that when the Tennessee Central entered Nashville it was only after strong opposition from the Louisville & Nashville; and (p. 79) that prior to the year 1898 the people of Nashville had become desirous of better terminal facilities, particularly of a union passenger depot, and an ordinance authorizing a contract to that end between the City and the Terminal Company was proposed, containing a proviso that the terminal facilities should also be available on an equitable basis to railroads which might be built in the future. The present appellants opposed this proviso and an ordinance omitting it was passed, but was vetoed by the mayor on account of the omission. It clearly enough appears, therefore, that the agreement of August, 1900, was made by appellants in view of the probability of some other road entering Nashville thereafter.

But were it otherwise, the result should be the same. The obligation to avoid discrimination and to afford "all reasonable, proper, and equal facilities for the interchange of traffic" is not qualified by any rights of priority. The new road is a servant of the public, equally with the others; subject to the same duty and entitled, for its patrons, to demand reasonable and impartial performance of the reciprocal duty from carriers that preceded it in the field.

In my opinion the present case is controlled by our decisions in the former case between the same parties (*Louis. & Nash. R. R.* v. *United States*, 238 U. S. 1, 18, 19), and the earlier case of *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 366 *et seq.* In these cases many of the same arguments that are here advanced were considered and overruled by the court. The latter case concerned the

switching of interstate carload traffic between industrial tracks and junction points within the switching limits at New Castle, Pennsylvania. The Pennsylvania Company undertook to sustain a practice of doing such switching at $2 per car for three railroads while refusing to do it for the Buffalo, Rochester & Pittsburgh, upon the ground of its sole ownership of the terminals and the fact that the three other carriers were in a position, either at New Castle or elsewhere, to offer it reciprocal advantages fully compensatory for the switching done for them in New Castle, whereas the Buffalo, Rochester & Pittsburgh was not in a position to offer similar advantages. The Interstate Commerce Commission (29 I. C. C. 114) overruled this contention, and in this was sustained by the District Court (214 Fed. Rep. 445), and by this court. We there held (236 U. S. 361) that the question what was an undue or unreasonable preference or advantage under § 3 of the Interstate Commerce Act was a question not of law but of fact, and that if the order of the Commission did not exceed its constitutional and statutory authority and was not unsupported by testimony, it could not be set aside by the courts; held (p. 363), that the provisions of § 3, although that section remains unchanged, must be read in connection with the amendments of 1906 and 1910 to other parts of the act, and that by these amendments the facilities for delivering freight at terminals were brought within the definition of transportation to be regulated; and also (pp. 368, 369) that the order did not amount to a compulsory taking of the use of the Pennsylvania tracks by another road within the inhibition of the final clause of § 3; no right being given to the Buffalo road to run its cars over the terminals of the Pennsylvania Company or to use or occupy its stations or depots for purposes of its own.

In the former case between the present parties (*Louis. & Nash. R. R.* v. *United States*, 238 U. S. 1), we sustained

the District Court (216 Fed. Rep. 672) in refusing an injunction to restrain the putting into effect of an order of the Commission (28 I. C. C. 533, 540) requiring appellants to interswitch interstate coal with the Tennessee Central as they did with each other. The findings of the Commission (p. 542) recognized that the terminals were in part jointly owned and in part the separate property of the two appellants. The District Court (216 Fed. Rep. 682, 684) alluded to this fact. And this court (238 U. S. 17, 18, 19, 20) did not ignore that fact but laid it aside as immaterial, declaring: "If the carrier, however, does not rest behind that statutory shield [the final clause of § 3] but chooses voluntarily to throw the Terminals open to many branches of traffic, it to that extent makes the Yard public. Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities."

If the decision reached in the present case is adhered to, and remains uncorrected by remedial legislation, it will open a wide door to discriminatory practices repugnant alike to the letter and the spirit of the Act to Regulate Commerce.

MR. JUSTICE DAY, MR JUSTICE BRANDEIS, and MR. JUSTICE CLARKE concur in this dissent.

UNITED STATES *v.* OPPENHEIMER ET AL.

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

No. 412. Argued October 19, 20, 1916.—Decided December 4, 1916.

A "motion to quash" an indictment, based upon a former adjudication that a previous indictment for the same offence was barred by the statute of limitations, *held*, in substance, a plea in bar. *United States* v. *Barber*, 219 U. S. 72, 78.

Under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, the right to review decisions and judgments sustaining special pleas in bar is not limited to cases in which the decisions or judgments are based upon the invalidity or construction of the statutes upon which the indictments are founded. *United States* v. *Keitel*, 211 U. S. 370, and *United States* v. *Kissel*, 218 U. S. 601, explained and distinguished.

A plea of the statute of limitations is a plea to the merits.

A judgment for defendant that the prosecution is barred by limitations goes to his liability in substantive law; and, in whatever form the issue was raised, such a judgment may be interposed as a conclusive bar to another prosecution for the same offence.

The Fifth Amendment, in providing that no one should be twice put in jeopardy, was not intended to supplant the fundamental principle of *res judicata* in criminal cases.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren, with whom *Mr. A. J. Clopton* was on the briefs, for the United States.

Mr. Benjamin Slade, with whom *Mr. L. Laflin Kellogg* and *Mr. Abram J. Rose* were on the briefs, for Oppenheimer.

MR. JUSTICE HOLMES delivered the opinion of the court.

The defendant in error and others were indicted for a conspiracy to conceal assets from a trustee in bankruptcy.

Act of July 1, 1898, c. 541, § 29; 30 Stat. 544, 554. The defendant Oppenheimer set up a previous adjudication upon a former indictment for the same offence that it was barred by the one-year statute of limitations in the bankruptcy act for offences against that act, § 29d; an adjudication since held to be wrong in another case. *United States* v. *Rabinowich*, 238 U. S. 78. This defence was presented in four forms entitled respectively, demurrer, motion to quash, plea in abatement, and plea in bar. After motion by the Government that the defendant be required to elect which of the four he would stand upon he withdrew the last-mentioned two, and subsequently the court granted what was styled the motion to quash, ordered the indictment quashed and discharged the defendant without day. The Government brings this writ of error treating the so-called motion to quash as a plea in bar, which in substance it was. *United States* v. *Barber*, 219 U. S. 72, 78.

The defendant objects that the statute giving a writ of error to the United States "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," Act of March 2, 1907, c. 2564, 34 Stat. 1246, is limited like the earlier clauses to judgments based on the invalidity or construction of the statute upon which the indictment is founded. But that limitation expressed in each of the two preceding paragraphs of the statute is not repeated here. The language used in *United States* v. *Keitel*, 211 U. S. 370, 399, had reference only to the construction of the indictment and to its sufficiency upon matters not involving a statute, in cases brought up by the United States under the earlier clauses of the Act. That quoted from *United States* v. *Kissel*, 218 U. S. 601, so far as material also meant that the sufficiency of the indictment would not be considered here upon a writ of error to the allowance of a plea in bar. In view of our opinion upon the merits

we do not discuss the preliminary objections at greater length.

Upon the merits the proposition of the Government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offence to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offence charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue, *United States* v. *Kissel*, 218 U. S. 601, 610, but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words. *Iowa* v. *Fields*, 106 Iowa, 406. Wharton, Crim. Pl. & Pr., 9th ed., § 406.

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. A plea of the statute of limitations is a plea to the merits, *United States* v. *Barber*, 219 U. S. 72, 78, and however the issue was raised in the former case,

after judgment upon it, it could not be reopened in a later prosecution. We may adopt in its application to this case the statement of a judge of great experience in the criminal law: "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings." Hawkins, J., in *The Queen* v. *Miles*, 24 Q. B. D. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Commonwealth* v. *Evans*, 101 Massachusetts, 25, the criminal and the civil law agreeing, as Mr. Justice Hawkins says. *Commonwealth* v. *Ellis*, 160 Massachusetts, 165. *Brittain* v. *Kinnaird*, 1 Brod. & B. 432. Seemingly the same view was taken in *Frank* v. *Mangum*, 237 U. S. 309, 334, as it was also in *Coffey* v. *United States*, 116 U. S. 436, 445.

The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter* v. *Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

Judgment affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* W. F. JACOBY & COMPANY.

ON CERTIFICATE FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 22. Argued October 20, 1915; affirmed by divided court November 15, 1915; restored to docket for reargument December 20, 1915; reargued October 23, 24, 1916.—Decided December 4, 1916.

In an action against a carrier to enforce an award made by the Interstate Commerce Commission for damages arising from discrimination in allotments of coal cars, plaintiffs, to prove the damage suffered, relied on the *prima facie* case made by the findings and orders of the Commission; the defendant introduced a tabulated statement of car allotments and percentages which had been introduced in evidence before the Commission by the plaintiffs, and which, when compared with the findings, justified most strongly, if it did not compel, a deduction that, in fixing the damages awarded, the Commission, by misapplying percentages given in the statement, had followed a legally erroneous method of computation and so had arrived at a legally erroneous result.

Held: (1) That the tabulated statement, and oral testimony comparing it mathematically with figures stated in the findings, were competent evidence, tending to overcome the *prima facie* force of the Commission's orders.

(2) That the defendant was entitled to a specific instruction to the effect that, if the jury found such erroneous method of computation was the one actually employed by the Commission, the award was erroneous and the plaintiffs not entitled to recover.

(3) That, under the circumstances, the fact that the evidence before the Commission was not all before the court would not justify a controlling presumption that the award was properly arrived at on competent proofs.

(4) That the error was not cured by divers general instructions which are stated in the opinion.

In computing damages resulting from discrimination by a carrier in car allotments, it is error to assume that the complaining shipper should have received cars in the same ratio to shipping requirements

as was allowed his favored competitor in the making of the discrimination.

The award should be based on the damages actually resulting from the discrimination.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the briefs, for Pennsylvania Railroad Co.

Mr. Wm. A. Glasgow, Jr., for Jacoby & Co.

MR. JUSTICE DAY delivered the opinion of the court.

Jacoby & Company, hereinafter called the plaintiffs, owned a coal mine known as Falcon No. 2 in the Clearfield District served by the Tyrone Division of the lines of the Pennsylvania Railroad Company, hereinafter called the Company, and shipped coal from their mine in interstate commerce. In June, 1907, the plaintiffs made complaint before the Interstate Commerce Commission of discriminatory practices against them in the distribution of coal cars, in violation of the Act to Regulate Commerce. The Commission made findings, among others, that Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Company in the matter of the distribution of the defendant's available coal car equipment during the period of the action. It also found a special allotment of 500 cars daily to the Berwind-White Company to be an undue preference and discrimination, and on March 7th, 1910, the Commission made an order, finding that the complainants had been unduly discriminated against, and set forth that it appeared "that it is and has been the defendant's rule, regulation and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage

periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as 'assigned cars,' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars." The Commission ordered "That the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated and is in violation of the third section of the Act to Regulate Commerce" and "That the defendant be, and it is hereby, notified and required, on or before the 1st day of November, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

At the same time, the Commission ordered that the question of damages sustained by the plaintiffs in respect to the matters and things in the report found to be discriminatory be deferred pending further argument. See also 19 I. C. C. 392, where the decision is reported. In that case the Commission referred to its report filed the same day in the case of *Hillsdale Coal & Coke Company* v. *Pennsylvania Railroad Company*, 19 I. C. C. 356, in which the discriminatory character of the rules of car distribution of the Company is fully discussed (page 364) and the rules are condemned, largely because of the advantages given to the owners of private cars unless the same shall be counted against the distributive share of the mine receiving them. See also the discussion of these rulings in

Pennsylvania Railroad Company v. *Clark Coal Company*, 238 U. S. 456.

On March 11, 1912, the Commission made a further report, in which it found as follows:

"We find that by reason of the discriminations ascertained and set forth in our report in *Jacoby* v. *P. R. R. Co.*, 19 I. C. C. 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

"The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

"(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

"(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

"(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

"(d) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

"(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits for the coal actually shipped during the period in question."

On March 11th, 1912, the Commission made a reparation order in favor of the plaintiffs, confirming its former orders, findings and conclusions, and ordering that the Company should pay to the plaintiffs on or before the first day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 28th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination had been found by the Commission to be unlawful and unjust. Upon these orders of the Commission, suit was brought in the District Court of the United States for the Eastern District of Pennsylvania, on July 19th, 1912, the action being based upon § 16 of the Act to Regulate Commerce, 34 Stat. 590. The case was heard in the District Court, and resulted in a verdict for the amount awarded by the Commission, with interest thereon. On the case going to the Circuit Court of Appeals, that court certified certain questions to this court, and upon writ of certiorari the whole record was brought here.

The case was argued before this court at the October term, 1915. At that term the judgment below was affirmed, with costs, by a divided court. Afterwards, and at the same term, a petition for rehearing was granted and the former judgment set aside, and the case restored to the docket for reargument. 239 U. S. 631.

At the trial in the District Court the plaintiffs offered

no other testimony as to the amount of damages sustained by them than that contained in the orders of the Commission, before recited. Section 16 of the Act makes the findings and orders of the Commission *prima facie* evidence of the facts therein stated, and it may be conceded that if no testimony was offered in the case to overcome the *prima facie* case thus made, the orders of the Commission would be controlling and determine the amount of recovery. The *prima facie* character of the findings of fact and award of damages by the Commission was established upon full consideration of the subject in *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 426–431, and second *Meeker Case*, 236 U. S. 434. This court said in *Mills* v. *Lehigh Valley Railroad Co.*, 238 U. S. 473, 481, after quoting from the *Meeker Cases*, *supra*, "The statute was not concerned with mere forms of expression and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim."

In order to meet the *prima facie* case made by the plaintiffs upon the orders of the Commission in awarding damages, in the course of the testimony the Company put in evidence certain sheets, which were offered in evidence before the Commission by the plaintiffs, in the hearing before that body, known as Exhibit No. 10. These sheets were entitled "Detailed statement showing discrimination in favor of other mines and against Falcon No. 2 [the mine of the plaintiffs] from April 1, 1904, to April 1, 1905," and "from April 1, 1905, to October 15, 1905," respectively, these being the periods for which recovery was sought in this case by the plaintiffs. These sheets undertook to show the percentage of cars awarded to certain preferred companies by the Railroad Company, as com-

pared to those awarded to the plaintiffs for use in their mine during the period stated. They were intended to show that the favored companies received cars during the first period to the extent of 59.9% of their mine ratings, and during the second 59.6% of their mine ratings, which percentages were much larger than the plaintiffs received for their mine during the like periods. In other words, it was thus sought to establish that the favored mines received, not their just proportion of the distributable cars, but a much larger, and highly discriminatory, share when compared with the allotment made to the plaintiffs. It is the contention of the Company that it is demonstrable from this record that these tables showing the percentages awarded to favored companies were made the basis of the Commission's award of damages.

We have already seen from the orders of the Commission, above recited, the manner in which it made its award and reached its conclusion as to the amount recoverable by the plaintiffs. At the trial in the District Court, the Company placed a witness upon the stand, who testified as follows:

"Q. Referring to the order which has been put in evidence made by the Interstate Commerce Commission, finding a certain amount as due Jacoby & Company, will you please say whether you have taken the daily rating fixed by the Commission as proper, namely, 450 tons per day, and multiply that by 275 days, the days which the Commission found the plaintiff's mine would have been able to work in the year ending March 31, 1905, and tell us what the aggregate number of tons is, based upon those two figures?

"A. 123,750 tons.

"Q. In that same order the Commission has found that the plaintiff shipped in that period 38,714.23 tons and that they ought to have received cars which would have enabled them to ship 35,412.02 tons additional. If they had made

those additional shipments what would the total volume of shipments have been?

"A. 74,126.25 tons.

"Q. What percentage of the aggregate capacity of the mine, based upon 450 tons per day and 275 days, are the aggregate shipments which would have been made, which you have just spoken of?

"A. 59.9 per cent.

"Q. Coming to the second period of the action, the Commission found that 450 tons per day was a proper rating for the mine and that the mine would have been capable of working 138¼ days. What, on that basis, is the aggregate capacity of the mine in that period?

"A. 62,212.51 tons.

"Q. In their order the Commission found that in that period the mine had shipped 17,973.88 tons and that it should have received cars which would have enabled it to ship 19,104.77 tons additional. If it had made those additional shipments, what would have been the total shipments in that period?

"A. 37,078.65 tons.

"Q. And what percentage is that of the aggregate rated capacity based on 450 tons a day and 138¼ days?

"A. 59.6."

This testimony was competent in order to meet the plaintiffs' case based on the orders of the Commission, and from it we think the conclusion is inevitable that the Commission may have used the percentages of 59.9% and 59.6% respectively in reaching the amount of damages awarded to the complainant. If so, the recovery was permitted, not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that they were entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of

the enforcement of such rule, would be, not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor,—a result manifestly not intended by the Act of Congress.

The testimony being in the condition which we have stated, and the plaintiffs having offered no testimony to show the amount of damages sustained other than that contained in the order made by the Commission, the Company made certain definite requests to charge, which were refused. In one of them, they requested a peremptory instruction in favor of the Company upon the ground that as the award of the Interstate Commerce Commission was based upon the conclusion that in the year ending April 1st, 1905, the plaintiffs should have received cars equal in capacity to 59.9% of the aggregate of their daily mine rating for 275 days, and in the period between April 1st and October 18th, 1905, cars equal in capacity to 59.6% of their daily mine rating for 138¼ days, it was apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9% and in the later period 59.6% of the aggregate ratings of these selected mines. If the court should refuse to charge as above requested, the court was requested to instruct the jury as follows:

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived

at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

In view of the testimony as we have already stated it, we think the Company was entitled to have this eighth request given in charge to the jury. Nor do we think this refusal was cured by the charge that the finding of the Commission was *prima facie* correct, and entitled to weight as such unless the defendant produced evidence to show that some other state of facts existed, and that the plaintiffs had not suffered the damages awarded to them by the Commission, and the charge in general terms that it was the duty of the Company to apportion and deliver to the plaintiffs their fair share of all cars available during the period of the action to shippers in the district in which plaintiffs' mine was located, and that if plaintiffs received their full and proportionate share of cars in the district they had no cause for complaint against the Company and the burden was upon the plaintiffs to establish by satisfactory proof that they did not receive their share; nor by other parts of the charge in which the jury was told in general terms that the shipper was entitled to recover the full amount of damages which he sustained, and that in arriving at such damages the jury could only take into consideration whether they had been discriminated against, and to what extent they were damaged by that discrimination, and that, if the Berwind-White Company got 59 per cent. of its output when the average allottable was 28 per cent., it did not necessarily follow that the plaintiffs would be damaged the entire difference between

28 per cent. and 59 per cent., but their damage would be the amount to which their number of cars was reduced in the general allotment by favoring somebody else and taking the cars from them. However correct these general observations may have been, we think it was error in the state of the record to which we have already referred to refuse the specific charge requested.

It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury.

For error in refusing to give this request in the charge, the judgment of the District Court must be reversed, and the case remanded to that court for a new trial.

Reversed.

Dissenting, MR. JUSTICE PITNEY.

SETON HALL COLLEGE *v.* VILLAGE OF SOUTH ORANGE ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 74. Submitted November 3, 1916.—Decided December 4, 1916.

Nine years after the incorporation and establishment of a college under special charter, a supplemental act declared that its property should be exempt from taxation. Long afterward, a general tax law was passed repealing all general and special acts inconsistent with its terms, and thereunder a portion of the college property, consisting of farm buildings and pasture land, necessary for its use but not productive of income, was assessed for taxation. No previous attempt had been made to tax any part of its property. The college, however, entered upon no new undertaking when the exemption was given, nor promised nor parted with anything because of it. Furthermore, there was in force at that time a law providing that every charter to be granted should be subject to alteration, suspension or repeal in the discretion of the legislature.

Held: (1) That it was reasonable to assume that the exemption was extended subject to the right of alteration and repeal. *New Jersey* v. *Yard*, 95 U. S. 104, distinguished.

(2) That, in view of this and the apparent absence of any promise made or burden assumed in reliance on the exemption, this court was not prepared to hold that the state court erred in holding the exemption a revocable privilege. *Home of the Friendless* v. *Rouse*, 8 Wall. 430, and *University* v. *People*, 99 U. S. 309, distinguished.

In determining whether there is a contract which has been impaired by subsequent legislation, this court, though exercising its right of independent examination, accords much consideration and respect to the decision of the state court construing the state statutes involved in the inquiry.

To all claims of contract exemption from taxation must be applied the well settled rule that, as the power to tax is an exercise of the sovereign authority of the State, essential to its existence, the fact of its surrender in favor of a corporation or an individual must be shown in language which cannot be otherwise reasonably construed, and

all doubts which arise as to the intent to make such contract are to be resolved in favor of the State.

86 N. J. L. 365, affirmed.

THE case is stated in the opinion.

Mr. William J. Kearns for plaintiff in error.

Mr. Adrian Riker for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This is a writ of error to the Supreme Court of New Jersey, seeking to reverse a judgment of that court, which judgment was affirmed by the Court of Errors and Appeals of New Jersey (86 N. J. L. 365) and the record remitted to the Supreme Court. The case involves the validity of a tax levied by the assessor of the Village of South Orange, for the year 1911, the contention being that the act of the legislature of New Jersey of March 16th, 1870, hereinafter referred to, constituted a contract which could not be repealed by subsequent legislation without doing violence to the contract clause of the Constitution of the United States.

The case was heard by the Board of Equalization of Taxes of New Jersey, and by the Supreme Court of that State, upon a stipulation of facts:

"(1) Seton Hall College was incorporated under an act of the Legislature of the State of New Jersey entitled 'An Act to incorporate Seton Hall College,' Chapter 86 of the Laws of 1861, pages 198 and 199, approved March 8, 1861.

"(2) A supplement to said act was passed, being Chapter 167 of the Laws of 1870, entitled 'Supplement to an Act to Incorporate Seton Hall College', approved March 8th, 1861, which supplement was approved March 16th, 1870.

"(3) The act incorporating Drew Theological Semi-

nary of the Methodist Episcopal Church, referred to in the supplement above mentioned, was approved February 12th, 1868 (Laws of 1868, Chap. 2, p. 4).

"(4) That Seton Hall College accepted its charter contained in the Laws of 1861 aforesaid, and thereafter purchased real and personal property from time to time, erected college buildings thereon and continuously since has been and still is actively engaged in carrying out the purposes of its creation and fulfilling its obligations imposed by its said charter, and has been and is exercising all the powers granted by said charter.

"(5) After the supplement to its charter was passed in 1870, Seton Hall College accepted the same, and purchased further lands and erected further buildings, and has continued ever since to live up to the terms of both acts and carry out the purposes of its creation, and has been and is exercising all the powers granted thereby.

"(6) That the lands in question with other lands were acquired by the College by a conveyance dated the 17th day of October, Eighteen Hundred and Sixty-four, and recorded in the office of the Register of the County of Essex on the 21st day of February, Eighteen Hundred and Sixty-five, in Book M-12 of Deeds for said County on page 343.

"(7) That no assessment or tax has been levied or imposed upon the property, real and personal, of Seton Hall College from the date of its original charter in 1861, down to the year 1911; and the tax in question, imposed in the year 1911, is the first tax imposed or attempted to be imposed upon the property of said Seton Hall College, real or personal."

From the act of 1861, under which Seton Hall College was incorporated, it appears that the object of the incorporation is the advancement of education, and that the corporation was given the right to have and possess the authority to confer academic and other degrees granted

by other colleges in the State. The act of 1870, referred to in the stipulation, extended to Seton Hall College the privileges which were granted to Drew Theological Seminary, in relation to the exemption of real and personal property of the corporation from assessment and taxation. The act incorporating the Drew Theological Seminary provided that the property of the corporation, real and personal, should be exempt from assessment and taxation. In 1875 the constitution of New Jersey was amended so as to provide that property should be assessed for taxation under general laws and uniform rules, according to its true value. In 1903, the legislature passed a taxation law (4 N. J. Comp. Stat. 5079), which provided that all property not therein expressly exempted should be subject to taxation, and that all acts, general and special, inconsistent with its provisions, were repealed.

It appears that the lands so assessed are not those upon which the college buildings are erected, but are used for pasture lands for cows and the dwellings of the help on the farm, and that the same are essential and necessary to the use of the college, and that the college derives no pecuniary profit from the lands in question.

Upon the hearing before the Board of Equalization, the president of that body delivered an opinion, in which it was held that the act relied upon did not purport an intention to impose upon the State an irrepealable contract obligation, but was a privilege extended to the corporation by the State, and therefore subject to revocation. This opinion was adopted and affirmed by the Supreme Court of New Jersey, and also by the Court of Errors and Appeals.

This court has the right to determine for itself whether there is a contract which has been impaired by subsequent legislation of the State. This principle has often been recognized and stated in decisions of this court. While this is true, the decision of the state court, con-

struing its own statutes, is entitled to much consideration and respect. *Milwaukee Electric Railway & Light Co.* v. *R. R. Commission*, 238 U. S. 174, 182; *Interborough Transit Co.* v. *Sohmer*, 237 U. S. 276, 284.

In this case, the stipulation of facts shows that Seton Hall College was incorporated under an act of the legislature and entered upon the discharge of its charter obligations without reliance upon any legislative authority exempting it from taxation upon its property. When the subsequent legislation was enacted,—nine years after,—extending to Seton Hall College the same exemption as was given to the Drew Theological Seminary, it entered upon no new undertaking, and made no agreement by which it promised to do something, nor did it part with anything because of the immunity thus extended to it by the State.

It is true that this court has held that a charter contract, express in its character, may arise from the acceptance of and action under the terms of a charter which grants such exemption. In this connection, much reliance is placed by the plaintiff in error upon certain rulings of this court; among others, in *Home of the Friendless* v. *Rouse*, 8 Wall. 430. In that case the corporation is shown to have entered upon its duties and expended its money in reliance upon the grant of the charter, which declared that the property of the corporation should be exempt from taxation, and that that grant was made for the purpose of encouraging such undertaking and enabling the parties engaged therein more fully and effectually to accomplish their purpose; and it was, moreover, provided that the sections of the act concerning corporations, which provided that the charter of every incorporation should be subject to alteration, suspension and repeal at the discretion of the legislature, should not apply to the act creating the Home of the Friendless. This court held that the corporation was thus expressly withdrawn from

the authority of the general act of the legislature giving a right to alter, suspend and repeal, and that, under such circumstances, the acceptance of the charter, and the action under it and in reliance upon its terms, constituted an express contact.

So, in *University* v. *People*, 99 U. S. 309, the act of the legislature declared that the property of the Northwestern University should be *forever* free from taxation, and this court, differing from the Supreme Court of Illinois in that respect, held that the exemption applied, in view of the language used in the statute, not only to lots and lands directly used for the purposes of the institution as a school, but also to other lots, lands and property, the annual profits of which were applied to school purposes, and that the exempting authority of the legislature was not limited to real estate occupied, or in immediate use, by the university.

Furthermore, when the alleged contract exempting Seton Hall College from taxation was made, the New Jersey act of 1846 was in force, providing that:

"The charter of every corporation which shall hereafter be granted by the legislature, shall be subject to alteration, suspension, and repeal, in the discretion of the legislature."

It is true that this act of the legislature was held by this court, in the case of *New Jersey* v. *Yard*, 95 U. S. 104, not to apply to a case where it appeared, from a subsequent act of the legislature, that a contract was made by requiring of the benefited company the performance of certain acts and a formal acceptance within sixty days, otherwise the act to become wholly inoperative. In that case, the company was obligated, in consideration of the tax limitation stated in the act, to commence and do certain work within a year; in consideration whereof the tax was fixed at the rate of one-half of one per cent. This, said this court, had been a subject of disagreement, which

was adjusted, additional rights were granted, and the tax fixed as to its rate and time of commencement, and, in view of these circumstances, it did appear that it was the legislative intention to make such contract in the same manner and on the same terms of equal obligation as other contracts are made, and not to pass a statute which it could repeal under another act of the legislature. But here there being no such express obligation shown it is only reasonable to assume that the legislature extended the immunity from taxation to Seton Hall College subject to the right of alteration and repeal reserved in the act of 1846.

To all claims of contract exemption from taxation must be applied the well settled rule that, as the power to tax is an exercise of the sovereign authority of the State, essential to its existence, the fact of its surrender in favor of a corporation or an individual must be shown in language which cannot be otherwise reasonably construed, and all doubts which arise as to the intent to make such contract are to be resolved in favor of the State. *Hoge* v. *Railroad Co.*, 99 U. S. 348, 354; *New Orleans City and Lake Railroad Co.* v. *New Orleans*, 143 U. S. 192, 195; *Wilmington & Weldon Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 294; *Phœnix Insurance Co.* v. *Tennessee*, 161 U. S. 174, 179; *Yazoo &c. Railway Co.* v. *Adams*, 180 U. S. 1, 22.

Applying these principles, we are unable to conclude that the state court was wrong in finding no binding contract here. As we have said, the college was incorporated under no promise of such exemption, and could not have relied upon it in undertaking the work for which it was organized. After the privilege of the act in favor of the Drew Seminary was extended to it, it made no new promises and assumed no new burdens. It is true it has been kept in operation, and has doubtless continued and expanded its usefulness, but we fail to discover from any-

thing in this record that it would not have done so except in reliance upon the tax exemption extended to it by the legislature. By the terms of that act, the state court has held a revocable privilege was extended and no irrepealable contract was entered into. Bearing in mind our own right of independent examination of questions of this character, we are unable to say that the conclusion reached is not well founded in law and in fact.

It follows that the judgment of the state court must be

Affirmed.

SWIFT & COMPANY ET AL. *v.* HOOVER.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 101. Submitted November 14, 1916.—Decided December 4, 1916.

A decree of the Supreme Court of the District of Columbia refusing to adjudicate defendant a bankrupt is not directly reviewable in this court.

Under § 24 of the Bankruptcy Act and § 252 of the Judicial Code, only controversies arising in bankruptcy proceedings, and not the steps taken in the proceedings themselves, afford basis for direct appeal to this court from the Supreme Court of the District of Columbia.

Quære: Whether Congress has omitted to provide for appellate review of bankruptcy adjudications of the Supreme Court of the District of Columbia.

THE case is stated in the opinion.

Mr. Arthur A. Birney, Mr. H. W. Wheatley and *Mr. Lucas P. Loving* for plaintiffs in error and appellants.

Mr. E. F. Colladay for defendant in error and appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This case is brought here by appeal and allowance of writ of error, from a decree of the Supreme Court of the District of Columbia, adjudging Hoover not a bankrupt. Counsel for the appellee and defendant in error urges that the appeal and writ be dismissed, but does not argue the question of the jurisdiction of this court; but, as such matters are noticed by this court whether specially urged by counsel or not, as it concerns our jurisdiction, we proceed to consider it. *Mansfield &c. Ry. Co.* v. *Swan*, 111 U. S. 379.

The provisions of the Bankruptcy Act for consideration in this connection are:

"Section 24. The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia. . . .

"Section 25. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; . . ."

The same provision as to the review by this court of controversies arising in bankruptcy proceedings is carried into the Judicial Code, § 252, in which provision is made for the review in this court of controversies arising in bank-

ruptcy proceedings in the Supreme Court of the District of Columbia.

It is apparent from reading these sections of the statute that a direct appeal to this court from the Supreme Court of the District of Columbia is allowed only in controversies arising in bankruptcy proceedings, and not from the steps in a bankruptcy proceeding. The nature of such controversies has been frequently considered in decisions of this court, and needs little discussion now. Such controversies embrace litigation which arises after the adjudication in bankruptcy, sometimes by intervention, the parties claiming title to property in the hands of the trustee, or other actions, usually plenary in character, concerning the right and title to the bankrupt's estate. Such proceedings as the present one, resulting in a decree refusing to adjudicate the defendant a bankrupt, are but steps in a bankruptcy proceeding and not controversies arising in bankruptcy proceedings within the meaning of the statute. *Denver First National Bank* v. *Klug*, 186 U. S. 202.

The decisions of this court in *Tefft, Weller & Company* v. *Munsuri*, 222 U. S. 114, and *Munsuri* v. *Fricker*, 222 U. S. 121, are decisive of this point. In the first of these cases there was an attempt to prosecute a direct appeal to this court from the District Court of the United States for Porto Rico, where the proceeding was based upon a claim in bankruptcy. It was there held that an order of the bankruptcy court of Porto Rico, disallowing the claim, was not a controversy arising in a bankruptcy proceeding within the meaning of the statute. The contention that such action, based upon a claim filed in a bankruptcy proceeding, was appealable to this court was denied, the court saying:

"But the entire argument rests upon a misconception of the words 'controversies in bankruptcy proceedings,' as used in the section, since it disregards the authoritative

construction affixed to those words. *Coder* v. *Arts*, 213 U. S. 223, 234; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300. Those cases expressly decide that controversies in bankruptcy proceedings as used in the section do not include mere steps in proceedings in bankruptcy, but embrace controversies which are not of that inherent character, even although they may arise in the course of proceedings in bankruptcy."

It is true that in *Audubon* v. *Shufeldt*, 181 U. S. 575, and in *Armstrong* v. *Fernandez*, 208 U. S. 324, this court did review proceedings in bankruptcy—in one case from the District of Columbia, and in the other from the District Court of the United States for Porto Rico. Of the *Armstrong Case*, which was a review by appeal of an adjudication of bankruptcy, this court, in the *Tefft, Weller & Company Case*, *supra*, said:

"It is true, as suggested in argument, that in *Armstrong* v. *Fernandez*, 208 U. S. 324, jurisdiction was exerted to review the action of the court below in a case which was not susceptible of being reviewed under the construction of the statute which we have here applied. But in that case there was no appearance of counsel for the appellee, and while a general suggestion was made in the argument of appellant as to the duty of the court not to exceed its jurisdiction, no argument concerning the want of jurisdiction was made. The case therefore in substance proceeded upon a tacit assumption of the existence of jurisdiction, an assumption which would not be now possible in consequence of the authoritative construction given to § 24 (a) in *Coder* v. *Arts*, *supra*. Under these circumstances, the mere implication as to the meaning of the statute resulting from the jurisdiction which was in that case merely assumed to exist, is not controlling and the *Armstrong Case*, therefore, in so far as it conflicts with the construction which we here give the statute, must be deemed to be qualified and limited."

It may be true that Congress has failed to give an appellate review in proceedings in bankruptcy from the Supreme Court of the District of Columbia from a decree with reference to an adjudication in bankruptcy, but, as observed in the *Tefft, Weller & Company Case*, that does not give this court authority to assume jurisdiction not given to it by law.

It follows that the appeal and writ of error must be dismissed for want of jurisdiction.

Dismissed.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY *v.* STILES.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 212. Submitted October 17, 1916.—Decided December 4, 1916.

Three corporations, formed, and operating railways, in Alabama, Tennessee and Mississippi, respectively, consolidated themselves under the laws of each of those States. The consolidated company succeeded to all the property of the constituents and issued its shares in lieu of theirs. As construed by the court below, the law of Alabama, under which the consolidation was there effected, constituted the new company a domestic corporation of that State; and, treating it as such, the State has imposed a franchise tax, not unreasonable in amount, based upon its entire paid-up capitalization.

Held: (1) That, subject to the limitations of the Federal Constitution, the existence and status of the consolidated corporation in Alabama were dependent on the Alabama laws.

(2) That the tax being a franchise tax, imposed equally upon all corporations of the State, consolidated or otherwise, and based in each instance on the entire paid-up capitalization, no arbitrary classification emerges either (a) because the consolidated corporation has, and a purely intrastate corporation might not have, property outside of the State; or (b) because foreign corporations are taxed only on

the basis of their property within the State. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, distinguished.

A State may tax foreign corporations for the privilege of doing business within her limits at a different rate than that which she applies to her own corporations in taxing the franchises by which she creates them.

While a State may not tax property beyond her borders, she may measure a franchise tax within her authority by capital stock which stands in part for property beyond her taxing power. *Kansas City &c. Railway Co.* v. *Kansas*, 240 U. S. 227, applied; and *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, distinguished.

Whether a tax is a burden on interstate commerce depends on the nature of the tax; a tax which in kind is within the state authority may properly be measured by capital which in part is used for interstate commerce, where the circumstances do not indicate a purpose to burden such commerce or that such will be the necessary effect.

182 Alabama, 138, affirmed.

THE case is stated in the opinion.

Mr. Forney Johnston and *Mr. W. F. Evans* for plaintiff in error.

Mr. William L. Martin, Attorney General of the State of Alabama, and *Mr. Lawrence E. Brown*, Assistant Attorney General of the State of Alabama, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The Kansas City, Memphis & Birmingham Railroad Company, plaintiff in error herein (hereinafter called the Railroad Company), filed its complaint in the City Court of Birmingham, Alabama, against James P. Stiles, Probate Judge of Jefferson County, Alabama, whereby it sought to recover sundry sums of money, aggregating $2,434.40, paid to Stiles by virtue of the provisions of § 12 of an act of the Alabama Legislature, entitled "An Act to further provide for the revenues of the State of Alabama." By this act it is provided that corporations organized under

the laws of Alabama shall pay an annual franchise tax as follows: where the paid-up capital stock does not exceed $50,000, one dollar per thousand of such paid-up capital stock; where paid-up capital stock is more than $50,000 and up to $1,000,000, one dollar per thousand on the first $50,000, and fifty cents for each thousand of the remainder; where paid-up capital stock is more than $1,000,000 and up to $5,000,000, one dollar per thousand on the first $50,000, and fifty cents per thousand for the next $950,000, and twenty-five cents per thousand for the remainder; where the paid-up capital stock exceeds $5,000,000, one dollar per thousand on the first $50,000, fifty cents per thousand on the next $950,000, twenty-five cents per thousand on the next $4,000,000, and ten cents per thousand on the remainder; and that corporations organized under the laws of any other State and doing business within the State of Alabama shall pay annually franchise tax as above, based, however, on the actual amount of capital employed in the State of Alabama. The act also contains provisions not relevant to this action and not necessary to be set forth here.

The Railroad Company is a consolidated corporation, existing by virtue of the consolidation, under concurrent acts of the States of Tennessee, Mississippi, and Alabama, of three independent and distinct railroad corporations created by and formerly operating solely within the respective States named. As regards this consolidation, plaintiff avers—

"that it is a consolidated corporation, made up and consisting of the consolidation of three distinct and separate corporations, under the following circumstances: A railroad corporation organized and existing solely under the laws of the State of Tennessee, acquired, constructed, owned and operated all of that part of plaintiff's line and railway situated within the State of Tennessee; a separate and distinct railroad corporation, organized and existing

solely under the laws of the State of Mississippi, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Mississippi; and a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Alabama, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Alabama. Plaintiff avers that said separate railroad corporations, being desirous of operating said distinct and separately owned properties as a single system, for the conduct of the business of a common carrier in interstate commerce, as well as the continuation of intrastate commerce within said several States, before the period mentioned or involved herein, and by virtue of concurrent or contemporaneous laws or special acts of said several States, including the States of Tennessee and Mississippi, as well as the State of Alabama, consolidated themselves into a corporation known as Kansas City, Memphis & Birmingham Railroad Company, the plaintiff herein, and, in pursuance of the laws of each of said States, duly filed therein agreements and instruments consolidating said companies, and complying with the laws of each of said States authorizing the same. And plaintiff avers that by said consolidation the shares of stock of said several companies were surrendered by the holders thereof and in lieu thereof there were issued the shares of stock of said consolidated company, the plaintiff herein—being the capital stock of plaintiff issued and outstanding as aforesaid. Plaintiff further avers that the capital stock on which said franchise tax was estimated and exacted as aforesaid was and is the capital stock issued and outstanding under the circumstances aforesaid, although less than one-half thereof was issued in lieu of the stock of or represents the property or assets or business of the Alabama corporation which became a constituent of the plaintiff by consolidation as aforesaid."

The entire capital stock of the consolidated Railroad Company amounted to $5,976,000.00, and it was upon this entire amount that the Company was assessed. By this action the Railroad Company seeks to recover the full amount of the franchise tax exacted upon that basis, and contends that in any event it should have been assessed only upon that part of the capital employed by it in the State of Alabama.

The Railroad Company averred, if it was required to pay the franchise tax in question upon its entire capital, that it would be paying another and different rate of taxation, or another and different amount of franchise tax, from that which is required of like corporations doing business in Alabama, contrary to the provision of the Fourteenth Amendment to the Federal Constitution that no State shall deny to any person within its jurisdiction the equal protection of its laws; that the enforcement of the act by subjecting to its operation the Railroad Company's property in other States constituted a taking of its property without due process of law; and that said act imposed a direct burden upon interstate commerce in requiring it to pay, in addition to all other fees and taxes provided by law, a tax upon its capital stock for the right and privilege of transacting and carrying on its interstate business as a common carrier, in violation of clause three of § 8, Article I of the Federal Constitution.

A demurrer was filed to this complaint, which demurrer was sustained. Upon appeal to the Supreme Court of Alabama, this judgment was affirmed, 182 Alabama, 138, and a writ of error brings the action to this court.

The consolidated Company was formed, so far as the State of Alabama is concerned, under § 1583 of the Alabama Code of 1887, which provides in substance, as follows: That whenever the lines of any two or more railroads chartered under the laws of that or any other State, which, when completed, may admit the passage of burden or

passenger cars over any two or more of such roads continuously without break or interruption, such companies are authorized before or after completion to consolidate themselves into a single corporation, in the manner following: The directors of such corporations may enter into an agreement, prescribing the terms and conditions thereof, mode of carrying into effect, name, number of directors, etc., and such new corporation shall possess all the powers, rights and franchises conferred upon the two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by such statute. Provision is also made for ratification of such consolidation by the stockholders, after which ratification the agreement is deemed completed, as to each corporation. It is also provided that "every such new corporation so formed shall keep an office in the State of Alabama, and be in all respects subject to the laws of the State of Alabama as a domestic corporation." The corporation is to be deemed consolidated when a copy of the agreement is filed with the Secretary of State, and after the election of the first board of directors the property and franchises of each corporation shall be vested in the new corporation, and it shall be subject to the liabilities of its integral parts, as if such debts had been incurred by it.

It will be noted that this statute, which is a grant of corporate rights from the State of Alabama to the consolidated company, contains the express provision that such company shall in all respects be subject to the laws of the State of Alabama as a domestic corporation. Applying § 12 of the statute, the Alabama Supreme Court has held that the Railroad Company is a corporation organized under the laws of that State, and as such subject to the franchise tax imposed by that section of the statute.

The federal questions (which are alone within the jurisdiction of this court) are to be determined upon this construction of the state statute by its highest court.

When the companies comprised in this consolidation sought to avail themselves of the laws of Alabama, they were asking a privilege and right which, subject to the limitations of the Federal Constitution, was within the authority of the State. This principle was succinctly stated in *Ashley* v. *Ryan*, 153 U. S. 436, 442:

"Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another State. The power of corporations of other States to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that State as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Paul* v. *Virginia*, 8 Wall. 168, 181."

This doctrine has been affirmed since. *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 703, and previous cases in this court therein cited; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84.

The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the State of Alabama.

The specific objections based upon the Federal Constitution remain to be noticed. It is said that the Company is deprived of the equal protection of the laws, this contention being based upon the fact that domestic corporations, operating only within the State, are required to pay the tax upon property within the State, and foreign cor-

porations are taxed only upon the basis of property within the State. To support this contention as to denial of equal protection of the laws, the Company relies principally upon the decision of this court in *Southern Railway Company* v. *Greene*, 216 U. S. 400. In that case, a foreign corporation, complying with the laws of Alabama, entered upon business within the State, paid both license and property taxes imposed by the laws of the State, and when it was attempted to impose upon it another tax for the privilege of doing business in the State, a business in all respects like that done by domestic corporations of a similar character who were not subjected to the additional tax complained of, it contended that it was denied equal protection of the law, and this court so held.

That case is readily distinguishable from the one now under consideration. Here the State imposes the franchise tax equally upon all of its corporations, consolidated and otherwise. The fact that a wholly intrastate corporation may own no property outside of the State while the consolidated Company does presents no case of arbitrary classification. In both cases, the franchise tax is based upon a percentage of the capital stock. There is no denial of equal protection of the laws because a State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them.

It is urged that this tax is void because it undertakes to tax property beyond the jurisdiction of the State, and imposes a direct burden upon interstate commerce. Objections of this character were so recently discussed, and the previous cases in this court considered, in *Kansas City &c. Railway Co.* v. *Kansas*, 240 U. S. 227, that it would be superfluous to undertake extended discussion of the subject now. In that case, after a full review of the previous decisions in this court, it was held that each case

must depend upon its own circumstances, and that while the State could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the State. As to the objection based upon the due process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the State is in part measured by the capital stock representing property owned in other States.

The tax is not of the character condemned in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and kindred cases. In the latter case, a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the State. Under the circumstances therein disclosed and the character of the business involved, this court held that the statute was in substance an attempt to tax the right to do interstate business, and to tax property beyond the confines of the State, and was therefore void. Here, a franchise tax is levied upon a corporation consolidated under the laws of the State by its own acceptance of that law in incorporating under it.

So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City &c. Railway Co.* v. *Kansas*, *supra*, is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consoli-

dated under the state law, and engaged in both interstate and intrastate commerce.

We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce, and so beyond the authority of the State to impose. It results that the judgment of the Supreme Court of Alabama must be

Affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* SONMAN SHAFT COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 10. Argued May 14, 1915; restored to docket for reargument June 14, 1915; reargued October 25, 1915.—Decided December 4, 1916.

The duty of a carrier to furnish cars for coal to be loaded at the mine and forwarded promptly for delivery to purchasers in other States is a duty in interstate commerce, notwithstanding the sale of the coal is f. o. b. at the mine.

If no administrative question is involved, a claim for damages for failure, upon reasonable request, to furnish to a shipper in interstate commerce cars sufficient to meet his needs may be enforced in a state as well as a federal court, and without preliminary finding by the Interstate Commerce Commission.

Such remedy is preserved by § 22 of the Interstate Commerce Act. The modes of redress provided by §§ 8 and 9 are not exclusive. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121.

Where relevant conditions of trade and transportation are normal, it is the duty of the carrier, upon reasonable demand, to furnish a shipper in interstate commerce sufficient cars to satisfy the actual needs of his business. That duty, in this case, existed under the common law until the date of the Hepburn Act, and continued thereafter under a provision of that act which, so far as concerns this case, amounts to an adoption of the common law. Act of June 29, 1906, § 1, c. 3591, 34 Stat. 584.

It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. R. Co.* v. *Puritan Coal Co., supra.*

Evidence that throughout the period covered by alleged failures to supply cars, many cars of the carrier which otherwise would have been available to shippers on the carrier's lines were on the lines of other railroad companies as the result of through routings and joint rates, has no tendency to prove that the carrier supplied the complaining shipper with the cars to which he was entitled or to mitigate its default in that regard.

241 Pa. St. 487, affirmed.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the briefs, for plaintiff in error.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

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

The coal company brought this action to recover damages from the railroad company upon two grounds, first, that for a period of four years, beginning April 1, 1903, the railroad company had failed to supply the coal company with a sufficient number of cars to meet the needs of the latter's coal mine; and, second, that during the same period the railroad company, in furnishing cars to the several mines in that district, had discriminated unjustly against the coal company and in favor of some of its competitors. The second ground was eliminated by the coal company at the trial and does not require further notice. The action was begun in a state court and resulted in a

judgment for the coal company for $145,830.25, which the Supreme Court of the State affirmed. 241 Pa. St. 487.

The questions presented by the several assignments of error are: (1) What was the nature of the commerce involved? (2) If the commerce was interstate, was the action cognizable in a state court? (3) Was prejudicial error committed in excluding evidence presently to be mentioned?

The coal company sold its coal f. o. b. cars at the mine, and when the cars were loaded the coal was promptly forwarded to the purchasers at points within and without the State—largely to points in other States. This was well understood by both companies—by the coal company when it asked for cars and by the railroad company when it supplied them. Cars were not requested or furnished merely to be used in holding or storing coal, but always to be employed in its immediate transportation. While furnishing some cars for this service, the railroad company failed to furnish as many as the coal company needed and requested. It is plain that supplying the requisite cars was an essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate—to which that movement belonged. It was expressly so held in *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 465–468. We there said of the sale and delivery of coal f. o. b. at the mine for transportation to purchasers in other States: "The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce." Here the state court ruled that, as the coal was sold f. o. b. at the mine, the commerce involved was intrastate, even though the coal was going to purchasers outside the State. This was error, but it plainly was without prejudice unless it led the state court to exercise a jurisdiction which it did not possess.

In the courts below the railroad company contended that, in so far as the commerce involved was interstate,

the action could not be entertained by a state court consistently with the Interstate Commerce Act, c. 104, 24 Stat. 379; and that contention is renewed here. It proceeds upon the theory, first, that the coal company was without any right to redress in respect of its interstate business unless the failure to supply it with the requisite cars was a violation of some provision of that act; second, that §§ 8 and 9 of the act prescribe the only modes of obtaining redress for violations of its provisions, and, third, that an action for damages in a state court is not among the modes prescribed.

It is true that §§ 8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that §§ 8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for § 22 contains this important provision: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision in § 22 is to make it plain that such "appropriate common law or statutory remedies" as can be enforced consistently with the scheme and purpose of the act are not abrogated or

displaced, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, *ibid.* 130; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission, *ibid.* 131–132; and that, if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a federal or a state court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act,[1] *ibid.* 132–135; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140, 143; *Illinois Central R. R. Co.* v. *Mulberry*

[1] "SEC. 1. . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, . . . ; and it shall be the duty of every carrier subject

Hill Coal Co., 238 U. S. 275, 283; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 472.

Applying these rulings to the case in hand, we are of opinion that a state court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in § 22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common law rule. There was evidence tending to show, and the jury found, that the conditions in the coal trade were normal and the demand for the cars reasonable. Indeed, without objection from the carrier, the court said when charging the jury: "There is no testimony disputing the claim of the plaintiff that these were normal times." The carrier insisted and the jury found that the carrier had a generally ample car supply for the needs of the coal traffic under normal conditions, and the jury further found that the failure to furnish the cars demanded was without justifiable excuse. Thus far it is apparent that no administrative question was involved—nothing which the act intends shall be passed upon by the

to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, . . . " c. 3591, 34 Stat. 584.

Commission either to the exclusion of the courts or as a necessary condition to judicial action.

But there was testimony tending to show that the carrier was applying or following a rule for allotting cars which did not entitle the coal company to receive as many cars as it needed and requested, and because of this it is contended that the reasonableness of this rule was in issue and was an administrative question which the act intends that the Commission shall solve. We cannot accede to the contention. The conditions in the coal trade being normal, as just shown, the number of cars to which the coal company was entitled was to be measured by its reasonable requests based upon its actual needs. It is only in times of car shortage resulting from unusual demands or other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carrier can be regarded as qualifying or affecting the right of a shipper to demand and receive cars commensurate in number with his needs. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 133. Such a rule being inapplicable in the conditions existing at the time, the rule mentioned in the testimony could not be a factor in the decision of the case, and whether in a time of unforeseen car shortage it would be reasonable or otherwise was not then material.

Upon the trial the carrier offered to prove by a witness then under examination . . . "that during all of the period of this action the defendant had in effect . . . through routes and joint rates to points outside the State of Pennsylvania on the lines of other common carriers; that it was obliged to permit cars loaded by its shippers with bituminous coal consigned to such points outside the State of Pennsylvania to go through to destination, even when on the lines of other railroad companies; that as a result of doing this it had continuously throughout the period of this action a large number of cars off its own lines

and on the lines of other common carriers, which cars would otherwise have been available for shippers of coal on the railroad lines of the defendant and these cars if not on other railroad lines would have increased the equipment available for distribution to the plaintiff's mine and would consequently have diminished the damage which plaintiff claims to have sustained by reason of the fact that it did not receive more cars than it did receive."

But on the coal company's objection the evidence was excluded. We think the ruling was right. The offer did not point to any unusual or abnormal condition, not reasonably to have been foreseen, but, on the contrary, to a situation which was described as continuous throughout the four year period to which the action relates. It did not indicate that this condition was even peculiar to that period, or was caused by an extraordinary volume of coal traffic or an unusual detention of cars on other lines of railroad, or that it was other than a normal incident of the coal transportation in which the carrier was engaged. Without doubt the cars of this carrier when loaded with coal often went forward to destinations on the lines of other carriers. It is common knowledge that coal transportation has been conducted quite generally in this way for many years. Besides, a carrier extensively engaged in such transportation from mines along its lines, as this one was, naturally would expect to have a considerable number of cars on other lines in the ordinary course of business. Although possibly having a bearing upon the adequacy of the supply of cars provided by the carrier for the coal business as a whole,—a matter not within the contemplation of the offer,—it is certain that what was proposed to be proved had no tendency to show that the carrier had supplied to the coal company the number of cars to which it was entitled or to mitigate the carrier's default in that regard.

Judgment affirmed.

STEWART *v.* RAMSAY.

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

No. 105. Argued November 15, 1916.—Decided December 4, 1916.

A direct writ of error lies, under Judicial Code, § 238, to test the jurisdiction of the District Court over the person of the defendant.

A District Court sitting in one State cannot acquire personal jurisdiction over a citizen and resident of another through civil process served upon him while in attendance on such court as plaintiff and witness and while he is returning from the court-room after testifying.

THE case is stated in the opinion.

Mr. Robert C. Fergus for plaintiff in error.

Mr. Clarence S. Darrow for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Stewart brought an action at law against Ramsay in the United States District Court for the Northern District of Illinois, and the summons was served personally upon defendant in that District. The jurisdiction was invoked on the ground that plaintiff was a citizen of Illinois and a resident of the Northern District and defendant was a citizen and resident of Colorado. Ramsay pleaded in abatement that he was a resident of the State of Colorado and was served with process while in attendance upon the District Court as a witness in a case wherein he was plaintiff and one Anderson defendant, and that the process was served while he was returning from the court-room after testifying. Upon plaintiff's demurrer this plea was sustained, and, plaintiff electing to stand upon his demurrer, it was ordered that the writ be quashed and

the defendant go without day. The present writ of error was sued out under § 238, Judicial Code, the jurisdictional question being certified.

That a direct writ of error lies in such a case is well settled. *Merriam Company* v. *Saalfield*, 241 U. S. 22, 26.

In our opinion, the decision of the District Court was correct. The true rule, well founded in reason and sustained by the greater weight of authority, is, that suitors, as well as witnesses, coming from another State or jurisdiction, are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going. A leading authority in the state courts is *Halsey* v. *Stewart*, 4 N. J. L. 366, decided in the New Jersey Supreme Court nearly one hundred years ago, upon the following reasoning: "Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen, in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. He should also be enabled to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights. Now, this great object in the administration of justice would in a variety of ways be obstructed, if parties and witnesses were liable to be served with process, while actually attending the court. It is often matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons, will as effectually prevent his approach as if a *capias* might be served upon him. This is especially the case with citizens of neighboring States, to whom the power which the court possesses of compelling attendance, cannot reach."

The state courts, with few exceptions, have followed this rule, applying it to plaintiffs as well as defendants, and to witnesses attending voluntarily as well as those under subpœna. Illustrative cases may be cited. *Richardson* v. *Smith*, 74 N. J. L. 111, 114; *Matthews* v. *Tufts*, 87 N. Y. 568; *Mitchell* v. *Huron Circuit Judge*, 53 Michigan, 541; *Andrews* v. *Lembeck*, 46 Oh. St. 38; *Wilson* v. *Donaldson*, 117 Indiana, 356; *First Natl. Bank* v. *Ames*, 39 Minnesota, 179; *Linton* v. *Cooper*, 54 Nebraska, 438; *Bolz* v. *Crone*, 64 Kansas, 570; *Murray* v. *Wilcox*, 122 Iowa, 188; *Martin* v. *Bacon*, 76 Arkansas, 158.

There are a few cases to the contrary, of which *Bishop* v. *Vose*, 27 Connecticut, 1, 11; *Baldwin* v. *Emerson*, 16 R. I. 304; *Lewis* v. *Miller, Judge*, 115 Kentucky, 623, are instances.

In *Blight* v. *Fisher* (1809), Pet. C. C. 41, Fed. Cas. No. 1542, Mr. Justice Washington, sitting at circuit, held that the privilege of a suitor or witness extended only to an exemption from arrest, and that the service of a summons was not a violation of the privilege or a contempt of court unless done in the actual or constructive presence of the court. But in *Parker* v. *Hotchkiss* (1849), 1 Wall. Jr. 269, Fed. Cas. No. 10,739, District Judge Kane, with the concurrence, as he states, of Chief Justice Taney and Mr. Justice Grier, overruled *Blight* v. *Fisher*, and sustained the privilege in favor of a non-resident admitted to make defense in a pending suit and served with summons while attending court for that purpose, the court declaring: "The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed

to dangerous influences, if they might be punished with a law suit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from the defeated party." Since this decision, the federal Circuit and District Courts have consistently sustained the privilege. *Juneau Bank* v. *McSpedan*, 5 Bissell, 64; Fed. Cas. 7,582; *Brooks* v. *Farwell*, 4 Fed. Rep. 166; *Atchison* v. *Morris*, 11 Fed. Rep. 582; *Nichols* v. *Horton*, 14 Fed. Rep. 327; *Wilson Sewing Mch. Co.* v. *Wilson*, 22 Fed. Rep. 803; *Small* v. *Montgomery*, 23 Fed. Rep. 707; *Kinne* v. *Lant*, 68 Fed. Rep. 436; *Hale* v. *Wharton*, 73 Fed. Rep. 739; *Morrow* v. *U. H. Dudley & Co.*, 144 Fed. Rep. 441; *Skinner & Mounce Co.* v. *Waite*, 155 Fed. Rep. 828; *Peet* v. *Fowler*, 170 Fed. Rep. 618; *Roschynialski* v. *Hale*, 201 Fed. Rep. 1017.

Judgment affirmed.

SIM *v.* EDENBORN.

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

No. 8. Argued May 5, 1915; restored to docket for reargument April 3, 1916; reargued October 23, 1916.—Decided December 4, 1916.

Respondent induced petitioner and others to join with him as subscribers to a syndicate agreement, under which the stock of a corporation was acquired, other property purchased and added to its capital, its stock increased and the shares distributed to the subscribers in proportion to their subscriptions. By this agreement respondent was constituted an agent for the other subscribers with large powers, and became their fiduciary in respect of the acquisition

and management of the subject-matter. By misleading representations and suppression he concealed the fact that the original shares were largely his when the agreement was made, and, carrying out a purpose entertained from the beginning, surreptitiously made use of those he owned in squaring off his subscription. Subsequently, petitioner and other subscribers, discovering this deception and fraud, promptly elected to rescind, gave due notice, offered to return all stock by them received, and demanded back their money.

Held, that tender of the stock actually received, being all the subscribers could do toward restoring the original position, was an adequate preliminary to an action at law against the respondent to recover the amounts paid on their subscriptions. *Heckscher* v. *Edenborn*, 203 N. Y. 210, approved.

Although on a question of commercial law or general jurisprudence the federal courts exercise their own judgment, they nevertheless lean toward agreement with the state courts where the question is balanced with doubt.

206 Fed. Rep. 275, reversed.

THE case is stated in the opinion.

Mr. Theron G. Strong for petitioner.

Mr. Joseph W. Bailey, with whom *Mr. Martin W. Littleton* and *Mr. Owen N. Brown* were on the briefs, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By an action at law commenced in the Supreme Court, Kings County, New York, and subsequently removed to the United States Circuit Court because of diverse citizenship, petitioner, Sim, sought to recover from respondent the amounts paid upon subscriptions to a syndicate agreement which the latter fraudulently induced him and his assignors to make. By stipulation, a jury being waived, the issues were referred to a referee. The reported facts, essential to an understanding of points now involved, are summarized below.

While owning the majority stock of United States Iron Company, respondent and others conceived a scheme to consolidate it with certain coal properties, erect blast furnaces, engage in smelting and manufacturing iron, etc. He accordingly prepared an agreement, dated April 15, 1902, stating generally the ends in view, and invited subscriptions. This instrument designated him and two others as "Syndicate Managers," and recited there was an opportunity to acquire for cash the $1,000,000 capital stock of that company, together with valuable coal properties, and that the purpose was to raise the essential two and a half million dollars. It further specified that "The Syndicate Managers hereunder shall have the direction and management of the subject-matter of the said Syndicate, and each subscriber nominates and appoints the Syndicate Managers his agents and attorneys irrevocable, until the termination of this agreement to exercise all the rights of the subscribers in and to the properties proposed to be acquired." Still other provisions conferred upon the managers wide discretion and powers of control. Petitioner and his assignors became subscribers while in entire ignorance of respondent's true position. He represented that it was proposed to purchase only valuable and paying properties; that subscriptions were payable in dollars, and not in property; that he had made a subscription for $500,000 payable in dollars; that the enterprise was being organized in good faith; that all, according to their interest, had equal rights and stood on same basis; that every man's dollar was put up against every other man's dollar; and that there were to be no special advantages to any one. In fact, however, he always intended to utilize stock owned by him in payment of his subscription. The managers changed the company's name to Sheffield Coal & Iron Company, increased the capital to $2,500,000, and caused it to acquire additional coal properties. For cash paid to them

by syndicate members, they delivered an equal amount of stock issued by the corporation. In settlement of his subscription (reduced from $500,000 to $475,000) respondent surrendered the majority stock in United States Iron Company, at a valuation of $70 per share, paid balance in cash, and took new certificates. When he solicited and obtained subscriptions and received payments, he knew subscribers were relying upon him faithfully to act as their agent. Subsequent to the specified transactions petitioner and his assignors discovered respondent's interest, and thereupon promptly elected to rescind their subscriptions, gave due notice to the managers, offered to return and restore all stock received, and demanded their money.

Relying on *Heckscher* v. *Edenborn*, 203 N. Y. 210, the referee reported that Edenborn was liable for amounts paid, with interest, and final judgment therefor was duly entered. The Circuit Court of Appeals declined to follow the state court, and, being of opinion that, "it is a condition of rescission that the status quo shall be restored," and that no such restoration had been offered, reversed the trial court (206 Fed. Rep. 275, 277). The cause is here upon writ of certiorari.

Heckscher v. *Edenborn* arose out of another subscription to the agreement now involved, and the essential facts there and here are substantially alike. After much consideration the Court of Appeals decided in favor of plaintiff, Heckscher, holding the agreement was vitiated by fraud because Edenborn failed to reveal his interest in the stock intended to be purchased, and further that tender of stock actually received was all the subscriber could do towards restoring the original position, and constituted an adequate preliminary to an action for recovery. The opinion expresses that court's deliberate conclusion upon the issues, and is supported by reference to earlier decisions of its own and other authorities.

Petitioner now contends that the Court of Appeals was correct upon principle, and moreover, that if doubts exist they should be resolved in favor of its opinion. On the other hand, respondent maintains the questions involved are of general law and that the state court reached an unwarranted result not to be accepted here.

This court has many times considered how far federal tribunals, when undertaking to enforce laws of the States, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess* v. *Seligman*, 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence, the former exercise their own judgment, "But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt." This has been often reaffirmed. *Wilson* v. *Standefer*, 184 U. S. 399, 412; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 220; *Stanly County* v. *Coler*, 190 U. S. 437, 444–445; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, 547; *Tampa Water Works Co.* v. *Tampa*, 199 U. S. 241, 243–244; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 357–360, 361; *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652, 657–658; *Moore-Mansfield Co.* v. *Electrical Co.*, 234 U. S. 619, 625; *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461, 474.

The conclusions of the Court of Appeals in *Heckscher's Case* are not in direct conflict with any declared views of this court, and some expressions in our former opinions tend to support them. *Veazie* v. *Williams*, 8 How. 134, 158; *Andrews* v. *Hensler*, 6 Wall. 254, 258; *Neblett* v. *Macfarland*, 92 U. S. 101, 103, 104–105.

Through misleading representations and suppression of facts, respondent induced syndicate subscribers to become parties to an agreement creating him their agent to acquire and deal with certain properties—a position

of especial trust and confidence. His original undisclosed purpose was to obtain their money and appropriate it toward purchase of something partly owned by himself. Having led them to intrust their funds to his discretion, he carried out his preconceived plan, and as a part of it caused them to receive an equivalent amount of corporate stock. He now seeks to avoid a judgment, because his own actions have rendered it impossible for him to get back to the beginning point.

This was not a proceeding in equity addressed to the court's discretion, but a demand at law upon an agent for return of something improperly received and disposed of. The defrauded principals tendered back everything received by them—did all they could towards restoring original conditions. In such circumstances it is but just and right that any loss should fall on the unfaithful agent, not on his too-confiding principals. See *Snow* v. *Alley*, 144 Massachusetts, 546, 551; *O'Shea* v. *Vaughn*, 201 Massachusetts, 412; Bigelow on Fraud, 430–431; Wharton on Contracts, § 285.

We think, in *Heckscher* v. *Edenborn*, the Court of Appeals reached a result well supported both by reason and upon authority, and that the courts below should have followed it when undertaking to determine rights depending upon the laws of New York. The action of the Circuit Court of Appeals is accordingly reversed; and the judgment of the trial court is affirmed.

Reversed.

Mr. Justice McKenna, Mr. Justice Day and Mr. Justice Van Devanter dissent, being of opinion that the questions involved are of general, not local, law; that there has not been such restoration of the *status quo* as is essential to a recovery at law upon a rescission, and that upon the facts specially found by the referee the decision of the Circuit Court of Appeals was right.

ALDER *v.* EDENBORN.

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

No. 9. Argued May 5, 1915; restored to docket for reargument April 3, 1916; reargued October 23, 1916.—Decided December 4, 1916.

Decided on authority of *Sim* v. *Edenborn, ante*, p. 131.
206 Fed. Rep. 275, reversed.

Mr. Theron G. Strong for petitioner.

Mr. Joseph W. Bailey, with whom *Mr. Martin W. Littleton* and *Mr. Owen N. Brown* were on the briefs, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This cause is similar in all essential respects to *Sim* v. *Edenborn*, just decided. Accordingly, the Circuit Court of Appeals' action is reversed and the judgment of the trial court is affirmed.

Reversed.

MR. JUSTICE MCKENNA, MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent.

McINTYRE *v.* KAVANAUGH.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 88. Argued November 10, 1916.—Decided December 4, 1916.

Partners are individually responsible for torts committed by their firm while acting within the general scope of its business, whether they personally participate therein or not.

One who, being entrusted with the possession of corporate stocks as security for an indebtedness, deliberately sells them and appropriates the proceeds, in excess of the debt secured, without the knowledge or consent of their owner, is guilty of a "willful and malicious" injury to property within the meaning of § 17, clause 2, of the Bankruptcy Act, as amended by the Act of February 5, 1903, 32 Stat. 798, and, consequently, his liability is not released by a discharge in bankruptcy.

210 N. Y. 175, affirmed.

THE case is stated in the opinion.

Mr. Robert H. Patton for plaintiff in error.

Mr. Myer Nussbaum for defendant in error.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Plaintiff in error was a member of T. A. McIntyre and Company, engaged in business as brokers. During February, 1908, the partnership received certain stock certificates owned by defendant in error and undertook to hold them as security for his indebtedness amounting to less than one-sixth of their market value. Within a few weeks, without authority and without his knowledge, they sold the stocks and appropriated the avails to their

own use. Shortly thereafter both firm and its members were adjudged bankrupts. After his discharge in bankruptcy this suit was instituted against plaintiff in error seeking damages for the wrongful conversion. He set up his discharge and also personal ignorance of and non-participation in any tortious act.

The trial court held the liability was for wilful and malicious injury to property and expressly excluded from release by § 17 (2), Bankruptcy Act, as amended in 1903; and that the several partners were liable. A judgment for damages was affirmed by Appellate Division, 128 App. Div. 722, and Court of Appeals, 210 N. Y. 175.

That partners are individually responsible for torts by a firm when acting within the general scope of its business whether they personally participate therein or not we regard as entirely clear. *Castle* v. *Bullard*, 23 How. 172; *Matter of Peck*, 206 N. Y. 55. If under the circumstances here presented the firm inflicted a wilful and malicious injury to property, of course, plaintiff in error incurred liability for that character of wrong.

As originally enacted, § 17 of the Bankruptcy Act provided:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; . . . (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

This was amended by Act February 5, 1903, so as to read:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations, or for willful 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; . . . or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The trial court found—

That on February 5, 1908, McIntyre and Company by agreement obtained possession of Kavanaugh's stocks, worth approximately $25,000, and held them as security for his indebtedness amounting to $3,853.32.

"That almost immediately after taking over said stocks by certificates as aforesaid by said firm of T. A. McIntyre & Company, composed as aforesaid, and commencing on the very next day, said firm of T. A. McIntyre & Company (the above-named defendants being members thereof) without any notice to the plaintiff, and without his authority, knowledge or consent, or demand of any kind upon him, sold and disposed of the identical certificates of such stock and scrip so turned over to them as aforesaid, and placed the avails thereof in the bank account of said firm of T. A. McIntyre & Company to the credit of said firm.

"That the various stocks aforesaid had all been disposed of prior to the 18th day of March, 1908, and that three-quarters in value thereof had been disposed of on or prior to February 14th, 1908, or within nine days after the acquisition of the possession thereof by defendant's firm as aforesaid.

"That the above named defendants, together with the other members of said firm of T. A. McIntyre & Company, in disposing of said stocks aforesaid, without notice to, or demand upon the plaintiff, and without his authority, knowledge or consent, and in depositing the proceeds and avails thereof in the bank account to the credit of said firm of T. A. McIntyre & Company, committed wilful and malicious injury to the property of the plaintiff.

"That on April 23rd, 1908, the said firm of T. A. McIntyre & Company filed a petition in bankruptcy in the United States District Court for the Southern District of New York, and were afterwards adjudicated bankrupts.

"That thereafter the plaintiff in this action proved his claim against the bankrupt estate without waiving any legal rights in this action or otherwise."

To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words. Bouvier's Law Dictionary—Injury. And this we understand is not controverted; but the argument is that an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 amendment will show Congress never intended the words in question to include conversion. We can find no sufficient reason for such a narrow construction. And instead of subserving the fundamental purposes of the statute it would rather tend to bring about unfortunate if not irrational results. Why, for example, should a bankrupt who had stolen a watch escape payment of damages but remain obligated for one maliciously broken? To exclude from discharge the liability arising from such transactions as those involved in *Crawford* v. *Burke*, 195 U. S. 176, and here presented, not improbably was a special purpose of the amendment.

In *Tinker* v. *Colwell*, 193 U. S. 473, 485, 487, we said of original § 17 (2), "In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained." And further, "A willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to

come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where more intentional injury without special malice towards the individual has been held by some courts not to be sufficient. *Commonwealth* v. *Williams*, 110 Massachusetts, 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor and not a malicious wrongdoer that was to be discharged."

The circumstances disclosed suffice to show a wilful and malicious injury to property for which plaintiff in error became and remains liable to respond in damages. The judgment below is

Affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* McLAUGHLIN.

ERROR TO THE CIRCUIT COURT OF POCAHONTAS COUNTY, STATE OF WEST VIRGINIA.

No. 100. Argued November 14, 1916.—Decided December 4, 1916.

A stipulation in a "uniform live stock contract" signed and accepted by both shipper and carrier to govern an interstate shipment, and declaring in effect that the carrier shall not be liable for loss or damage unless a claim therefor be made in writing, verified by affidavit, and delivered to a designated agent of the carrier at his office, in a place named, within five days of the removal of the stock from the cars, is on its face unobjectionable and, in the absence of any proof of circumstances tending to render it invalid or excuse a failure to comply with it, will be enforced.

THE case is stated in the opinion.

Mr. F. B. Enslow, with whom *Mr. Herbert Fitzpatrick* was on the brief, for plaintiff in error.

No appearance or brief filed for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

McLaughlin recovered judgment against the railway company in the Circuit Court, Pocahontas County, West Virginia, for injuries to a horse which it transported from Lexington, Kentucky, and delivered to him at Seebert, West Virginia, February 17, 1914.

The shipment was under a "uniform live stock contract" signed by both parties and introduced in evidence by defendant in error which among other things provides:

"That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any Court by the said shipper, unless claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent and delivered to the General Claim Agent of the said carrier at his office in Richmond, Va., within five days from the time said stock is removed from said car or cars; and that if any loss or damages occur upon the line of a connecting carrier then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

It conclusively appears that McLaughlin did not present a verified claim to the carrier's agent as provided by the contract. Upon its face the agreement seems to be unobjectionable and nothing in the record tends to establish circumstances rendering it invalid or excuse failure

to comply therewith. The court below erred in denying a seasonable request for a directed verdict; and its judgment must be reversed. Our recent opinions render unnecessary any further discussion of the reasons for this conclusion. *Northern Pacific Railway Co.* v. *Wall*, 241 U. S. 87; *Georgia, Florida & Alabama Railway Co.* v. *Blish Milling Co.*, 241 U. S. 190; *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Rankin*, 241 U. S. 319.

Reverse and remand for further proceedings not inconsistent with this opinion.

Reversed.

GREAT NORTHERN RAILWAY COMPANY *v.* CAPITAL TRUST COMPANY, ADMINISTRATOR OF WARD.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 107. Submitted November 15, 1916.—Decided December 4, 1916.

Such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under the Employers' Liability Act, as amended by the Act of April 5, 1910. *St. Louis & Iron Mountain Ry.* v. *Craft*, 237 U. S. 648, 655.

Although an error not challenged in the State Supreme Court may not be relied on here as a ground of reversal, it is proper for this court to point it out in anticipation of a possible new trial.

Under the Employers' Liability Act, as amended April 5, 1910, when the personal representative unites a claim for the injury suffered by the decedent with a claim for losses resulting to the beneficiaries from his death, the damages recoverable under the former claim are limited to such as will reasonably compensate for the loss and suffering of the injured person while he lived, and it is error to permit

the jury to increase them by taking account of his premature death and of what he would have earned or accomplished in the natural span of his life. *St. Louis & Iron Mountain Ry.* v. *Craft, supra.*

127 Minnesota, 144; 128 Minnesota, 537, reversed.

THE case is stated in the opinion.

Mr. A. L. Janes and *Mr. M. L. Countryman* for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

While employed by the railway company as a switchman, William M. Ward was accidentally killed, December 13, 1912; and the Administrator brought suit in a state court under the Federal Employers' Liability Act, as amended, for the benefit of his father and mother, seeking to recover their pecuniary loss and also damages for the injuries suffered by him prior to death. Some evidence tended to show that after being run over by one or more cars, although wholly unconscious, the deceased continued to breathe for perhaps ten minutes. Testimony of other witnesses supported a claim that there was no appreciable continuation of life. Judgment upon an unapportioned verdict, in favor of the Administrator, was affirmed by the state Supreme Court, October, 1914. The railway company duly excepted to the following portions of the charge:

"Did Ward's injuries kill him instantly? If he was killed instantly, one rule of damages applies, while if he lived some time after he was injured, another rule of damages would apply. There is some evidence that he lived a few minutes after receiving his injuries; there is other evidence that he was dead when taken out from

under the car. If you should find that Ward died from his injuries without living an appreciable length of time, then the plaintiff could only recover, if at all, what would have been the pecuniary value of Ward's life to his father and mother had he lived. . . . And in that connection it would be proper for you to consider his health, his disposition to contribute to the support of his parents, the evidence of what he customarily earned, his earning capacity, the amount he was in the habit of giving to his parents, his age, his condition in life, the length of time he probably would have lived had not this accident happened, and the expectancy of the life of the father and mother, and the reasonable expectancy of the parents in respect to benefits, if any, from the services of their son; . . .

"In case you find that Ward did not die instantly from his injuries but that he lived some appreciable length of time after the accident, then you would come to another question in the case.

"Under the law of the United States it is provided that any right of action given by the Act of Congress in reference to injuries of this kind under such circumstances, that the right of action shall survive to the personal representatives of the deceased for the benefit of his parents, if there is no surviving widow and children. And if you should find from the evidence that Ward did not die instantly from his injuries but that he lived some little time after he was injured, then, under the law, the plaintiff would be entitled to recover damages in the same amount that Ward, the deceased, would have been entitled to recover had he brought the action in his life time. That is, you can award such damages as in your judgment would be a full, fair and reasonable compensation for the loss sustained by Ward, the deceased, by reason of the injuries he received. . . . And in that connection, it would be proper for you to consider his age, his habits

of industry, his health, his ability to work, his earning capacity, and the amount he usually earned at the time he was injured, and the length of time he would probably have lived had he not been injured, using your best judgment under all the circumstances in arriving at what would be a fair compensation for his loss."

In *St. Louis & Iron Mountain Ry.* v. *Craft*, 237 U. S. 648, 655, 658 (June 1, 1915), we held that under the Employers' Liability Act, as amended in 1910, the administrator of a fatally injured employé might recover the beneficiary's pecuniary loss and also for pain and suffering endured by deceased between the moment of injury and final dissolution. We were careful, however, to say—(655) "But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." And, referring to the two separate grounds of recovery—(658) "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

The present record presents the very circumstances which we declared afforded no basis for an estimation or award of damages in addition to the beneficiary's pecuniary loss. And although apparently not challenged in the State Supreme Court and therefore not now to be

relied on as ground for reversal (*Harding* v. *Illinois*, 196 U. S. 78, 87, 88), in view of a possible new trial, it seems proper to point out that the method approved by the trial court for estimating damages where the deceased's cause of action does survive conflicts with the rule sanctioned by us in the *Craft Case*.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* BEAHAM.

ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

No. 118. Argued November 16, 1916.—Decided December 4, 1916.

When a passenger claims damages from a carrier for the loss of baggage accepted by the carrier for transportation between States, the rights and liabilities of the parties depend upon the Acts of Congress, the agreement of the parties and the common-law principles accepted and enforced by the federal courts.

In such case, the carrier is entitled to the presumption that its business was being rightfully conducted.

Where a stipulation, limiting a carrier's liability for baggage unless its value is stated and an extra charge paid, is printed on the face of a ticket as an ingredient of the ticket contract, and is, in substance, reiterated on a baggage check, one who, purchasing the ticket, employs it at once in checking baggage, receives the check and accepts and uses both ticket and check without objection, may be presumed to have assented to the stipulation, although he did not read it.

As bearing on its baggage liability, an interstate carrier has a right to put in evidence applicable tariff schedules on file with the Interstate Commerce Commission, and to have them duly considered by the court.

In an action over lost baggage, copies of tariff schedules on file with

the Interstate Commerce Commission, certified by its Chairman, and containing clauses limiting baggage liability, were offered by the defendant and received in evidence notwithstanding objection to the mode of certification. Judgment having been rendered on the theory that the limitation could not bind the plaintiff without her assent, the court below, on appeal, though holding such theory erroneous, affirmed the judgment upon the ground that the certification was insufficient and the copies therefore inadmissible. *Held*, that, whether the certification was sufficient or not, it was error to affirm the judgment and thus foreclose the defendant from protecting itself by introducing other evidence on a new trial.

THE case is stated in the opinion.

Mr. Albert S. Marley, with whom *Mr. John S. Marley* and *Mr. Robert J. Cary* were on the brief, for plaintiff in error.

Mr. Justin D. Bowersock, with whom *Mr. Robert B. Fizzell* was on the briefs, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

At its New York City Station, in September, 1910, Miss Beaham purchased of plaintiff in error a first class ticket over its own and connecting lines on the face of which was printed—"Issued by the New York Central & Hudson River Railroad. Good for one passage of the class indicated on coupons attached to Kansas City, Missouri, when stamped and sold by an agent holding written authority as prescribed by law, and presented with coupons attached. Subject to the following Contract: . . . 5. Baggage liability is limited to wearing apparel not to exceed one hundred (100) dollars in value for a whole ticket and fifty (50) dollars for a half ticket unless a greater value is declared by the owner, and excess charge thereon paid at the time of taking passage."

Immediately after purchasing the ticket she presented it at the baggage department; her trunk was received for transportation; and she accepted a check or receipt therefor upon which were the words—"See conditions on back. Value not stated." On the back this was printed—"Notice to Passengers. Baggage consists of a passenger's personal wearing apparel and liability is limited to $100 (except a greater or less amount is provided in tariffs) on full fare ticket, unless a greater value is declared by owner at time of checking and payment is made therefor."

The trunk and contents having been lost she sued plaintiff in error for their full value in the Circuit Court, Jackson County, Missouri. Admitting responsibility for one hundred dollars the company claimed exemption from any larger recovery because of limitations specified in the ticket and impliedly assented to when it was accepted and used; and also because of the same limitations embodied in its tariff schedules filed with the Interstate Commerce Commission.

A jury being waived the cause was tried by the court. Acceptance and use of both ticket and check were shown and nothing in the evidence indicated any purpose to deceive or mislead the purchaser or inability on her part to appreciate the provisions in question; she disclaimed having read them and denied their validity under general principles of law. Counsel for the railroad offered in evidence copies of its tariff schedules on file with the Interstate Commerce Commission, certified by the Chairman of that body. These contained clauses limiting liability for baggage to one hundred dollars unless greater value was declared and paid for; and they were admitted notwithstanding an objection to mode of their authentication.

The Circuit Court held no agreement limiting liability resulted from acceptance and use of ticket and check,

and that, "even if the local and interstate tariffs of excess baggage rates introduced in evidence were filed with the Interstate Commerce Commission of the United States, and properly posted as required by the Interstate Commerce Act, still plaintiff would be entitled to recover the reasonable value of her trunk and the reasonable value of the articles of baggage contained therein, unless she expressly assented to the provisions of said tariffs limiting the liability of the defendant to $100 for loss of baggage unless a greater value should be declared and paid for." A judgment for $1771.52 was affirmed by the Kansas City Court of Appeals. It held that *Boston and Maine Railroad* v. *Hooker*, 233 U. S. 97, would necessitate a reversal but for the fact that the record contained no competent evidence to show a schedule on file with the Commission specifying liability for baggage; "the Federal statute provides that copies of tariff rates on file with that commission, shall be received in evidence, if certified by the Secretary, under the seal of the commission," and certification by the Chairman is insufficient. It therefore wholly disregarded the copies in the record and treated the cause as though they had not been introduced.

The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and common law principles accepted and enforced in federal courts. And the carrier is entitled to the presumption that its business is being conducted lawfully. *Southern Express Company* v. *Byers*, 240 U. S. 612, 614; *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Rankin*, 241 U. S. 319, 326.

In the circumstances disclosed, acceptance and use of the ticket sufficed to establish an agreement *prima facie* valid which limited the carrier's liability. Mere failure by the passenger to read matter plainly placed before her

could not overcome the presumption of assent. *Railroad Company* v. *Fraloff*, 100 U. S. 24, 27; *The Kensington*, 183 U. S. 263; *Phineas Fonseca* v. *Cunard Steamship Co.*, 153 Massachusetts, 553.

In order to determine the liability assumed for baggage it was proper to consider applicable tariff schedules on file with the Interstate Commerce Commission; and the carrier had a federal right not only to a fair opportunity to put these in evidence but also that when before the court they should be given due consideration. *Southern Express Company* v. *Byers*, 240 U. S. 614; *Kansas City Southern Railway Co.* v. *Jones*, 241 U. S. 181. After their admission in evidence by the trial court the schedules could not be disregarded arbitrarily without denying the railroad's federal right; and we think they were so treated by the Court of Appeals. We are cited to no decision of the Supreme Court of Missouri recognizing any settled rule of practice there which required such action and the unjust consequences of it are apparent. Assuming, without deciding, the correctness of its opinion that the schedules as certified were inadmissible and improperly received, nevertheless the court should not have destroyed the carrier's opportunity to protect itself by introducing other evidence upon a new trial.

Reverse and remand for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE PITNEY dissents.

HUTCHINSON ICE CREAM COMPANY ET AL. *v.* STATE OF IOWA.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

CROWL *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 40, 50. Argued November 13, 1916.—Decided December 4, 1916.

Laws forbidding the sale, offering for sale, etc., as "Ice Cream" of any article not containing butter-fat in reasonable proportion fall fairly within the state police power.

The fact that the name "Ice Cream," as commonly used, includes many compounds which are entirely wholesome yet contain no cream or butter-fat, does not render such legislation arbitrary or unreasonable, but tends rather to support it as serving to prevent the public from being misled in the purchase of a food article of general consumption.

Whether the State may prohibit the sale of wholesome products if the public welfare seems to require such action is a question not involved in these cases.

168 Iowa, 1; 245 Pa. St. 554, affirmed.

THE case is stated in the opinion.

Mr. Walter Jeffreys Carlin and *Mr. R. L. Parrish* for plaintiffs in error:

While the police power may be exercised to protect the public health, morals, safety and general welfare, it may

[1] Pursuant to stipulation, the case of *Sanders Ice Cream Co. et al.* v. *State of Iowa*, No. 39, October Term, 1916, in error to the Supreme Court of the State of Iowa, was argued on the record in the *Hutchinson Case*, *supra*, and disposed of in the same way.

not destroy private rights arbitrarily; and whether its exercise in a given case is valid or not is a judicial question.

"Ice Cream" is a generic term, embracing a large number and variety of products, many of which, though entirely wholesome, do not contain either cream of milk or butter-fat. The term, as generally used and understood, does not imply the presence of such ingredients in definite proportions or at all. The product, thus broadly defined, is not an imitation or substitute for any other confection or food, but an admittedly wholesome article passing honestly by its own name.

The standard enacted is purely arbitrary. The legislature selects one variety of the product and declares that henceforth all other varieties of the same product shall cease to bear the name under which they have customarily been sold for more than a hundred years. The percentages are without reasonable basis. It also arbitrarily excludes from the standard product ingredients which are wholesome and commonly employed. Such arbitrary classifications are unconstitutional. *Truax* v. *Raich*, 229 U. S. 33; *People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8; *Nichols* v. *Ames*, 173 U. S. 509, 521; *State* v. *Miksicek*, 125 S. W. Rep. 501.

The legislation has no tendency to prevent fraud. The cases involving colored oleomargarine have no application, there being here no substitute for a well known article of food. See *State* v. *Layton*, 61 S. W. Rep. 171, 176. The cases concerning milk are inapplicable. Milk is a definite product of nature. Its quality has been standardized to protect health and prevent fraud. *Rigbers* v. *City of Atlanta*, 66 S. E. Rep. 991; *People* v. *Biesecker*, 169 N. Y. 53, 57. Neither do cases apply which concern regulations of weight and measure.

This legislation if sustained, must be sustained solely as tending to prevent fraud, and only on the basis of the

situation as it existed before the enactment, not on the basis of a situation created by the legislation itself, and since the incontrovertible facts of common knowledge absolutely negative the possibility that any purchaser of ice cream could have been misled by the term "ice cream" into assuming that the name implied any particular proportionate butter-fat content, or that the product was made of dairy cream alone, it necessarily follows that no fraud was possible and hence the law cannot be sustained as a police measure tending to prevent fraud and deceit.

The legislature cannot prohibit the sale of a wholesome commodity in the absence of fraud; but such is the effect of this legislation if sustained. When manufacturers are deprived of the name under which their product is always bought and sold, they are deprived of the right to sell it, their business is injured, and their property taken. The privilege to sell it as something else is a privilege of no value.

Under the Pennsylvania law ice cream containing less than 8 per cent. of butter-fat can not be sold under any name. This would absolutely forbid the sale of an innocent and wholesome commodity. It can not be done. See decision of the Iowa Supreme Court in the *Hutchinson Case;* also *Rigbers* v. *City of Atlanta, supra; State* v. *Hanson* (Minn.), 136 N. W. Rep. 412; *People* v. *Marx*, 99 N. Y. 383, 387; *People* v. *Biesecker, supra.*

Mr. George Cosson, Attorney General of the State of Iowa, for the State of Iowa.

Mr. William M. Hargest, Deputy Attorney General of the Commonwealth of Pennsylvania, with whom *Mr. Francis Shunk Brown*, Attorney General of the Commonwealth of Pennsylvania, was on the brief, for the Commonwealth of Pennsylvania.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These cases were argued together. In each a state statute which prohibits the sale of ice cream containing less than a fixed percentage of butter-fat is assailed as invalid under the Fourteenth Amendment; the Supreme Court of each State having held its statute constitutional. *State* v. *Hutchinson Ice Cream Co.*, 168 Iowa, 1; *Commonwealth* v. *Crowl*, 245 Pa. St. 554. Iowa makes 12 per cent. the required minimum; Pennsylvania 8 per cent. The material provisions of the several statutes are copied in the margin.[1]

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[1] Iowa: Code Supp., 1913, § 4999-a20:

"No person, firm or corporation, . . . shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act."

Code Supp., 1913, § 4999-a31e:

"For the purpose of this act, an article of food shall be deemed to be adulterated:

"First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

"Second. If any substance or substances has or have been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it does not conform to the standards established by law."

Chap. 175, Acts 34th G. A. (1911), p. 192:

"ICE-CREAM."

"1. Ice-cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent. (1%) by weight of a harmless thickener, and contains not less than twelve per cent. (12%) by weight

The right of the State under the police power to regulate the sale of products with a view to preventing frauds or protecting the public health is conceded by plaintiffs in error. And they do not contend that the particular percentages of butter-fat set by Iowa and Pennsylvania are so exacting as to be in themselves unreasonable. Thirteen other States have by similar legislation set 14 per cent. as the minimum; five other States 12 per cent.; only eight States have fixed a percentage as low as Pennsylvania; and

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of milk fat, and the acidity shall not exceed three tenths (3-10) of one per cent (1%)."

Pennsylvania: P. L., 1909, p. 63, Purden's Dig., vol. 5, p. 5209:

"An act for the protection of the public health and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream; fixing a standard of butter fat for ice cream; providing penalties for the violation thereof, and providing for the enforcement thereof.

"SECTION 1. *Be it enacted, &c.*, That no person, firm, or corporate body, by himself, herself, itself or themselves, or by his, her or their agents, servants, or employees, shall sell, offer for sale, expose for sale, or have in possession with intent to sell, ice cream adulterated within the meaning of this act.

"SECTION 2. Ice cream shall be deemed to be adulterated within the meaning of this act—

"*First.* If it shall contain boric acid, formaldehyde, saccharine, or any other added substance or compound that is deleterious to health.

"*Second.* If it shall contain salts of copper, iron oxide, ochres, or any coloring substance deleterious to health: *Provided*, That this paragraph shall not be construed to prohibit the use of harmless coloring matter in ice cream, when not used for fraudulent purposes.

"*Third.* If it shall contain any deleterious flavoring matter, or flavoring matter not true to name.

"*Fourth.* If it be an imitation of, or offered for sale under, the name of another article. . . .

"SECTION 4. No ice cream shall be sold within the State containing less than eight (8) per centum butter fat, except where fruit or nuts are used for the purpose of flavoring, when it shall not contain less than six (6) per centum butter fat."

the United States Department of Agriculture has declared 14 per cent. to be standard.[1] The main objection urged is this: To require that ice cream, in order to be legally salable, must contain some butter-fat is a regulation so unreasonable and arbitrary as to be a deprivation of property without due process of law and a denial of the equal protection of the laws. To support this contention the following trade facts are shown:

The ice cream of commerce is not iced or frozen cream. It is a frozen confection—a compound. The ingredients of this compound may vary widely in character, in the number used and in the proportions in which they are used. These variations are dependent upon the ingenuity, skill and judgment of the maker, the relative cost at a particular time or at a particular place of the possible ingredients, and the requirements of the market in respect to taste or selling price. Thus, some Philadelphia Ice Cream is made of only cream, sugar and a vanilla flavor. In making other Philadelphia Ice Cream the whites of eggs are added; and according to some formulas Vanilla Ice Cream may be made without any cream or milk whatsoever; for instance by proper manipulation of the yolks of eggs, the whites of eggs, sugar, syrup and the vanilla bean. All of these different compounds are commonly sold as ice cream; and none of them is necessarily unwholesome.

Plaintiffs in error contend that as ice cream is shown to be a generic term embracing a large number and variety of products and the term as used does not necessarily imply the use of dairy cream in its composition, it is arbitrary and unreasonable to limit the ice cream of commerce to that containing a fixed minimum of butter-fat. But the legislature may well have found in these facts persuasive

[1] The requirements of the several States are set forth in U. S. Department of Agriculture (Bureau of Animal Industry) Circular 218, on Legal Standards for Dairy Products.

evidence that the public welfare required the prohibition enacted. The facts show that in the absence of legislative regulation the ordinary purchaser at retail does not and cannot know exactly what he is getting when he purchases ice cream. He presumably believes that cream or at least rich milk is among the important ingredients; and he may make his purchase with a knowledge that butter-fat is the principal food value in cream or milk. Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power. The legislature defines the standard article or fixes some of its characteristics; and it may conclude that fraud or mistake can be effectively prevented only by prohibiting the sale of the article under the usual trade name, if it fails to meet the requirements of the standard set. Laws prohibiting the sale of milk or cream containing less than fixed percentages of butter-fat present a familiar instance of such legislation. Cases in the state courts upholding laws of this character are referred to in the margin.[1] This court has repeatedly sustained the validity of similar prohibitions. *Schmidinger* v. *Chicago*, 226 U. S. 578; *Armour & Co.* v. *North Dakota*, 240 U. S. 510.

It is specially urged that the statutes are unconstitutional because they do not merely define the term ice cream; but arbitrarily prohibit the sale of a large variety of wholesome compounds theretofore included under the name ice cream. The acts appear to us merely to prohibit the sale of such compounds as ice cream. Such is the construction given to the act by the Supreme Court of Iowa.

[1] *Iowa* v. *Schlenker*, 112 Iowa, 642; *State* v. *Campbell*, 64 N. H. 402; *People* v. *Bowen*, 182 N. Y. 1; *State* v. *Crescent Creamery Co.*, 83 Minn. 284; *Louisiana* v. *Stone*, 46 La. Ann. 147; *Deems* v. *Baltimore*, 80 Md. 164; *Commonwealth* v. *Wheeler*, 205 Mass. 384; *St. Louis* v. *Grafeman Dairy Co.*, 190 Mo. 507; *State* v. *Smyth*, 14 R. I. 100.

State v. *Hutchinson Ice Cream Co.*, 168 Iowa, 1, 15, which is of course binding on us. We cannot assume, in the absence of a definite and authoritative ruling, that the Supreme Court of Pennsylvania would construe the law of that State otherwise. The conviction here under review was for selling the "compound" as ice cream, so that we are not called upon to determine whether the State may in the exercise of its police power prohibit the sale even of a wholesome product, if the public welfare appear to require such action—and if, as here, interstate commerce is not involved. See *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 15.

In view of the conclusion stated above, it is unnecessary to consider whether the statutes are or are not sustainable as health measures; and upon this we express no opinion.

The judgment in each case is

Affirmed.

KANE *v.* STATE OF NEW JERSEY.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 51. Argued October 31, 1916.—Decided December 4, 1916.

In regulating the use of motor vehicles upon its highways, (*Hendrick* v. *Maryland*, 235 U. S. 610), a State may require nonresident owners to appoint a state official as agent upon whom process may be served in legal proceedings brought against them, and resulting from the operation of their motor vehicles, within the State.

A registration fee, not unreasonable in amount, which is exacted by a State from residents and nonresidents alike as a condition to the use of its highways by motor vehicles, is not a discrimination against the citizens of other States either (a) because the amount of the fee is fixed for each calendar year without reference to the extent

to which the highways are used, or (b) because the liability of non-residents to pay is not tempered by the allowance of any period of free use in reciprocation for like privileges allowed by the States in which they reside.

It is clearly within the discretion of the State to determine whether the compensation for the use of highways by automobiles shall be determined by way of a fee, payable annually or semi-annually, or by a toll based on mileage or otherwise.

The power of the State, in the absence of national legislation upon the subject, to regulate the use of its highways by motor vehicles moving in interstate commerce, applies as well to such as are moving through the State as to such as are moving into it only.

As applied to vehicles of nonresidents moving in interstate commerce as well as to vehicles of residents, the amount of the registration fee may properly be based not only on the cost of inspection and regulation, but also on the cost of maintaining improved roads. *Hendrick* v. *Maryland*, *supra*, explained and followed.

81 N. J. L. 594, affirmed.

THE case is stated in the opinion.

Mr. John W. Griggs and *Mr. Charles Thaddeus Terry* for plaintiff in error:

The history of the legislation, with § 37 of the statute, providing for the disposition of the moneys received, proves that the Legislature intended to impose the fees for revenue purposes. The record shows affirmatively that in a very short period the income was vastly in excess of the cost of registration and inspection. This was pure profit. In this important respect the case differs very materially from *Hendrick* v. *Maryland*, 235 U. S. 610, for there the fees were no more than sufficient to defray the cost of registration.

In the *Hendrick Case* it did not appear that a license to operate had been obtained in Maryland. The fact that Kane had such a license in New Jersey discriminates the two cases. In the former, the power of the State to regulate and therein to impose taxes for revenue was based upon the danger in the *operation* of motor vehicles as well

as their destructive effect upon roads, and not upon the proposition that such vehicles are inherently dangerous agencies, and as such subject to be regulated out of existence. It being well settled that they do not bear that character but are lawful vehicles, entitled to equal rights on the highways (*Vincent & Seymour* v. *Crandall & Godley Co.*, 131 N. Y. App. Div. 200; *Indiana Springs Co.* v. *Brown* (Ind.), 74 N. E. Rep. 615; *Mason* v. *West*, 61 N. Y. App. Div. 40; *City of Chicago* v. *Banker*, 112 Ill. App. 94), it follows that they cannot be singled out to be specially taxed for general revenue purposes.

The right to use the streets is a natural right of every citizen which cannot be converted into a privilege by a legislative fiat.

Again, in the *Hendrick Case* it did not appear, as here, that there had been compliance as to license and registration, etc., with the laws of his own domicile by the owner of the machine. The record also did not contain sufficient facts on which it could be determined that Hendrick was engaged in interstate commerce. The question raised here, viz., whether the State may impose a pure tax upon a vehicle of a nonresident for the use of its roads while he is engaged in interstate commerce, was neither presented nor decided in that case. Maintaining roads is one of the regular functions of government, and taxes to defray the cost are like any other taxes levied to meet governmental expenses generally. Such taxes cannot be lawfully imposed on interstate commerce.

The tax is not sustainable, like tolls or wharfage, as a charge for the use of "artificial facilities." The cases of *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 699; *Huse* v. *Glover*, 119 U. S. 543, 548, 549; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329, 330; and authorities cited in the *Minnesota Rate Cases*, 230 U. S. 352, at p. 405, do not sustain it. In the *Minnesota Rate Cases* the charge was for tolls for the actual use of

the facility and proportioned to the amount of such user. Here the tax is imposed for registration of the vehicle whether there be any subsequent user or not, and quite irrespective of the extent of such user. See *Adams Express Co.* v. *City of New York*, 232 U. S. 14; *Muehlenbrinck* v. *Commissioners*, 13 Vroom, 364–368.

To impose the tax on motors alone would be an unlawful discrimination in favor of all other kinds of vehicles, such as express wagons and farm trucks, upon which the law lays no charge. See *Adams Express Co.* v. *City of New York, supra; Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

To avoid such discrimination the charge should be based not on the character of the vehicle, but on the use of the road. The tax should apply to all classes using the special facilities (if such they can be regarded); and if it be considered a recompense for wear of roads, the fee should be adjusted in proportion to the damage done by each class.

The tax is not supportable as a tax upon occupation or privilege. The privilege of a citizen to pass from one State over the highways of another cannot be impaired by any state legislation. In this case the burden on interstate commerce is direct. Nonresidents have to pay a gross fee for the privilege of entering and traversing New Jersey.

In requiring of nonresidents the filing of a power of attorney to accept service, the law abridges the privileges of citizens of other States. This power of attorney is made a condition precedent to the right of passage. It thus discriminates against nonresidents, since residents are not so compelled to submit to jurisdiction in advance of legal proceedings.

The vehicle is not taxable in New Jersey as property;

its *situs* is elsewhere for direct taxation, and under the equal protection clause the people of all States are guaranteed the right of free ingress and egress, whether by motor or any other class of vehicle, without having their vehicles taxed.

Mr. Herbert Boggs, with whom *Mr. John W. Wescott*, Attorney General of the State of New Jersey, was on the brief, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

The New Jersey automobile law of 1906, as amended in 1908 (P. L. 1908, p. 613), provides in substance that no person, whether a resident or nonresident of the State, shall drive an automobile upon a public highway unless he shall have been licensed so to do and the automobile shall have been registered under the statute; and also that a nonresident owner shall appoint the Secretary of State his attorney upon whom process may be served "in any action or legal proceeding caused by the operation of his registered motor vehicle, within this State, against such owner." The statute fixes the driver's license fee for cars of less than thirty horse power at two dollars and more than thirty horse power at four dollars. It fixes the registration fee at three dollars for cars of not more than ten horse power; five dollars for those from eleven to twenty-nine horse power; and ten dollars for those of thirty or greater horse power. Both license fees and registration fees, whensoever issued, expire at the close of the calendar year. The moneys received from license and registration fees in excess of the amount required for the maintenance of the Motor Vehicle Department are to be applied to the maintenance of the improved highways. Penalties are prescribed for using the public highways

without complying with the requirements of the act. The material portions of the statute are copied in the margin.[1]

Kane, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey

[1] "Part IV.—The Operation of Motor Vehicles.

* * * * * * * *

"16.—(1) Every resident of this State and every nonresident, whose automobile shall be driven in this State, shall, before using such vehicle on the public highways, register the same, and no motor vehicle shall be driven unless so registered. Every registration shall expire and the certificate thereof become void on the thirty-first of December of each year; provided, it may be lawful for any automobile duly registered, to operate under said registration certificate for a period not exceeding thirty-one days after the expiration of said registration certificate. . . . The applicant shall pay the Commissioner of Motor Vehicles for each registration, a fee of three dollars for automobiles of the first class; five dollars for the second class; and ten dollars for the third class. Automobiles of ten horsepower or less, shall be of the first class; from eleven to twenty-nine horsepower, inclusive, of the second class; and of thirty horsepower or more, of the third class. . . . Each owner having a residence outside of the State shall file with the Secretary of State a duly executed instrument, constituting the Secretary of State, and his successors in office, the true and lawful attorney upon whom all original process in any action or legal proceeding caused by the operation of his registered motor vehicle, within the State, against such owner may be served, and therein shall agree that any original process against such owner shall be of the same force and effect as if served on such owner within this State; the service of such process shall be made by leaving a copy of the same in the office of the Secretary of State, with a service fee of two dollars, to be taxed on the plaintiff's costs of suit. Said Commissioner of Motor Vehicles shall forthwith notify such owner of such service by letter directed to him at the post office address stated in his application. . . .

"17.—No person shall hereafter drive an automobile upon any public highway in this State, unless licensed to do so in accordance with the provisions of this act. No person under the age of sixteen years shall be licensed to drive automobiles, nor shall any person be licensed to drive automobiles until said person shall have passed a satisfactory examination as to his ability as an operator. . . . There shall be two classes of drivers' licenses. Those authorizing the licensee to drive cars of less than thirty horsepower shall be of the first class, and those authorizing

and tried in the Recorder's Court. The following facts were stipulated: Kane had been duly licensed as a driver under the laws of both New York and New Jersey. He had registered his car in New York but not in New Jersey. He had not filed with the Secretary of State of New Jersey the prescribed instrument appointing that official his attorney upon whom process might be served. When arrested he was on his way from New York to Pennsylvania. The aggregate receipts from license and registration fees for the year exceeded the amount required to defray the expenses of the Motor Vehicle Department, so that a large sum became available for maintenance of the improved roads of the State. Kane contended that the statute was invalid as to him, a nonresident, because it violated the Constitution and laws of the United States regulating interstate commerce and also because it violated

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the licensee to drive cars of thirty and greater horsepower shall be of the second class. The annual license fee to be charged shall be two dollars for drivers of the first class, and four dollars for drivers of the second class. . . .

* * * * * * * *

"Part X.—Miscellaneous.

"37.—Moneys received in accordance with the provisions of this act, whether from fines, penalties, registration fees, license fees, or otherwise, shall be accounted for and forwarded to the Commissioner of Motor Vehicles and by him paid over to the Treasurer of the State of New Jersey, to be appropriated annually to the Commissioner of Public Roads, to be used as a fund for the repair of the improved roads throughout the State, whether they had been originally built by State aid or not, and to be by the said Commissioner, apportioned once each year among the several counties of this State according to the mileage of improved roads in each county, the share apportioned each county to be used for the repair of improved roads in that county under the direction of the Commissioner of Public Roads or his authorized representatives, and to be paid in the same manner as State funds are now paid for the improvement of public roads. The term 'improved roads' as used in this section shall not include streets paved with cobble stones, Belgium block or asphalt."

the Fourteenth Amendment. These contentions were overruled; and he was fined five dollars. The conviction was duly reviewed both in the Supreme Court and by the Court of Errors and Appeals. The contentions were repeated in both of those courts; and both courts affirmed the conviction. *Kane* v. *New Jersey*, 81 N. J. L. 594. The case was brought here by writ of error.

The power of a State to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to ensure safety. And it is properly exercised in imposing a license fee graduated according to the horse power of the engine. *Hendrick* v. *Maryland*, 235 U. S. 610. Several reasons are urged why that case should not be deemed controlling:

1. The Maryland law did not require the nonresident to appoint an agent within the State upon whom process may be served. But it was recognized in discussing it, that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public" (p. 622). We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against nonresidents, denying them equal protection of the law. On the contrary, it puts nonresident owners upon an equality with resident owners.

2. The Maryland law contained a reciprocal provision by which nonresidents whose cars are duly registered in

their home State are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee. The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the State to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semi-annually, or by a toll based on mileage or otherwise. Our decision sustaining the Maryland law was not dependent upon the existence of the reciprocal provision. Indeed, the plaintiff in error there was not in a position to avail himself of the reciprocal clause; and it was referred to only because of the contention that the law discriminated between nonresidents; that is, that Maryland extended to residents of other States privileges it denied to residents of the District of Columbia.

3. In *Hendrick* v. *Maryland*, it appeared only that the nonresident drove his automobile *into* the State. In this case it is admitted that he was driving *through* the State. The distinction is of no significance. As we there said (622): "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others."

4. In the *Hendrick Case* it did not appear, as here, that

the fees collected under the motor vehicle law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. But the Maryland statute, like that of New Jersey, contemplated that there would be such excess and provided that it should be applied to the maintenance of improved roads. And it was expressly recognized that the purpose of the Maryland law "was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

The judgment should be

Affirmed.

MR. JUSTICE PITNEY took no part in the consideration or decision of this case.

BALTIMORE & OHIO RAILROAD COMPANY *v.* WHITACRE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 71. Argued November 7, 1916.—Decided December 4, 1916.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of state trial and appellate courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Employers' Liability Act.

Certain requests for instructions are here held rightly refused because of deficiencies in recitals of facts.

124 Maryland, 411, affirmed.

THE case is stated in the opinion.

Mr. Duncan K. Brent and *Mr. George A. Pearre*, with whom *Mr. A. Hunter Boyd, Jr.*, and *Mr. Geo. E. Hamilton* were on the brief, for plaintiff in error.

Mr. Frank A. Perdew and *Mr. Albert A. Doub* for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

Whitacre, a freight train brakeman, while walking through a railroad yard on a dark and foggy night, fell into a water cinder pit and was seriously injured. He brought suit under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, in a state court and recovered a verdict. Exceptions were taken to certain refusals to rule. The Court of Appeals of Maryland affirmed the judgment of the court below. 124 Maryland, 411.

It appeared at the trial that, although the pit was of modern construction and well adapted to the purpose for which it was constructed, it was not protected by a guard rail. There was testimony that at the time of the accident certain lights alleged to have been provided about the pit were not lighted; that it had been raining; and that the top of the water was covered to some extent with ashes which made it difficult to distinguish the surface of the pit from solid ground. It was admitted that Whitacre was engaged in interstate commerce. The defences relied upon were assumption of risk and denial of negligence.

The defendant (plaintiff in error) requested a peremptory instruction in its favor, on the ground that there was not sufficient evidence to entitle the plaintiff to recover. The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No

clear and palpable error is shown which would justify us in disturbing that ruling. *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466. The defendant further complains that the trial court refused to give certain instructions on the issues of negligence and assumption of risk. These instructions were properly refused; because in each instance the recital therein did not include all the facts which the jury was entitled to consider on the issues presented and concerning which there was some evidence. The judgment is

Affirmed.

KRYGER *v.* WILSON ET AL., ADMINISTRATORS.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 99. Submitted November 13, 1916.—Decided December 4, 1916.

Whether the cancellation of a land contract is governed by the law of the *situs* or the law of the place of making and performance is a question of local common law with which this court is not concerned in a case coming from a state tribunal.

In a suit in a state court to quiet title to land within its jurisdiction, a resident of another State voluntarily appeared and, as defendant and counterclaimant, asserted his right to possession and control of the land under a contract of sale. The court adjudged that his rights under the contract were gone as the result of statutory pro-

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[1] The title of this case, as originally docketed, was "*Henry H. Kryger, plaintiff in error*, v. *Edward H. Wilson.*" On October 9, 1916, the death of Edward H. Wilson was suggested and the appearance of Ida S. Wilson and J. E. Davis, administrators, as the parties defendant in error, was filed and entered.

ceedings for forfeiture and cancellation taken pursuant to the *lex loci rei sitæ*. *Held*, that, whether the court was right or wrong in upholding the cancellation proceeding as applied to the contract, there was no denial of due process of law, since due process was afforded in the suit to quiet title itself. *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112, distinguished.

Such proceedings as are required by Minnesota Revised Statutes, 1905, § 4442, and North Dakota Revised Code of Civil Procedure, 1905, ch. 30, Art. 3, pars. 7494–7497, in order to enable a vendor to cancel and avoid a contract for a default of the vendee, are not judicial proceedings but merely statutory conditions upon the right of cancellation, and hence the absence of notice does not involve a denial of due process.

No federal question arises under the contract clause from the impairment of a contractual obligation by judicial decision alone.

29 N. Dak. 28, affirmed.

THE case is stated in the opinion.

Mr. O. E. Holman and *Mr. William W. Fry* for plaintiff in error:

A contract for the sale of real estate must be canceled according to the law of and in the State where it was made, where all the parties to it reside, and where it is to be performed. *Finnes* v. *Selover*, 102 Minnesota, 334; *Walsh* v. *Selover, Bates & Co.*, 109 Minnesota, 136; and the latter case in this court, *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112. The contract in the *Walsh Case* was by no means as clearly a Minnesota contract as is the contract in the case at bar.

The contract involves rights irrespective of the location of the land. It does not itself convey the land, being simply an agreement that upon payment a conveyance will be made. The form of conveyance would have to suit the *lex sitæ*, but the Minnesota courts, if they had jurisdiction of the vendor, could compel a conveyance in that form. See *Polson* v. *Stewart*, 167 Massachusetts, 211.

The process by which the obligation of a contract is

canceled is not remedial merely; it goes to the substance. *Scudder* v. *Union National Bank*, 91 U. S. 406; *True* v. *Northern Pacific Railway*, 126 Minnesota, 72. This, being a Minnesota contract, could be canceled only by complying with the Minnesota law. The attempt in North Dakota was void. Kryger's vested right could not be disturbed without due process. The constitutional inhibition applies to every form of proceeding, legislative, judicial and executive. Kryger had no notice of the cancellation proceeding, or anything approaching notice. If the contract is canceled at all it must be canceled as a whole, and this can only be done as provided by the Minnesota law.

In the suit to quiet title the court should have decreed the title as it found it and stopped; it should not have proceeded to determine the liability of Kryger's vendor.

The decision is an impairment of the obligation of the contract. *Minnesota ex rel. National Bond & Security Co.* v. *Krahmer*, 105 Minnesota, 422; *Von Hoffman* v. *Quincy*, 4 Wall. 553; Cooley, Const. Lim., 178. It in effect determines that no obligation under it any longer exists. The Minnesota law being part of the contract, fixing its obligations, the Dakota judgment impairs the contract indirectly by reading that law entirely out of it.

Mr. George S. Grimes and *Mr. Jesse Van Valkenburg* for defendants in error.

Mr. Justice Brandeis delivered the opinion of the court.

This case comes here on writ of error to the Supreme Court of North Dakota to review a decree quieting title in the defendant in error—the plaintiff below—to land situated in that State. The plaintiff in error, a resident of Minnesota, claimed under an executory contract for

the purchase of the land in controversy, and the rights of the parties turned upon whether this contract was outstanding or had been duly cancelled. Both Minnesota, where the contract was made and to be performed, and North Dakota, had statutes providing that a vendor in a contract for the sale of land may not cancel and terminate the same upon default, except after written notice to the vendee giving him at least thirty days within which to make good his non-performance. Minn. R. S., 1905, § 4442; N. Dak. Rev. Code, 1905, Chap. 30, Art. 3. The material provisions of the latter statute are copied in the margin.[1] The vendor in this case (grantor of defendant

[1] N. Dak. Rev. Code of Civ. Pro. (1905), Chap. 30, Art. 3:

"Par. 7494. Owner must give written notice to vendee or purchaser. No owner of real estate, or owner of any equity therein, [who] shall hereafter make or execute a contract for deed, bond for deed, or other instrument for the future conveyance of any such real estate or equity therein, shall have the right to declare a cancellation, termination or forfeiture thereof or thereunder, except upon written notice to the vendee or purchaser, or his assigns, as hereinafter provided; and such notice shall be given to such vendee or purchaser or his assigns, notwithstanding any provision or condition in any such instrument to the contrary.

"Par. 7495. In case of default. Contents of notice. Whenever any default shall have been made in the terms or conditions of any such instrument hereinafter made, and the owner or vendor shall desire to cancel or terminate the same, [he] shall, within a reasonable time after such default, cause a written notice to be served upon the vendee or purchaser, or his assigns, stating that such default occurred, and that said contract will be cancelled or terminated, and shall recite in said notice the time when said cancellation or termination shall take effect, which shall not be less than thirty days after the service of such notice.

"Par. 7496. Notice how served. Such notice shall be served upon the vendee or purchaser, or his assigns, in the manner now provided for the service of summons in the District Court of this state, if such person to be served resides within the state. If such vendee or purchaser, or his assigns, as the case may be, resides without the state or cannot be found therein, of which fact, the return of the sheriff of the county in which said real estate is situated, that such person to be served cannot

in error) had given to the sheriff of the county where the land lay a written notice of cancellation to be served upon the plaintiff in error if found within the said county, and upon return of *not found*, caused the same to be published in a county newspaper, and later filed for record affidavits of publication and of non-redemption—all in conformity with the North Dakota statute, if it applied.

When the present action was brought to quiet title, plaintiff in error defended, and asked for counter relief, contending that his contract was still valid and subsisting, as the action prescribed by the Minnesota statute to entitle a vendor to cancel had not been taken. The trial court held that the North Dakota law governed; that under it the contract had been "duly and legally cancelled"; that the plaintiff in error having shown no right in the land, title should be forever quieted in the defendant in error. This decree was affirmed by the Supreme Court on appeal. *Wilson* v. *Kryger*, 29 N. Dak. 28. We are asked to review the case on the ground that the state court deprived the plaintiff in error of property without

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be found in his county, shall be *prima facie* evidence, then such notice shall be served by the publication thereof in a weekly newspaper within said county; or, if there is no weekly newspaper within said county, then in a newspaper published at the capital of this state for a period of three successive weeks.

"Par. 7497. Time allowed. Such vendee or purchaser, or his assigns, shall have thirty days after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred; and upon such performance, and upon making such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default had occurred therein. No provision in any contract for the purchase of land, or an interest in land, shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, any provision in such contract to the contrary notwithstanding."

The provisions of the Minnesota statute are substantially to the same effect.

due process of law and impaired the obligation of his contract, in holding that the cancellation proceeding, of which the plaintiff in error had no actual notice, effectively terminated his rights under the contract.

It is apparent from the above statement that there has been no lack of due process. The court below, having jurisdiction of the suit to quiet title, was called upon to determine the conflicting claims to the land. The plaintiff in error voluntarily appeared and he availed himself of the opportunity to urge his claims to equitable ownership under the contract of sale. The court decided against him, holding the contract no longer outstanding. The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned. *Pennsylvania R. Co.* v. *Hughes*, 191 U. S. 477; *Finney* v. *Guy*, 189 U. S. 335, 346; *Allen* v. *Alleghany Co.*, 196 U. S. 458; *Marrow* v. *Brinkley*, 129 U. S. 178.

The argument of the plaintiff in error is seemingly based upon the erroneous theory that his rights were foreclosed by the cancellation proceeding, which, lacking the requisite notice, deprived him of property without due process. But the action under the cancellation statute was in no sense a judicial proceeding. It was simply a statutory condition with which vendors were required to comply before they could take advantage of a default by the vendee. If the contract properly interpreted or the law properly applied required that this condition be performed in Minnesota, steps taken by him under the North Dakota statute would be ineffective. Whether or not proper proceedings had been taken to secure cancellation could be determined only by a court having

jurisdiction; and the North Dakota court had jurisdiction not only over the land but through the voluntary appearance of plaintiff in error, also over him. His rights have been foreclosed, not by the cancellation proceeding under the statute, but by a due and regular judicial decree which was based upon the finding that a default had occurred, of which the vendor was entitled to take advantage, having complied with the proper law. If the plaintiff in error had not submitted himself to the jurisdiction of the court, the decree could have determined only the title to the land and would have left him free to assert any personal rights he may have had under the contract. But having come into court and specifically asked in his cross bill that he be declared entitled to the "possession and control of the real estate described in the complaint herein under a contract of sale," he cannot now complain if he has been concluded altogether in the premises. The plaintiff in error relies upon *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112. That was a personal action for breach of contract and not, like the present case, an action merely to determine the title to land; and as the court found on the facts there involved that the proper law as to cancellation had been applied, the case cannot be construed as holding that an erroneous application thereof would raise a question of due process.

The contention based on the contract clause is equally devoid of merit, for there has been no subsequent legislation impairing the obligation of the contract. Impairment by judicial decision does not raise a federal question. *Cross Lake Shooting and Fishing Club* v. *Louisiana*, 224 U. S. 632.

Judgment affirmed.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL. *v.* MERCHANTS & MANUFACTURERS TRAFFIC ASSOCIATION OF SACRAMENTO ET AL.

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

No. 452. Argued October 19, 1916.—Decided December 4, 1916.

Appellant carriers made applications to the Interstate Commerce Commission, under § 4 of the Act to Regulate Commerce, as amended by the Act of June 18, 1910, c. 309, 36 Stat. 539, 547, for authority to continue existing tariffs (and, more generally, to continue an existing method) whereby rates were made lower for certain ports and inland cities than for certain places less distant from points of origin.

Held, that, in passing on such applications, the Commission was empowered, while granting the relief as asked in respect of the ports, to grant it in a less degree only in respect of the inland cities, thus making a distinction between them and the ports not made by the tariffs or sought for in the applications.

The power of the Commission, under § 4 of the Act to Regulate Commerce, as amended June 18, 1910, is not limited to granting or denying *in toto* the precise relief applied for by a carrier; but whenever, following such an application, the Commission has considered the special circumstances affecting the particular carrier in its relations to that section, it may exercise a broad administrative discretion in determining from time to time the relief which such carrier should receive.

Quære, whether application by the carrier is a prerequisite to the granting of relief under § 4 as amended.

In a proceeding under § 4, as amended, the Commission represents the public and the carrier is the only necessary party; interested communities and shippers, though customarily heard, need not be notified, and, at least in the absence of participation, are not bound.

Such shippers or communities as deem themselves injured by dis-

crimination or unreasonable rates in tariffs filed pursuant to orders made by the Commission under amended § 4 have their remedy, not in applying for a rehearing of the proceedings in which such orders were made, but by direct applications to the Commission for relief under §§ 13 and 15.

That part of amended § 4 which provides that when rates have been reduced in competition with water routes they shall not be increased unless, upon hearing, the Commission finds a reason in changes of conditions other than the elimination of water competition, has no application to a case in which the complaint is based not on increase but on difference of rates; in which the elimination of water competition is denied by the parties complaining; and in which the change complained of was part of a general readjustment of transcontinental rates made necessary by increase of water competition and authorized by the Commission after prolonged hearings.

231 Fed. Rep. 292, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Underwood for the United States.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

Mr. John E. Alexander for appellees:

The orders complained of and the tariffs filed thereunder operated, first, to increase freight rates to and from Sacramento, Stockton, San Jose and Santa Clara, and second, to remove those cities from the list of "California Terminals" and classify them as "intermediates." The increase in rates was unjustified; and depriving the four cities of the benefit of terminal rates was unreasonable and discriminated against them in favor of San Francisco and Oakland.

The carriers had petitioned, not to change rates, but to continue the then method of rate-making under which

these four cities were given the same rates as the ports. The only point at issue was whether higher rates could be charged to intermountain points. The last plan submitted by the carriers before the final order of the Commission was, in effect, a request that the terminal situation be not changed, and the Commission so regarded it. The Commission, however, adopted a new scheme without taking evidence and without any corresponding application before it. The resulting tariffs increased the rates of the complaining cities as above stated. Their protests and demands for rehearing were denied. Thus they were deprived of valuable interests without due process of law.

The "long and short haul" clause of § 4 of the act, as amended, is mandatory, except in special cases where a particular carrier presents a specific application for relief and after investigation the Commission finds that a special case exists. The proviso does not mean that the Commission may of its own motion, without application or hearing, make orders of exemption. It may only enter an order in a special case, though afterwards, the matter thus being before it, it may modify that particular order. It has, however, no rate-making authority, and may modify its orders only after hearing with notice to all interested parties.

Respondents were entitled to such a hearing under § 4. *United States* v. *Louis. & Nash. R. R. Co.*, 235 U. S. 314, 321.

Sections 13 and 15 have no application. The former contemplates only complaints for acts done or omitted by the carrier, as where their rates are unreasonable or discriminatory as regards certain persons or localities—such acts as are unlawful under §§ 1, 2 and 3. In such cases the party injured may complain to the Commission, but where the complaint respects a wrongful act done by the Commission itself, the remedy lies with the courts.

The District Court had jurisdiction to grant the relief both independently and by derivation from the Commerce Court. Judicial Code, § 207, par. 2; *id.*, § 208; Act of October 22, 1913, c. 32, 38 Stat. 208, 219. This court has repeatedly held that where orders of the Commission exceed its authority, are not preceded by fair hearing, are erroneous in law or contrary to the indisputable evidence, they may be set aside by the federal courts.

Filing tariffs as directed by the orders did not constitute compliance with § 4. It is the orders themselves that are complained of. Besides having been filed on less than 30 days' notice, and without complying in other respects with § 6, these tariffs were not the voluntary acts of the carriers. They could not amount to a waiver of that which § 4 requires for the protection of public and private rights.

The last paragraph of § 4, as amended, prohibits this increase of rates. Lowering of rail rates because of water competition took place both before and after June 18, 1910. There are no "changed conditions" other than the elimination of such competition. The complaining cities are within the influence of water competition as much now as ever, and quite in the same manner as the port cities. The amendment of June 18, 1910, was meant to evince the policy of Congress that communities and industries built up, as these were, under rates granted by rail carriers because of water competition, should be deemed to have acquired inchoate rights which such carriers might not thereafter destroy.

The decree merely enjoins the enforcement of the order in so far as it was made without authority. It works no hardship or discrimination against intermediate points in California or Nevada. No confusion can follow; the only effect is that the carriers must apply the San Francisco rate to the four cities mentioned.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the Act of June 18, 1910, c. 309, 36 Stat. 539, 547, amending § 4 of the Act to Regulate Commerce, carriers were prohibited from charging more "for a shorter than for a longer distance over the same line or route in the same direction" without obtaining authority from the Interstate Commerce Commission so to do. A period of six months from the passage of the amendment was provided within which carriers might file application for authority to continue charges of that nature then lawfully existing.

For many years prior to 1910 it had been a common practice to make freight rates from the East to Pacific coast points lower than to intermountain territory, because of competition by the Atlantic-Pacific Ocean carriers. About 185 interior cities near the coast had been granted the same transcontinental rates as the ports of San Francisco and Oakland, because the competing water carriers customarily "absorbed" the local rates or charges from the ports to those cities. Among the interior cities thus treated as "Pacific Coast Terminals" were Sacramento, Stockton, San Jose and Santa Clara. The extent to which the higher rates to intermountain territory were justified and the proper basis for "back haul" rates had been the subject of many hearings before the Interstate Commerce Commission.

Proceeding under § 4 as amended, six railroads applied to the Commission under date of December 7, 1910, for relief in respect to westbound transcontinental commodity rates. The applications, after enumerating the then existing tariffs, sought authority specifically "to continue all rates shown in the above-named tariffs from eastern shipping points designated to Pacific coast terminal points" and generally "to continue the present method of

making rates lower at the more distant points than at the intermediate points, such lower rates being necessary by reason of competition of various water carriers" from Atlantic to Pacific ports. After prolonged hearings the Commission entered its so-called Fourth Section Order No. 124, by which, while declining to grant the applications as made, it authorized charging, in some respects, lower rates for the longer hauls. The limitation of such charges was set by a zone system and rate percentage basis prescribed by the Commission, which involved an extensive readjustment of rates; but the existing practice of treating these interior cities as terminals was not disturbed. The validity of the order was attacked by the carriers in the courts and after three years of litigation, finally sustained in *Intermountain Rate Cases*, 234 U. S. 476.

Meanwhile the "effective date" of the order had been extended by the Commission. After the decision of this court, further extensions of the "effective date" were sought by the carriers and granted. Some modifications of the order were proposed by the carriers. Additional hearings were had in which many shippers participated. Changes in conditions occurring since the entry of the original order on July 31, 1911, were considered—among others, that Congress had passed the Act of August 24, 1912, giving the Commission jurisdiction over transportation "by rail and water through the Panama Canal"; that the Canal itself had been opened on August 15, 1914; that competing ocean rates had been lowered and service improved; and that the ocean carriers had discontinued the practice of "absorbing" rates from the ports to interior cities. An elaborate supplemental report was made by the Commission on January 29, 1915, and another on April 30, 1915. The propriety of modifications in addition to those proposed by the carriers was shown and a new plan for constructing "back haul" rates, devel-

oped by the Commission, was eventually embodied in the Amended Fourth Section Order No. 124 of April 30th, 1915, and adopted by the carriers in the tariffs filed thereunder. Following the limitation imposed by the amended order, the tariffs filed confined the low "Terminal" rates to ports of call like San Francisco and Oakland; and the interior coast cities including Sacramento, Stockton, San Jose and Santa Clara, were subjected to rates materially higher than San Francisco and Oakland, though much lower than those to intermountain territory.

Representatives of these four cities, conceiving them aggrieved by the refusal to grant them the same rates as the ports and alleging that they had participated in whole or in part at hearings which preceded the entry of the last amendment order, applied to the Commission for a rehearing and when their application was denied, brought this suit in the District Court to restrain the enforcement as to them of the amended order, and of the tariffs filed thereunder. The City of Santa Clara and associations representing the traffic interests of Sacramento, Stockton and San Jose joined as plaintiffs. The United States, the Interstate Commerce Commission and the six railroads were made defendants. The bill alleged, among other things, that these cities had for a number of years enjoyed the same rates as San Francisco and Oakland; that large industries and other businesses had been established there because they enjoyed terminal rates; that their commercial importance and prosperity would be ruined if the rates were withdrawn; that no changed conditions existed justifying a withdrawal of terminal rates; that they had not been parties to the proceedings in which the orders were made; and that the "orders authorizing the withdrawal of terminal rates" from them were, among other things, "discriminatory and unjust, were made without said cities having their day in court or without giving them an opportunity to show the unreasonableness thereof, that

no justification for such increase was shown, and the order of April 30, 1915, was without evidence, that petitioners have been denied the equal protection of the law and deprived of property without due process of law, to their irreparable damage."

The case was heard before three judges; and a final decree was entered which declared that the "orders of the Interstate Commerce Commission of January 29, 1915, and April 30, 1915, in Fourth Section Applications Nos. 205, 342, 343, 344, 350 and 352," in so far as they authorize the carriers to charge for the transportation of westbound transcontinental freight destined to Sacramento, Stockton, San Jose and Santa Clara, California, "any greater amount than is concurrently charged for the like carriage of like freight to San Francisco and Oakland, California, were beyond the statutory powers of the Interstate Commerce Commission, and the enforcement thereof should be enjoined; and said orders in the particulars above mentioned are hereby canceled and set aside." The decree also enjoined and canceled to like extent the tariffs filed in pursuance of such orders. The District Court rested its decision that the Commission had no statutory power to enter the amended order upon the ground, that an order authorizing higher rates to these interior cities could not legally be entered unless there was an "application" to it by the carriers for that specific purpose and "a hearing upon that particular application as in a special case"; that there had been no such application and hearing and that consequently the orders were void and the tariffs filed in pursuance thereof illegal. *Merchants & Manufacturers Traffic Ass'n et al.* v. *United States et al.*, 231 Fed. Rep. 292.

The appeal, in which all the defendants joined, raises important questions involved in the administration of the Fourth Section as amended June 18, 1910, namely:

First: Is it essential to the validity of an order au-

thorizing a lower rate for a longer haul, that it be based upon an application asking only the precise relief granted?

Second: What is the remedy of a community or shipper which deems itself aggrieved by the order made?

The orders here in controversy were confessedly based upon applications made by the carriers. Both the amended orders and the decree recite by numbers the applications dated December 7, 1910. The objection made by the appellees is that the limited authority granted by the Commission had not been applied for; since the carriers asked specifically for leave to continue lower rates, which were the same for ports and for interior California cities, but the Commission permitted these rates to ports while it denied like rates to the interior cities. Respondents deny that the District Court holds in effect that applications for relief must be granted *in toto* or denied *in toto;* but such is the necessary effect of its decision. Amended § 4 empowers the Commission "upon application" to authorize a carrier "to charge less for longer than for shorter distances." These carriers asked leave, among other things, to charge on westbound transcontinental freight to about 193 coast and interior cities much less than to intermountain territory. The Commission permitted them to charge, to eight of these cities which were ports, *as much less* as the applications requested; but as to the other 185, which were interior cities, including the four complaining here, permitted the carriers to charge only *somewhat less.* In other words, the Commission granted a part of the relief asked. The District Court says it had no power so to do. But there is nothing in the act to justify limiting the power of the Commission to either a grant or a denial *in toto* of the precise relief applied for. Such a construction would make § 4 unworkable and defeat the purpose of the amendment. It is at variance with the broad discretion vested in the Com-

mission and the prevailing practice of administrative bodies. It fails to give effect to the provision that "the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section." It is inconsistent with *Intermountain Rate Cases*, 234 U. S. 476, where the order sustained granted relief very different from that applied for; and it finds no support in *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 314, 322, cited by the District Court, in which case relief from the operation of the Fourth Section had not been granted. The clause in Amended Fourth Section which declares "That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances" was designed to guard against the issue, by the Commission, of general orders suspending the long and short haul clause and to ensure action by it separately in respect to particular carriers and only after consideration of the special circumstances existing. Whenever such consideration has been given—"the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

It may be doubted whether application by the carrier is a prerequisite to the granting of relief. As was said in *Intermountain Rate Cases*, 234 U. S. 476, 485, § 4 vests in the Commission the "primary instead of a reviewing function" to determine the propriety of a lesser rate for a longer distance; and § 13 declares that the Commission "shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had

excepting orders for the payment of money." Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived; and it would be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief "but were denied the right of a hearing" and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more. The decree of the District Court cancels the amended order and the tariff only so far as it concerns the four complaining cities and thereby discriminates perhaps most unjustly in their favor as against the other 181 interior cities.

It was also contended on behalf of the four cities that the amended orders violated the clause added to § 4 by

the Act of June 18, 1910, which provides that "Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." The answers to this contention are many. What these four cities complain of is not increase of rates but the fact that San Francisco and Oakland may be given rates lower than theirs; and they strongly deny that water competition has been eliminated. Indeed, it was the increased effectiveness of water competition due to the opening of the Panama Canal—a notable change in conditions—which compelled the rate readjustment of which they complain; and the higher rates to the interior cities made under authority of the Commission were granted after prolonged hearings as part of the general readjustment of transcontinental rates. The provision relied upon has no application to such a case.

The decree of the District Court must be reversed with directions to dismiss the bill.

Reversed.

UNITED STATES *v.* NORTHERN PACIFIC RAILWAY COMPANY.

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

No. 44. Argued October 27, 1916.—Decided December 4, 1916.

A railroad company which, being required by order of the Interstate Commerce Commission to report all instances in which its employees have been kept on duty longer than the period provided by the Hours of Service Act, 34 Stat. 1415, omits from its report as filed certain instances of excessive service, under the honest but mistaken belief that they did not come within that act, is not liable to the penalties prescribed by § 20 of the Act to Regulate Commerce, as amended June 18, 1910, 36 Stat. 539, 556, where it appears that the mistake was not only honest but was made in a genuinely doubtful case.

Section 20 in its penal features should be applied only to cases coming plainly within its terms. *Semble*, that the only sanction securing the correctness of such reports is the penalty for the perjury committed when the oath under which they are made is violated.

In construing a penal provision, the court will be slow to attribute to Congress an intention to exact punishment which the Government itself has conceded would be greatly disproportionate to the offence.

Statutes should be construed, if possible, so that their requirements shall be apparent in their own terms rather than dependent upon the discretion of executive officers.

213 Fed. Rep. 162, affirmed.

THIS is a civil proceeding brought by the United States in the United States District Court for the District of North Dakota, to recover $500 from the Northern Pacific Railway Company for the claimed failure to file, for five successive days, with the Interstate Commerce Commission, a report of violations of the Hours of Service Act, as required by an order of the Commission issued June 28, 1911. The order was made under authority of § 20 of the Act to Regulate Commerce, as amended June 18th,

1910, 36 Stat. 539, 556, and has the force of statute law. It requires the carrier to report "under oath" within thirty days after the end of each month, all instances where employees have been on duty for a longer period than that provided in said act, which in this case was sixteen hours.

The District Court rendered judgment for the Government, which was reversed by the Circuit Court of Appeals for the Eighth Circuit (213 Fed. Rep. 162). The case is here for decision on writ of certiorari.

The judgment of the District Court was rendered on the pleadings, the admitted facts of the case being as follows:

Five employees of the defendant were called to take charge of a wrecking train at 8.10 o'clock p. m. October 29, 1911, but, before they reported at the place of duty, it was ascertained that such train would not be needed and when they arrived they were notified that their services would not then be required, but that they should report for duty at 10.35 o'clock p. m. the same evening. From 8.10 to 10.35 o'clock they did not render any service "save that they kept alive the fire in the engine during said period." At 10.35 o'clock the five men entered upon a freight train run, which, because of hot boxes, was delayed so that it did not arrive at destination until 1.15 o'clock p. m. the next day.

If the service of the men were considered as beginning at 8.10 o'clock, the hour for which they were called, they were on duty for 17 hours and 5 minutes, but if the time were reckoned from 10.35 p. m., when the men actually took charge of the freight train, they were on duty less than sixteen hours. It is admitted that the officials of the railway company believed in good faith that the time of the men should be reckoned from 10.35 p. m., and not from 8.10 p. m., and that, for that reason, when next after October 30th, 1911, they filed their report of employees

subject to the act who had been kept on duty for a longer period than sixteen hours, the names of the members of this crew were omitted, although the names of many other employees who had been kept on duty longer than the statutory limit were stated in that report.

It was conceded at the hearing in the Circuit Court of Appeals that the United States had sued the company for the "forfeitures" prescribed for these excessive services under discussion in this case, and had secured a judgment which had been paid, and that thereby it was determined, for the purposes of this suit, that these employees were on duty from 8.10 o'clock p. m., and therefore for more than sixteen hours.

The Government's claim in the case is for the omission for five days to file the report and it prays judgment for "forfeitures" aggregating $500, although when the complaint was filed the report claimed to be defective had been on file from November 30th, 1911, to September 14th, 1912, and if the "forfeitures" of $100 per day prescribed by the law for each day of failure to file a proper report were allowed, the amount of recovery by the Government would be $28,900, and it is only by grace of the public officials that the claim in the suit was not for this amount instead of for $500.

Mr. Assistant Attorney General Underwood for the United States.

Mr. Emerson Hadley, with whom *Mr. Charles W. Bunn* was on the brief, for respondent.

Mr. Justice Clarke, after making the foregoing statement, delivered the opinion of the court.

It will be seen from the foregoing statement of facts that the question presented by the record in this case for decision is: Assuming that the law required that in the

report of the company filed on November 30th, 1911, the names of these five employees of the defendant should have been included as having been on duty for more than sixteen hours, and that their names were omitted from that report because it was in good faith believed that their hours of service should be computed from 10.35 o'clock p. m., and that, therefore, they had not been on duty in excess of sixteen hours, is the company liable for the "forfeitures" prescribed by the statute, judgment for which was prayed for in the complaint?

Section 20 of the Act to Regulate Commerce of February 4, 1887, as amended June 18, 1910, 36 Stat. 556, requires the filing of elaborate annual reports by carriers and also the filing of such special reports as the Commission may, by general or special order, require. On the twenty-eighth day of June, 1911, the Commission ordered that all carriers subject to the provisions of the act should report "under oath" within thirty days after the end of each month all instances of employees who had been on duty for a longer time than that required by the act. It is for violation of this order, which has the effect of statute law, that this suit was instituted, it being admitted by the Government that the failure to mention these five men in the report by the defendant, filed at the proper time, and which contained a report of many men kept on duty for a period longer than the time allowed by law, was due to the fact that it in good faith believed that these men commenced their time of service at 10.35 instead of at 8.10 o'clock, and that therefore they were not on duty more than the sixteen hours prescribed by the statute. The defendant in error contends that judgment is asked for an omission caused by an honest mistake with respect to a genuinely doubtful case in a report which was properly filed and this, it is claimed, is not a violation of the law. The statute is a penal one and should be applied only to cases coming plainly within its terms. *Steam*

Engine Co. v. *Hubbard,* 101 U. S. 188. While the reports filed must be truthful reports (*Yates* v. *Jones National Bank,* 206 U. S. 158), yet, since they must be made under oath, the penalties for perjury would seem to be the direct and sufficient sanction relied upon by the law-making power to secure their correctness.

We are confirmed in this conclusion by the fact that the annual report required of carriers by this same § 20 of the act calls for so great an amount of detailed information that it would be difficult, if not impossible, for any one to prepare such a report without making some unintentional omission or mistake, and we cannot bring ourselves to think that Congress intended to punish such an innocent mistake or omission with a penalty of $100 a day.

There are, to be sure, many statutes which punish violations of their requirements regardless of the intent of the persons violating them, but innocent mistakes, made in reporting facts, where the circumstances are such that candid minded men may well differ in their conclusions with respect to them, should not be punished by exacting penalties, except where the express letter of the statute so requires, and we conclude that the section under discussion contains no such requirement. In reports in which a mistake is much more likely to prove harmful than in such a report as we have here, the national banking laws punish mistakes only where "knowingly" made.

It is argued that if good faith will excuse an omission or a mistaken statement in this report, it will be widely taken advantage of as a cover for making false and fraudulent statements in such reports in the future. Such a prospect seems quite groundless, since many, if not most, criminal laws imposing penalties are made applicable only in cases where corrupt intent or purpose is established to the satisfaction of a court or jury, yet such requirement has not been found in practice to be an encouragement to wrongdoing.

The fact that the Government sues for only one fifty-seventh part of the forfeitures which had accrued under the construction of the rule and statute contended for by it, should make us slow to attribute to Congress a purpose to exact what is thus admitted to be a punishment greatly disproportionate to the offense. Statutes should be construed, as far as possible, so that those subject to their control may, by reference to their terms, ascertain the measure of their duty and obligation, rather than that such measure should be dependent upon the discretion of executive officers, to the end that ours may continue to be a Government of written laws rather than one of official grace.

It being very clear that it is not the purpose of the law under discussion to punish honest mistakes, made in a genuinely doubtful case, the decision of the Circuit Court of Appeals is

Affirmed.

CISSNA *v.* STATE OF TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 89. Argued November 10, 1916.—Reargument ordered December 11, 1916.

The jurisdiction of this court being here challenged; and it appearing that the facts presented are identical with those on which depends a suit over boundary, brought by the State of Arkansas against the State of Tennessee (defendant in error herein) while this case was pending in the courts of the latter State; that a decision of this case upon the merits will be equivalent to a decision of the boundary controversy and that an affirmance of the judgment will dispose of the avails of nearly or quite all the lands involved in that case and this; *Ordered*, that this case be restored to the docket and be assigned

for hearing immediately after the boundary case; and that upon a stipulation of the facts of that case by the parties thereto, both cases will be taken on briefs if all parties consent, or advanced for early argument if they prefer.

THE facts are stated in the opinion.

Mr. Caruthers Ewing for plaintiff in error.

Mr. John P. Bullington, with whom *Mr. Frank M. Thompson*, Attorney General of the State of Tennessee, was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

As owner in trust for the people of the State of certain described lands, the State of Tennessee in a state court commenced this action in 1903 against Cissna and others to recover the lands and to restrain cutting timber thereon and for an accounting for timber already cut. A temporary injunction was granted against removing and cutting timber, which was modified by permitting, on the giving of a bond, the removal of timber already cut, and was subsequently again modified by allowing all the timber on the land to be cut and removed on the giving of an additional bond. By pleas in abatement and answers the jurisdiction of the court was denied on the ground that the lands were not in Tennessee but in Arkansas and this was sustained and the suit dismissed for want of jurisdiction. The Supreme Court of the State, however, reversed this action and remanded the case for trial on the merits. 119 Tennessee, 47.

The pleadings were amended in the trial court and while the case was there undetermined the State of Arkansas filed in this court its complaint against Tennessee to settle

the boundary line between the two. The bill made reference to the suit pending in Tennessee and alleged that the lands embraced by that suit were in Arkansas subject to its sovereignty and denied the power of the State of Tennessee in its own courts to interfere with the lawful authority of the State of Arkansas. Thereafter, the existence of the suit in this court was alleged in the state court and that court was asked to suspend proceedings until the decision in the boundary case. This was denied and a judgment was entered in favor of the State of Tennessee, holding that the lands were in Tennessee and belonged to that State and this judgment was subsequently affirmed by the Supreme Court of the State. In that court also the pendency of the original suit between the two States in this court was specially set up and an application for suspension of proceedings based on the fact was prayed but was refused. The judgment of the Supreme Court of the State not only decreed the lands to belong to the State of Tennessee in its sovereign capacity, on the ground that they were situated within that State, but gave a recovery for the amount of the timber cut before the bringing of the suit and also for the money value of the balance of the timber on the lands which had been cut and removed as the result of the modification of the injunction permitting that to be done.

At the threshold jurisdiction to review the judgment thus rendered is denied on the ground that no federal question arises for decision.

It is conceded in argument by both parties that the decision of the merits of this case will necessarily be the equivalent of a decision of the boundary suit pending on our original calendar between the two States and that an affirmance of the money judgment below will in substance be an award for virtually the entire avails of the lands in suit in this case as well as of the greater part, if not all, of the lands to be affected in the boundary suit. More-

over, in substance it is not disputed that the facts here presented are identical with those upon which the solution of the boundary suit must depend. Under these conditions we think, without intimating an opinion on the question of jurisdiction raised in this case or on the merits, that we ought not to consider and pass upon this case without at the same time considering and passing upon the controversy concerning the boundary between the two States now pending on our docket. The identity of the two issues, the possible influence which the decision of the one would have on the rights pending in the other and the fact that the actor, the State of Tennessee, in this suit is the defendant in the original suit, we think render that conclusion necessary.

For these reasons we direct that this case be restored to the docket and that it be hereafter assigned for hearing at the same time and immediately after the coming on for hearing of the original boundary suit between the two States. And to the end that that hearing may be expedited, we say in addition, first, that if the facts in the boundary case be stipulated by the parties either by reference to the facts shown in this case or otherwise, both the cases will be taken on submission on printed briefs, if the parties are so advised; or second, if they are not so advised, upon an agreement and stipulation as to the facts in the boundary case, that case and this will be ordered advanced and assigned for oral argument at an early day.

And it is so ordered.

LOVATO *v.* STATE OF NEW MEXICO.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

No. 123. Submitted November 16, 1916.— Decided December 11, 1916.

In a criminal case tried in a District Court of a Territory and coming here by way of the Supreme Court of the State into which the Territory was afterwards converted, defenses based on the Fifth and Sixth Amendments (in part not raised until the case reached the latter court) are within this court's jurisdiction to consider.

Quære, Whether under the Constitution a defense of former jeopardy is waived if not made before the prosecution has introduced its evidence in chief?

Defendant was arraigned and pleaded not guilty to an indictment for murder; on a day subsequent, without withdrawing the plea, he demurred to the indictment as not charging an offense. The demurrer being overruled, both sides being ready for trial, a jury was duly impanelled and sworn and the witnesses for both sides called and sworn, but on motion of the prosecuting officer the court dismissed the jury and directed that the defendant be arraigned anew. This was done forthwith, the accused pleaded not guilty again, and both sides being ready, the same jury was sworn once more and the trial proceeded to a conviction.

Held, (1) Not double jeopardy.

(2) Due process and the right to a jury, under the Fifth and Sixth Amendments respectively, did not require that a new jury be impanelled after the second arraignment and plea.

(3) Under the circumstances, dismissing the jury to allow of the second arraignment and plea, whether a necessary formality or not, was clearly permissible.

17 N. Mex. 666, affirmed.

THE case is stated in the opinion.

Mr. T. B. Catron for plaintiff in error.

Mr. Frank W. Clancy, Attorney General of the State of New Mexico, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In the District Court of the Territory of New Mexico the accused, on May 9th, 1910, pleaded not guilty to an indictment for murder. On May 24, 1911, without withdrawing his plea he demurred to the indictment on the ground that it charged no offence. The demurrer was overruled and, both parties announcing themselves ready for trial, a jury was impanelled and sworn and the witnesses for both sides were called and sworn. The record then states: "That thereupon it appearing to E. C. Abbott, Esq., District Attorney, that defendant had not been arraigned and had not plead since the overruling of defendant's demurrer, upon motion the court dismissed the jury and directed that the defendant be arraigned and plead." The accused was accordingly again at once arraigned and pleaded not guilty and, both sides again announcing themselves ready for trial, the same jury previously impanelled was sworn and the trial proceeded. At the close of the evidence for the prosecution the defendant moved for a directed verdict on the ground, among others, that the record showed that he had been formerly placed in jeopardy for the same offence, since it appeared that in the same case a jury had been impanelled and sworn and thereafter had been dismissed from a consideration of the case. The motion was denied and a conviction of manslaughter followed. The same ground was relied upon in a motion in arrest of judgment which was denied and from the judgment and sentence subsequently entered an appeal was prosecuted to the Supreme Court of the Territory.

Pending the appeal New Mexico was admitted to the Union and the case was heard by the Supreme Court of the State. In that court in addition to the contention as to former jeopardy the accused urged that he had been

denied due process of law and had been deprived of the right to a trial by jury because from the record it appeared that although a jury was impanelled before he was arraigned and pleaded not guilty, that jury was dismissed and it did not appear that any jury was impanelled after his arraignment and plea. The court held this contention to be without merit and concluded from a consideration of the common-law doctrine of former jeopardy, in the light of which it deemed the constitutional provision on the subject was to be construed, that the question concerning it was raised too late, since it was first presented to the trial court after the conclusion of the state's case. To the judgment of affirmance giving effect to these conclusions this writ of error was prosecuted. 17 N. Mex. 666.

As the case was tried in a territorial court, the denial of asserted rights based upon the Fifth and Sixth Amendments presents questions within our jurisdiction.

Without expressing any opinion as to the correctness of the ruling of the court below concerning the failure to promptly raise the question of former jeopardy, although on this record it may be conceded it presents a federal question, we pass from its consideration, since we think the contention that the accused was twice put in jeopardy is wholly without merit. Under the circumstances there was in the best possible view for the accused a mere irregularity of procedure which deprived him of no right. Indeed, when it is borne in mind that the situation upon which the court acted resulted from entertaining a demurrer to the indictment after a plea of not guilty had been entered and not withdrawn, it is apparent that the confusion was brought about by an over-cautious purpose on the part of the court to protect the rights of the accused. Whether or not under the circumstances it was a necessary formality to dismiss the jury in order to enable the accused to be again arraigned and plead, the action taken was clearly within the bounds of sound judicial discretion.

United States v. *Perez*, 9 Wheat. 579, 580; *Dreyer* v. *Illinois*, 187 U. S. 71, 85–86. See *United States* v. *Riley*, 5 Blatchf. 204, in which the facts were in substance identical with those here presented.

As to the contention concerning the denial of due process and the right to jury trial, it is not disputed that in the first instance a jury was legally impanelled. The argument is, however, that constitutional rights of the accused were violated because after the order of dismissal and the plea of not guilty there was a failure to impanel a jury, although the same jury previously drawn was at once sworn and tried the case. But we think the absolute want of merit in the proposition is manifest from its mere statement and is additionally demonstrated by what we have previously said.

Affirmed.

GOSHEN MANUFACTURING COMPANY *v.* HUBERT A. MYERS MANUFACTURING COMPANY ET AL.

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

No. 60. Argued November 1, 2, 1916.—Decided December 11, 1916.

When patent rights have been infringed and sound reason exists for believing that the infringement may be resumed in the future, the case is remediable in equity by an injunction, with an accounting for past profits.

Evidence to the effect that defendant company, as a result of plaintiff's published claim of infringement, became financially embarrassed, decided to cease manufacturing the device in question, sold all its property (except its patent), and went out of business six months before this suit was begun, *held*, insufficient to remove the menace

of future injury arising from the facts that defendant retained the junior patent under which the alleged infringements were practiced and justified, did not disclaim intention to proceed under it, denied infringement, put in issue plaintiff's patent and title, and shortly before this bill was filed brought an action for damages based on the published notice of infringement, averring that it was still in the business of manufacturing the articles in question.
215 Fed. Rep. 594, reversed.

THE case is stated in the opinion.

Mr. Fred L. Chappell, with whom *Mr. Otis A. Earl* was on the briefs, for petitioner.

Mr. V. H. Lockwood for the respondent company, submitted.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit for infringement of a patent brought by petitioner, whom we shall call complainant, against the respondents, whom we shall call defendants, in the Circuit Court for the District of Indiana, October 3, 1910.

The device of the controversy is a new and useful improvement in hoisting pulleys. It is alleged to have been invented by Hubert A. Myers, one of the defendants, who, after his application for a patent but before the issue thereof, assigned all of his right and title to one Allen P. Boyer, to whom a patent was issued January 21, 1908. Boyer, on the twenty-eighth of September, 1910, sold and assigned his right and title to the patent to complainant, "together with all rights and choses in action which had accrued to him, as well as those which might accrue for infringement thereof, and all rights to sue for and recover damages or profits for the same."

It is alleged that after the issue of the patent and before the commencement of the suit defendants infringed the

invention by constructing and selling a large number of the pulleys, the exact number not known, and discovery is therefore prayed; and it is alleged that defendants have a large number on hand which they are offering for sale.

It is further alleged that large profits have been realized by defendants which might have been obtained by complainant; how much exactly, however, is unknown, and discovery is prayed. An accounting is also prayed and preliminary and final injunctions.

It is alleged that Myers took part in promoting and organizing the defendant corporation, that he is a large stockholder and is actively engaged in directing and managing the affairs of the company, being its general manager.

It is also alleged that the trade and public have recognized the value and validity of the patent.

The defendants answered separately. Myers' answer is not in the record. The defendant company's is, and denies that the company had in any manner infringed the rights of the complainant under the patent or that any great loss or injury had accrued or will accrue to complainant by reason of anything theretofore done by defendant or that complainant had been or is being deprived of any gains or profits to which it is lawfully entitled, by reason of any act or any manufacture, use or sale of hoisting devices by defendant.

And defendant alleges that it has not manufactured any hoisting device of any kind since October, 1909, or sold or had for sale any hoisting device since March, 1910, and that complainant had knowledge of such facts before bringing this suit; and denies that it was receiving or enjoying great gains or profits or had avowed its determination to continue manufacturing and selling any such devices.

It admits that Myers took part in organizing the defendant corporation, but denies that he is a stockholder or

in management of its affairs; alleges that he has not been a director or other officer since November 18th, 1909, and that he ceased to be a stockholder on December 17th, 1909, or connected with the company or interested therein.

The answer denies the other allegations of the bill, including the novelty of the device, specifically alleging that it was not the result of invention but merely of mechanical skill in bringing together parts of hoisting devices long previously well known and described and published in prior patents, a list of which is given, and that hoisting devices in all substantial and patentable respects similar to the alleged invention were known and publicly sold and used in the United States, the instances of which are related.

Abandonment of the alleged invention by Myers is alleged, that complainant is estopped by reason of actions had in the Patent Office from claiming a device other than in the specific form shown and described in the patent, that Myers was not the first inventor or discoverer of a material and substantial part of the device of the patent and that neither he nor the complainant has ever made or filed a disclaimer thereof, to the great injury of defendants.

There was a replication filed to the answer.

Upon the issues thus formed by the pleadings proofs were taken and a decree was entered that the suit be dismissed for want of equity. The decree gives no information upon which it was based.

The complainant took the case to the Circuit Court of Appeals and that court affirmed the decree. Stating the question presented, the court said: "The first and decisive question in this appeal from a decree dismissing a bill in equity after a full hearing is whether a court of equity or a court of law is the proper forum in which to determine complainant's rights."

It will be observed that defendant puts in issue the title of complainant, the novelty of the device described in the

patent, alleges anticipation and precludes or narrows it by the condition of the prior art. It denies infringement and also irreparable loss or injury to complainant by anything theretofore done by defendant or that complainant was deprived or is being deprived of any great gains or profits to which it is lawfully entitled by reason of any act or any manufacture, use or sale of hoisting devices by defendant.

It appears from the facts found that Myers was the inventor of complainant's device and that he subsequently claimed to have invented another, different from and superior to that of complainant which he assigned to Boyer, and that the defendant company which Myers had helped to organize began to manufacture the device of the alleged second invention of Myers and made 25 in the Spring of 1908, and the following Fall prepared to make 500 more, 300 of which were sold and the rest not completed. In August, 1909, the defendant company contracted to manufacture and sell to one Diedrich 500 additional carriers for the season of 1910. It was in testimony that the 300 carriers sold by defendant were sold through Diedrich as its agent.

In October, 1909, complainant published a newspaper advertisement declaring defendant company to be an infringer of complainant's device and also sent a direct notice to defendant to the same effect. In consequence of this it is testified that the defendant company was unable to proceed and it fulfilled its contract with Diedrich by giving him permission to use its shop and materials to finish the 200 uncompleted carriers and to manufacture the 300 more called for by his contract.

In December, 1909, Myers sold his stock to the other stockholders and thereafter had no connection with the company, and it is testified that the company neither manufactured nor sold carriers after the notice of infringement, except as stated above, and that its president and general manager notified complainants in February, 1910,

that the company was practically dead. In March, 1910, it is further testified, it sold its entire plant and all of its property except only the letters patent No. 942,735, that is, the patent for the second invention of Myers, since which time it has been out of business and without factory or office. It is also testified that in the latter part of 1909, after notice of infringement, it had decided not to manufacture any more carriers.

From this testimony the Circuit Court of Appeals deduced that clearly as to Myers, after December, 1909, and as to the defendant company, after March, 1910, at the latest, no infringement of complainant's rights had been committed or threatened.

We are unable to concur in the conclusion as to the company. It sold its plant in March, 1910, but it retained the patent under which prior alleged infringements had been practiced and justified, and the right to proceed under it is neither given up nor the intention to do so denied. Besides, in September, 1910, the company sued Boyer in the state court for the injury to its business by the advertisement of infringement published a year before, and in that suit the company made the following allegation: That it "is a corporation duly organized under the laws of the State of Indiana and is now and has been for more than five years last past engaged in the business of manufacturing hay cars." We cannot ascribe this to the inadvertence or improvidence of counsel, for which the company was not responsible, as an expression of its intention. It had infringed (we assume this for the sake of argument only), it retained the patent under which it asserted the right to infringe; there was injury inflicted, therefore, and the means retained of further infringement; a denial of complainant's right, and the assertion of a countervailing right submitted for legal judgment in the case under review and besides in an independent action. We must regard this conduct as a continuing menace, and we think

complainant had a right to arrest its execution and recover as well the profits of which it had been deprived, if any. The case, therefore, does not fall within the rules of the cases cited by the Circuit Court of Appeals and those cited by defendants. In other words, further infringement was in effect threatened and could be reasonably apprehended.

We have assumed that there was infringing done and threatened, and, of course, both assumptions are based on the validity and novelty of the device and that the defendant company's device—that is, the device of patent No. 942,735—is an unsubstantial variation of it. Whether the assumption is justified is yet to be decided and, in the first instance, should be decided by the Circuit Court of Appeals.

Its decree dismissing the case is reversed and the case is remanded for further proceedings in accordance with this opinion.

Reversed.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* PENNSYLVANIA RAILROAD COMPANY.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, ET AL. *v.* PENNSYLVANIA RAILROAD COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Nos. 340, 341. Argued October 18, 19, 1916.—Decided December 11, 1916.

The powers conferred on the Interstate Commerce Commission by the Act to Regulate Commerce, as amended (Acts of February 4, 1887, 24 Stat. 379; March 2, 1889, 25 Stat. 855; June 29, 1906, 34 Stat.

584; and June 18, 1910, 36 Stat. 539), do not include the power to require carriers to provide and furnish oil tank cars—no question of discrimination being involved.

Without attempting to define the measure of the carrier's duty to satisfy the needs of shippers by adding in quantity or kind to its car equipment, *held*, that neither by the Act of 1887 nor the amendatory Act of 1906 did Congress intend that the enforcement of such duty might be compelled by orders of the Interstate Commerce Commission.

In reaching this conclusion much weight is properly attached to the fact that it accords both with the construction placed by the Commission upon the Act of 1887 before the Act of 1906 was adopted and also with the explanation which the Commission made to Congress concerning the occasion and scope of the Act of 1906 when that statute was in process of enactment.

In construing the amendment of 1906, the fact that, as here involved, it was drawn and recommended by the Commission justifies in this case the assumption that in legal import it was not intended to exceed the Commission's recommendation.

The neglect or refusal to furnish tank cars is not a "practice" within the meaning of § 15 of the Commerce Act, as amended June 18, 1910.

When a carrier in its published tariffs denies any obligation to furnish tank cars, the fact that it publishes rates for commodities so carried may not be construed as an offer, constituting a duty, to furnish such cars; and a finding by the Commission to the contrary is reviewable as a conclusion of law.

Whether the order of the Commission was invalid because requiring the Railroad Company to supply cars for movement over other lines, or because of being non-administrative, or uncertain and indefinite—not decided.

Chicago, Rock Island & Pacific Ry. Co. v. *Hardwick Elevator Co.*, 226 U. S. 426, and other decisions of this court, explained and distinguished.

227 Fed. Rep. 911, affirmed.

On petition of the Pennsylvania Paraffine Works and the Crew-Levick Company the Interstate Commerce Commission made the following order:

"It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to

abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect."

The time of compliance was subsequently extended to November 15, 1915. In the meantime, the railroad company brought this suit to enjoin the enforcement of the order. A preliminary injunction was prayed and, upon a hearing by three judges, was granted. 227 Fed. Rep. 911. To review that action this appeal is prosecuted.

The Commission made quite elaborate findings, which, however, we do not think it is necessary to quote in full. It found the production of the oil companies, and the following additional facts:

(1) That 91% of the oil produced by the Paraffine Company was shipped in tanks, 1½% in barrels loaded in cars other than tank cars, and 7½% in pipe lines, while of the shipments made by the other company 86.8% moved in tank cars, 4.7% in barrels, and 8.5% in pipe lines.

(2) For a long time the bulk of refined oil in the United States has been shipped in tank cars and at present 91% is so transported. The railroad has been using tank cars for twenty-five years. The capacity of the cars is found, and they are so constructed that they may be rapidly

loaded at the refineries, and jobbers and dealers in refined oil throughout the country have the proper and necessary facilities for unloading the cars by gravity at their various stations.

(3) The only other method of transporting oil is in barrels or similar containers, the cost of which is from 3½ to 3¾ cents a gallon above the cost of transportation in tank cars, and this makes such method of transportation practically prohibitive, and the refusal of the railroad to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough cars to move their own products; and witnesses for the railroad admitted that tank cars are an economic necessity for the transportation of refined products.

(4) In 1887 the railroad acquired 1308 tank cars, some of which have since been sold to independent refiners, but it owned at the time of the hearing 499 cars, of which 482 are furnished to shippers of oil located on its lines.

(5) At the time of the hearing the Paraffine Company owned 54 tank cars and the Crew-Levick Company 57; and it was testified that these companies for five or six years have daily made inquiry for the delivery of cars to them and that formal orders for cars have been constantly on file in the railroad's offices.

(6) On November 11, 1912, shortly before the filing of the complaints before the Commission, complainants served notice upon the railroad company, requesting it to furnish a sufficient number of tank cars to ship respectively 450,000 gallons of oil per month from the Paraffine Company's refinery at Titusville and 600,000 gallons per month from the Glade (Crew-Levick Co.) Oil Works at Warren.

To the request of complainants, the railroad company replied:

"We beg to say that the railroad company is not pre-

pared to increase its present tank-car equipment but is prepared to transport the commodities in question when properly contained in barrels or other similar containers at rates that are fair, reasonable, and nondiscriminatory."

The Solicitor General, with whom *Mr. Robert Szold* was on the brief, for the United States:

The railroad is under a legal duty to furnish oil tank cars upon reasonable request.

The common law requires the common carrier to furnish reasonably adequate facilities for the transportation of the class of goods which it professes to carry. *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 133; Hutchinson on Carriers, 3d ed., § 495; Beale and Wyman, Railroad Rate Regulation, 2d ed., § 930.

The obligation is not simply to devote the specific property on hand to the public use, but to render adequate transportation service. Wyman on Public Service Corporations, §§ 253, 260, 797; *The Southwark*, 191 U. S. 1, 9. See also *Lukrawka* v. *Spring Valley Water Co.*, 169 California, 318, 329–332; *Haugen* v. *Albina Light & Water Co.*, 21 Oregon, 411; *Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 659; *Leavell* v. *Western Union Telegraph Co.*, 116 N. Car. 211, 221; *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. Rep. 66.

Additional equipment must be provided if necessary to accommodate reasonable public demands. *Branch* v. *Wilmington &c. R. R. Co.*, 77 N. Car. 347, 350; *Cobb* v. *Illinois Central R. R. Co.*, 38 Iowa, 601, 623; *Illinois Central R. R. Co.* v. *River & Coal Co.*, 150 Kentucky, 489, 491, 493; *Yazoo & Miss. Valley R. R. Co.* v. *Blum Co.*, 88 Mississippi, 180, 191, 192; *Ocean Steamship Co.* v. *Savannah Supply Co.*, 131 Georgia, 831; *People* v. *St. Louis &c. Railroad Co.*, 176 Illinois, 512.

Special facilities such as tank cars must be provided even though previously the railroad has not held itself

out so to do. *Baker* v. *Boston & Maine R. R. Co.*, 74 N. H. 100, 110; *Kansas Pacific Ry.* v. *Nichols*, 9 Kansas, 235; *State* v. *Railway Co.*, 47 Ohio St. 130, 139; *Railroad Co.* v. *Pratt*, 22 Wall. 123; *Covington Stock Yards Co.* v. *Keith, supra; Loraine* v. *Pittsburg &c. R. R. Co.*, 205 Pa. St. 132; *Atlantic Coast Line R. R. Co.* v. *Geraty*, 166 Fed. Rep. 10; *Mathis* v. *Southern Ry.*, 65 S. Car. 271; *Cincinnati &c. Ry. Co.* v. *Fairbanks & Co.*, 90 Fed. Rep. 467.

This railroad has held itself out specifically to carry oil in tank cars. In its answer before the Commission it alleged that in the schedules of rates filed for carrying articles in tank cars it stated that no obligation was assumed to furnish tank cars. But the fact of such disclaimer does not appear from the record in the cases at bar. The obligation seems to be a matter of law, which follows as a necessary incident from the fact of the holding out and the public nature of the carrying business. See *Lloyd* v. *Haugh*, 223 Pa. St. 148, 154. The Commission's finding of fact that the railroad has held itself out to carry oil in bulk and in tank cars is not reviewable. *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, 320.

The duty is clearly imposed by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, § 1.

Whatever be the duty at common law, here is an obligation of the statute to *provide* the required cars—not merely furnish such cars as chance to be on hand.

Recent decisions in this court recognize the obligation imposed. The comprehensive character of the amendment was indicated in *Chicago &c. Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426. The case has been followed many times: *Yazoo &c. R. R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1; *St. Louis &c. Ry. Co.* v. *Edwards*, 227 U. S. 265; *M., K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, 418; *Menasha Co.* v. *Chicago & Northwestern Ry.*, 241 U. S. 55, 58; *Ellis* v. *Interstate Com. Comm.*, 237 U. S. 434.

The evil to be remedied by the amendment of 1906

was in part the public injury due to insufficiency of the railroad's supply of tank and refrigerator cars. *Scofield* v. *Lake Shore &c. Ry. Co.*, 2 I. C. C. 90, 117 (1888); *In re Transportation of Fruit*, 10 I. C. C. 360, 373 (1904); Special Message by the President, of May 4, 1906; Report of the Commissioner of Corporations on the Transportation of Petroleum, 1906, House Doc. 812, 59th Cong., 1st sess.; see Sen. Doc. 428, *id.;* Cong. Rec., vol. 40, pt. 7, p. 6358; Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, p. 1958.

The legislative history of the amendment of 1906 shows that it was designed to meet this evil. Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, pp. 1764, 1765, 2005, 2109, 2155; *id.*, pt. 3, pp. 2081, 2103, 2104, 2109, 2155, 2241, 2260; *id.*, pt. 7, pp. 6374–6375, 6376, 6438, 6440, 6570.

The Commission has power to order the carrier to comply with a reasonable request to furnish oil tank cars. In support of the Commission's power, the Government relies particularly upon §§ 1, 12, and 15, as amended. Section 12 imposes upon the Commission the authority and duty "to execute and enforce the provisions of this act." Act of March 2, 1889, c. 382, 25 Stat. 858. One of the provisions which it is thus made the duty of the Commission to enforce is § 1, requiring railroads to furnish cars. The very purpose of imposing upon the carrier in 1906 the duty to furnish cars was to give the Commission jurisdiction to enforce that duty. This seems clear from a simple reading of the statute, as also from the debates, *supra.*

It is settled that a governing principle in the construction of the Commission's powers under the amendment of 1906 is the recognized purpose of the amendment to grant speedy and efficacious remedies for the enforcement of the duties imposed. *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 498, 499.

The amendment of 1910 serves to remove all doubt.

The order in question deals with a regulation or practice of the railroad in furnishing the facilities of transportation, and § 15 in explicit terms authorizes the Commission by order to prescribe regulations or practices of that character. Rates and rebating had already been dealt with; the object of this amendment was to insure proper service. See the report of the Committee on Interstate and Foreign Commerce which, on April 1, 1910, recommended the bill to amend the Interstate Commerce Act, H. R. 17536, House Report No. 923, 61st Cong., 2d sess.; Cong. Rec., 61st Cong., 2d sess., vol. 45, pt. 5, p. 4571; *id.*, pt. 6, p. 5852; Conference Report No. 1588 on House Bill 17536, Sen. Doc. No. 623; Cong. Rec., vol. 45, pt. 8, pp. 8134 *et seq.*

That the power conferred upon the Commission was intended to be most comprehensive is shown by the terms of § 15. The words are "*any* individual or joint classifications, regulations, or practices *whatsoever*." A regulation is a written rule governing a method of doing business. A practice clearly is not limited to such methods as have become habits. It includes any manner of performing the duties imposed by the act.

Consideration of the amendment to § 1 in the Act of 1910 also shows the all-embracing character of the practices over which the control of the Commission was extended. Section 1, as appears from the committee report recommending the legislation of 1910, is to be read in connection with § 15.

The railroad company's refusal was in writing and laid down a permanent rule. It was a regulation or practice as found by the Commission—a finding of fact which not being entirely unsupported by evidence, must be taken as conclusive. All the members of the court below agreed that the order dealt with a practice—a view fully sustained by *Atchison Railway Co.* v. *United States*, 232 U. S. 199; *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 50; *New*

York Shippers' Ass'n v. *New York Central &c. R. R. Co.*, 30 I. C. C. 437; *Protection of Potato Shipments in Winter*, 26 I. C. C. 681, 685; *National Lumber Dealers' Ass'n* v. *Atlantic Coast Line R. R. Co.*, 14 I. C. C. 154; *Millers' Club* v. *Railroad Co.*, 26 I. C. C. 245; *Farmers Co-op. Ass'n* v. *Railroad Co.*, 34 I. C. C. 60; *Montgomery* v. *C., B. & Q. R. R. Co.*, 228 Fed. Rep. 616; *Newmark Grain Co.* v. *Southern Pacific Co.*, 30 I. C. C. 431.

The order was within the jurisdiction of the Commission even if not strictly a practice. Section 12 is here relied on and the concluding paragraph of § 15. The tendency of this court has been to uphold the broad powers granted. *Pipe Line Cases*, 234 U. S. 548. The policy of the act as a whole relies on expert and uniform administrative control rather than judicial orders.

The question whether the duty to provide and furnish cars is violated is administrative, and uniform control by the Commission is requisite. *Loomis* v. *Lehigh Valley R. R. Co., supra; Minnesota Rate Cases*, 230 U. S. 352, 419, 420; *Mo. & Ill. Coal Co.* v. *Ill. Central R. R. Co.*, 22 I. C. C. 39; *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136, 150.

Control by the Commission is imperatively required if the purpose of the act to prevent discrimination is to be effectuated. *Balto. & Ohio R. R. Co.* v. *Pitcairn Coal Co., supra; Interstate Com. Comm.* v. *Ill. Central R. R. Co.*, 215 U. S. 452; *Texas & Pac. Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426.

The order involves the exercise of no new or unusual power by the Commission.

The order is not subject to the objection that it compels the use of cars beyond the line of the railroad. *Mich. Central R. R. Co.* v. *Mich. R. R. Comm.*, 236 U. S. 615, 631, 632; *Pennsylvania Co.* v. *United States*, 236 U. S. 351.

The order is not void because indefinite or uncertain.

It follows the statute; seems as definite as that upheld in *Pennsylvania Co.* v. *United States, supra,* (see also *Baltimore & Ohio R. R. Co.* v. *Interstate Com. Comm.*, 221 U. S. 612, 621, 622); and is as specific as it could reasonably be. The objection here is premature, the railroad having made no effort to comply.

The order does not require an unlawful interference with the rights of owners of private cars. It affords sufficient time for compliance.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

Mr. Charles D. Chamberlin and *Mr. David Wallerstein* filed a brief for the Crew-Levick Company.

Mr. John G. Johnson and *Mr. Thomas Patterson,* with whom *Mr. Henry Wolf Biklé* and *Mr. F. D. McKenney* were on the brief, for the Pennsylvania Railroad Company.

By leave of court, *Mr. Charles W. Atwater* and *Mr. Samuel B. Clarke* filed a brief in behalf of the Sterling Salt Company, as *amici curiæ.*

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The question in the case is, Has the Commission the jurisdiction exercised by the order? It is not denied that the Commission has power over the general equipment of a carrier, but it is denied that it has power to require "vehicles of a special type having no reference to the safety of transportation," and to this distinction the argument of counsel for the railroad company, is addressed.

The judgment of the District Court had somewhat broader basis. The court said: "The act to regulate com-

merce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment." And that, aside from special enactments, "Federal legislation regulating commerce, in so far at least as it is contained in the act of 1887 and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction and equipment of their roads and in the selection of their rolling stock." Indicating that the law conferred upon the Commission the power to prevent and redress unfair practices and discriminations, the court further said: "We find nothing in the law which confers upon the Commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities."

And coming to consider the question of power conferred by the Interstate Commerce Act of 1887 as amended in 1906, the court decided that the amendment "added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission, and vested in the Commission no increase of power over cars as instrumentalities of shipment."

To this proposition the United States and the Commission oppose the contentions that "it is the duty of every interstate carrier to provide and furnish upon reasonable request such cars as are reasonably necessary for handling the normal traffic of which it is a common carrier," and that the Commission is given jurisdiction to enforce the duty.

The power of the Commission has been given precedence and dominance in the argument, the extent of the duty of carriers coming in secondarily though important to be considered. In other words the main question pre-

sented is, whatever be the duty of carriers as to the equipment they must have or furnish, whether the Interstate Commerce Commission is the tribunal to enforce the duty.

A comparison of the act as passed in 1887 with the amendment of 1906 becomes necessary and a consideration of the rulings under the former as an interpreter of the latter.

The Act of 1887 (24 Stat. 379) provided that—

"The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage."

The word "transportation" is the crucial word, and its definition in the amendment of 1906 is as follows:

". . . . and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor . . ." And this, it is contended, must be read in connection with § 12, as amended March 2, 1889, as follows:

". . . and the Commission is hereby authorized and required to execute and enforce the provisions of this act." 25 Stat. 855, 858.

Section 1 of the Act of 1887 came before the Commission for consideration, and the duty thereunder of carriers to furnish tank cars for the transportation of petroleum, in

Scofield v. *Lake Shore & Michigan Southern Railway Co.*, 2 I. C. C. 90. The opinion is too long to review. It is enough to say of it that it considered the conditions of the oil trade, the different methods of shipping oil in barrels and in tank cars, and stated that the latter method had become established, though very few of the railroads of the country owned tank cars; compared the cost and advantages of the methods, and from this declared that it was obvious that where the carriers did not furnish tank cars one shipper could not compete in all respects upon equal terms with another shipper who furnished tank cars for the transportation of his oil, unless he also furnished tanks; and, following a former decision, declared that it was properly the business of the carrier to supply the rolling stock for the freight he offers or proposes to carry, and that if the diversities of the traffic are such that this is "not always practicable, and consignors are allowed to supply it themselves, the carrier must not allow his own deficiencies in this particular to be made the means of putting at an unreasonable disadvantage those who make use in the same traffic of the facilities he supplies." To prevent such disadvantages or preferences the Commission decided it had power; to enforce the duty of supplying cars it decided it had not the power.

Section 3 of the act was asserted against the conclusion, and the Commission replied that that section applied only to facilities between connecting lines and did not embrace car equipment for the origination of freight; and, referring to § 1, it was said:

"The term 'instrumentalities of shipment or carriage,' as found in the first section of the statute, of course includes cars, but they are such cars as are provided by the carrier or used by it in interstate commerce, and the statute nowhere clothes the Commission with power to determine what kind of cars the carrier should use for this purpose and require the carrier to place upon its line for

use in this business such kind and number of cars as the Commission may decide will constitute a proper and necessary equipment of car service. The duty of every such carrier is none the less obligatory at common law, and by its charter to furnish an adequate and proper car equipment for all the business of this character it undertakes and advertises in its tariffs it will do. The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings. . . .

"The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

And it was declared that the law-making power had not itself undertaken the responsibility or clothed the Commission with the responsibility of directing a carrier to supply itself with any particular kind of equipment or cars, or, in fact, any equipment or cars at all for the transportation of freight over its line. It will be observed, therefore, that all of the elements that entered into the problem of the power of the Commission and the reasons which seemed to impel its exercise were considered.

There was a repetition of the elements and decision *In re Transportation, etc., of Fruit*, 10 I. C. C. 360, 373 (1904). It was there said that the Commission was of opinion

that it was the duty of railroad companies to furnish refrigerator cars for the transportation of fruit; that at one time carriers might have declined to provide this special kind of equipment but that the trade had so grown that the carriers "might as well decline to provide stock cars for the transportation of live stock as refrigerator cars for the carriage of perishable commodities." It was, however, added, "But this duty does not spring from the Act to regulate commerce, nor has this Commission any jurisdiction of that matter. It arises out of the common-law liability of the defendant railway companies as common carriers, and redress for failure to fulfill it must be sought in the courts."

Certain abuses were pointed out in that case and the tendency of the ownership of cars by private car lines to monopoly, and as a consequence it was urged upon the Commission that carriers should not be permitted to make exclusive contracts with private car lines like those then under consideration but should be compelled to provide their own equipment. The Commission replied, at page 377: "The facts before us call for no expression of opinion on that subject, and none is attempted."

This, then, was the view of the Interstate Commerce Commission of the duty of carriers and of its power over them; that is, that it was the duty of carriers to provide and furnish equipment for transportation of commodities and that this duty might expand with time and conditions, the special car becoming the common car, and the shipper's right to demand it receiving the sanction of law. But the Commission decided it was the sanction of the common law, not of the statute, and that the remedy was in the courts, not in the Commission. With this view we start as the first element of our decision.

But a change in the statute and remedy is asserted, a change, it is further asserted, consequent upon a demand for a greater administrative power and remedy. To sus-

tain the assertions the reports of the Commission are adduced, the legislation it recommended and the comments of the legislators.

It is especially to be noted that the amendment of 1906 is in the exact language of the recommendation of the Commission, as far as concerns that part which defines "railroad" and "transportation."

The Senate Committee on Interstate Commerce had instituted an extended inquiry and members of the Commission appeared before the special committee which had been appointed and presented a bill which the commissioners said embodied their recommendations and which the Commission subsequently made part of its nineteenth annual report. Significant explanations accompanied the bill. It was stated: "The form of the proposed measure, as will appear upon inspection, is an amendment of certain sections of the present statute. . . . Aside from the main question—the grant of power to the Commission, after hearing, to fix the future rate—several other amendments are proposed with the view of improving the law as a remedial measure, and these amendments will now be referred to under appropriate headings," one of which was as follows:

"*Enlargement of Jurisdiction.*

"It will be seen that the changes proposed in the first section are designed (*a*) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (*b*) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the power of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase 'under a common control, management, or arrangement,' in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the act. The second pur-

pose is sought to be accomplished by enlarging the definition of the term 'transportation,' so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide the services here referred to is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the act, which are commonly spoken of as containing its principal or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction. In this connection, and as illustrative of the matters here referred to, the subject of refrigeration charges may be properly considered."

Then follows a consideration of refrigeration charges, the dispute that existed as to whether the shipper or the carrier should bear the expense of refrigeration, and the controversy over the jurisdiction of the Commission. It was said that "the Congress ought to make that service, by express provision in the law, a part of the transportation itself. We do not at this time recommend that carriers should be prohibited from using private cars or from employing the owners of such cars to perform the icing service if they find that course to their advantage, but we do recommend that these charges should be put on the same basis as all other freight charges. They should be published and maintained the same as the transportation charge, and be subject to the same supervision and control."

Under the heading "Terminal Roads, Elevator Charges, and Private Cars," the following was said:

"It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that.

Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously both to the shipper and railway and without injury to the public if provided by the shipper himself."

After commenting on the amendment to § 16 and the added § 16a, the Commission explained that—

"It will thus be seen that the substantial amendments proposed are few in number and easily understood, the remaining changes being merely such as are needful to harmonize other parts of the act with the main amendments. . . . In brief, the proposed measure amends certain sections of the act to regulate commerce and is confined to such recommendations as are deemed necessary to effect its intended purpose, and thereby furnish adequate protection against excessive and discriminating charges."

It will be observed that there is not one word in the report that indicates that there was a necessity or desire for the power exercised in the order under review. Indeed, there was directly expressed an approval of private cars, and the opinion declared that they were a facility which could be furnished more advantageously both to the shipper and the railroad, without injury to the public, if provided by the shipper himself, and the recommendation was that they be brought under the jurisdiction of the Commission and thereby prevent oppressive and discriminatory practices; the principle being, to borrow from another, that all services incident to transportation, whether primary (carrying the goods) or accessorial (caring for the goods in transit whenever such care calls for special facilities or special equipment), should be subject to the same supervision and regulation.

But is there anything in the words of the amendment which exhibits on the part of Congress a larger knowledge of conditions than the Commission had, and that Congress, in a broader comprehension and judgment of the conditions and their remedy, gave the Commission a greater jurisdiction than that which in any way occurred to it was necessary?

The act as it was enacted in 1887 defined the term railroad and the term transportation, the latter as follows: "And the term 'transportation' shall include all instrumentalities of shipment or carriage." The definition was very comprehensive, and needed not the mobilization of its denotation; but this subsequently was attempted. Words, indeed, were multiplied—was meaning changed?

In 1906 the term "transportation" was defined to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage. . . ." The words are not much less general than the words of the Act of 1887. There is no advance made by them or enlargement of meaning. There was simply a useless tautology. But granting it was not and that Congress deemed a special declaration of things to be necessary, such declaration did not alter the relation of the companies to them. The duty which attached to "instrumentalities" of the Act of 1887 attached to the things covered by its comprehensive generality—to the things declared in the amendment of 1906, that is, to "cars," "vehicles," "facilities." And this duty under the Act of 1887, we have seen, had, in the opinion of the Commission, the sanction only of the common law. Under the amendment the most that can be said is that the duty is particularized. Its sanction is not enlarged.

But other words occur which, it is contended, have such effect. These words are: "And it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request therefor . . ."

This however is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do, he must do "upon reasonable request." The duty having been imposed, it necessarily could be demanded. But the expression of the right, if it needed expression, adds nothing of indication to the previous words of the tribunal by which the demand was to be enforced.

But it is said the duty having explicit declaration the power to enforce it was found in § 12 as amended March 2, 1889, as follows: "And the Commission is hereby authorized and required to execute and enforce the provisions of this act." 25 Stat. 855, 858.

But this casts us back to our general considerations to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or under the amendment of 1906. It was their duty under both to furnish the instrumentalities of transportation. The question is whether under the latter, as under the former, jurisdiction to enforce the duty was at common law in the courts or under the statute and in the Commission; and we have seen that it was the view of the Commission that the remedy was in the courts and that the amendment of 1906 was not intended to and did not change the remedy. In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions. We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation. *United States* v. *Louis. & Nash. R. R.*, 236 U. S. 318, 333 *et seq.*

There was amendment in 1910, not of § 1 in any particular relevant to our discussion, but of §§ 13 and 15. It was said by the committee which reported them for consideration that under § 15 as it then stood the author-

ity of the Commission to enter an order was "confined to the subject-matter of rates for transportation and regulations or practices 'affecting such rates' and the establishment of through routes where 'no reasonable or satisfactory through route exists.'" And the committee added that as recommended to be amended § 15 "will have its scope largely increased and the jurisdiction of the Commission will be much enlarged;" and that by the amendment the Commission is given jurisdiction to enter orders not only regarding rates but regarding classifications, regulations, or practices, whether they affect rates or not, and make orders requiring conformity thereto.

"Practices" were not otherwise or precisely defined either in the report or in the amendment recommended and as finally passed. Regarding only its broad generality anything may be asserted of it; regarding its context and the conditions which existed an immediate limitation of it is indicated, made necessary, as we shall presently show.

Section 15 provides that whenever after full hearing as provided by § 13 the Commission should be of opinion that any individual or joint rates collected by a common carrier or "that any individual or joint classifications, regulations, or *practices* whatsoever of such carrier or carriers subject to the provisions" of the act are "unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of" the act, the Commission is authorized and empowered to determine and prescribe what shall be the just and reasonable rate or rates and "what individual or joint classification, regulation, or *practice* is just, fair, and reasonable," and make an order that the carrier shall cease and desist from the charging of excessive rates and shall adopt the classification and conform to and observe the regulation or practice prescribed; the order to continue such time not exceeding two years as shall be prescribed by the Commission.

Applying the section, it is contended that the neglect to provide or certainly the refusal to furnish tank cars is a "practice" and became especially so by the reply made by the railroad to the request to furnish them.

Let us test the contention and see where it takes us. The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a "practice" within the meaning of § 15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as "practice." Following a well known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one. These have illustrations in decisions of the Commission. And this was purpose enough, remedied all that was deemed evil in privately owned cars of any type. Beyond that it was not necessary to go; beyond that there were serious impediments to going; and we cannot but believe that if beyond that it was intended to go there would have been explicit declaration of the intent, with such provision as to notice and time and preparation as its consequences would demand—not ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency, a construction that could be disputed and was disputed.

Three commissioners out of seven dissented, they declaring that if the act conferred power upon the Commission to order a carrier to enlarge its complement of cars it would follow that the Commission had also the power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches.

In fact, it was said that no facility of transportation would be exempt. The purpose of the provision reviewed was declared to be the regulation of facilities possessed by the carrier, that there should be no unjust discrimination, and the plain intent to be that the shipper should not be required to deal with any other than the carrier. And this, as far as we can glean from the extensive congressional literature, was the end sought. In other words, it was on account of the abuses of the private car system, not of its uses, that legislation was urged.

There was some sentiment outside of the Commission for the abolition of the private car system, but abolition was not attempted. It would have been a short cut to the solution of the problems and could easily have been accomplished by requiring the railroads to furnish all of the equipment necessary for taking care of all kinds of traffic. But neither the Government nor the Commission contends for such an extreme, and, to forestall the charge that the order has such tendency, each represents that the duty of the carrier to furnish special equipment is not absolute but relative to the conditions of trade and the business of the shipper. This weakens the principle upon which the duty is based. If there be a duty, it would seem necessarily to be universal. And such contention is growing.

A friend of the court appears in the form of a Salt Company and presents an argument in support of the order of the Commission and asserts the right to a special equipment for the transportation of salt in bulk.

Little more need be said. Private cars came into existence as conveniences or necessities to particular businesses, developing by degrees and differentiating according to conditions. It was said in argument that there are different kinds of tank cars for different oils and liquids, and there are cars for live stock, fruit, live poultry, milk, and, as we have seen, salt in bulk. What others there are neither the record nor the argument has given us informa-

tion, nor the extent of their specialization. However, the information is not needed. The facts of the present case illustrate the condition of the carriers of the country. Describing it, the Commission says:

"The bulk of the movement of refined oil is in tank cars owned by the shippers. In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887 and 482 of which are furnished to shippers of oil located on its lines. The other railroads east of the Mississippi River own, in the aggregate, only 303 tank cars. The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000."

This, then, was the situation of the railroad, not dissimilar to that of other railroads, not therefore created in deliberate fault but in accommodation to conditions useful to shippers, advantageous to the railroad, beneficial to the public, as the Commission had declared; and yet a change is suddenly required. The burden of the requirement we shall presently notice.

Of course, if there is a duty upon a carrier to furnish tank or other special cars upon request, its enforcement cannot be arrested by the burden it imposes; but here again the thought obtrudes, which we have already expressed—it may be to tiresome extent—that if Congress had intended such consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language but would have put it in explicit declaration and with notice and time for accommodation to it.

It is to be remembered that the tank car is both package and car, must have special mechanical means of loading and unloading. May these, too, be ordered? Are they

not a "manner and method of presenting, marking, packing, and delivering property for transportation," to use the language of § 1, as amended?

It is difficult to particularize all that the ruling of the Commission implies of power. What of omission or commission in the carrier's relation to the public may not be said to be a practice or practices in the broad sense attempted to be given to those words? A railroad's powers are its duties, bearing, of course, obligations; and all of them by the asserted construction are swept under the jurisdiction of the Commission—so swept by a single word, not of itself apposite, and determined besides, by its association, against the contention. This was apparent to the dissenting commissioners and repelled their concurrence. Well might they have recoiled from going to such extreme upon doubtful implication and have been impelled to declare as they did declare that if such power was given it logically and necessarily extended to every facility of transportation.

As to whether this is desirable, we express no opinion, and we only mean now to say that it was not expressed as desirable in the statutes which we have considered, nor was there a word or a line from the Interstate Commerce Commission, so far as the record shows or intimates, of recommendation of such result. Indeed, there is intimation that such result would be radical and, as said by the railroad company, "the Safety Appliance Acts indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers, it covers the subject by careful specific rules." And we may further say with the company that "it is pertinent to inquire why committees of Congress should consider, as they continue to do from time to time, the wisdom of devolving on carriers the duty to furnish steel coaches for passenger traffic, if already the provisions of the Act to Regulate Commerce are broad enough to cover matters of this kind." And

there is strength in the observation of the railroad company that if the argument based upon the word "practice" or "practices" were sound "it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the Act, why should the Commission ask that it be empowered to require the use of the block signal system? (Report of 1913, page 82.) Why should the Commission make this request if, because of its jurisdiction with respect to practices, it is already endowed with power to regulate the details of operation of carriers?"

The United States and the Commission insist that they have authority of cases for their two fundamental propositions, to-wit: (1) That it is the duty of the railroad to furnish equipment for the transportation of products; and (2) That the Commission has the jurisdiction to enforce that duty.

The authorities upon the first proposition we are not concerned to review. The duty, as far as this question is concerned, may be admitted—certainly admitted in its general sense. But we need not pause to distinguish its application in the cases to special equipment as distinguished from common equipment, or how much the decisions were based upon the belief of the shipper, justified or encouraged by the railroads, that the equipment required would be furnished.

With the second proposition we are concerned, and a consideration of the cases becomes necessary as they are cases in this court and are cited to sustain the power of the Commission. They are as follows: *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *Yazoo, &c. R. R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1; *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412; *Menasha Paper Co.* v. *Chicago & N. W. Ry. Co.*, 241 U. S. 55.

The *Hardwick Elevator Case* passed upon a law of Minnesota, known as the Minnesota Reciprocal Demurrage Law, which made it the duty of a railroad company on demand from a shipper to furnish cars for transportation at terminal points within 48 hours and at intermediate points within 72 hours after such demand, Sundays and legal holidays excepted. A penalty was imposed for each day's delay. This court held that by § 1 of the Hepburn Act Congress had legislated concerning the delivery of cars in interstate commerce by carriers subject to the act. This was based upon the definitions of § 1 and the provisions of §§ 8 and 9. The questions in the case were not those in the present case. The kinds of equipment were not involved nor the questions dependent upon them. The only question was as to whether Congress had entered the field of regulation.

In *Yazoo &c. R. R. Co.* v. *Greenwood Grocery Company* there was also involved a statute which penalized delays in delivering cars. It was held to be within the decision of the *Hardwick Elevator Case*, as it undoubtedly was.

In the *Harris Case*, the Carmack Amendment was decided as not excluding a state statute allowing an attorney's fee in certain actions based on claims for small amounts against railway companies. It has no relevancy to the present case.

The *Ellis Case* grew out of a right asserted by the Interstate Commerce Commission to inquire whether Armour & Company, shipping packing house products in commerce among the States, was controlling the Armour Car Lines and using them as a device to obtain concessions from the published rates for transportation. A series of questions were put to a witness in regard thereto which he refused to answer, and proceedings to compel his testimony were instituted. A question of the power of the Commission was presented and that was made to depend upon whether the Armour Car Lines was a com-

mon carrier subject to the Interstate Commerce Act. It was replied that the Car Lines Company had no control over the motive power and movement of the cars and was not a common carrier subject to the act. And this was said: "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth." The language was perfectly apposite to the question under consideration, the relation of the Armour Car Lines to the Armour Company and to the railroad. The cars the latter obtained from the Car Lines Company constituted the equipment of the railroad company and were, of course, subject to the provisions of the Interstate Commerce Act.

The question with which the present case is concerned was not presented to the court nor intended to be decided. The testimony sought by the Commission was to expose and prevent what were supposed to be discriminatory practices, and the right to require the testimony depended, it was the effect of the decision, upon the relation of the Armour Company to the Armour Car Lines through the railroad, and whether what was paid to the Armour Car Lines was in effect paid to the Armour Company and made a means of discrimination. This view was rejected and it was said: "It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor" —the lessor of that case being the Armour Car Lines; and, as it was not shown that it was merely the tool of the Armour Company, it had immunity from the investigation. The case, therefore, is not authority for the proposition which it is urged to support.

Menasha Paper Co. v. *Chicago & N. W. Ry. Co.*, needs

no comment. It quotes but attempts no explanation of the words of the statute that is relevant to our present inquiry. Indeed, in all of the cases the points of inquiry and decision were different from the case at bar. They declared or enforced or recognized the general duty of carriers under the particular facts and the law to which the carriers were subject.

It is next contended by the United States that the railroad has held itself out specifically to carry oil in tank cars, and the fact, it is said, has been found by the Commission and is not reviewable, citing *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. We are unable to assent.

The railroad company in its answer to the petition before the Interstate Commerce Commission alleged that Rule 29 of the official classification No. 39 providing rates for articles in tank cars stated that the carriers whose tariffs were covered by such classification did not assume any obligation to furnish tank cars. There is a concession in the brief of the Interstate Commerce Commission that such was the published tariff, though contesting its efficacy to divest the company of its duty as a carrier. This might be if there was a duty; but the United States seeks to establish the duty from the offer of the company and must take the offer as made and cannot, nor can the Commission, ignore its explicit qualification that the company assumed no obligation to furnish tank cars. The finding of the Commission, therefore, was one of law and not of fact, and is reviewable.

The railroad company, besides the contentions of want of power in the Commission to make the order under review, objects to it (1) in that it is defective because it requires the company to supply cars for movement over the lines of other carriers; and (2) that it is not administrative in character, but is uncertain, indefinite and unlawful.

In support of the first contention the railroad company points out that the company owns more tank cars than all of the other carriers east of the Mississippi River, amounting at the time of the hearing to 499 cars. The total ownership of other cars east of the Mississippi River amounted to 303, and the privately owned tank cars to 27,700. It therefore appears, it is said, that the railroad ownership is less than 3% of the total ownership and that of this 3% the company is furnishing more than half. The company, therefore, asserts that if it be compelled to furnish all of the tank cars required for the transportation of oil on its line irrespective of their destination, it is obvious that a burden out of all proportion is placed upon it. It further complains that although the New York Central Railroad serves the oil companies equally with it, no order is made against that company but, on the contrary, the entire burden is devolved upon it.

In support of the second contention the company asserts that the order of the Commission is not administrative is indicated by decisions of this court in actions for failure to furnish cars. The cases are: *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70 (1912); *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140 (1915); *Penna. R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121 (1915); *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275 (1915).

Again, it is charged that the order expressed but a legislative principle, has the generality of such principle without any criterion of application. The order requires the company to "provide . . . upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce." What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer and if the railroad company ventures, however honestly,

any resistance to a request or notice not deemed reasonable or to shipments not deemed normal it must exercise this right at the risk of a penalty of $5,000 a day against all of its responsible officers and agents. These considerations are very serious (*International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions.

Decree affirmed.

DETROIT UNITED RAILWAY *v.* PEOPLE OF THE STATE OF MICHIGAN.

DETROIT UNITED RAILWAY *v.* CITY OF DETROIT.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Nos. 1, 4. Argued October 20, 1916.—Decided December 11, 1916.

Plaintiff in error, in 1900, under the Michigan Street Railway law (Laws 1867, vol. 1, p. 46; Comp. Laws 1897, c. 168), acquired by purchase certain street railway lines in the City of Detroit, with their franchises, and, soon afterwards, certain suburban lines, with their franchises. The latter lines connected with the former at the city boundary, but lay wholly within adjacent village and township territory. The franchises for the city lines had arisen through ordinances of the city, among them ordinances passed in 1889, which placed special restrictions on fares, and were accepted by the then owners of the city properties. The franchises for the suburban lines had arisen through village and township ordinances which fixed the fares upon a basis more favorable to the respective grantees. Until all were acquired by the plaintiff in error, the city properties had been owned and held independently of the suburban properties. Plaintiff in error united the properties thus acquired under one organization. Thereafter, by acts of the legislature passed in 1905 and 1907, the limits of the city were so extended that portions of the two outlying railways were embraced therein. These acts

contained no reference to existing contracts nor specific mention of street railway rights, but each provided that the territory annexed should be subject to all the laws of the State applicable to the city and to all the ordinances and regulations of the city, with exceptions not here material. This litigation resulted from the contention of the city, (which the state court sustained), that the outlying lines, in so far as they had come within the city through its extension, came also within the fare restrictions of the city ordinances of 1889.

Held, (1) Upon consideration of the village and township grants and the law under which they were made (Act of 1867, §§ 13, 14 and 20), that the right to charge fare as therein permitted, upon the lines covered by those grants, was a valid right of contract whose obligation could not constitutionally be impaired by subsequent state legislation.

(2) That, conceding the validity of the Acts of 1905 and 1907 as annexation acts, yet an impairment of this contractual right, resulting from the effect given to them by the decision of the state court combined with the construction of the city ordinances as contractually binding the plaintiff in error to submit to their fare restrictions on all of its lines within the city as so extended, was an impairment attributable to the annexation acts as well as to the construction of the city ordinances.

(3) Therefore, whether the agreements imported by the ordinances of 1889, when properly construed, were operative in the added city territory, was a question touching the merits of the case and not the jurisdiction of this court.

(4) That, read with the other city ordinances under which the franchises for the city lines were granted, the ordinances of 1889, in requiring one of the predecessors of plaintiff in error to carry passengers at reduced rates "over any of its lines in said city" and in requiring another to apply single fares and reduced rates "over the entire route of said company" were not intended to apply prospectively to lines which those companies might afterwards own within subsequent additions to the city.

(5) Even if such extended construction were allowable in respect of lines subsequently built under the actual or assumed authority of the ordinances of 1889, it could not be allowed in derogation of rights, privileges, and franchises—especially as to fare—arising independently under the township and village ordinances and acquired by plaintiff in error by purchase before the city was extended. Michigan Street Railway Act of 1867, § 15; Comp. Laws, 1897, § 6648, applied.

A grantee of a public grant may not be compelled to suffer the ills of a strict construction in one aspect without being accorded the benefits necessarily flowing from that construction in others.

Notwithstanding statements in *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679, 689; 173 U. S. 592, 602, it is settled that when called upon to exercise jurisdiction under the contract clause this court must determine upon its independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation?

162 Michigan, 460; 173 Michigan, 314, reversed.

THE case is stated in the opinion.

Mr. Elihu Root, with whom *Mr. John C. Donnelly*, *Mr. William L. Carpenter*, *Mr. Fred A. Baker* and *Mr. Henry L. Lyster* were on the briefs, for plaintiff in error.

Mr. P. J. M. Hally, with whom *Mr. Harry J. Dingeman* was on the brief, for defendants in error:

The Michigan Supreme Court bases its judgments solely on the meaning of the contracts existing between the parties. *People* v. *Detroit United Railway*, 162 Michigan, 460, 463, 465; *City of Detroit* v. *Detroit United Railway*, 173 Michigan, 314, 326, 327, 328.

The decision of a state court defining the meaning of a contract, without reference to a subsequent law, raises no federal question. *Detroit City Railway* v. *Guthard*, 114 U. S. 133; *Henderson Bridge Co.* v. *City of Henderson*, 141 U. S. 679; *Henderson Bridge Co.* v. *City of Henderson*, 173 U. S. 592, 608; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 39.

In the present cases, the court below gave no effect to a subsequent law, but based its decision on the independent ground that the rights claimed by the plaintiff in error were not conferred by the contracts made with the villages and townships surrounding Detroit, because of other and previous obligations which had been contracted through its predecessors with the City of Detroit. The annexation

acts being unquestionably valid, the impairment, if any exists, of the contract obligations arises not from the acts, but comes as a mere incident of the legislation due to the agreements made by the parties.

The litigants are bound by the state court's construction of the contracts. *Henderson Bridge Co.* v. *City of Henderson*, 173 U. S. 592, 602. The only impairment conferring jurisdiction on this court is impairment by state law or constitution. *Knox* v. *Exchange Bank of Virginia*, 12 Wall. 379; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392. It is only where subsequent legislation intervenes that this court will construe the contract for itself. *Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 41, 45; *Missouri & K. I. R. Co.* v. *Olathe*, 222 U. S. 187; *Southern Wisconsin R. Co.* v. *Madison*, 240 U. S. 457, 460, 461.

There is no denial of due process where, without denying any fundamental principle of law, a lawful tribunal in a regular way hears the parties and determines their rights. *Morley* v. *Lake Shore & Michigan Southern Ry.*, 146 U. S. 162; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112.

The court below correctly interpreted the contracts. In succeeding to their property, franchises, etc., plaintiff in error obligated itself to carry out the contracts made by its predecessors. The decisions of the court below, in interpreting these obligations, merely followed the established rule that public grants or franchises must be construed strictly against the grantee and in favor of the public—a principle established by many decisions of this court.

The continued expansion of Detroit was of common knowledge, evidenced by many acts of annexation, enacted before the plaintiff in error purchased the properties in question, and all prior to the contract of 1889. The contracting parties must have had in view the certainty that the city limits would go further. The term "city limits" in a contract to run for thirty years means the city limits as they will become. The obligations of the parties under

the contract of 1889 were intended to expand territorially as the limits grew.

MR. JUSTICE PITNEY delivered the opinion of the court.

These two cases involve identical questions, were argued together, and may be disposed of in a single opinion. They concern the rates of fare that may be charged by plaintiff in error upon certain street railway lines within the present limits of the City of Detroit, and in both cases it is insisted that the state court of last resort has given such an effect to statutes enacted in the years 1905 and 1907 for extending the corporate limits as to impair the obligation of the contracts contained in franchises theretofore granted by the governing authorities of the annexed territory to the predecessors in title of plaintiff in error.

Plaintiff in error was incorporated December 28, 1900, under the Street Railway Act of 1867 and amendments thereto (Mich. Laws 1867, vol. 1, p. 46; Comp. Laws 1897, c. 168), for the purpose, as its corporate name indicates, of acquiring, maintaining, and operating various lines theretofore constructed by other companies. Section 15 of the act (§ 6448, Comp. Laws) provides that any street railway company may purchase and acquire any street railway in any city, village, or township owned by another corporation, together with the rights, privileges, and franchises thereof, "and may use and enjoy the rights, privileges and franchises of such company, the same, and upon the same terms as the company whose road and franchises were so acquired might have done." Under this authority it shortly thereafter acquired and united under one organization certain lines previously constructed and operated independently throughout the city and its suburbs under different and distinct franchises, of which the following is a summary:

In November, 1862, the city, by ordinance, granted to the incorporators of the Detroit City Railway the right

to construct railways in certain streets, including Jefferson Avenue, which extends from the centre of the city in a northeasterly direction to and beyond the city limits. All the lines authorized were to commence at Campus Martius, and run thence on their several courses to the city limits, and the route along Jefferson Avenue to the eastern limits was to be completed within six months after March 31, 1863. In 1873 a section was added authorizing the construction of a second track along Jefferson Avenue. In 1862 the city limits on Jefferson Avenue were at Mt. Elliott Avenue. In 1885 they were extended to a point 200 feet east of Baldwin Avenue, and while they remained as thus fixed, and in the year 1889, a supplemental ordinance was passed granting to the Detroit City Railway, among other things, the right to extend its double track along Jefferson Avenue from its then present easterly terminus to the easterly city limits, and fixing a time within which the same should be constructed. There was a provision that the additional lines should be operated in connection with and as parts of the then present system of the Detroit City Railway, and that the company should agree, among other things, to make arrangements for carrying passengers between the hours of 5.30 and 7.00 a. m., and between 5.15 and 6.15 p. m., over any of its lines in the city for a single fare upon tickets sold at the rate of eight for twenty-five cents, with specified transfer rights.

In 1891 the city limits were further extended along Jefferson Avenue to Hurlburt Avenue, which was the easterly line of the Township of Hamtramck. The railroad on Jefferson Avenue in the territory covered by this extension was constructed under franchises granted by the authorities of that township, respecting which no question is now raised.

From Hurlburt Avenue eastwardly to the Country Club in the Township of Grosse Pointe—a distance of about four and one-half miles—the railroad on Jefferson Avenue was constructed under several grants made by the Town-

ship and Village of Grosse Pointe, and the Village of Fairview, in the years 1891, 1893, and 1895, and further powers were conferred upon plaintiff in error, after its acquisition of these lines, by ordinance of the Village of Fairview passed May 16, 1905. These several village and township grants were for terms that have not yet expired, and contain provisions for five-cent fares within the territory covered by them.

The Jefferson Avenue lines are operated together as a single system in connection with lines leading from the city northwestwardly on Grand River Avenue to and beyond the city limits, constructed under rights derived by predecessors in title of plaintiff in error as follows:

By ordinance of May 1, 1868, the city granted to the incorporators of the Grand River Street Railway Company the right to construct lines on certain streets, including Grand River Avenue to its intersection with the Michigan Southern Railway at or near the then present city limits, with the right to build a second track within five years after the completion of the first. By § 8 this line was to be completed to a specified point contemporaneously with the paving of the street, and thence to the western city limits whenever public necessity, as determined by the common council, should require. By Acts of 1875 and 1885 the limits were extended from the railroad intersection to a point just beyond the Boulevard. By ordinance of August 3, 1888, there was granted the right to construct single tracks on Grand River Avenue from its then present terminus to the westerly city limits, and by ordinance of January 3, 1889, the city granted the right, among others, to construct a double track railway on Grand River Avenue from Woodward Avenue to the city limits, and under this authority tracks were built to the limits just beyond the Boulevard. The latter ordinance required the company to stipulate that it would sell tickets eight for twenty-five cents, good over the entire

route of the company, when offered during the morning and afternoon hours specified in the ordinance passed on the same date respecting the Detroit City lines and already referred to.

In 1897 the Township of Greenfield granted to the incorporators of the Grand River Electric Railway, (a different corporation from that last mentioned), a franchise for tracks along the Grand River Road from the westerly line of the township to the then present city limits of Detroit, with a right to charge not exceeding five cents as the fare for any distance in Greenfield, or six tickets for twenty-five cents, with school tickets at ten for thirty cents. Under this franchise a railroad was built along the Grand River Road from the then city limits near the Boulevard throughout the Township of Greenfield.

As already indicated, all of these lines of railway, with the appurtenant rights, privileges, and franchises, were acquired by plaintiff in error shortly after its incorporation, under the authority of § 15 of the Act of 1867.

Afterwards, by an act of the legislature approved October 24, 1907 (Mich. Laws, Ex. Sess. 1907, p. 55), a part of the former Village of Fairview, including Jefferson Avenue for a distance of about 12,500 feet northeastwardly from Hurlburt Avenue, was annexed to the City of Detroit. And by Acts of June 16, 1905, and June 19, 1907 (Mich. Local Acts 1905, p. 1144; Local Acts 1907, p. 940), the city limits were extended northwestwardly along Grand River Avenue for a distance of about one-half mile in territory previously part of Greenfield Township. Each of these acts provided that the annexed territory should be subject to all the laws of the State applicable to the city and to all the ordinances and regulations of the city, with exceptions not now material.

It is the contention of defendants in error that the provisions respecting fares in the two ordinances of January 3, 1889, assented to by the predecessors of plaintiff in error

in the ownership of the city lines on Jefferson and Grand River Avenues, were intended to be applicable throughout the city as it might from time to time be enlarged, and that plaintiff in error is bound by the limitations of those ordinances as to all its lines within the city, not only as its limits existed in 1889, but also including the territory annexed in 1905 and 1907.

In case No. 1, the Supreme Court of the State sustained the imposition of a fine for failure to accept workingmen's tickets, so called, within the hours prescribed by the ordinance of 1889 upon the Jefferson Avenue line within the territory formerly part of the Village of Fairview but annexed to the city by the Act of October 24, 1907. 162 Michigan, 460.

In No. 4, the court sustained a judgment awarding a mandamus requiring plaintiff in error to observe the provisions of the ordinances of 1889 upon the entire Jefferson Avenue—Grand River Avenue route, so far as included within the city limits as extended in 1907. 173 Michigan, 314.

In each case plaintiff in error seasonably and expressly insisted that the several township and village grants above referred to were subsisting and valid contracts when the legislature of Michigan passed the acts extending the city limits, and that those acts, if so construed or applied as to affect or modify the contracts, were in conflict with § 10 of Article I of the Constitution of the United States. And it is upon the overruling of these contentions that the cases are brought here, under § 237, Jud. Code.

Defendants in error challenge our jurisdiction, upon the ground that the judgments of the state court of last resort were based solely upon the meaning that it attributed to the ordinances of January 3, 1889, without reference to any subsequent legislation.

It is true, as this court has many times decided, that the "contract clause" of the Constitution is not addressed to

such impairment of contract obligations, if any, as may arise by mere judicial decisions in the state courts without action by the legislative authority of the State. *Cross Lake Shooting and Fishing Club* v. *Louisiana*, 224 U. S. 632, 639; *Frank* v. *Mangum*, 237 U. S. 309, 344.

But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905 and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to these subsequent laws. Assuming what in effect is conceded, that the village and township franchises constituted contracts within the protection of the Federal Constitution, the force of the decisions was to abrogate the rights acquired by plaintiff in error through its acquisition of the suburban lines, not merely because of the assent of the owners of the city lines to the ordinances of January 3, 1889, but because of the combined effect of those ordinances and the acts of the legislature of Michigan that thereafter extended the city limits. It is true that no question is or can be here made respecting the authority of the legislature to add new territory to the city; and it is likewise true that the annexation acts contain no reference to existing contracts, nor any specific mention of the subject-matter of street railway rights. But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation. *McCullough* v. *Virginia*, 172 U. S. 102, 116, 117; *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66, 77; *Terre Haute &c. R. R. Co.* v. *Indiana*, 194 U. S. 579, 589; *Hubert* v. *New Orleans*, 215

U. S. 170, 175; *Fisher* v. *New Orleans*, 218 U. S. 438, 440; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 376; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U. S. 164, 170. The necessary operation of the decisions under review is to give an effect to the annexation acts that substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that that result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error. Whether the agreement thus invoked, when properly construed, has the effect attributed to it, is a question that touches upon the merits, and not upon the jurisdiction of this court.

Coming, then, to the merits: Not only is it not disputed, but it is not open to serious dispute, that the original village and township grants were contractual in their nature. It appears that the recipients of those grants, like their successor, the plaintiff in error, became incorporated under the Street Railway Act of 1867, of which § 13 provides that consent for the construction and maintenance of a street railway is to be given by the corporate authorities in an ordinance to be enacted for the purpose, and under such rules, regulations, and conditions as may be prescribed by such ordinance, but that no such railway shall be constructed until the company shall have accepted in writing the terms and conditions upon which they are permitted to use the streets. By § 14, after any city, village, or township shall thus have consented to the construction and maintenance of street railways, or granted rights and privileges to the company, and such consent and grant shall have been accepted by the company, the consent shall not be revoked or the company deprived of the rights and privileges conferred. And by § 20 the rates of toll or fare to be charged by the company are to be established by agreement between it and the corporate authorities, and are not to be increased without consent of

such authorities. It is plain, as was pointed out by this court in *Detroit* v. *Detroit Citizens St. Ry. Co.*, 184 U. S. 368, 385, that the legislature regarded the fixing of the rate of fare as a subject for agreement between the municipality and the company. And in these cases, as in that, the terms of the several ordinances are such as clearly to import a purpose to contract under the legislative authority thus conferred.

But it is insisted—and to this effect was the decision of the state court—that the terms of these contracts were in effect modified by the assent of the owners of the city lines on Jefferson and Grand River avenues to the ordinances of January 3, 1889, and the subsequent acquisition of these lines by plaintiff in error followed by its acquisition of the suburban lines. It is, indeed, argued that the construction placed by the state court upon the ordinances of 1889 as contracts is not subject to the review of this court, and a declaration to this effect is cited from *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679, 689, quoted in a subsequent case of the same title in 173 U. S. 592, 602. But, notwithstanding what was there said, it is too well settled to be open to further debate, that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obligation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation? *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66, 77; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 147; *Terre Haute &c. R. R. Co.* v. *Indiana*, 194 U. S. 579, 589.

But of course in the present cases the crucial question is, what were the obligations of the contracts as they stood at the time of the subsequent legislation? And therefore it becomes material to determine whether, by voluntary action of the parties between the making of the suburban

grants and the passage of the annexation acts, the obligations arising out of those grants had been modified. The state court deemed that the assent of the Detroit City Railway to that provision of the first-mentioned ordinance of January 3, 1889, which required it to carry passengers at reduced rates "over any of its lines in said city" applied to any and all lines it either then owned or might thereafter acquire, and comprehended all territory within the limits of the city, including any extension of the municipal boundaries or of the company's lines within those boundaries; and that by the acquisition of the lines of the Detroit City Railway plaintiff in error became bound by this agreement, and was obliged to observe it, even with respect to the lines that it afterwards acquired as assignee of the Grosse Pointe and Fairview franchises, so far as those lines were included in the extended city limits. It was said (162 Michigan, 462) that there were two methods of extending street railways, one by construction, the other by purchase under § 6448 (2 Comp. Laws 1897), being § 15 of the Act of 1867; that "the purchased railway becomes as much a part of the system as does the railroad as constructed;" and that the ordinance of 1889 was made in view of the power of the legislature to increase or diminish the territory within the city, and the real intent was to provide for single fares within the city limits as they should from time to time be fixed. In 173 Michigan, 314, similar reasoning was applied to the ordinance of 1889 respecting the Grand River Avenue line and the obligation imposed upon the owner of that line to apply the single fare and the reduced rates "over the entire route of said company." The court considered (173 Michigan, 325, 326) that certain of the language used in the original ordinance of 1862 to the Detroit City Railway and in that of 1868 to the Grand River Street Railway Company showed that the probable growth of the city and development of its public utilities were anticipated, and

indicated a purpose that the grants should apply as far as the city might be extended.

Notwithstanding our disposition to lean towards concurrence with the view of the state court of last resort in a matter of this nature, we are unable to accept its construction of the ordinances of 1889. In the first place, we are unable to view the original ordinances as intended to extend the rights of the respective grantees beyond the then existing city limits and as far as the limits should be extended in the future. Their language does not seem to us to admit of this interpretation, and the practical construction placed upon them by the parties was to the contrary. As the city limits on Jefferson Avenue and on Grand River Avenue were extended, the respective companies obtained, and presumably were required to obtain, new grants authorizing an extension of the railways from their then present *termini* to the new city limits. Both of the ordinances of 1889 contained express grants to this effect with respect to Jefferson Avenue and Grand River Avenue respectively. Each of the original city grants, and each of the ordinances of 1889, contained particular and comparatively brief limitations of time within which the authorized lines of railway were to be constructed and placed in operation. For these reasons, and because in other respects the grants are quite specific in their terms, and because the city at that time had no authority to extend its corporate limits nor to make a grant of street railway rights beyond them, we are compelled to conclude that the ordinances of 1889 had no such extensive meaning as that attributed to them by the state court.

Defendants in error invoke the established rule that the terms of a municipal grant or franchise should be construed strictly as against the grantee, and as favorably to the grantor as its terms permit. The state court deemed the rule to be applicable. 162 Michigan, 465; 173 Michigan, 323. It is at least doubtful, however, whether the

rule, properly applied to the facts of these cases, does not bear altogether in favor of plaintiff in error. For of course it is not possible to adopt an extensive construction of the obligations imposed upon the city companies by the ordinances without adopting a like construction as to the extent of the franchises thereby conferred upon the companies. And can it be supposed that, if either of these companies had claimed the right to lay down tracks and operate railways in the annexed territory by virtue of the ordinances of 1889, they would not have been met with the rule that municipal grants are to be construed strictly against the grantee, and cannot be extended beyond their express terms? In any view, the ordinances, just because they were intended to be contracts, and not merely legislative enactments, ought to be regarded as having reference to a specific subject-matter.

But were we in error about the construction of these ordinances, we still think that the acquisition of the city lines by plaintiff in error, and its subsequent acquisition of the suburban lines, did not bind it to put the reduced fare provisions in effect upon the suburban lines if and when the city limits should thereafter be extended to include any parts of the latter. If the city lines had been extended into the annexed territory by either of the city railway companies under any authority conferred by or assumed under the ordinances of 1889, a very different question would be presented. But such is not the case. And although we may follow the state court to the extent of considering the acquisition of the suburban lines under § 6448, Comp. Laws, as being in effect an extension of the city railways, we cannot, without doing violence to the provisions of that section, regard such acquisition as abrogating any part of the franchise rights that pertained to the suburban lines; for the section itself declares that upon such purchase being made, the purchasing company "may use and enjoy the rights, privileges and franchises

of such company, the same, and upon the same terms as the company whose road and franchises were so acquired might have done." The rate of fare being among the most material and important of the terms and conditions referred to (*Detroit* v. *Detroit Citizens St. Ry. Co.*, 184 U. S. 368, 384; *Minneapolis* v. *Minneapolis Street Railway Co.*, 215 U. S. 417, 434), we find it impossible to regard the purchase of the suburban lines, with their rights, privileges, and franchises, as being in effect an extension of the city lines, but at the same time an abrogation of an essential part of the rights and privileges appurtenant to the acquired lines.

The state court cited and relied upon *Indiana Ry. Co.* v. *Hoffman*, 161 Indiana, 593, and *Peterson* v. *Tacoma Ry. & Power Co.*, 60 Washington, 406. In their particular facts and circumstances those cases differ somewhat from the cases now before us; and, without stopping here to analyze them, we deem it sufficient to say that we are unable to accept their reasoning so far as it is inconsistent with the views we have expressed.

It results that the provisions of the township and village ordinances respecting the rates of fare remained in full force and effect after the acquisition of the suburban lines by plaintiff in error, notwithstanding its previous acquisition of the city lines or the previous assent of the city railway companies to the ordinances of 1889. Because of the provision of § 10 of Article I of the Constitution of the United States, it was not within the power of the State of Michigan by any subsequent legislation to impair the obligations of those contracts, and since the judgments of the Supreme Court of that State gave such an effect to the annexation Acts of 1905 and 1907, in conjunction with the ordinances of 1889, as to impair those obligations, the judgments must be reversed.

We have made no particular mention of an agreement entered into between the city and plaintiff in error in the

year 1909, because we agree with the state court (173 Michigan, 321) that it was no more than a temporary provision for a *modus operandi*, and had not the effect of waiving any of the rights of either party.

Judgments reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE CLARKE, dissenting:

I greatly regret that I cannot concur in the decision just announced. The opinion of the majority of the court plainly regards the act of the legislature of the State of Michigan, extending the corporate limits of the City of Detroit, as a valid law, passed in the exercise of an undoubted power in the legislature to deal as it does with the municipal corporations of that State, and its validity for the purposes for which it was intended is not questioned. It will remain a valid law after this decision as it was before. In substance the decision of this court is that the Supreme Court of Michigan, in deciding that there is an implied condition in the contract between the City of Detroit and the railway company that the rates of fare therein provided for shall apply within the city limits when extended, and in requiring the railway company to accept the same fares throughout the new city limits as were accepted throughout the former limits, gives an effect to the extension act which impairs the railway company's contract with the city. I am of the opinion that for the state Supreme Court thus to interpret the terms of the contract of the railway company with the city is not to give an effect to the valid extension act of the legislature which violates the provision of the Constitution prohibiting a State from passing any "law impairing the obligation of contracts." The passing of the valid extension act merely created a situation under which the implied condition, *existing in the fare contract from its*

beginning, finds an application to the new territory. This is giving effect not to the terms of the act of the legislature but to the terms of the contract with the city, and the most that can be said against the decision of the Supreme Court of Michigan is that it gives an erroneous construction to the contract. But since it is settled by many decisions of this court that the contract clause of the Federal Constitution does not protect contracts against impairment by the decisions of courts except where such decisions give effect to constitutions adopted or laws passed subsequent to the date of such contracts (*Cross Lake Shooting and Fishing Club* v. *Louisiana*, 224 U. S. 632), I am of opinion that there is no federal question before this court in this case and that the writ of error should be dismissed. This is a high and delicate power which the court is exercising in this case and it should be resorted to only in cases which are clear, and, for the reasons thus briefly stated, I am convinced that this is not such a case.

I am authorized to state that MR. JUSTICE BRANDEIS concurs in this dissent.

VANDALIA RAILROAD COMPANY *v.* PUBLIC SERVICE COMMISSION OF INDIANA, AS THE SUCCESSOR OF THE RAILROAD COMMISSION OF INDIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 81. Submitted November 6, 1916.—Decided December 11, 1916.

Prior to the Act of March 4, 1915, c. 169, 38 Stat. 1192, and after the Act of February 17, 1911, c. 103, 36 Stat. 913, the state police power extended to the regulation of the character of headlights used on

locomotives employed in interstate commerce. *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280.

A judgment which correctly refused injunctive relief against such state regulation may not be attacked on writ of error as a judgment infringing federal rights (Judicial Code, § 237), upon the ground that the same field of regulation has since been occupied by the federal Government under an act of Congress enacted after the judgment was rendered.

The question whether, because of the Act of 1915, *supra*, or action of the Interstate Commerce Commission thereunder, further enforcement of the order of the state commission here involved would infringe the plaintiff's rights, may be raised and determined in another action without prejudice from this one.

An order of a state commission requiring a carrier to equip its locomotives with headlights of a specified minimum candle-power is not objectionable as lacking due process, when made on notice and full hearing, and where the law under which the commission acted afforded opportunity for review in the courts, of which the complaining carrier availed itself.

Complaint that such an order is so indefinite and uncertain as to amount to a denial of due process will not be heard where the party complaining failed to take advantage of a legal opportunity to have the order revised through a rehearing before the commission.

182 Indiana, 382, affirmed.

THE case is stated in the opinion.

Mr. Samuel O. Pickens, *Mr. F. D. McKenney*, *Mr. D. P. Williams* and *Mr. Owen Pickens* for plaintiff in error.

Mr. Evan B. Stotsenburg, Attorney General of the State of Indiana, *Mr. Bert Winters*, *Mr. Burt New*, and *Mr. Wilbur T. Gruber* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Railroad Commission of Indiana was created and broad powers were conferred upon it by an act approved February 28, 1905, and an amendatory act approved March 9, 1907. Acts 1905, p. 83; Acts 1907, p. 454; Burns'

Ann. Ind. Stats. 1908, §§ 5531 *et seq.* By a later act (Acts 1909, p. 323), the Commission was specifically authorized and directed to investigate the condition and efficiency of headlights then in use on locomotive engines on the railroads in the State, determine the most practicable and efficient headlight for all purposes, and make and enforce against the railroad companies the necessary orders for the installation of such headlights. Pursuant to this authority it conducted an investigation, upon notice to plaintiff in error and all other steam railroad companies operating in the State, the result of which was an order, made January 6, 1910, reciting the investigation, declaring that the oil headlights commonly in use were inadequate for the protection of persons and property, and ordering that all engines used in the transportation of trains over any line of railroad in the State should be equipped "with headlights of not less than fifteen hundred candle power." About one month thereafter plaintiff in error brought an action in a state court of competent jurisdiction seeking to enjoin enforcement of the order upon the ground that the Act of 1909 and the order made pursuant to it were repugnant to the "commerce clause" of the Constitution of the United States and the statutes enacted thereunder, and to the "due process clause" of the Fourteenth Amendment. Among other grounds of attack it was averred that the order was so vague, indefinite, and uncertain in its description of the headlight required as to be meaningless and void, because it failed to specify at what distance from the source of light the illuminating power was to be measured, and whether it was to be determined by averaging the intensity of the light at a given distance from its source, and if so at what distance; that the order did not specify the character of the reflector, nor whether the required candle-power might be developed by reflectors or lenses, or whether the light must be of 1500 candle-power independent of such lenses or re-

flectors; it being averred that each of these elements was an essential factor in the ascertainment and measurement of the illuminating capacity of headlights, and that there was no known standard by which such capacity might be measured and expressed in terms of candle-power in the absence of those factors. From an amended complaint, and from the Commission's answer thereto, it was made to appear that after the making of the order Mr. Houghton, chairman of a committee appointed to represent the plaintiff and the other railroad companies named in the order with respect to presenting a petition to the Commission for a modification of its provisions, made written application to the Commission for a suspension of the order and a further hearing upon the subject; that the Commission replied that under the statute and the practice of the Commission it had authority to alter, change, or modify any final order made by it, and that the Commission would not suspend the order in question, but would treat Mr. Houghton's communication as an application for its modification, and specifying a time for the hearing of that application; that on the date specified the carriers appeared by Mr. Houghton, chairman of the committee, and by counsel, and withdrew the application for modification, whereupon it was dismissed. Plaintiff demurred to the answer, the demurrer was overruled, and, plaintiff refusing to plead further, final judgment was rendered against it, and, on appeal, this was affirmed by the Supreme Court of Indiana; that court holding that plaintiff's complaint did not show ground for the relief sought. 182 Indiana, 382. The case comes here upon the federal questions, under § 237, Jud. Code.

So far as the attack upon the Act of 1909 and the order made pursuant to it is based upon interference with interstate commerce, it very properly is conceded that, but for a recent act of Congress, the case would be controlled by *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280, 290,

where it was held that in the absence of federal legislation the States are at liberty, in the exercise of their police power, to establish regulations for securing safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce, and that (p. 293) the Safety Appliance Acts of Congress, since they provided no regulations for locomotive headlights, showed no intent to supersede the exercise of state power with respect to this subject.

But it is insisted that this decision is no longer controlling, because Congress has since then "exercised its power as to equipment over the entire locomotive and tender and all parts and appurtenances thereof." The reference is to the Act of March 4, 1915, c. 169, 38 Stat. 1192, amendatory of the Act of February 17, 1911, requiring common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto, c. 103, 36 Stat. 913. The latter act was among those referred to in the *Georgia Case*, and held not to oust the authority of the State because it did not appear either that Congress had acted, or that the Interstate Commerce Commission, under the authority of Congress, had established any regulations concerning headlights. The amendment of 1915 extends the provisions respecting inspection, etc., to the entire locomotive and all its appurtenances. Whether those provisions authorize the Interstate Commerce Commission to prescribe any particular type of headlight, or other appliance, is a question upon which we need not now pass, for the reason that the decision of the Supreme Court of Indiana, refusing an injunction to restrain the enforcement of the state commission's order, was rendered and judgment thereon entered before the passage by Congress of the act referred to. Obviously, we cannot say that by that decision and judgment any right of plaintiff in error under a law of the United States was infringed, within the mean-

ing of § 237, Jud. Code, when the law creating the supposed right was not enacted until after the judgment. If, however, by virtue of the provisions of the Act of 1915, or of any action heretofore or hereafter taken by the Interstate Commerce Commission under it, plaintiff in error is entitled to an injunction against the further enforcement of the order of the state commission, that right may be asserted in another action and will not be prejudiced by our present decision.

With respect to the question of due process of law, it is unnecessary to determine whether the Fourteenth Amendment requires that state action, legislative in its nature, of the character of the order of the Railroad Commission, shall be preceded by notice and an opportunity for a hearing. In the case before us, the Supreme Court of Indiana construed the Act of 1909 as supplemental to the Act of 1905, which, as amended in 1907 (Acts 1907, p. 469, § 6; Burns' Ann. Ind. Stats. 1908, § 5536), gave to any carrier or other party dissatisfied with any order made by the Commission a right to resort to the courts in an action to suspend it or set it aside. Since the order in question was made after notice and a full hearing, and plaintiff in error had and exercised the right to a judicial review by action at law, we concur in the view of the state court that there has been in this respect no deprivation of property without due process of law.

The only other point requiring mention is the insistence that the order is so indefinite and uncertain in its terms as not to furnish an intelligible measure of the duty of plaintiff in error, and is therefore a denial of due process of law. Upon this point the state court held, following its previous decision in *Chicago &c. R. Co.* v. *Railroad Comm.*, 175 Indiana, 630, 638, that the Railroad Commission itself, by virtue of the act, had power to grant relief through a rehearing, and that without first resorting to that method of procedure plaintiff in error was not entitled to have the

order set aside by the courts. The general rule is that one aggrieved by the rulings of such an administrative tribunal may not complain that the Constitution of the United States has been violated if he has not availed himself of the remedies prescribed by the state law for a rectification of such rulings. *Bradley* v. *City of Richmond*, 227 U. S. 477, 485. And since the record shows that plaintiff in error and its associates were accorded a rehearing upon the very question of modification, but abandoned it, nothing more need be said upon that point.

Judgment affirmed.

MR. JUSTICE CLARKE took no part in the consideration or decision of this case.

MINERALS SEPARATION, LIMITED, ET AL. *v.* HYDE.

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

No. 46. Argued October 27, 30, 31, 1916; additional argument November 1, 1916.—Decided December 11, 1916.

Patent No. 835120, issued November 6, 1906, to Henry Livingstone Sulman *et al.*, for improvements in the concentration of ores by a process of oil flotation, is valid as to claims Nos. 1, 2, 3, 5, 6, 7 and 12, but invalid as to claims Nos. 9, 10 and 11.

The process covered by the patent, as sustained, is simpler and more economical and has proved more successful than the flotation processes relied on as anticipations; it accomplishes separation of metallic particles from ore pulp, not through the buoyancy of oil alone, but largely also through the buoyancy of air bubbles introduced into the mixture of ore, water and oil by means of an agitation differing in kind and degree from that previously employed; and it results

in a froth concentrate of peculiar constitution and stability. For these reasons it is held to be a patentable invention.

It is persuasive evidence of invention that the process in suit came immediately into general use, and has largely replaced all earlier like processes without the aid of puffing or business exploitation.

The patentees planned the experiments, directed the investigations day by day, conducted them largely in person and interpreted the results, and they cannot be denied the status of original discoverers on the ground that their employee made the analyses and observations which resulted immediately in the discovery. *Agawam Company* v. *Jordan*, 7 Wall. 583–603.

A patent for a process of ore concentration which, because of the varied character of the subject-matter, necessarily requires preliminary tests by the user to apply it most successfully to the ores treated, is not on that account invalid, if the process is described in the claims with sufficient definiteness to guide those skilled in the art to a successful use of it.

The particularity and certainty of disclosure which the law requires in patents is not greater than is reasonable, having regard to their subject-matter.

Any variation from the process disclosed in a patent must come within the claims of the patent to constitute an infringement.

214 Fed. Rep. 100, reversed.

THE case is stated in the opinion. For the opinion of the District Court see 207 Fed. Rep. 956.

Mr. Henry D. Williams and *Mr. Wm. Houston Kenyon*, with whom *Mr. F. D. McKenney*, *Mr. Lindley M. Garrison*, *Mr. John H. Miller* and *Mr. Odell W. McConnell* were on the briefs, for petitioners.

Mr. Walter A. Scott, with whom *Mr. Thomas F. Sheridan*, *Mr. George L. Wilkinson*, *Mr. K. R. Babbitt*, *Mr. J. Bruce Kremer* and *Mr. John F. Neary* were on the briefs, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this suit the complainants, the first named as the owner and the other as general licensee, claim an infringe-

ment of United States letters patent No. 835120, issued on the sixth day of November, 1906, to Henry Livingstone Sulman, Hugh Fitzalis Kirkpatrick-Picard and John Ballot. The usual injunction, accounting and damages are prayed for. The District Court sustained the patent as to claims numbered 1, 2, 3, 5, 6, 7, 9, 10, 11 and 12; found that the defendant had infringed each of these claims, and granted the prayer of the petition. The Circuit Court of Appeals for the Ninth Circuit reversed the decree of the District Court and remanded the case with instructions to dismiss the bill. The case is here on writ of certiorari to review that decision.

As stated in the specification, the claimed discovery of the patent in the suit relates "to improvements in the concentration of ores, the object being to separate metalliferous matter, graphite, and the like from gangue by means of oils, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue."

The answer denies all of the allegations of the bill and avers that in twenty-five designated United States and five British patents the process described in suit was "fully and clearly described or claimed," and it also avers that the claimed discovery was invented, known and used by many persons long prior to the time when the application was made for the patent in suit. Notwithstanding this elaboration of denial counsel for the defendant in the summarized conclusion to their brief rely upon only five of the many patents referred to as showing that the patent in suit was anticipated and is therefore invalid for want of novelty and invention, viz: Everson (1886), Froment (Italy, 1902; Great Britain, 1903), Glogner (1903), Schwarz (applied for April 19, 1905, issued December 19, 1905), and Kirby (applied for December 17, 1903, issued December 18, 1906). And the defendant, a man obviously experienced in the subject, says that, in his opinion, the

whole basis of flotation concentration was disclosed in the Everson United States patent No. 348157 and in the Froment British patent.

It is clear that in the prior art, as it is developed in this record, it was well known that oil and oily substances had a selective affinity or attraction for, and would unite mechanically with, the minute particles of metal and metallic compounds found in crushed or powdered ores, but would not so unite with the quartz, or rocky non-metallic material, called "gangue." Haynes British patent (1860), and United States patents, Everson (1886), Robson (1897) and Elmore (1901). It was also well known this selective property of oils and oily substances was increased when applied to some ores by the addition of a small amount of acid to the ore and water used in process of concentration. United States patents, Everson (1886), Elmore (1901), and Cattermole (1904).

Prior to the date of the patent in suit a number of patents had been granted in this and other countries for processes aiming to make practical use of this property of oil and of oil mixed with acid in the treatment of ores, all of which, speaking broadly, consisted in mixing finely crushed or powdered ore with water and oil, sometimes with acid added, and then in variously treating the mass—"the pulp"—thus formed so as to separate the oil, when it became impregnated or loaded with the metal and metal-bearing particles, from the valueless gangue. From the resulting concentrate the metals were recovered in various ways.

The processes, of this general character, described in the prior patents may be roughly divided into two classes. The process in the patents of the first class is called in the record the "Surface Flotation Process" and it depends for its usefulness on the oil used being sufficient to collect and hold in mechanical suspension the small particles of metal and metalliferous compounds and by its buoyancy

to carry them to the surface of the mixture of ore, water and oil, thus making it possible, by methods familiar to persons skilled in the art, to float off the concentrate thus obtained into any desired receptacle. The waste material, or gangue, not being affected by the oil and being heavier than water sinks to the bottom of the containing vessel and may be disposed of as desired.

The process of the other class, called in the record the "Metal Sinking Process," reverses the action of the Surface Flotation Process and is illustrated by the Cattermole U. S. patent, No. 777273, in which oil is used to the extent of 4% to 6% to 10% of the weight of the metalliferous mineral matter, depending on the character of the ore, for the purpose of agglomerating the oil-coated concentrate into granules heavier than water, so that they will sink to the bottom of the containing vessel, permitting the gangue to be carried away by an upward flowing stream of water.

The process of the patent in suit, as described and practiced, consists in the use of an amount of oil which is "critical," and minute as compared with the amount used in prior processes "amounting to a fraction of one per cent. on the ore," and in so impregnating with air the mass of ore and water used, by agitation—"by beating the air into the mass"—as to cause to rise to the surface of the mass, or pulp, a froth, peculiarly coherent and persistent in character, which is composed of air bubbles with only a trace of oil in them, which carry in mechanical suspension a very high percentage of the metal and metalliferous particles of ore which were contained in the mass of crushed ore subjected to treatment. This froth can be removed and the metal recovered by processes with which the patent is not concerned.

It is obvious that the process of the patent in suit, as we have described it, is not of the Metal Sinking class, and while it may, in terms, be described as a Surface

Flotation Process, yet it differs so essentially from all prior processes in its character, in its simplicity of operation and in the resulting concentrate, that we are persuaded that it constitutes a new and patentable discovery.

The prior processes which we have described required the use of so much oil that they were too expensive to be used on lean ores, to which they were intended to have their chief application, and the efforts of investigators for several years prior to the discovery of the process in suit had been directed to the search for a means or method of reducing the amount of oil used, and it is clear from the record that approach was being made, slowly, but more and more nearly to the result which was reached by the patentees of the process in suit in March, 1905. The Froment Great Britain patent (1903) and the Kirby United States patent (applied for in 1903 and granted in 1906) are especially suggestive of the advance which was being made toward the desired result, but the Froment process was little more than a laboratory experiment and has never proved of value in practice, and the Kirby process, though approaching in some respects more nearly to the end attained by the process of the patent in suit, found its preferred application in the use of an amount of oil solution equal to one-fourth to three-fourths in weight of the ore treated, which was prohibitive in cost.

Into this field of investigation at this stage of its development came the patentees of the patent in suit. They were experienced metallurgists of London, of inventive genius and with financial resources, and they entered upon an investigation of the processes of oil concentration of ores which was continued through several years, and consisted of a very extended series of experiments in which the quantities of oil, of water and of acid used and the extent and character of the agitation of the mass under treatment resorted to, were varied to an almost un-

paralleled extent as to each factor and the results were carefully tabulated and interpreted. It was while pursuing a comprehensive investigation of this character, having, as the evidence shows, the special purpose in mind at the time to trace the effect on the results of the process of a reduction to the vanishing point of the quantity of oil used, that the discovery embodied in the patent in suit was made. The experimenters were working on the Cattermole "Metal Sinking Process" as a basis when it was discovered that the granulation on which the process depended practically ceased when the oleic acid (oil) was reduced to about five-tenths of one per cent. "on the ore." It was observed, however, that, as the amount of oleic acid was further reduced and the granulation diminished, there was an increase in the amount of "float froth," which collected on the surface of the mass and that the production of this froth reached its maximum when about one-tenth of one per cent. or slightly less "on the ore" of oleic acid was used. This froth, on collection, was found to consist of air bubbles modified by the presence of the minute amount of oil used and holding in mechanical suspension between 70% and 80% of the total mineral content of the mass treated. It was promptly recognized by the patentees that this froth was not due to the liberation of gas in the mass treated by the action of the dilute acid used, and its formation was at once attributed in large part to the presence of the air introduced into the mixture by the agitation which had been resorted to to mix the oil with the particles of crushed ore, which air, in bubbles, attached itself to the mineral particles, slightly coated as they were with what was necessarily an infinitesimal amount of oil, and floated them to the surface. The extent of the agitation of the mass had been increased as the experiments proceeded until the "series of Gabbett mixers, fitted with the usual baffles, were speeded at from 1,000 to 1,100 revolutions per minute."

A careful consideration of the record in this case convinces us that the facts with respect to the process of the patent in suit are not overstated by the plaintiffs' witness, Adolf Liebmann, an expert of learning and experience, when he says in substance:

"The present invention differs essentially from all previous results. It is true that oil is one of the substances used but it is used in quantities much smaller than was ever heard of, and it produces a result never obtained, before. The minerals are obtained in a froth of a peculiar character, consisting of air bubbles which in their covering film have the minerals embedded in such manner that they form a complete surface all over the bubbles. A remarkable fact with regard to this froth is that, although the very light and easily destructible air bubbles are covered with a heavy mineral, yet the froth is stable and utterly different from any froth known before, being so permanent in character that I have personally seen it stand for twenty-four hours without any change having taken place. The simplicity of the operation, as compared with the prior attempts, is startling. All that has to be done is to add a minute quantity of oil to the pulp to which acid may or may not be added, agitate for from two and one-half to ten minutes and then after a few seconds collect from the surface the froth which will contain a large percentage of the minerals present in the ore."

It is not necessary for us to go into a detailed examination of the process in suit to distinguish it from the processes of the patents relied on as anticipations, convinced as we are that the small amount of oil used makes it clear that the lifting force which separates the metallic particles of the pulp from the other substances of it is not to be found principally in the buoyancy of the oil used, as was the case in prior processes, but that this force is to be found, chiefly, in the buoyancy of the air bubbles introduced into the mixture by an agitation greater than and

different from that which had been resorted to before and that this advance on the prior art and the resulting froth concentrate so different from the product of other processes make of it a patentable discovery as new and original as it has proved useful and economical. It results without more discussion, that we fully agree with the decision of the House of Lords, arrived at upon a different record and with different witnesses, but when dealing with the equivalent of the patent in suit, in *Minerals Separation, Limited,* v. *British Ore Concentration Syndicate, Limited,* 27 R. P. C. 33. In this decision Lord Shaw, speaking for the court and distinguishing the process there in suit especially from the Elmore oil flotation process which had gone before but which was typical of the then prior art, said: "They (the patentees of the Agitation Froth Process of the patent in suit) are not promoting a method of separation which had before been described, but they are engaged upon a new method of separation. Instead of relying upon the lesser specific gravity of oil in bulk, they rely upon the production of a froth by means of an agitation which not only assists the process of the minute quantities of oil reaching the minute particles of metal, but forms a multitude of air cells, the buoyancy of which air cells, forming round single particles of the metal, floats them to the surface of the liquid."

And Lord Atkinson said: "In their process this mysterious affinity of oil for the metallic particles of the ore is availed of, yet the oil is used in such relatively infinitesimal quantities, that the metallic particles are only coated with a thin film of it, and the lifting force is found not in the natural buoyancy of the mass of added oil, but in the buoyancy of air bubbles, which, introduced into the mixture by the more or less violent agitation of it, envelop or become attached to, the thinly oiled metallic particles, and raise them to the surface, where they are maintained by what is styled the surface tension of the water."

The record shows not only that the process in suit was promptly considered by the patentees as an original and important discovery, but that it was immediately generally accepted as so great an advance over any process known before that, without puffing or other business exploitation, it promptly came into extensive use for the concentration of ores in most, if not all, of the principal mining countries of the world, notably in the United States, Australia, Sweden, Chile and Cuba, and that, because of its economy and simplicity, it has largely replaced all earlier processes. This, of itself, is persuasive evidence of that invention which it is the purpose of the patent laws to reward and protect. *Diamond Rubber Co.* v. *Consolidated Tire Co.*, 220 U. S. 428; *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 429, 430; *The Barbed Wire Patent*, 143 U. S. 275; *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486.

The claim that the patentees of the patent in suit are not the original discoverers of the process patented because an employee of theirs happened to make the analyses and observations which resulted immediately in the discovery, cannot be allowed. The record shows very clearly that the patentees planned the experiments in progress when the discovery was made; that they directed the investigations day by day, conducting them in large part personally and that they interpreted the results. *Agawam Company* v. *Jordan*, 7 Wall. 583–603, rules this claim against the defendant.

Equally untenable is the claim that the patent is invalid for the reason that the evidence shows that when different ores are treated preliminary tests must be made to determine the amount of oil and the extent of agitation necessary in order to obtain the best results. Such variation of treatment must be within the scope of the claims, and the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter.

The composition of ores varies infinitely, each one presenting its special problem, and it is obviously impossible to specify in a patent the precise treatment which would be most successful and economical in each case. The process is one for dealing with a large class of substances and the range of treatment within the terms of the claims, while leaving something to the skill of persons applying the invention, is clearly sufficiently definite to guide those skilled in the art to its successful application, as the evidence abundantly shows. This satisfies the law. *Mowry* v. *Whitney*, 14 Wall. 620; *Ives* v. *Hamilton*, 92 U. S. 426, and *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 436, 437.

The evidence of infringement is clear.

While we thus find in favor of the validity of the patent, we cannot agree with the District Court in regarding it valid as to all of the claims in suit. As we have pointed out in this opinion there were many investigators at work in this field to which the process in suit relates when the patentees came into it, and it was while engaged in study of prior kindred processes that their discovery was made. While the evidence in the case makes it clear that they discovered the final step which converted experiment into solution, "turned failure into success," (*The Barbed Wire Patent*, 143 U. S. 275), yet the investigations preceding were so informing that this final step was not a long one and the patent must be confined to the results obtained by the use of oil within the proportions often described in the testimony and in the claims of the patent as "critical proportions" "amounting to a fraction of one per cent. on the ore," and therefore the decree of this court will be that the patent is valid as to claims Nos. 1, 2, 3, 5, 6, 7 and 12, and that the defendant infringed these claims, but that it is invalid as to claims 9, 10 and 11. Claims Nos. 4, 8 and 13 were not considered in the decrees of the two lower courts and are not in issue in this proceeding.

The decision of the Circuit Court of Appeals will be reversed, and the decision of the District Court, modified to conform to the conclusions expressed in this opinion, will be affirmed.

LONG SAULT DEVELOPMENT COMPANY *v.* CALL (AS SUCCESSOR OF KENNEDY), AS TREASURER OF THE STATE OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 49. Argued April 14, 17, 1916; restored to docket for reargument June 12, 1916; reargued October 31, 1916.—Decided December 11, 1916.

When a claim of contractual rights under a state statute is denied by a state court purely upon the ground that the attempted grant was in conflict with the state constitution and therefore void *ab initio*, the "contract clause" of the Federal Constitution is not violated and this court may not review the decision.

In determining whether such decision was influenced by legislation subsequent to the alleged contract, this court will give considerate attention to the state court's decision, presuming an intention on the part of such court to obey the Constitution and laws of the United States; it will not, however, confine itself to the language of the opinion, but will examine the decision in its scope and substance, and decide for itself whether subsequent legislation was given effect in arriving at the result.

The decision of the court below, holding void an act of the legislature of New York (Laws of 1907, c. 355) which purported to grant rights in the Saint Lawrence River, was arrived at independently of the later repealing act and accompanying legislation found in Laws of 1913, chaps. 452 and 453.

Writ of error to review 212 N. Y. 1, dismissed.

THE case is stated in the opinion.

Mr. Henry W. Taft, with whom *Mr. Francis Sims McGrath* was on the briefs, for plaintiff in error.

Mr. Merton E. Lewis, with whom *Mr. E. E. Woodbury*, Attorney General of the State of New York, and *Mr. C. T. Dawes* were on the briefs, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

This proceeding was commenced in the Supreme Court of New York by the Long Sault Development Company, hereinafter called the plaintiff, for the purpose of testing the constitutionality of an act of the legislature of that State, passed in 1907, to incorporate the plaintiff and to grant to it important rights in the bed of, and with respect to the use of the waters of, the St. Lawrence River. (Laws of 1907, c. 355.)

The case is now in this court on the claim that this Act of 1907 is a valid law and that the property rights, springing from the grants therein and the acceptance of them by the plaintiff, were impaired by a later act, passed in 1913, purporting to repeal the Act of 1907, and by the effect given to this later act by the decision of the Court of Appeals, rendered in June, 1914.

The title of the Act of 1907 indicates the comprehensive character of the grants which the legislature attempted to make by it. It reads as follows: "An Act to incorporate the Long Sault development company, and to authorize said company to construct and maintain dams, canals, power-houses and locks at or near Long Sault island, for the purpose of improving the navigation of the St. Lawrence river and developing power from the waters thereof, and to construct and maintain a bridge, and carry on the manufacture of commodities."

The act proceeds, first, to incorporate the Long Sault Development Company, giving it perpetual corporate

existence, and then in terms to authorize it: to construct, maintain and operate dams, canals, reservoirs, and the appurtenances necessary or useful for the purpose of developing waterpower and electrical energy, at such point or points adjacent to the south shore of the St. Lawrence River, and in and upon the river bed near Long Sault Island or Barnhart's Island as may be selected by the company; to erect and maintain powerhouses and electrical transmission appliances; and to construct a bridge or bridges across the river, in connection with the dam authorized, and to charge tolls for passage thereon.

These important rights are declared to be granted upon various specified conditions, the most important of which is "that the rights hereby granted shall never be so used as to impair or obstruct the navigation of the Saint Lawrence river, but, on the contrary, that such navigation shall be preserved *in as good condition as, if not better than, the same is at present,* regard being always had to the amount of the natural flow of water in said river as affecting its navigability from time to time."

The act further provides that, after the Congress of the United States shall authorize the construction of the proposed dams, locks and canals, and after the payment of certain sums of money into the State Treasury then the commissioners of the land office shall, upon application of said corporation, "*grant unto it the title and interest of the people of the state in and to lands under the waters of the Saint Lawrence river to be covered or occupied by said works and locks and power-houses.*" The payments to be made, after the year 1911, shall be not less than $25,000 for each year. The petition alleges that the river at Long Sault Rapids is now practically unnavigable being navigated only by light draft passenger vessels down stream during the summer tourist season and that all other traffic up and down the river passes around the rapids by way of the Cornwall Canal on the Canadian side of the river.

The plaintiff was duly organized as a corporation and expended a large sum of money in preparing to utilize the grants of the act.

By an act which became a law on the eighth day of May, 1913, the legislature of the State in terms repealed this Act of 1907, under which the plaintiff in error is claiming.

Almost three months before this repealing act was passed this suit was commenced by the filing of a petition in the Supreme Court of New York, praying for a writ of mandamus, to be directed to the Treasurer of that State, requiring him to receive as a payment into the Treasury of the State the sum of $25,000, as the sum due and payable on February 1st, 1913, for the year 1912, under the provisions of the Act of 1907, which sum had theretofore been tendered to the Treasurer and had been by him refused, for the reason, it is alleged, that he had been advised by the Attorney General of the State that said act was unconstitutional and void. The application of the petitioner for a writ of mandamus was denied by the Supreme Court and this decision was affirmed by the Appellate Division and by the Court of Appeals which ordered the record in the case remitted to the Supreme Court, to be proceeded upon according to law.

Up to this time there is nothing in the record before us to indicate that any question was presented to the state courts, excepting the single one as to whether or not the Act of 1907 was valid under the constitution of the State of New York.

More than a month later, on the fourteenth day of July, 1914, the Court of Appeals, on motion of the plaintiff, requested the Supreme Court to return the remittitur to the Court of Appeals, which court then amended the same by incorporating therein the statement that "Upon the argument of the appeal in this cause before the Court of Appeals" there was submitted a brief, containing five

specified points. Of these in "Point III" alone counsel for the plaintiff for the first time, and then only by way of argument, attempt to present a federal question by claiming that if the repealing act is to be regarded as an attempted condemnation of the special franchises claimed by the plaintiff it "would be unconstitutional in that such franchises were not taken by the State for public use," in violation of the Fourteenth Amendment to the Constitution of the United States.

It is significant to note that the Court of Appeals, in its decision, rendered before the remittitur was thus amended, did not treat or regard the repealing act as "an attempted condemnation of the special franchises claimed by the plaintiff," nor did it afterwards so treat it.

Upon the record thus described the plaintiff in error comes into this court, claiming that the act of the legislature of the State of New York of 1907 is a valid, constitutional law, and that, it having been accepted and acted upon by the plaintiff, contract and other property rights resulted which, under the decision of the Court of Appeals, have been impaired or taken away by the repealing Act of 1913, in violation of the Constitution of the United States and of the Fourteenth Amendment thereto, and it therefore prays for a reversal of the judgment of the Supreme Court, entered pursuant to the decision of the Court of Appeals.

The defendant in error meets this claim of the plaintiff by a denial of the jurisdiction of this court, for the claimed reason that the Court of Appeals reached the conclusion that the Act of 1907 was unconstitutional and void without reference to, and without giving any effect to, the subsequent repealing statute.

The grants of the Act of 1907 are such that, if it was a valid law, upon their being accepted, they constituted property or contract rights, of which the plaintiff could not be deprived, and which could not be impaired, by

subsequent legislation, and, therefore, the denial by the defendant in error of the jurisdiction of this court renders it necessary for us to determine whether the Court of Appeals, in its decision, gave any effect to the repealing act. If it did not give effect to that act, either expressly or by implication, this court is without jurisdiction to review its decision, for the reason that the provisions of the Constitution of the United States for the protection of contract rights are directed only against the impairment of them by constitutions or laws adopted or passed subsequent to the date of the contract from which such rights spring, and do not reach decisions of courts construing constitutions or laws which were in effect when the contract was entered into, as has been held by a long line of decisions extending from *Knox* v. *Exchange Bank*, 12 Wall. 379, to *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 224 U. S. 632.

In deciding this question, this court is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given by it to the repealing act. *Fisher* v. *City of New Orleans*, 218 U. S. 438; *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 224 U. S. 632, and *Louisiana Railway & Navigation Co.* v. *New Orleans*, 235 U. S. 164. While this court will exercise independent judgment as to the scope of the decision of the state court, it will give to that decision that respectful and sympathetic attention which is always due to the highest court of a State (*Fisher* v. *City of New Orleans, supra*), with the presumption always in mind, that the state courts will do what the Constitution and laws of the United States require. *Neal* v. *Delaware*, 103 U. S. 370, 389; *Chicago &c. R. R. Co.* v. *Wiggins Ferry Co.*, 108 U. S. 18; *New Orleans* v. *Benjamin*, 153 U. S. 411, and *Defiance Water Co.* v. *Defiance*, 191 U. S. 184.

An examination of the opinion of the Court of Appeals shows that the court, in its consideration of the repealing Act of 1913, not only did not give to it an effect which would impair any contract relation springing from the Act of 1907, but that, on the contrary, it concluded that the repeal "could not operate to confiscate any valid franchise or property right which the Long Sault Development Company had previously acquired under the act repealed," and that this conclusion made it necessary for the court to "consider and determine whether the legislature possessed the constitutional power to convey away the state control over the navigation of the St. Lawrence River to the extent attempted by the act of 1907."

And then addressing itself to the constitutional problem thus stated, the court proceeds, upon principle and authority, to decide: That, under the constitution of the State of New York, the power of the legislature of that State to grant lands under navigable waters to private persons or corporations is limited to purposes which may be useful, convenient or necessary to the public; that it has no power to so part with the title to such lands that the State may not in the future improve navigation over them, if the public interest shall so require; and that they are held by the State on such a trust for the public use that the legislature has no power to authorize the conveyance of them to a private corporation to maintain navigation thereover "in as good condition as . . . at present," thereby parting for all time with its power to improve such navigation.

The court finds its principal authority for these legal positions in the decision of this court in *Illinois Central Railroad Company* v. *Illinois*, 146 U. S. 387, in which it was decided: That the title which a State holds to land under navigable waters is different in character from that which it holds in land intended for sale and occupation, in the former case it being held in trust for the people of the

State, in order that they may enjoy the navigation of the waters and carry on commerce over them, free from obstruction or interference by private parties; that this trust devolving upon the State in the public interest is one which cannot be relinquished by a transfer of the property; that a State can no more abdicate its trust over such property, in which the whole people are interested, so as to leave it under the control of private parties, than it can abdicate its police powers in the administration of government and the preservation of the peace; and that the trust under which such lands are held is governmental so that they cannot be alienated, except to be used for the improvement of the public use in them.

This was a pioneer decision upon the subject at the time it was rendered by a divided court, but the principles upon which it proceeds have been frequently approved by this court. *Morris* v. *United States*, 174 U. S. 196; *United States* v. *Mission Rock Co.*, 189 U. S. 391, 406; *Kean* v. *Calumet Canal Co.*, 190 U. S. 452, 481; and they have been very widely approved by many of the highest courts of the States of the Union. Rose's Notes on U. S. Reports, Vol. 12, p. 270; Supp. III, p. 291; Supp. V, p. 369.

Having arrived at these conclusions of law, the Court of Appeals proceeds to make application of them to the Act of 1907, and concludes that that act, in terms, virtually turns over to the corporation the entire control of the navigation of the Long Sault Rapids (provided that the consent of Congress to the grant could be obtained), requiring only that the company shall pay certain stipulated sums of money, and that it shall preserve the navigation of the river "in as good condition as . . . the same is at present," and says that, no matter how much the interest of the public might demand the improvement of the river in the future, the State would be powerless to act, either directly or by constraint upon the corporation, and for this reason it concludes that the act is, in substance, an abdica-

tion of the trust upon which the State holds control over the St. Lawrence River as navigable water and that, therefore, it is unconstitutional and void. Whether this construction placed upon the act is the one which this court would place upon it if coming to an original interpretation of it, we need not inquire, for, under the authorities hereinbefore cited, the prohibition of the Constitution against the impairing of contracts by state legislation does not reach errors committed by state courts when passing upon the validity and effect of a contract under a constitution or laws existing when it is made.

This discussion of the decision by the Court of Appeals makes it very clear that that decision does not give any effect whatever to the repealing Act of 1913, but that, wholly independent of that act and proceeding upon sound principle and abundant authority, the court arrived at the conclusion that the Act of 1907 was unconstitutional and void, and therefore it results that this case does not present any question for decision under the Federal Constitution, and that, for want of jurisdiction, the writ of error must be

Dismissed.

Mr. Justice McKenna and Mr. Justice Pitney dissent upon the ground that Chapter 355 of the Laws of 1907 of the State of New York, creating the Long Sault Development Company and conferring upon it certain rights and franchises, when accepted, as it was, by the company, constituted a contract between the State and the company; that the repealing act and accompanying legislation passed in 1913 (Chaps. 452 and 453) had the effect of impairing the obligation of that contract, in contravention of § 10 of Article I of the Federal Constitution; and that effect was given to the latter legislation by the decision under review.

EX PARTE INDIANA TRANSPORTATION COMPANY, PETITIONER.

PETITION FOR WRIT OF PROHIBITION.

No. 25, Original. Motion for permission to intervene and to make return to rule to show cause. Submitted December 4, 1916.—Decided December 18, 1916.

In a proceeding in prohibition, wherein a District Judge had been ruled to show cause why the execution of an order should not be restrained for want of jurisdiction, a request was made on the return day, by the persons interested in upholding the order, that a return tendered by them be accepted as the return to the rule and that they be treated as the respondents. *Held*, that the judge is the essential party respondent and the request must therefore be denied.
No return having been made by the respondent on the return day, the time for his return is, under the circumstances, extended.

THE facts are stated in the opinion.

Mr. Harry W. Standidge on behalf of the moving parties.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

Speaking in a general sense, on the ground that in an admiralty cause pending in the District Court of the United States for the Northern District of Illinois, one of the judges of that court had, by an order which he was absolutely devoid of jurisdiction to make, permitted more than 270 persons to become co-libelants, an application by the defendant in the cause was made on the sixteenth day of October, 1916, for leave to file a petition for prohibition directed to the judge in question, to prevent the carrying out of the order. On the twenty-third of October

permission to file the petition for prohibition was granted and a rule to show cause was directed to be issued to the Honorable Kenesaw M. Landis, the judge by whom the order complained of was made. On the day upon which this rule was returnable, December 4, there was no response to the rule made on behalf of the respondent judge, but by oral motion a request was made on behalf of the parties who it was asserted had been mistakenly permitted to become co-libelants, that they be treated as the respondents to the rule and be permitted in that capacity to file a return to the rule, a copy of which return was prepared to be filed and presented for filing in case the permission asked was granted, and that request is the matter now before us for consideration.

We are of opinion, however, that the substitution of respondents asked for cannot be granted, since it is apparent that the judge who rendered the order and against whom the writ prayed for, if allowed, is to be directed, is the essential party respondent, however much when his return to the rule is made either by his authority or because of their interest in the result or as friends of the court, the persons to be adversely affected by the granting of the relief prayed may be heard to sustain the sufficiency of the return when that subject arises for consideration. We therefore transfer the date fixed for the return in the original rule to show cause from the fourth day of December, 1916, to the fifteenth day of January, 1917, in order to afford ample opportunity for the making by the respondent judge of the return which the original order calls for.

And it is so ordered.

CHICAGO, TERRE HAUTE & SOUTHEASTERN RAILWAY COMPANY *v.* ANDERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 34. Argued October 25, 1916.—Decided December 18, 1916.

When a state statute is unobjectionable as applied in the case in which it is attacked, it will not be held unconstitutional upon a construction which has not been given, and may never be given, by the Supreme Court of the State. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546.

A statute of Indiana (Laws 1889, p. 146, c. 82; 2 Burns' Ann. Ind. Stats. 1914, §§ 5524, 5525) requiring all railroad companies doing business in the State to cut down and destroy noxious weeds "on lands occupied by them in any city, village or township of this State," and providing a penalty of twenty-five dollars in case of default, to be recovered in a civil action "by any person feeling himself aggrieved," is not violative of the due process or equal protection clauses of the Fourteenth Amendment, as applied to a case in which the lands in question are part of a railroad right of way, and the "person feeling himself aggrieved" is the owner of lands contiguous thereto who does not appear to have been guilty of similar neglect. *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267.

Semble, that the act under review permits but one recovery for the same offense within the same territory.

182 Indiana, 140, affirmed.

THE case is stated in the opinion.

Mr. William F. Peter, with whom *Mr. James C. Hutchins* was on the brief, for plaintiff in error.

No brief filed for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A statute of Indiana provides as follows:

"Sec. 1. . . . That all railroad corporations doing

business in this State shall, between the first day of July and the twentieth day of August in each year, cause all thistles, burrs, docks and other noxious weeds growing on lands occupied by them in any city, village or township of this State, to be cut down and destroyed.

"Sec. 2. In case any railroad company shall refuse or neglect to comply with the requirements specified in the first section of this act, such company shall be liable in a penalty of twenty-five dollars, to be prosecuted for in an action of debt by any person feeling himself aggrieved. Said suit may be brought before any Justice of the Peace in the county, who shall require of the complainant surety to pay costs in case he fails to maintain his action. Summons may be served on any agent or officer of the company."

The company was proceeded against under this statute by defendant in error, who alleged that the railroad company is a corporation doing business in the State and that one of the branches of its railway lines intersects and runs through his land for a distance of ¼ of a mile in the township of Curry, Sullivan County, Indiana, and that the company, between July 1, 1911, and August 20, 1911, refused and neglected to cause all noxious weeds (following the words of the statute) growing on lands occupied by it in the township and county designated above to be cut down and destroyed, and especially on its lands running through the lands of defendant in error. He also alleged that he felt himself aggrieved thereby and had been damaged in the sum of $25 and should receive the statutory penalty of $25.

The company demurred to the complaint for insufficiency to constitute a cause of action, filing therewith a memorandum alleging among other things that the act was unconstitutional.

The demurrer was overruled and the company filed a general denial of the allegations of the complaint.

After hearing a penalty was imposed upon the company in the sum of $25. It filed a motion in arrest of judgment in which it repeated that the law was unconstitutional. The motion was overruled and judgment entered against the company. It was affirmed by the Supreme Court. In that court the ground was specifically urged that the statute offended the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The court considered both contentions and rejected both, and to review its decision this writ of error is prosecuted.

As offending against the equal protection assured by the Fourteenth Amendment the company complains that occupiers of land are separated into two classes—"(1) railway corporations and (2) all others." This, it is insisted, "is an unnatural and unjustifiable classification with respect to the obligation imposed of cutting down weeds growing on lands occupied, as there is no relation between the line of division of the classes and the subject matter." *Gulf, Colorado & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150, and *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, are cited. We need not pause to review them or the many cases decided since them explaining the wide discretion a legislature has in the classification of the objects of legislation, for immediately repellent to plaintiff in error's contention is *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267. In that case a statute of Texas imposed a penalty on railroad companies for permitting Johnson grass and Russian thistle to go to seed upon their rights of way. A right of action for the penalty was given to contiguous owners. The act was sustained, but certain distinctions between that statute and the Indiana statute are pointed out. These distinctions are: (1) The Texas statute gave the penalty to contiguous land owners; the Indiana statute gives it to "any person feeling himself aggrieved." (2) The Texas statute required the con-

tiguous land owner to be free from the same neglect; the Indiana statute does not impose this limitation. (3) The Texas statute is limited to the railroad's rights of way; the Indiana statute applies to all lands occupied by a railroad "in any city, village or township."

How discriminating and arbitrary these distinctions make the Indiana statute as compared with the Texas statute and remove the latter from authority is variously illustrated by plaintiff in error.

The Supreme Court of Indiana is not specific as to these contentions. On the authority of *Pennsylvania Co.* v. *State*, 142 Indiana, 428, and *Western Union Telegraph Co.* v. *Ferguson*, 157 Indiana, 37, the court decided that it was neither necessary to aver in the complaint nor prove that the person bringing the action had suffered actual damages. The court said: "The penalty imposed is for violation of a duty required of appellant [the railway company], and it is not in a position to complain that the penalty when collected shall be paid to the complaining party, and this is not available in defense of an action for the recovery of the penalty prescribed."

In *Pennsylvania Co.* v. *State* the penalty was imposed for failure of railroads to provide blackboards in their passenger stations showing the time of arrival and departure of trains, the act providing that one-half of the recovery should go to the prosecuting attorney. It was held that this was a method of compensating that officer and to encourage the actual enforcement of the law against its violators and not intended to require him to become a party litigant.

In the second case a statute was considered that required telegrams to be transmitted with impartiality and in the order of time in which they were received, and without discrimination as to rates. It was provided that any person or company violating the act should be liable to "any party aggrieved in a penalty of $100 for each

offense, to be recovered in a civil action in any court of competent jurisdiction." It was held that the party aggrieved "is the person whose message the telegraph company has refused to receive or failed to transmit on the terms or in the manner prescribed by the statute," and that it was not necessary for him to show that he had sustained any actual damages; that he might recover compensation for damages independently of the statute which furnished a cumulative remedy.

Both cases illustrate the principle that a penalty imposed by a statute may be given to an informer or prosecutor as a means of enforcing the statute—as a means of its public vindication—and necessarily there could be but one recovery in the designated territory. But we cannot say whom, under the statute under review in this case, the court would consider a "party aggrieved," or who could be considered as a "person feeling himself aggrieved," to use the language of the statute, whether a contiguous land owner, or other land owner, or whether any person could be aggrieved within the meaning of the statute if he himself was guilty of the same neglect as the railroad company. Nor can we say how the Supreme Court would decide as to what was meant by "lands occupied by" railroad corporations; whether this would mean only their rights of way, the designation of "in any city, village or township" being only for the purpose of venue, or mean, which is difficult to suppose, the corporation's "roundhouses, shops, yards, repair tracks, turntables and other buildings and structures used in connection" with the business of a railroad, which seems to be the alarm of plaintiff in error. At any rate, such construction has not yet been given and may never be given and we cannot anticipate that it ever will be given and on that anticipation hold the statute invalid. We have heretofore expressed the propriety of waiting, when a state statute is attacked for unconstitutionality, until the

state court has given it a construction which may justify the attack. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546. The statute has only been applied in favor of a contiguous land holder and only one recovery has been permitted. So limited we think its validity must be admitted under the doctrine of the *May Case*. But we express no opinion concerning the consequences if a broader construction should be accepted by the state court.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* OHIO VALLEY TIE COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 66. Argued November 3, 6, 1916.—Decided December 18, 1916.

Under §§ 8, 9 and 16 of the Act to Regulate Commerce, all damages properly attributable to the exaction of excessive rates by carriers in interstate commerce may be awarded in a proceeding before the Interstate Commerce Commission; and, when damages because of such rates have been so awarded, and satisfied, further damages resulting from the same cause may not be recovered through independent proceedings in court.

161 Kentucky, 212, reversed.

THE case is stated in the opinion.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone* was on the briefs, for plaintiff in error.

Mr. Edward W. Hines and *Mr. John Bryce Baskin*, with whom *Mr. J. V. Norman* was on the briefs, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the defendant in error in 1911 against the Railroad Company to recover for injury to business and other damages alleged to have been caused by the Railroad's acts. The most important feature at this stage is that the Railroad maintained and collected a higher rate for cross-ties than it did for lumber when they were carried between States, although the state commission required the same rate upon both for carriage within the State, and although, as the Railroad knew, the Interstate Commerce Commission repeatedly had decided that the rates for cross-ties and lumber should be the same. It is alleged that these and the other acts complained of were done for the purpose of getting rid of the plaintiff as a competitive buyer, and, in that sense, maliciously. The plaintiff tried to meet the higher rate by directing delivery within the State of ties intended to go beyond, which attempt the defendant encountered by refusal to carry them except on its interstate tariff, and hampered the plaintiff by declining to let its cars leave its road, by deliveries at points requiring a haul by wagon and so forth, and, in short, it may be assumed that the Railroad did other acts to further the alleged end, not necessary to be stated here.

Shortly before bringing this suit the plaintiff complained to the Interstate Commerce Commission in respect of charges collected upon ninety-one carloads of ties, and in 1912 obtained an order that the Railroad pay to it $6198 as reparation for unreasonable rates, and establish a rate for ties not to exceed its contemporaneous one for lumber of the same kind of wood. This order was pleaded by an amendment to the petition and it appeared at the trial that the sum awarded had been paid. As the damage alleged was attributed mainly to the publication and exaction of excessive charges, the defendant insisted at

the trial and before the Court of Appeals upon its rights under the Act to Regulate Commerce, and those rights were passed upon by the court, so that there is no doubt of the jurisdiction here, although some questions were raised that we think it unnecessary to discuss.

The defendant contended and asked for a ruling that in this action no damages could be allowed "on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties" and other rulings to similar effect. It also asked an instruction that under the Act to Regulate Commerce it was required to collect the rates fixed by its tariff on file and in effect. These requests were refused, and the jury were told that if they believed that the rates found by the Interstate Commerce Commission to be unreasonable were wilfully and maliciously maintained with intent to injure the plaintiff's business, and that the defendant knew them to be unreasonable, and that by its acts it tied up a part of the plaintiff's capital, and so damaged the plaintiff's business, then upon this, as well as on several other possible findings stated, they would find for the plaintiff. The jury found a verdict for the plaintiff for certain itemized expenses and for $50,000 damage to plaintiff's business and credit as mentioned in the above instruction. Judgment on the verdict was affirmed by the Court of Appeals. 161 Kentucky, 212.

The Court of Appeals decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of opinion that the court was wrong.

By § 8 a common carrier violating the commands of the act is made liable to the person injured thereby "for the

full amount of damages sustained in consequence" of the violation. By § 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by § 16. By the same section if the carrier does not comply in due time with the order the complainant may sue in a state court—which implies that if the order has been complied with and the money paid no suit can be maintained. It is to be noticed further that reparation before answer is contemplated as possible by § 13 and in that case the carrier shall be relieved of liability to the complainant though only of course for the particular violation of law. The decisions say that whatever the damages were they could be recovered; *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 202, 203; *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 429; and that the statute determines the extent of damages. *Pennsylvania R. R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456, 472. We are of opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid.

If at a new trial the plaintiff can prove that the defendant unjustifiably refused cars or caused it other damage not attributable to the overcharge of freight, our decision does not prevent a recovery; but it is evident that the present judgment embraces elements that cannot be allowed.

Judgment reversed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* PEERY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 77. Argued November 7, 8, 1916.—Decided December 18, 1916.

Plaintiff was a conductor in charge of a train-service south and north between two stations in Kentucky, established chiefly because of southbound traffic which was more certain than the northbound and generally included freight bound beyond the State. The trips south and back were, however, distinct, and all freight obtainable was taken, either way. Having made the southward journey, carrying interstate freight, plaintiff was injured while returning with the same engine, caboose and crew, and with local freight only, and while writing his report for the round trip. *Held*, that the plaintiff was not employed in interstate commerce when injured, and the case, therefore, was not within the Federal Employers' Liability Act.
128 Minnesota, 119, reversed.

THE case is stated in the opinion.

Mr. Blewett Lee, with whom *Mr. W. S. Horton* was on the brief, for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought under the Federal Employers' Liability Act to recover for personal injuries caused by a rear end collision in Kentucky. The Railroad Company denied that the case was governed by the federal act, contending that the train upon which the plaintiff was moving was engaged in local business only, between two

points within the State. The issue was important as affecting the rules of law to be applied. At a second trial the judge intending to follow the previous decision of the Supreme Court of the State, 123 Minnesota, 264, ruled that the accident happened in interstate commerce and that the act of Congress governed the case. The defendant excepted and assigned as error that the court determined the matter of fact instead of leaving it to the jury in accordance with the intimation of the former decision, 123 Minnesota, 266, but the judgment was affirmed by the Supreme Court of the State. 128 Minnesota, 119.

We are of opinion that the ruling was wrong, as, we think, will be seen from a short statement of the facts. The plaintiff was a freight conductor on the defendant's road having his principal run from Paducah, south, to Fulton, both in Kentucky, and the same day back from Fulton, north, to Paducah. According to his testimony he took back the engine, caboose and crew with which he started and was allowed one hundred miles of mileage in compensation for the trip out and back. The train out generally and on this occasion had freight destined to beyond the limits of the State. That on the return depended on what could be picked up, the engine and caboose sometimes coming back alone. The accident happened when the engine was returning to Paducah, after having taken up a switch engine from the Fulton yards seemingly in need of repairs at the Paducah shops, and a pile driver and outfit on three flat cars, and having in the rear behind the last the plaintiff's caboose. The pile driver was dropped on the way, at Mayfield, and the train thereafter consisted of the two engines and the caboose. The plaintiff was sitting in the caboose making up a report of his trip out and back, when the collision occurred.

Of course the plaintiff treats the round trip as one, and the return as merely the necessary complement of the trip out. The conclusion is drawn that the plaintiff still

was engaged in interstate commerce because the train out had cars destined to Tennessee. But on the other hand the trips out and back were distinct, in opposite directions, with different trains. The plaintiff's journey was confined wholly to Kentucky. Only the circumstance that the southbound train from Paducah carried freight destined to beyond Fulton caused him to be engaged in interstate commerce while on that trip. On the return when he was injured all the freight had domestic destinations. It is true that the greater certainty of getting traffic going south probably was the chief reason for the establishment of the circuit; but they got what they could coming back, generally a train or a part of a train. It seems to us extravagant to subordinate the northerly to the southerly journey so completely that if on the latter there happened to be a parcel destined beyond the State, the conductor should be regarded as still engaged in commerce among the States when going from Fulton to Paducah even though he had a full train devoted solely to domestic commerce. For it must be remembered that if the northerly movement is regarded as the incident of the southerly, that subordination is independent of the character of the commerce, and depends solely on the fact that southerly moving business, no matter what, induced establishing the route. Therefore it does not matter that the interstate traffic moving south was greater than, for purposes of illustration, we have supposed.

Judgment reversed.

BALTIMORE & OHIO RAILROAD COMPANY *v.* WILSON.

ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

No. 375. Argued December 5, 1916.—Decided December 18, 1916.

Under the Employers' Liability Act, c. 149, §§ 3, 4, 35 Stat. 65, the defenses of contributory negligence and assumption of risk are eliminated when the proximate cause of the injury is physical exhaustion attributable to a violation of the Hours of Service Act, c. 2939, § 2, 34 Stat. 1416.

So *held*, where a rest of more than the minimum period required by the latter act had intervened between the violation and the injury.

THE case is stated in the opinion.

Mr. James B. Sheean, with whom *Mr. William J. Calhoun*, *Mr. Will H. Lyford* and *Mr. George E. Hamilton* were on the briefs, for plaintiff in error:

Under the Hours of Service Act, there can be no recovery in this case unless at the time of the injury the fact of plaintiff's then being on duty was a violation of the act. The carrier is not an insurer of the safety of the employee after the expiration of 16 hours, nor is it responsible for any and all injuries which he may sustain while employed after 16 hours of continuous service. Even where the employee is injured while on duty in violation of the act, it is necessary to establish a proximate relationship between the injury and the violation of the law—it must be shown that the violation brought about or proximately contributed to the injury. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S. 265. See also *Atchison, Topeka & Santa Fé Ry. Co.* v. *Swearingen*, 239 U. S. 339. Plaintiff did not resume duty until 14 hours

after the violation of the act. He had 4 hours' rest in excess of the minimum fixed by the statute, and the injury did not occur until 16 hours after the violation of the law. He therefore was not on duty in violation of the Hours of Service Act at the time of the injury; the violation was not the proximate cause of the injury; and the defenses of assumption of risk and contributory negligence were available to the carrier.

The Hours of Service Act is a legislative finding of the boundaries of the employer's liability for injuries caused by permitting employees to remain on duty an excessive number of hours. The rights and duties of carriers subject to the act must be found in the language of the act itself. *Erie R. R. Co.* v. *New York*, 233 U. S. 671. If the construction given to the act by the court below be permitted to stand and juries, in the exercise of their discretion, may extend the minimum off time designated by the statute to suit different situations so as to eliminate the defenses of assumed risk and contributory negligence, the manifest purpose of Congress as set forth in the statute is destroyed and a uniform application of the statute is rendered impossible.

Mr. Morse Ives for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for personal injuries, brought under the Hours of Service Act, March 4, 1907, c. 2939, § 2, 34 Stat. 1415, 1416, and the Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65. There is a count alleging an improper construction of tracks, and there are others, which alone are of importance here, alleging that the plaintiff was kept on duty for more than sixteen hours and subsequently, (we may take it in fact to have been fourteen hours later,) put on duty again and injured be-

cause he was so exhausted as to be unable to protect himself in the work that he was attempting to perform. At the trial the judge instructed the jury that if they found that the defendant had been guilty of the breach of duty alleged and that the breach proximately contributed to the plaintiff's injury then they should not consider negligence, if any, on the part of the plaintiff, in determining the amount of the plaintiff's damages, if any. In other words, under § 3 of the Employers' Liability Act he allowed a violation of a statute enacted for the safety of employees to be found to exclude contributory negligence, although at the time of the accident the violation was fourteen hours old.

It is not important to give the particulars of the accident. The plaintiff was a freight conductor, and was intending to cut a car with a hot box out of a train. He stood on the running board at the rear of an engine on a side track until it drifted abreast of the car standing on the main track, when he stepped off and was very badly hurt.

The first step in the Railroad's real defence was that the plaintiff was not kept on duty more than sixteen hours, a proposition that there was substantial evidence to maintain. But that having been overthrown by the verdict, it contends that the injury must happen during the violation of law or at least that the Hours of Service Law fixes the limit of possible connection between the overwork and the injury at ten hours by the provision that an employee after being continuously on duty for sixteen hours shall have at least ten consecutive hours off. It also objects that the plaintiff if feeling incompetent to work should have notified the defendant. But no reason can be given for limiting liability to injuries happening while the violation of law is going on, and as to the ten hours the statute fixes only a minimum and a minimum for rest after work no longer than allowed. It has nothing to do with the

question of the varying rest needed after work extended beyond the lawful time. In this case there was evidence that whether technically on duty or not the plaintiff had been greatly overtaxed before the final strain of more than sixteen hours and that as a physical fact it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liability Act, §§ 3 and 4, questions of negligence and assumption of risk disappear.

Judgment affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* STINEMAN COAL MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 11. Argued May 14, 1915; restored to docket for reargument June 14, 1915; reargued October 25, 1915.—Decided December 18, 1916.

An action against an interstate carrier for damages caused by unfair and discriminatory departures from a rule of car distribution in times of car shortage may be prosecuted in a state court. *Pennsylvania R. R. Co.* v. *Sonman Shaft Coal Co., ante,* 120.

The rule of car distribution relied on by the plaintiff having been held discriminatory and illegal by the Interstate Commerce Commission, in due proceedings, at the complaint of other shippers, and this being proven by reports and orders of the Commission produced in evidence, *held,* that the administrative question, so determined, could not be revived by the carrier to oust the jurisdiction of the court.

By such proceedings of the Commission the Act to Regulate Commerce intends no less to redress past discriminations than prevent them in future, under the carrier's rule, and this for the benefit of all shippers who have been or may be affected thereby; and when the Commission finds the rule obnoxious, not because of temporary or changeable conditions, but inherently and from its adoption, and, be-

sides ordering its discontinuance, recognizes that all injured shippers are entitled to reparation and awards it to such as appear and prove damages, the status of the rule is fixed for past as well as future transactions under it.

Where a rule is found discriminatory by the Commission in the circumstances indicated in the last preceding paragraph, a shipper, though not a party before the Commission, cannot recover from the carrier for its failures to obey the rule before the finding was made.

241 Pa. St. 509, reversed.

THE case is stated in the opinion.

Mr. Francis I. Gowen and *Mr. John G. Johnson*, with whom *Mr. F. D. McKenney* was on the brief, for plaintiff in error.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

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

In a state court in Pennsylvania the coal company recovered a judgment against the railroad company for damages resulting, as was claimed, from unjust discrimination practiced in the distribution of coal cars in times of car shortage; and the Supreme Court of the State affirmed the judgment. 241 Pa. St. 509.

The suit related to both intrastate and interstate commerce, and whether, in respect of the latter, it could be brought in a state court consistently with the Interstate Commerce Act is the first question presented.

The coal company was engaged in coal mining on the carrier's line in Pennsylvania and was shipping the coal to points in that and other States. Other coal companies were engaged in like operations in the same district. A

rule of the carrier provided for a *pro rata* distribution of the available supply of coal cars in times of car shortage, but did not require or contemplate that individual cars, owned or controlled by the shipper, should be charged against his distributive share. Without questioning the reasonableness of this rule, but, on the contrary, assuming that it was unobjectionable and became the true measure of the shipper's right and the carrier's duty, the coal company claimed that the carrier had unjustly discriminated against it to its damage by furnishing it a smaller number of cars, and some of its competitors a greater number, than the rule contemplated or permitted. In other words, the claim was, not that the rule was discriminatory, but that it was violated or unequally enforced by the carrier. Of such a suit we said in *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 131–132, where the provisions of the Interstate Commerce Act were extensively considered: "There is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts." Adhering to this view, we think the suit was properly brought in a state court. See *Pennsylvania R. R. Co.* v. *Sonman Shaft Coal Co.*, *ante*, 120.

But it is suggested that in the course of the trial an administrative question—one which the act intends the Interstate Commerce Commission shall solve—was brought into the suit and that this disabled the court from proceeding to a decision upon the merits. The suggestion is grounded upon the fact that one of the carrier's defenses at the trial was to the effect that the rule invoked by the coal company as fixing its quota of the cars was unjustly discriminatory and therefore not an appropriate test of the shipper's right or the carrier's duty. We think the

suggestion is not well taken. The administrative question, which was whether the rule was reasonable or otherwise, was not then an open one. It had been theretofore determined in the mode contemplated by the act. Upon the complaint of other shippers, and after a full hearing, the Commission had found that the rule was unjustly discriminatory and had directed the carrier to give no further effect to it. See 19 I. C. C. 356, 392; 23 *ibid.* 186. This was shown by the reports and orders of the Commission, which were produced in evidence. Thus there was no jurisdictional obstacle at this point.

The Commission deemed it essential to a fair distribution in times of car shortage that individual cars, owned or controlled by the shipper, should be charged against his distributive share, and because the rule here took no account of such cars the Commission found that it was unjustly discriminatory. This occurred two years before the trial but after the period covered by the suit. As part of its defense the carrier claimed that the cars distributed to the coal company during that period included many individual cars controlled by the latter and that these were not charged against its distributive share. Evidently intending to recognize that this was so, and desiring to shorten the trial, the parties agreed that a verdict should be taken for the coal company in a designated sum, subject to the condition, among others, that, "if under the practice, the law and the rules," the court should conclude that "the plaintiff company should have been charged with individual cars," then judgment should be entered for the carrier *non obstante veredicto.* The verdict was taken and judgment entered thereon, the court concluding that the rule should be respected notwithstanding the Commission's finding. Complaint is made of this decision and we think it was wrong. That this shipper was not a party to the proceeding before the Commission hardly needs notice, no point being made of it in

the briefs. And it is not a valid objection that the finding came after the period to which the suit relates. The act contemplated that the proceeding should be conducted in the interest of all the shippers who had been, or were likely to be, affected by the rule, and not merely in the interest of those who filed the complaint. The purpose was to determine the character of the rule for the equal benefit of all, to the end not only that discrimination thereunder in the future might be prevented, but also that such discrimination in the past might be redressed. So understanding the act, the Commission, upon finding the rule unjustly discriminatory, ordered the carrier to cease giving effect to it and also recognized that shippers who had been injured through its operation in the past were entitled to reparation. And the Commission proceeded to award reparation to such shippers as appeared and adequately proved their injury and the amount of damages sustained. Not only so, but the Commission's report makes it plain that the finding was not based upon any temporary or changeable condition existing at the time but upon what inhered in the rule and therefore was true from the time of its adoption. The legal propriety of the Commission's finding is not questioned, but only that it operates to discredit the carrier's rule as respects earlier transactions.

In the circumstances stated we are of opinion that effect must be given to the Commission's finding, even though it came after the transactions in question, and that a recovery by the coal company cannot be permitted without departing from the uniformity and equality of treatment which the act is intended to secure. Only through an enforcement of the discriminatory rule, and of the particular feature which made it discriminatory, can a recovery be had. A right to recover independently of that is neither shown nor claimed. In short, the coal company concedes that it received all the cars to which it would have been entitled under a reasonable rule and yet seeks to recover

upon the ground that more cars were not delivered to it under a rule which was unreasonable, because unduly discriminatory in its favor. Consistently with the act this cannot be done.

Judgment reversed.

ERIE RAILROAD COMPANY *v.* WELSH.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 29. Argued October 25, 1916.—Decided December 18, 1916.

That a case may be within the Federal Employers' Liability Act (c. 149, 35 Stat. 65), it is essential that the person injured be employed at the time of injury in some task of interstate commerce; mere expectation of such employment is not enough. So *held* where the employee, subject to be employed in either interstate or intrastate commerce as directed by a superior, was injured while in quest of orders, and, but for the injury, would have received orders requiring him immediately to make up an interstate train.

In cases brought here under the Federal Employers' Liability Act, the rule obtains that, in the absence of manifest error, this court will not disturb concurrent findings of state trial and appellate courts that the evidence of employment in interstate commerce was insufficient to go to the jury.

89 Ohio St. 81, affirmed.

THE case is stated in the opinion.

Mr. Leroy A. Manchester, with whom *Mr. C. D. Hine, Mr. James B. Kennedy* and *Mr. John W. Ford* were on the brief, for plaintiff in error.

Mr. William R. Stewart for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Supreme Court of Ohio (89 Ohio St. 81) affirmed a circuit court judgment which sustained a judgment re-

covered in a court of common pleas by Welsh against the Erie Railroad Company for damages on account of personal injuries suffered by him while in its employ as a yard conductor in the Brier Hill yard, near Youngstown, Ohio; overruling the contention of the defendant (now plaintiff in error) that by certain rulings of the trial court defendant had been deprived of rights secured to it by the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65.

Plaintiff's case was that on March 7, 1911, about 11 o'clock p. m., while in the performance of his duties, he attempted to alight from the footboard of a slowly moving locomotive; that in so doing he stepped upon a pulley wheel of an interlocking mechanism situate between the tracks and then covered with snow, and the turning of the wheel under his weight caused his foot to become entangled in the interlocking wires, as a result of which he fell partly under the locomotive and sustained serious injuries. The negligence attributed to defendant was the failure properly to guard or cover the wires and the pulley wheel. There was evidence tending to show such a knowledge on plaintiff's part of the nature and character of the interlocking apparatus and its location between the tracks, and such a knowledge and appreciation of the dangers incident thereto, as to bring into play the defense of assumption of risk (*Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503; *Jacobs* v. *Southern Railway Co.*, 241 U. S. 229, 234), if the case came within the federal act; and this depended upon whether plaintiff was employed by defendant in interstate commerce at the time he received his injuries. Defendant's Fourth Request was for the submission to the jury of the question whether plaintiff was employed in such commerce, with an appropriate instruction embodying the rule as to assumption of risk in case they should find him to have been so employed. This request, which in terms invoked the protection of the act of Congress, was refused, and the trial court, in the in-

structions given, declined to follow that act or the common law, and on the contrary instructed the jury that under a state statute held to be applicable the assumption of risk was not a defense.

The rulings of the trial court were sustained by the Supreme Court (and presumably by the Circuit Court) upon the ground that, upon the undisputed evidence, plaintiff was not at the time employed in interstate commerce. As to this question, there was testimony tending to show that defendant was a common carrier by rail engaged in commerce between the States, and that plaintiff was and for some time had been a yard conductor engaged in night duty at its Brier Hill yard, a mile or more west of Youngstown; that he performed miscellaneous services in the way of shifting cars and breaking up and making up trains, under orders of the yardmaster, and had to apply frequently to the latter for such orders; that when any orders thus given had been performed, or had "run out," he usually reported at the yardmaster's office for further orders; that on the night in question plaintiff, with a yard crew, took a freight car loaded with merchandise destined to a point without the State, and a caboose which so far as appears was not to go beyond the limits of the State, from the Brier Hill yard eastwardly to the "F. D. yard" in Youngstown, where the freight car was placed upon a siding, so that it might be made up into a train by another crew; that they then took the caboose a short distance farther and placed it upon another siding; that they next took the engine to a water plug and took on water, and then returned with it to the Brier Hill yard; that on this return journey the engine was slowed down near the yardmaster's office, which is at the easterly end of that yard, so as to enable Welsh to report for further orders, all previous orders having been executed; and that the injury was received while he was attempting to alight for that purpose.

It was in evidence, also, that the orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478.

There remains the contention that plaintiff's act in stepping from the yard engine was in completion of his trip to the "F. D. yard" with the interstate car, and hence was itself an act in furtherance of interstate commerce. This cannot be answered by saying, in the words used *arguendo* by the state Supreme Court (89 Ohio St. 88), that "he was not then and there employed in moving or handling cars engaged in interstate commerce." The question remains whether he was performing an act so directly and immediately connected with his previous act of placing the interstate car in the "F. D. yard" as to be a part of it or a necessary incident thereto. *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 264; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 559. And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task. It turns upon no interpretation of the act of Congress, but involves simply an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment

in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that in the proper exercise of the jurisdiction of this court in cases of this character, the decision ought not to be disturbed. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466.

Judgment affirmed.

WILLIAMS, AS RECEIVER OF THE FIRST NATIONAL BANK OF MINERAL POINT, WISCONSIN, *v.* COBB.

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

No. 125. Submitted November 17, 1916.—Decided December 18, 1916.

Defendant and another, executors, seeking in good faith to follow a testamentary direction to invest a sum in "interest bearing securities," on certain trusts, caused to be transferred to themselves as trustees certain National Bank shares belonging to the estate. Thereafter, their final account as executors, explaining this transaction and reporting the estate wholly distributed except for these shares, was approved by the proper court of Wisconsin. The bank afterwards becoming insolvent, suit was brought by the receiver to recover the amount of an assessment levied upon the shares by the Comptroller of the Currency, the bill seeking to hold the defendant, (who had received a larger amount as legatee), under a Wisconsin law making distributees liable for debts of estates in certain cases.

Held, (1) That whether or not the shares were "interest bearing securities," the transfer was not void.

(2) Title being in the trustees, the estate was not liable for the assessment, and consequently defendant could not be held as a distributee under the Wisconsin statute.

At common law executors have implied authority to pass title to personal assets of the estate—a rule which has not been modified in Wisconsin.

Section 2091, Wisconsin Statutes, 1913, providing that conveyances made by trustees in contravention of express trusts shall be absolutely void, does not apply to personal property.
219 Fed. Rep. 663, affirmed.

THE case is stated in the opinion.

Mr. John B. Sanborn and *Mr. Chauncey E. Blake* for appellant.

Mr. K. R. Babbitt for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1904 Laura A. Cobb died testate at Mineral Point, Wisconsin, and by her will directed her executors to invest the sum of $2,000 of her estate in "interest bearing securities," to pay the income thereof to Catherine Monohan during her life, and on her death to distribute the trust fund to certain persons designated in the will. The defendant, John P. Cobb, and one Calvert Spensley were appointed executors of Mrs. Cobb's will, and so administered her estate that in July, 1908, they filed their final account as executors, reciting that the estate was wholly distributed, with the exception of twenty shares of the capital stock of the First National Bank of Mineral Point, which the account stated the executors had caused to be transferred to themselves and registered in their names as trustees for Catherine Monohan.

The bank became insolvent and the Comptroller of the Currency on the third day of November, 1909, made an assessment of $100 upon each share of the capital stock of the bank for the payment of creditors.

The defendant was a son of the deceased, and, as legatee and distributee, received a sum of money greater than the amount of the assessment on the twenty bank shares.

The foregoing facts are all derived from the bill filed in

this case, to which the defendant demurred. The District Court sustained the demurrer and entered an order dismissing the bill. The Circuit Court of Appeals affirmed this decree, and the case is here upon appeal.

The theory upon which this suit was commenced is that the transfer of the twenty shares of bank stock by Cobb and Spensley, as executors, to themselves, as trustees for Catherine Monohan, is void; that the stock is as if it had never been transferred at all and is therefore an undistributed asset of the estate of Mrs. Cobb, and that the defendant, having received as legatee and distributee much more than the amount of the assessment, is liable under the Wisconsin statute to the Receiver for the assessment, a debt of the estate, all the other assets having been distributed before the failure of the bank.

Obviously the question as to the liability of the defendant turns upon whether the transfer of the stock to Cobb and Spensley, as trustees for Catherine Monohan, is void or voidable, for if it is voidable only this suit was improvidently commenced. At common law, and no Wisconsin statute is cited to modify the rule, an executor has full power, without any special provision of the will that he is administering or order of court, to sell or dispose of the personal assets of the estate, and thereby to pass good title to them. *Munteith* v. *Rahn*, 14 Wisconsin, 210; *In re Gay*, 5 Massachusetts, 419; *Leitch* v. *Wells*, 48 N. Y. 585; Perry on Trusts, §§ 225, 809. A sale by an executor, even to himself, is not void, but only voidable at the option of interested persons. *Grim's Appeal*, 105 Pa. St. 375; *Tate* v. *Dalton*, 41 N. Car. 562. And if, after such purchase from himself, an executor sells to another, the purchaser from him acquires a good title. *Cannon* v. *Jenkins*, 16 N. Car. 422.

No suggestion is made that the transfer of the stock by the executors to themselves as trustees was not made in good faith and it was obviously made under the conviction

that it was, if not "an interest bearing security," at least the equivalent of such a security. Very certainly this was the basis for the approval of the transaction by the appropriate Wisconsin court more than a year before the bank failed, and, for anything that appears in the record, prior to the time when the bank became insolvent.

The claim that the lower court failed to give proper effect to § 2091 of the Wisconsin statute cannot be allowed. The part of this section which is claimed to be applicable reads:

"When a trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust shall be absolutely void."

This section is found in a chapter devoted to "Uses and Trusts" of the title "Real Property and the nature and quality of Estates Therein" and the claim is made that its drastic provision should be extended to trusts in personal property. No Wisconsin court has so applied it, but, on the contrary, the Supreme Court of the State, in *Lamberton* v. *Pereles*, 87 Wisconsin, 449, refused to make other sections of this same chapter respecting real estate applicable to personal property, saying "In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property." It is significant also that in the statute dealing with "Trust Investments," no such provision is found. Wis. Stat. Sup., § 2100b.

It results that, since the executors had lawful authority to dispose of the bank shares, assets as they were of the estate, so long as the transfer is permitted to stand unassailed directly the title to them is in the defendant and Spensley, as trustees for Catherine Monohan, and that the estate of Mrs. Cobb is not liable to the Receiver for the assessment claimed. If the estate is not liable the

defendant, as legatee and distributee, is not liable and the claim in suit, obviously without natural equity, is therefore without technical merit and the decree of the Circuit Court of Appeals must be

Affirmed.

CLARK DISTILLING COMPANY *v.* WESTERN MARYLAND RAILWAY COMPANY AND STATE OF WEST VIRGINIA.

CLARK DISTILLING COMPANY *v.* AMERICAN EXPRESS COMPANY AND STATE OF WEST VIRGINIA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Nos. 75, 76. Argued May 10, 11, 1915; restored to docket for reargument November 1, 1915; reargued November 8, 9, 1916.—Decided January 8, 1917.

The West Virginia prohibition law of February, 1913, Code 1913, c. 32A, as amended by Acts of 1915, p. 33, *id.* p. 660, includes in its prohibitions the bringing into the State by carriers of intoxicating liquors intended for personal use and the receipt and possession of such liquors, when so introduced, for personal use.

Since the right asserted by the plaintiff is a permanent right to ship such liquors into the State, the decision concerns the state law as now amended, though the amendment occurred after the decision of the court below and after the first argument in this court.

Without considering whether governmental power respecting intoxicating liquors extends to the prohibition of personal use, the right to restrict the means of procuring them for that purpose exists as an incident to the indubitable power to forbid manufacture and sale. Therefore these prohibitions of the West Virginia law are not offensive to the due process clause of the Fourteenth Amendment.

The prohibitions, however, unless sanctioned by a valid law of Congress, would be repugnant to the Constitution as a direct burden

on interstate commerce and an interference with the power of Congress to regulate it. *Leisy* v. *Hardin*, 135 U. S. 100.

The Act of Congress of March 1, 1913, 37 Stat. 699, known as the Webb-Kenyon Act, operated, if constitutional, to give effect to the above stated prohibitions of the West Virginia law in respect of liquors shipped into the State for personal use, by withdrawing from such shipments the immunity of interstate commerce, and, to forbid the shipment or transportation into the State of liquors intended to be received or possessed there for personal use contrary to such state prohibitions. *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, distinguished.

The Webb-Kenyon Act is a legitimate exertion of the power to regulate commerce.

That power, in the case of intoxicants, because of their character extends to the total prohibition of their transport in interstate commerce, and necessarily includes the lesser power, exercised in the Webb-Kenyon Act, of adapting the regulation to the various local requirements and conditions that may be expressed in the laws of the States.

Such a mode of exercise involves no delegation of the power to the States.

Neither is the act objectionable as productive of a lack of uniformity. This results:

(1) Because it applies uniformly to the conditions which call it into play; its provisions apply to all the States, and

(2) Because the power of Congress to regulate interstate commerce is not subject to the restriction that regulations shall be uniform throughout the United States.

The right of Congress to regulate a subject of interstate commerce, its scope and the mode in which it may be exerted, depend upon the degree of the power of Congress over the subject regulated, viz., in this case, intoxicating liquor, and not upon those considerations which cause some subjects of interstate commerce to be under state control in the absence of congressional regulation and others to be free from state control until Congress has acted. *Leisy* v. *Hardin*, *supra*, explained and applied.

The Webb-Kenyon Act is not repugnant to the due process clause of the Fifth Amendment.

219 Fed. Rep. 333; *id.* 339, affirmed.

THESE were suits for injunctions compelling the defendants to accept intoxicating liquors for shipment into West Virginia. The appeals were taken from decrees

of the District Court dismissing the bills. The facts are stated in the opinion.

Mr. Lawrence Maxwell, with whom *Mr. Joseph S. Graydon, Mr. Walter C. Capper* and *Mr. J. Phillip Roman* were on the briefs, for appellant:

The Webb-Kenyon Law does not in any way change the status, or permit any State to change the status, of liquors shipped in interstate commerce, except such as are intended "to be received, possessed, sold, or in any manner used," in violation of the law of the destination State. *Adams Express Co.* v. *Kentucky,* 238 U. S. 190. The Kentucky statute involved in that case was in all respects similar to the West Virginia statute, prior to the amendment by the West Virginia legislature on May 24, 1915. Both prohibited the interstate transportation and in terms made the place of delivery the place of sale, both in respect to intrastate and interstate shipments, and regardless of whether the shipments were intended for personal or other use. But this court, approving the construction of the Webb-Kenyon Law which had been adopted by the Court of Appeals of Kentucky in *Adams Express Co.* v. *Commonwealth,* 154 Kentucky, 462, held that, as the law of Kentucky permitted the personal use of liquors by the citizen and possession thereof for such use, the Webb-Kenyon Law conferred on the State of Kentucky no power to prohibit the transportation for such use, or to make the place of delivery the place of sale. The law of West Virginia also recognizes the right of the citizen of that State to have and use liquor. See *State* v. *Gilman,* 33 W. Va. 146, under the old constitution; and the same principle announced under the constitution of 1912 and in cases arising under the present law,— *State* v. *Sixo,* 87 S. E. Rep. 267; *Emsweller* v. *Wallace,* 88 S. E. Rep. 787; *State* v. *Baltimore & Ohio R. R. Co.,* 89 S. E. Rep. 288.

That being true, the decision in the Kentucky case is determinative of this case, unless it be that the amendment of May 24, 1915, to the West Virginia Law necessitates a different conclusion. That amendment makes it unlawful for a citizen of the State to receive intoxicating liquors from a common carrier, or to have in his possession liquors received from a carrier, even when intended for personal use. But where the state law permits the citizen to purchase liquors, carry them to his home, keep them there for personal use and use them, a law which punishes the receipt of liquors for personal use from a common carrier is not a police measure authorized by the Webb-Kenyon Law, but is, in so far as it applies to interstate shipments, a law regulating commerce in violation of the commerce clause of the Constitution.

Congress did not intend by the Webb-Kenyon Law to permit the States to regulate such interstate commerce, *Adams Express Co.* v. *Kentucky, supra;* nor could Congress constitutionally confer or re-delegate such power to the States, being the power to regulate interstate commerce in its fundamental aspect. *Rhodes* v. *Iowa*, 170 U. S. 412; *Minnesota Rate Cases*, 230 U. S. 352.

The power which the States exerted under the Wilson Law was in respect to incidents of commerce only, and did not constitute a direct burden on commerce in its fundamental aspect. See cases above cited and *cf. Delamater* v. *South Dakota*, 205 U. S. 93, and *Rosenberger* v. *Pacific Express Co.*, 240 U. S. 48.

Incidentally, it is contended that plaintiff is not entitled to the relief prayed in the bill, because plaintiff's proposed shipments into West Virginia would result from orders solicited in West Virginia, contrary to § 8 of the law, which forbids advertising and the solicitation of orders, and *State* v. *Davis*, 87 S. E. Rep. 262, is relied on, in connection with *Delamater* v. *South Dakota, supra.* But *State* v. *Davis*, holding that the solicitation of orders by interstate mail

was illegal, was based on the erroneous assumption that the resulting sales would be consummated at the place of delivery in West Virginia, in accordance with § 3 of the statute. As the State had no power to make the place of delivery the place of sale, it has no power to make the solicitation of orders by interstate mail for lawful sales in Maryland, illegal. *Delamater* v. *South Dakota, supra,* is not in point. That case involved a South Dakota statute imposing a tax upon the business of personally soliciting orders in the State of South Dakota. Such statute was held not a direct burden on interstate commerce, and valid under the Wilson Law. The solicitation here involved constitutes a transaction carried on in two States and one "which in its very nature requires to be governed by laws apart from the laws of the several States." The precise point was decided in *Rose* v. *State,* 133 Georgia, 353.

Mr. W. B. Wheeler and *Mr. Fred O. Blue* for the State of West Virginia.

By leave of court, a brief was filed by the Attorneys General of the States of Alabama, Arizona, Georgia, Idaho, Iowa, Kansas, Mississippi, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Virginia and Washington, as *amici curiæ.*

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

To refer to the principal state law relating to these suits, to the pleadings and the decision of the court below, will make the issues in these cases clear and point directly to the elements required to be considered in deciding them.

West Virginia in February, 1913, enacted a prohibition

law to go into effect on July 1st of the following year. Code 1913, c. 32A. Putting out of view the right of druggists under stringent regulations provided by the statute to sell for medicinal purposes and the right otherwise to sell wine for sacramental and alcohol for scientific and manufacturing purposes, the law forbade "the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale" intoxicating liquors, and the intoxicants embraced were comprehensively defined. The statute contained many restrictions concerning hotels, restaurants, clubs and so-called associations where liquor was kept and served either as a result of membership or by gift or otherwise, which were evidently intended to prevent the frustration of the prohibitions against the keeping of intoxicants for sale and purchase by subterfuge in the guise of the exercise of an individual right. There was no express prohibition against the individual right to use intoxicants and none implied unless that result arose (a) from the prohibition in universal terms of all sales and purchases of liquor within the State, (b) from the clause providing that every delivery made in the State by a common or other carrier of the prohibited intoxicants should be considered as a consummation of a sale made in the State at the point of delivery, and (c) from the prohibitions which the statute contained against solicitations made to induce purchases of liquor and against the publication in the State of all circulars, advertisements, price-lists, etc., which might tend to stimulate purchases of liquor.

Under this statute and in reliance upon the provisions of the act of Congress known as the Webb-Kenyon Law (Act of Congress of March 1, 1913, 37 Stat. 699), the State of West Virginia in one of its courts sued the Western Maryland Railway Company and the Adams Express Company to enjoin them from carrying from Maryland into West Virginia liquor in violation of law. In sub-

stance it was charged that very many shipments had been taken by the carriers contrary to the law both as to solicitations and as to the use for which the liquor was intended. Preliminary injunctions were issued restraining the carrying of liquor into the State subject to many conditions as to investigation, etc., etc. With these injunctions in force, these suits were commenced by the Clark Distilling Company to compel the carriers to take a shipment of liquor which it was asserted was ordered for personal use and deliver it in West Virginia, on the ground that the Act of Congress to Regulate Commerce imposed the duty to receive and carry and that besides the West Virginia prohibition law when rightly construed did not forbid it. The carriers, not challenging the asserted meaning of the West Virginia law, set up the injunctions and averred that to receive and carry the liquor would violate their provisions and therefore there was no duty under the United States law to do so. West Virginia intervened in the suits, relying upon the state law and the injunctions which had been issued. At the trial it was shown that the plaintiff Distilling Company had systematically solicited purchases and constantly shipped liquor from Maryland into West Virginia in violation of the prohibition law. The court held that the West Virginia law did not prohibit personal use, and did not forbid shipments for such use and that as there was no state prohibition, the Webb-Kenyon Law had no application, and that as the solicitations forbidden by the state statute were solicitations to do that which was forbidden, that consideration was irrelevant. The construction of the statute made by the state court was held not authoritatively binding, as that court was not one of last resort, and the right to practically modify the injunctions was declared to exist because West Virginia by making herself a party to the suits had submitted herself to the jurisdiction of the court. All questions concerning the power of the State of West Virginia

to pass the prohibition law if it meant otherwise, and of the right of Congress to adopt the Webb-Kenyon Act under a like hypothesis, were reserved. 219 Fed. Rep. 333. Before the decrees entered became final the Circuit Court of Appeals for the Fourth Circuit in a case pending before it (*West Virginia* v. *Adams Express Company*, 219 Fed. Rep. 794) decided directly to the contrary. It held that the law of West Virginia did prohibit shipments for personal use; that it did forbid solicitations therefore for such purchases; that by operation of the Webb-Kenyon Act there was no longer a right to ship liquor into the State in violation of its laws; and that both the state law and the Webb-Kenyon Act were constitutional. Controlled by such decision, the trial court recalled its opinion, heard a re-argument, and, although not changing its view, accepted and gave effect to the conclusions reached by the Circuit Court of Appeals because they were deemed to be authoritative, and the cases were brought directly here, because of the constitutional questions, to review such action.

The issues to be decided may be embraced in four propositions which we proceed separately to consider.

1. *The correct meaning of the West Virginia law as to the subjects in dispute.*

The difference as to the meaning of the statute in the court below was whether or not the West Virginia law prohibited the receipt of liquor for personal use; and if it did, whether or not the prohibitions of the law equally applied to shipments from outside and to those originating in the State. But the possibility of dispute over these subjects no longer exists because after the decision below and since the cases were first argued (for they have been here argued twice) the State of West Virginia amended the statute so as to leave no room for doubt that it does forbid all shipments, whether for personal use or otherwise, and whether from within or without the State. The pertinent

provisions of the amendments are placed in the margin.[1] As the relief sought is the permanent right to ship in the future, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution. Indeed, this is frankly admitted by the

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[1] "SEC. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however*, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word 'home' as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further*, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and, *provided, further, however*, that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the same are being kept and stored for unlawful purposes."

"SEC. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as

parties since it is unequivocally declared that the question is the operation and effect of the statute as amended and its constitutionality. We therefore come to the second question, which is:

2. *The power of the State to enact the prohibition law consistently with the due process clause of the Fourteenth Amendment and the exclusive power of Congress to regulate commerce among the several States.*

That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be no doubt that the West Virginia prohibition law did not offend against the due process clause of the Fourteenth Amendment.

But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several States, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has been not open to question since the decision in *Leisy* v. *Hardin*, 135 U. S. 100. And this brings us to consider whether the Webb-Kenyon

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well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; *provided, however*, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

Law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration.

3. *Assuming the constitutionality of the Webb-Kenyon Act, what is its true meaning and its operation upon the prohibitions contained in the West Virginia law?*

Omitting words irrelevant to the subject now under consideration, the title and text of the Webb-Kenyon Act are as follows:

"An Act Divesting intoxicating liquors of their interstate character in certain cases.

" . . . That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, . . . into any other State, Territory, or District of the United States, . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, . . . is hereby prohibited."

As the state law forbade the shipment into or transportation of liquor in the State whether from inside or out, and all receipt and possession of liquor so transported without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor "intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State," there would seem

to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause. It is insisted that this view gives too wide an effect to the Webb-Kenyon Law since that act was only intended to include state prohibitions in so far as they forbade the shipment, receipt and possession of liquor for a forbidden use, and hence as individual use was not forbidden by the state law, the shipment, receipt and possession for such use was not embraced by the Webb-Kenyon Act and the state law, so far as it was outside of that act, was repugnant to the commerce clause. This is sought to be supported by the historical environment of the Webb-Kenyon Act as evidenced by the debates on its passage and by a decision of this court, as well as decisions of state courts (which are in the margin [1]) which, it is insisted, have so construed that act.

Assuming, for the sake of argument only, that the debates may be resorted to for the purpose of showing environment, we are of opinion they clearly establish a result directly contrary to that which they are cited to maintain. Undoubtedly they show that it was insisted the act was not intended to interfere with personal use, as of course it was not, since its only purpose was to give effect to state prohibitions, not to compel the States to prohibit personal use. Indeed, the meaning which it is sought to affix to the Webb-Kenyon Act, if accepted, would cause that act to have the effect of compelling the States to prohibit personal use, since if all the prohibitions of state laws against manufacture, sale, receipt and possession of intoxicants remained subject to the danger of indirect

[1] *Van Winkle* v. *State*, 27 Del. 578; *Adams Express Co.* v. *Commonwealth*, 154 Ky. 462; *Adams Express Co.* v. *Commonwealth*, 160 Ky. 66; *Palmer* v. *Southern Express Co.*, 129 Tenn. 116; *Ex parte Peede*, 75 Tex. Crim. Rep. 247.

violation by permitting shipment, receipt and possession for personal use, it would follow that a necessary and immediate incentive was imposed upon the States by the Webb-Kenyon Act to enact a provision against personal use.

The antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law (Act of Congress of August 8, 1890, 26 Stat. 313) forbidding the sale of liquor in a State in the original package even although brought in through interstate commerce when the existing or future state laws forbade sales of intoxicants. And this was recognized by the long line of decisions (a few of the leading cases are in the margin [1]) which upheld that law and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced, that is, the right to sell after receipt in the original package, any state law to the contrary nothwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a State where what is known as the dispensary system prevailed. *Vance* v. *Vandercook Company*, 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it,

[1] *In re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *American Express Co.* v. *Iowa*, 196 U. S. 133; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17; *Rosenberger* v. *Pacific Express Co.*, 241 U. S. 48.

there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable.

The case in this court relied upon to establish the contrary (*Adams Express Company* v. *Kentucky*, 238 U. S. 190) clearly does not do so. All that was decided in that case was that as the court of last resort of Kentucky into which liquor had been shipped had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle* v. *State*, 27 Delaware, 578. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act pro-

hibited the shipment of intoxicants "only when the liquor is intended to be used in violation of the law of the state," and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution; and this brings us to the last question, which is:

4. *Did Congress have power to enact the Webb-Kenyon Law?*

We are not unmindful that opinions adverse to the power of Congress to enact the law were formed and expressed in other departments of the government. Opinion of the Attorney General, 30 Op. A. G. 88; Veto Message of the President, Cong. Rec., vol. 49, pt. 5, p. 4291. We are additionally conscious, therefore, of the responsibility of determining these issues and of their serious character.

It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several States, such action would have been lawful because within the power

to regulate which the Constitution conferred. *Lottery Case*, 188 U. S. 321; *Hoke* v. *United States*, 227 U. S. 308. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the States by subjecting interstate commerce in such liquors to present and future state prohibitions, and hence in the nature of things was wanting in uniformity. Let us test the contentions by reason and authority.

The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible.

The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act 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, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. In fact the contention previously made that the prohibitions of the state law were not applicable to the extent that they were broader than the Webb-Kenyon Act is in direct conflict with the proposition as to delegation now made.

So far as uniformity is concerned, there is no question

that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one State to prevent the use of interstate commerce to ship liquor from another State, Congress exceeded its authority to regulate. We can see, therefore, no force in the argument relied upon tested from the point of view of reason, and we come to the question of authority.

It is settled, says the argument, that interstate commerce is divided into two great classes, one embracing subjects which do not exact uniformity and which, although subject to the regulation of Congress, are in the absence of such regulation subject to the control of the several States (*Cooley* v. *Board of Wardens*, 12 How. 299), and the other embracing subjects which do require uniformity and which in the absence of regulation by Congress remain free from all state control (*Leisy* v. *Hardin*, 135 U. S. 100). As to the first, it is said, Congress may, when regulating, to the extent it deems wise to do so permit state legislation enacted or to be enacted to govern, because to do so would only be to do that which would exist if nothing had been done by Congress. As to the second class, the argument is, that in adopting regulations Congress is wholly without power to provide for the ap-

plication of state power to any degree whatever, because in the absence of the exertion by Congress of power to regulate, the subject-matter would have been free from state control, and because, besides, the recognition of state power under such circumstances would be to bring about a want of uniformity. But granting the accuracy of the two classifications which the proposition states, the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support in the authority relied upon to sustain it. Let us see if this is not the case by examining the authority relied upon. What is that authority? The ruling in *Leisy* v. *Hardin*, *supra*. But that case, instead of supporting the contention, plainly refutes it for the following reason: Although *Leisy* v. *Hardin* declared in express terms that the movement of intoxicants in interstate commerce belonged to that class which was free from all interference by state control in the absence of regulation by Congress, it was at the same time in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions and that the freedom of intoxicants to move in interstate commerce and the protection over it from state control arose only from the absence of congressional regulation and would endure only until Congress had otherwise provided. Thus in that case in pointing out that the movement of intoxicants in interstate commerce was under the control of Congress despite the wide scope of the police authority of the State over the subject, it was said (p. 108): "Yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action." Again, referring to the uniform operation of interstate commerce regulations it was said (p. 109): "Hence, inasmuch as interstate commerce, consisting in the transportation, pur-

chase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." Further the court said (p. 119): "The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, . . ." Again after pointing out that the question of the prohibition of manufacture and sale of particular articles was a matter of state concern, it was said (pp. 123, 124): "But notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." And finally, after pointing out that the States had no power to interfere with the movement of goods in interstate commerce before they had been commingled with the property of the State, it was said that this limitation obtained "in the absence of congressional permission" to the State (p. 124).

Thus it follows that although we accept the classification of interstate commerce in intoxicants made in *Leisy* v. *Hardin*, we could not accept the contention which is now based upon that classification without in effect overruling that case, or what is equivalent thereto, refusing to give effect to the doctrine of that case announced in terms so certain that there is no room for controversy or contention concerning them. But we would be required to go further than this, since it would result that we would have to shut our eyes to the construction put upon the

ruling in *Leisy* v. *Hardin* by Congress in legislating when it adopted the Wilson Act and also to practically overrule the line of decisions which we have already referred to sustaining and enforcing that act. Let us see if this is not certain. As we have already pointed out, the very regulation made by Congress in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a State and selling it in violation of such law was to divest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained. And that Congress had the right to enact this legislation making existing and future state prohibitions applicable, was the express result of the decided cases to which we have referred, beginning with *In re Rahrer, supra.* As the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity, a result which, as we have previously said, would reverse *Leisy* v. *Hardin* and overthrow the many adjudications of this court sustaining the Wilson Act.

These considerations dispose of the contention, but we do not stop with stating them but recur again to the reason of things for the purpose of pointing out the fundamental error upon which the contention rests. It is this: The mistaken assumption that the accidental considerations which cause a subject on the one hand to come under state control in the absence of congressional regulation, and other subjects on the contrary to be free from state control until Congress has acted, are the essential criteria by which to test the question of the power of Congress to

regulate and the mode in which the exertion of that power may be manifested. The two things are widely different, since the right to regulate and its scope and the mode of exertion must depend upon the power possessed by Congress over the subject regulated. Following the unerring path pointed out by that great principle 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. Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce coöperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution. And it is well again to point out that this abnormal result to which the argument leads concerns a subject as to which both State and Nation in their respective spheres of authority possessed the supremest authority before the action of Congress which is complained of, and hence the argument virtually comes to the assertion that in some undisclosed way by the exertion of congressional authority, power possessed has evaporated.

It is only necessary to point out that the considerations which we have stated dispose of all contentions that the Webb-Kenyon Act is repugnant to the due process clause of the Fifth Amendment, since what we have said concerning that clause in the Fourteenth Amendment as applied to state power is decisive.

Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.

Affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.

MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER dissent.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 148. Argued December 5, 1916.—Decided January 8, 1917.

An order of a state commission fixing a rate for transportation in purely intrastate commerce will not be disturbed upon the grounds that it produces discrimination against interstate commerce, interferes with administrative provisions of the Interstate Commerce Act, and intrudes upon the jurisdiction of the Interstate Commerce Commission, where the relations of the rate fixed to interstate commerce have not been determined by the Interstate Commerce Commission and are not established by the evidence, and where the certainty that it will operate to the injury of those engaged in such commerce is not made to appear.

268 Illinois, 49, affirmed.

THE case is stated in the opinion.

Mr. O. W. Dynes, with whom *Mr. Burton Hanson* was on the briefs, for plaintiff in error.

Mr. M. F. Gallagher, with whom *Mr. Everett Jennings* was on the briefs, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment of the Supreme Court of Illinois sustaining an order of the State Public Utilities Commission made in a proceeding brought by Poehlmann Bros. Company against plaintiff in error, here called the railway company.

Poehlmann Bros. Company is an Illinois corporation,

engaged in growing and selling flowers and has its greenhouse at Morton Grove, Cook County, Illinois, a station on the railway company's line, three miles northeast of Chicago. Poehlmann Bros. Company uses in its greenhouse about 30,000 tons of coal each year, 95% of which is mined in Illinois, and 500 cars of manure which comes from places in and around Chicago. The coal and manure move to Morton Grove over the railway which receives them at Galewood, a station inside of Chicago.

The distance from Galewood to Morton Grove is about 12 miles and is the haul involved in this case. There are no joint or through rates on coal to Morton Grove from points in Illinois or from points in other States, the rate from Galewood to Morton Grove being a separate rate.

The rates on cars of coal to Chicago vary according to point of origin, but in all cases the charge of the railway company from Galewood to Morton Grove is 40 cents a ton and is published as such, for which the railway company is alone responsible.

July 18, 1913, Poehlmann Bros. Company filed a petition with the Warehouse Commission of Illinois, predecessor of defendant in error, charging that such rate of 40 cents a ton on coal and manure from Galewood to Morton Grove was unjust and unreasonable. After a hearing the commission so found and that 20 cents a ton on coal and 25 cents on manure were just and reasonable rates and should be put into effect by the railway company.

The order was affirmed by the Circuit Court of Sangamon County and subsequently by the Supreme Court of the State. 268 Illinois, 49.

The error assigned against the order of the commission and the judgment sustaining it is that so far as the order relates to coal, the rates on manure not being involved, it violates the commerce clause of the Constitution of the United States in that: (1) The order assumes to regulate a feature of commerce in which interstate and intrastate

commerce are commingled and after jurisdiction of that feature had been taken by the Interstate Commerce Commission, and regulates such feature of commerce differently from and inconsistently with the regulation of the Interstate Commerce Commission. (2) It requires the railway company to discriminate against localities outside of Illinois and give preference to those inside of the State in the charges that the company makes for the same service. (3) It violates § 3 of the Interstate Commerce Act as amended by requiring the company to give unreasonable preference and advantage to producers and shippers of coal in the State and subject those outside of the State to unreasonable prejudice and disadvantage by obliging the company to charge a less rate for the transportation of coal in car-load lots between specified points on its rails when the coal originates within the State than it is lawfully permitted to charge and does charge for the same service on interstate shipments of coal. (4) It violates § 6 of the Interstate Commerce Act as amended by requiring the railway company to charge a less compensation on car loads of coal between certain points named in tariffs on file with the Interstate Commerce Commission than the rates and charges specified in such tariffs. (5) It violates § 13 of the Interstate Commerce Act by disregarding the right of the railway company to have the Interstate Commerce Commission investigate any complaint of the railroad commission of any State and obtain such relief as the complaint might merit. (6) It violates § 15 of the Interstate Commerce Act which gives the Interstate Commerce Commission power over through rates and joint rates and transportation participated in by two or more carriers, the order under review seeking to regulate one factor of such through or joint rate without regard to the other. (7) The order is unreasonable and unlawful in that the commission, without finding the through rate excessive or discriminatory or having facts before it on

which to make such finding, made the order to reduce solely for the benefit of Illinois shippers and producers, the transportation charges being a factor of the transportation service involved that is common to interstate and intrastate commerce and over which factor the Interstate Commerce Commission had previously assumed jurisdiction.

The case, we think, is in small compass, although on its face and in the argument of counsel for plaintiff in error it concerns such relation between state and interstate rates as to make the order an interference with the latter. The facts remove the order from such effect. The coal that the order regulates has its point of shipment and its point of destination in Illinois and was for transportation for 12 miles on the lines of the railway company in the State. But counsel say that the rate for those 12 miles, that is for the haul from Galewood to Morton Grove, is part of the through rate from the coal-producing districts to Galewood, which is a station in Chicago, that such producing districts may be inside or outside of the State, and that the rate, therefore, may be a part of interstate commerce as well as intrastate commerce. There hence comes into the case, counsel contends, "a feature of commerce in which interstate commerce and intrastate commerce are commingled" and that, the interstate element dominating, the state commission had no jurisdiction to make its order, and it is asserted that discriminations and preferences between shippers and localities will result from it.

The contention based upon an interstate commerce element in a rate, that is, the relation of interstate and intrastate rates and their reciprocal effect, was at one time quite formidable, but since the *Minnesota Rate Cases*, 230 U. S. 352, its perplexity arising from a conflict of powers has been simplified. In those cases it was decided that there is a field of operation for the power of the State over

intrastate rates and the power of the Nation over interstate rates. In other words, and in the language of Mr. Justice Hughes, who delivered the opinion of the court, "The fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject, *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612," until the authority of the State is limited "through the exertion by Congress of its paramount constitutional power" where there may be a blending of "interstate and intrastate operations of interstate carriers." But it was decided that Congress had not exerted its power by the enactment of the Interstate Commerce Act.

It is, however, said that the Interstate Commerce Commission had assumed jurisdiction of the rates at the instance of Poehlmann Bros. Company and had rendered a decision sustaining the rates that the order under review adjudges unreasonable.

There was such a complaint and the testimony taken was introduced in the present case. But the complaints are different. That before the Interstate Commerce Commission concerned coal from West Virginia. The complaint in the present case concerns coal shipped from a place in Illinois to another place in Illinois, the latter place being Morton Grove, and the rate to it from Galewood being involved. The testimony taken before the Interstate Commerce Commission happened to have material relevancy to such rate and hence was admitted in evidence. The rulings were different. It was proper for the Interstate Commerce Commission to consider the rate as part of a through rate from points outside of the State. It was equally proper for the state commission to consider it as part of the intrastate haul, and we do not think the rates were so related as to exclude the exercise of jurisdiction by the state commission.

The report of the Interstate Commerce Commission is not in the record. It is, however, quoted in the briefs of counsel, and it appears therefrom that neither the through rate nor the carriers responsible for and participating in it were before the commission. The commission said: "Considering the absence of evidence as to the reasonableness of the through rate, and the unsatisfactory evidence as to the separately established rate under attack, we must refrain from expressing any conclusion upon the reasonableness of either rate."

But a relation is asserted between the state and interstate haul because it is said to be manifest that the order of the state commission gives commercial advantages to shippers and producers of coal in Illinois over shippers and producers outside of the State. But there is nothing in the record that justifies the confidence of the assertion. There are too many factors to be considered for such off-hand declarations to be accepted. Some relation we may admit between the state and interstate service, but the evidence does not bring it within that certainty and precision of influence that induced the decision in *Houston & Texas Ry. Co.* v. *United States*, 234 U. S. 342, but leaves it controlled by the *Minnesota Rate Cases, supra; Oregon R. R. & Nav. Co.* v. *Campbell*, 230 U. S. 525, and *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298. Therefore, the order is not subject to the charges against it and §§ 3, 13 and 15 of the Interstate Commerce Act have no application.

The motion to dismiss is denied. The judgment is

Affirmed.

CRANE *v.* JOHNSON, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.

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

No. 493. Argued December 12, 1916.—Decided January 8, 1917.

The distinction made in the law of California (Laws 1913, c. 354; as amended by Laws 1915, c. 105), passed for the regulation of the practice of medicine and other modes of healing, between treatment employing prayer and religious faith only and a species of treatment which, while reliant upon the creation of mental states and processes in the patient, involves for its proper application special skill and experience and ability to diagnose diseases—is not necessarily an arbitrary distinction denying equal protection of the laws under the Fourteenth Amendment.

When a party assails a state law upon the ground that it violates his rights under the Fourteenth Amendment, the law will be considered only in its application to his situation as revealed in the record, and all uncertainties of fact will be resolved against the complainant and in favor of the law.

233 Fed. Rep. 334, affirmed.

THE case is stated in the opinion.

Mr. Tom L. Johnston for appellant.

Mr. Robert M. Clarke and *Mr. Thomas Lee Woolwine*, with whom *Mr. U. S. Webb*, Attorney General of the State of California, and *Mr. George E. Cryer* were on the briefs, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from an order denying an interlocutory injunction, three judges sitting. The court took jurisdiction of

the action, citing *Raich* v. *Truax*, 219 Fed. Rep. 273, 283; *Truax* v. *Raich*, 239 U. S. 33; but denied the injunction on the ground that the averments of the complaint did not justify it.

Complainant is a drugless practitioner, he avers (we state the facts averred narratively), and has practiced his profession in the City and County of Los Angeles for the last seven years and is dependent upon it for making a living. He does not employ either medicine, drugs or surgery in his practice, nor is there anything harmful in it to the individual or dangerous to society; but he does employ in practice faith, hope, and the processes of mental suggestion and mental adaptation.

Under a statute of the State that went into effect August 10, 1913, amended in 1915, a board of medical examiners was created which was empowered to prescribe a course of study and examination for those practicing medicine (using this word in a broad sense for convenience) and to issue certificates of qualifications and licenses.

Three forms of certificates were required to be issued, first, a certificate authorizing the holder thereof to use drugs, or what are known as medicinal preparations, in or upon human beings and to perform surgical operations, which certificate shall be designated "physician and surgeon certificate." Second, a certificate authorizing an opposite treatment to that which the first certificate authorized (we are using general descriptions), which certificate shall be designated "drugless practitioner certificate." Third, a certificate authorizing the holder to practice chiropody. And the statute also provides for the issuance of what it designates as a "reciprocity certificate." Any of these certificates, on being recorded in the office of the county clerk, as provided in the act, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate.

Applicants must file with the board testimonials of good

moral character and diplomas of a school or schools and, in addition, each applicant for a "physician and surgeon certificate" must show that he has attended four courses of study, each to have been not less than 32 weeks' duration, with some other additions; and each applicant for a "drugless practitioner certificate" must show that he has attended two courses of study, each of such courses to have been of not less than 32 weeks' duration, but not necessarily pursued continuously or consecutively, and at least ten months shall have intervened between the beginning of any course and the beginning of the preceding course; and the course in chiropody is to be of not less than 39 weeks' duration consisting of not less than 664 hours. There is a provision that, in lieu of a diploma or diplomas and preliminary requirements in the other courses, if the applicant can show to the board that he has taken the courses required by the statute in a school or schools approved by the board totaling not less than 64 weeks' study of not less than 2,000 hours for a "drugless practitioner certificate" or 128 weeks' study of not less than 4,000 hours for a "physician and surgeon certificate," he shall be admitted to examination for his form of certificate.

The statute sets out the course of instruction which the respective applicants must have pursued, giving the course that is necessary for a "physician and surgeon certificate" and the course for a "drugless practitioner certificate." The descriptions are very elaborate and technical. The statute also prescribes the manner of examination, states the exemptions from its provisions, the penalties for its violation, and for what conduct and upon what conditions the certificates may be revoked. Among the latter is the following:

"Ninth. The use, by the holder of a 'drugless practitioner certificate,' of drugs or what are known as medicinal preparations, in or upon any human being, or the

severing or penetrating by the holder of said 'drugless practitioner certificate' of the tissues of any human being in the treatment of any disease, injury, deformity, or other physical or mental condition of such human being, excepting the severing of the umbilical cord."

By § 22 of the original act (unaffected by the Act of 1915) it is provided: "Nor shall this act be construed so as to discriminate against any particular school of medicine or surgery, or any other treatment, nor to regulate, prohibit or apply to, any kind of treatment by prayer, nor to interfere in any way with the practice of religion."

It is alleged that the statute violates the Fourteenth Amendment of the Constitution of the United States, especially the equal protection clause thereof, in that it imposes greater burdens upon complainant than upon others in the same calling and position. That it discriminates in favor of the Christian Science drugless practitioner, distinguishes between the treatment of the sick by prayer, the treatment of the sick by faith, mental suggestion and mental adaptation, and treatment by laying on of hands, annointing with Holy oil or other kindred treatment.

Complainant does not employ prayer in the treatment of disease and is, therefore, not exempt from examination by the medical board, and is subject, therefore, to the penalties of the act if he practices his profession for which he has fitted himself by study and practice, and upon which he is dependent and by reason of his age he is in large measure unable to take up any new branch of work. That defendants, appellees here, are threatening prosecutions under the act and he is without remedy at law.

There is an allegation that the Supreme Court of the State of California has decided that the statute is not offensive to the Fourteenth Amendment, in *habeas corpus* proceedings prosecuted by one Chow Juyan, who was

convicted of practicing some form of Chinese healing which was adjudged a violation of the act.

The allegations of the bill set forth complainant's particular grievance to be that the statute discriminates between forms of healing the sick by the use of prayer and other drugless methods, and invoke the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. In other words, he attacks the classification of the statute as having no relation to the purpose of the legislation. Of course, complainant is confined to the special discrimination against him; he cannot get assistance from the discrimination, if any exist, against other drugless practitioners. The case, therefore, is brought to the short point of the distinction made between his practice and certain forms of practice, or, more specifically, between his practice of drugless healing and the use of prayer.

The principle of decision needs no exposition and the only question is whether it was competent for the State to recognize a distinction in its legislation between drugless healing as practiced by complainant and such healing by prayer. That there is a distinction between his practice and that of prayer, complainant himself, it seems to us, has charged in his bill. He has not only charged that he does not employ either medicine, drugs or surgery in his practice but that he does employ faith, hope and the processes of mental suggestion and mental adaptation. These processes he does not describe. Presumably they are different from healing by prayer, different from the treatment by Christian Science. But he alleges that for his practice he has become "particularly fitted, . . . by many years of study and practice therein." In other words, the treatment is one in which skill is to be exercised and the skill can be enhanced by practice, and the objects of the treatment are diseased human beings whose condition is to be diagnosed. To treat a disease there

must be an appreciation of it, a distinction between it and other diseases, and special knowledge is therefore required. And this was the determination of the State; but it determined otherwise as to prayer, the use of which, it decided, was a practice of religion. We cannot say that the State's estimate of the practices and of their differences is arbitrary and therefore beyond the power of government. And this we should have to say to sustain the contentions of complainant, and say besides, possibly against the judgment of the State, that there was not greater opportunity for deception in complainant's practice than in other forms of drugless healing.

Because of our very recent opinions we omit extended reply to the argument of counsel and the cases cited by him, not only of the general scope of the police power of the State but also of the distinctions which may be made in classifying the objects of legislation. And for like reason we do not review or comment upon the cases cited in opposition to complainant's contentions.

It is to be observed that the order of the court was put upon the narrow ground of the averments of the complaint, no opinion beyond such averments being expressed.

Decree affirmed.

McNAUGHTON *v.* JOHNSON, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.

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

No. 494. Argued December 12, 1916.—Decided January 8, 1917.

The practice of fitting glasses to the human eye, and treating ocular inflammation, without the use of drugs or surgery, is subject to supervision and regulation under the state police power.

No discrimination violative of the equal protection clause of the Fourteenth Amendment is deducible from the fact that a state law (Laws of California, 1913, c. 598) requiring persons treating inflammation of the eye and fitting glasses without the use of drugs to be licensed under the name of "optometrists" and subjecting their practice to regulation excepts persons who employ drugs in their practice, it appearing that the latter, through another statute, are subject to similar supervision and regulation under another name.

233 Fed. Rep. 334, affirmed.

THE case is stated in the opinion.

Mr. Tom L. Johnston for appellant.

Mr. Robert M. Clarke and *Mr. Thomas Lee Woolwine*, with whom *Mr. U. S. Webb*, Attorney General of the State of California, *Mr. George E. Cryer* and *Mr. Ray E. Nimmo* were on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted with *Crane* v. *Johnson*, *ante*, 339. It was considered in the District Court with that case, three judges sitting as in that case. It comes here on appeal from an order denying an interlocutory injunction. The court entertained jurisdiction upon the authority of *Raich* v. *Truax*, 219 Fed. Rep. 273, 283; *Truax* v. *Raich*, 239 U. S. 33.

The court in denying the injunction said "that the granting of such orders is within the sound discretion of the court, and in the exercise of such discretion, based upon the averments of the bills, we are of opinion that the application should be denied." The court did not pass upon the merits, expressing a doubt of its authority to do so as the court said it was composed of three judges "under statutory requirement."

Appellant—we shall call her complainant, and state

narratively the facts she alleged—is a regularly graduated opthalmologist, which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye. She has practiced her profession in the City and County of Los Angeles for the past three years and is dependent upon the proceeds of her labor and services. She does not employ either medicine, drugs or surgery, nor is there anything in her practice hurtful to the individual or dangerous to society.

In her practice it is absolutely necessary and indispensable that she measure the powers and range of human vision without the use of drugs and there is no law in the State of California prescribing an examination for and regulating the practice of opthalmology.

At its 40th session the legislature of California enacted a statute by which it provided that it should be unlawful for any person to engage in the practice of optometry without first having obtained a certificate of registration from the State Board of Optometry under an act to regulate that practice approved March 20, 1903, and the acts amendatory thereof.

The practice of optometry is defined to be "the employment of any means other than the use of drugs for the measurement of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof."

The board is given the power, among others, to visit schools where the science of optometry is taught and accredit such as the board finds give a sufficient course of study for the preparation of optometrists; to keep a register of all persons to whom certificates of registration have been issued and of all itinerant licenses, and to grant or refuse or revoke such certificates. The act

prescribes a course of examination, describes the particulars of the examinations, and provides that every applicant for an examination upon passing it shall be entitled to be registered in the board's register of optometrists and a certificate of registration shall be issued to him.

"At such examinations the board shall examine applicants in the anatomy of the eye, in normal and abnormal refractive and accommodative and muscular conditions and co-ordination of the eye, in subjective and objective optometry, including the fitting of glasses, the principles of lens grinding and frame adjusting, and in such other subjects as pertain to the science and practice of optometry, such subjects to be enumerated in publication by the board. . . . All such applicants without discrimination, who shall satisfactorily pass such examination shall thereupon be registered in the board's register of optometrists and a certificate of registration shall be issued to them, under the seal and signature of the members of said board upon payment of a fee of five dollars. Such certificate shall continue in force until the first day of August in the year next succeeding."

Before engaging in practice it shall be the duty of each registered optometrist to notify the board in writing of the place or places where he is to engage or intends to engage in practice and of changes in such places.

There are other provisions intended to fortify those above mentioned, and violations of the act are made misdemeanors, with fines and imprisonment, increasing with repetition of the offense.

It is provided that the act shall not be construed to prevent duly licensed physicians and surgeons from treating the human eye nor to prohibit the sale of complete ready-to-wear eyeglasses as merchandise from a permanent place of business in good faith and not in evasion of the act by any person not holding himself out as competent to examine and prescribe for the human eye.

Registry certificates may be revoked for certain specified causes.

Complainant charges that the act offends the Fourteenth Amendment of the Constitution of the United States in that it deprives her of her property without due process of law and denies her the equal protection of the laws, and as specifications of the last she instances the exemption from the provisions of the act of licensed physicians and surgeons; the appropriation to the sole use of registered optometrists of the right to employ any means other than the use of drugs in the measurement of the powers or range of vision; the denial to all other schools of scientific learning and practice the right to measure the range of human vision other than by the use of drugs on equal terms with the physician and surgeon; and contends generally that her occupation being a lawful one, not hurtful to the individual or dangerous to the community, the State has no power to impose discriminatory regulations upon it.

She alleges her competency to practice her profession and apply its treatment, that appellees are threatening to enforce the law, and hence prays temporary and permanent injunctions.

These specific objections are brought down to the general objection that the statute discriminates against those who employ any other means than the use of drugs and, therefore, "creates a monopoly favored and protected by law, in the interest of practitioners who employ drugs in determining the accommodative and refractive states of the human eye."

To sustain the statute appellees adduce the police power of the State; against the statute complainant urges the Fourteenth Amendment and its prohibition of discrimination. The case requires, under the averments of the bill, adjustment of these contentions.

It is established that a State may regulate the practice

of medicine, using this word in its most general sense. *Dent* v. *West Virginia*, 129 U. S. 114; *Hawker* v. *New York*, 170 U. S. 189; *Reetz* v. *Michigan*, 188 U. S. 505; *Watson* v. *Maryland*, 218 U. S. 173; *Collins* v. *Texas*, 223 U. S. 288.

Complainant tries to escape from the rulings in those cases by asserting a discrimination against her. She is an opthalmologist, she avers, "which is a school of scientific learning and practice confined to the treatment of the inflammation of the eye and its membranes and in fitting glasses to the human eye," and that she has practiced her profession for the past three years, and does not employ medicine, drugs or surgery. She, however, attacks the statute because, to use the language of her counsel, it "arbitrarily discriminates against every other school of scientific knowledge and practice in favor of the school employing drugs in determining the accommodative and refractive states of the human eye." It undoubtedly does, but gives the name of the school that of "optometry" and its practitioners "optometrists." We cannot suppose that any injury is done her by the difference in names, and yet she gives no other tangible ground of complaint. Whether they are different and whether the difference is of substantial or unsubstantial degree she does not inform us. She practices one of them in preference to the other, and for the practice of that one the State has declared that its certificate of competency is necessary. The cases cited above establish that the State has such power and it requires no more of complainant than it requires of any other opthalmologist, to use her word, or of any other optometrist, to use the word of the statute.

The District Court was, therefore, right when it decided that on the averments of the bill complainant was not entitled to an injunction.

Decree affirmed.

ADAMSON *v.* GILLILAND.

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

No. 396. Submitted November 13, 1916.—Decided January 8, 1917.

Upon considering the evidence the court finds grave reasons for agreeing with the District Judge that the respondent copied the petitioner's patented invention.

The rule which gives conclusive effect to a finding made by a judge who saw the witnesses, when there is testimony consistent with it and the finding depends on conflicting testimony or the credibility of witnesses, is peculiarly applicable in a case wherein a patent is assailed by oral evidence of an alleged unpatented anticipation.

One who opposes a patent by oral evidence of a prior discovery, must prove his case beyond a reasonable doubt. *The Barbed Wire Patent*, 143 U. S. 275, 284.

227 Fed. Rep. 93, reversed.

THE case is stated in the opinion.

Mr. Percy B. Hills and *Mr. Douglas W. Robert* for petitioner.

Mr. James A. Carr and *Mr. T. Percy Carr* for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the petitioner for the infringement of a patent for a vulcanizing device, "including a vulcanizing member constructed to retain a combustible fluid upon and in contact with its upper surface, the lower surface of the vulcanizing member being adapted to be applied to the material to be vulcanized." In other words, the upper side of the upper of two sheets of metal, between

which, when heated, the material is to be vulcanized, is fashioned as a cup in which gasoline can be burned to heat it. The specific character of the machine has made of it a valuable success. The respondent admitted making and selling devices like the plaintiff's but alleged and testified that he made them first. In a previous suit by the plaintiff the plaintiff and the present defendant testified and District Judge Geiger gave the plaintiff a decree. In this case again the District Judge in his turn saw the defendant and heard additional evidence, but after criticising it said that his own judgment was that the new testimony would not have changed Judge Geiger's opinion, and while professing to follow that opinion according to the usage of District Judges in such matters, evidently, to our mind, signified that he agreed with Judge Geiger, although in terms only following what had been done. The Circuit Court of Appeals treated the action of the District Judge as a mere yielding to the authority of the former decision and reversed the decree upon the evidence as it stood in print.

We are unable to agree with the Circuit Court of Appeals. There is no question that the plaintiff did not copy the defendant, that he put his invention into the market in November, 1911, and that the defendant did not put out his vulcanizer until February or March of the following year; but the defendant says that on August 7, 1911, twelve days before the plaintiff made the drawing that depicted his invention, he had had castings made that are substantially identical with the plaintiff's device and identical in particulars that the plaintiff's patent made material, but that the defendant declared to answer no useful end. The plaintiff's cup had pins projecting from the bottom arranged in circles around a central one, which his specification described as serving to conduct the heat of the flame downwards into the vulcanizing plate and the combustible fluid. The defendant's original casting

showed pins of similar arrangement. He explained that the similarity was accidental, that the pins were of no use, but that "we expected to tell the poor, unsuspecting public that they conducted the heat to . . . the bottom of the vulcanizer," "which is a false statement." It needs no emphasis to point out the improbability that the defendant at nearly the same time as the plaintiff should have hit by accident upon the same configuration in striking particulars that he regarded as immaterial, and, merely to deceive the public, have invented the same by no means obvious explanation that was offered seriously by the plaintiff but that the defendant regarded as false. The improbability is intensified by a further coincidence also explained by the defendant as accident. The lugs by which the cup was to be fastened to the lower surface happened to face in opposite directions in the plaintiff's device, although later they were made to face the same way. The defendant's also faced in opposite directions. It surpasses the power of belief that a man who testified that there was nothing in the invention, that it was merely arranging to fasten a ladle to a board, should have come by pure chance to make so exact a replica of the plaintiff's specific form. Inspection of the two castings shows more clearly than can words that one must have been a copy of the other. The plaintiff and defendant lived far apart. Adamson had no chance to copy Gilliland. On the other hand after Adamson's vulcanizers were made public Gilliland could copy them. The man who made the castings shows that the resemblance was even more complete than we have stated by reason of the presence of a base plate, although Gilliland denies that he had one at that time.

There is no doubt that the defendant had castings made. The essential question is the time when they first were made. We shall not discuss the evidence of those concerned in the making beyond recurring to the impression that the witnesses made upon the District Judge and

mentioning that a dray ticket relied upon as fixing that date appears to have been open to grave suspicion from its character, marking and other details. Considering that a patent has been granted to the plaintiff the case is pre-eminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses "depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable." *Davis* v. *Schwartz*, 155 U. S. 631, 636. The reasons for requiring the defendant to prove his case beyond a reasonable doubt are stated in the case of *The Barbed Wire Patent*, 143 U. S. 275, 284. Upon these considerations and a review of the evidence we are of opinion that the decree must be reversed.

Decree reversed.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY *v.* WINTERS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 420. Argued December 5, 1916.—Decided January 8, 1917.

When a state court applies the Federal Employers' Liability Act to an action governed by the state law, the error is not ground for reversing the judgment upon the complaint of a party who did not oppose but invoked and relied upon the application of the federal statute.

In such circumstances, however, this court will not pass upon questions concerning negligence and assumption of risk if the facts touching the plaintiff's employment are stated and agreed and fail to make a case within the federal act.

The injury occurred while plaintiff was repairing an engine. The

engine had been used in interstate commerce before the injury and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce, or assigned to it at the time. *Held*, not a case within the Federal Employers' Liability Act.

131 Minnesota, 181; *id.* 496, affirmed.

THE case is stated in the opinion.

Mr. Frederick M. Miner, with whom *Mr. William H. Bremner* was on the brief, for plaintiff in error.

Mr. Humphrey Barton, with whom *Mr. John H. Kay* was on the briefs, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries suffered by the plaintiff, the defendant in error, at Marshalltown, Iowa, on October 21, 1912. The decisions below will be found in 126 Minnesota, 260 and 131 Minnesota, 181; *id.* 496. The declaration alleged that at the time the plaintiff was employed by the defendant in interstate commerce, although it went on to set forth laws of the State of Iowa concerning the liability of railroads and contributory negligence. It alleged that the injury was caused by the negligence of the defendant in failing to furnish a reasonably safe instrument for the work that the plaintiff was set to do. The answer denied among other things that the plaintiff was employed in interstate commerce and set up the plaintiff's negligence and assumption of the risk. In the course of the trial, the facts touching the employment having been agreed, the counsel for the defendant intimated that he might want to take the question whether the commerce was interstate to this court, but said no more about it and later moved to dismiss the suit upon

the ground, among others, that the plaintiff assumed the risk, adverting to a decision that that defence was open under the federal act. Later still the presiding judge in his charge, without objection, told the jury that the action was tried under the law of the United States; and in the assignment of errors to the Supreme Court of the State one error assigned was that the jury was instructed that they might find a less than unanimous verdict in a suit founded upon the Federal Employers' Liability Act—a proposition disposed of since the trial by a decision of this court. *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211.

It is true that error is assigned because the court affirmed its opinion rendered after a former trial. But in the assignment of errors to the state court no such error is alleged, and beyond judicial recitals that the evidence with some exceptions was the same at both trials and quotations from the decision as to negligence, the record shows nothing but a casual statement of counsel as to what was done or ruled before. In short, at the trial the defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident or to object to the application of the federal statute. On the contrary without qualification it invoked and relied upon that statute and the rights that because of that statute it supposed itself to possess. There is an ambiguous assignment of error that the Supreme Court of the State erred in holding as matter of law that the plaintiff was engaged in interstate commerce and in holding that the question of the plaintiff's assumption of the risk was for the jury "thereby depriving the appellant of a right guaranteed to it under the provisions of" the Federal Employers' Liability Act. But if the first clause is more than an introduction to and reason for the second, then, as we have indicated, no foundation for such an assignment was laid in the proceedings before the state courts.

Therefore even if the courts and parties were wrong about the proper basis for the suit that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below.

The defendant, however, as has been seen, did save the questions concerning its right to a unanimous verdict and the assumption of risk under the act of Congress and also concerning the evidence of its negligence, all of which, of course, in a case arising under the act could be brought to this court. In the present case the facts upon which the act of Congress was supposed to apply are stated and were agreed, so that although, for the reasons that we have stated, an error on that point would not entitle the defendant to a new trial, it necessarily must be determined whether they show a foundation for the attempt to come here upon the questions that were reserved. The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine "had been used in the hauling of freight trains over defendant's line . . . which freight trains hauled both intrastate and interstate commerce, and . . . it was so used after the plaintiff's injury." The last time before the injury on which the engine was used was on October 18 when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might

be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time not upon remote probabilities or upon accidental later events.

Judgment affirmed.

SAVINGS BANK OF DANBURY, OF DANBURY, CONNECTICUT, *v.* LOEWE, AS SURVIVING PARTNER OF THE FIRM OF D. E. LOEWE & COMPANY.

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

No. 713. Argued December 11, 1916.—Decided January 8, 1917.

Under the statutes of Connecticut, a garnishment of deposits in an ordinary savings bank without stockholders which is subject to a fiduciary duty to hold and invest for the benefit of its depositors all funds that it receives and to pay over to them the net income beyond enough to constitute a small safety fund, Gen. Stats., §§ 3440, 3441, reaches not only the principal of the deposits but also the dividends that accrue after service of the writ.

The lien is not affected by an assignment of the savings accounts made after the service.

236 Fed. Rep. 444, affirmed.

THE case is stated in the opinion.

Mr. William F. Tammany, with whom *Mr. John H. Light* was on the brief, for plaintiff in error.

Mr. Walter Gordon Merritt and *Mr. Daniel Davenport* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is *scire facias*, where the statutes of Connecticut provide a similar remedy, to recover savings bank accounts attached by trustee process in the hands of the plaintiff in error, judgment having been recovered in the original suit by the defendant in error and execution taken out. The garnishee submitted itself to the judgment of the court, admitting deposits, but setting up that after the attachment the accounts had been assigned to the United Hatters of North America and that the assignee claimed the dividends that had accrued since the writ was served. The assignee was cited, appeared and made the claim. The principal, except an item of $428.52, now has been paid, and the right to the dividends is the only question in the case. The Circuit Court of Appeals decided that the attaching creditor had the better right. 236 Fed. Rep. 444.

There is no doubt that under the statutes of Connecticut, as usual elsewhere, a garnishment reaches only effects of the defendant in the hands of the garnishee at the time of service upon the latter, as distinguished from contingent liabilities that do not become effects in the garnishee's hands until a later time. Gen. Stats. 1902, §§ 880, 931. But the commonest object of such attachments is a right, regarded as a thing within reach of the process because of the power of the court over the person subject to the corresponding obligation. *Barber* v. *Morgan*, 84 Connecticut, 618, 623; *Osborn* v. *Lloyd*, 1 Root, 447; *Harris* v. *Balk*, 198 U. S. 215, 222. If the right is vested the attachment reaches the whole of it, and therefore, there being no doubt that a *debitum in præsenti solvendum in futuro* could be attached, Gen. Stats., § 936, it was admitted at the argument that in the case of an interest-bearing debt the subsequently accruing interest was held as well as the principal. The obligation to pay the one stands on the same footing as the obligation to pay the

other; the two are one, they are limbs of the same contract, and there is no reason for splitting them up. *Adams* v. *Cordis*, 8 Pick. 260, 269. It may be true that apart from statute the attachment of stock in a corporation would not hold subsequently declared dividends, but, if so, that is because the stockholders have no right to the dividends until they are declared, which may never be if the directors see fit to convert earnings into capital. *Gibbons* v. *Mahon*, 136 U. S. 549. Compare *Norton* v. *Norton*, 43 Ohio St. 509, 525. The question then narrows itself to whether the so-called dividends of savings banks are analogous to dividends of a corporation or to interest due by contract upon a debt.

The plaintiff in error is an ordinary savings bank without stockholders. It is subject to a fiduciary duty to hold and invest for the benefit of its depositors all the funds that it receives and to pay over to them all the net income earned, after the retention of enough to constitute a small safety fund. Gen. Stats., §§ 3440, 3441. This duty certainly is no less because created by statute rather than by contract. It is guarded by other statutes limiting the investments allowed and requiring inspection, with the object of making principal and income secure rather than large. Gen. Stats., §§ 3428, 3457. The minimum amount of the dividends generally is as fixed in practice as if it were written in a bond. The practical certainty that a savings bank will pay is greater, in short, than that an average debtor will pay six per cent. according to his promise in a note. The only element of uncertainty other than that conditioning all future conduct, is the possibility that the dividend may be greater than that which experience has led the depositor to expect. He has a vested right to the dividends, a vested right that the corporation should take the most prudent steps to secure them, with an identified fund devoted to the result. We do not perceive why the possibility of there being no earnings because

of fraud or a cataclysm, or a possibility of the earnings being greater than was expected, should make the right less a present one, subject to and covered by the attachment, than the right to the capital, which runs the same risks, *Bunnell* v. *Collinsville Savings Society*, 38 Connecticut, 203, or than that arising from the promise of a debtor who may fail or abscond, or, if a corporation, may have no assets.

The case certainly is not weakened, it rather seems to us to be strengthened by the fact that the statutes of Connecticut provide that the levy of attachments and executions upon even the shares of a corporation shall include dividends growing due thereon. The provision indicates a policy, and although of course the words do not include dividends from savings banks, as in our opinion they did not need to, it is only by imagining unreal distinctions that the policy embodied in the statute, and extending by the common law to interest due upon contract, can be held to exclude the claim to subsequently earned income of ordinary savings banks, when that claim as we have tried to show is a vested right. *Middletown Savings Bank* v. *Jarvis*, 33 Connecticut, 372, 379. See *Norton* v. *Norton*, 43 Ohio St. 509, 525.

No argument against our conclusion can be based on the right to release the attachment by giving a bond equal to the value of the effects attached. Gen. Stats., §§ 849, 852. We presume that ordinarily a plaintiff would be satisfied with a bond for the principal of a debt or deposit. If he should raise a question we will wait for the Connecticut courts to decide whether he might or might not be entitled to more.

Finally, the assignment of course has no effect upon the rights of the defendant in error. If the attachment would have held dividends as against the original defendant it holds them as against the assignee.

Judgment affirmed.

HILL, A MINOR, ET AL. *v.* REYNOLDS, A MINOR.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 61. Argued November 2, 1916.—Decided January 8, 1917.

A decision of the Secretary of the Interior adjudicating a contest over certain Choctaw and Chickasaw lands, and awarding a patent, under the agreement in the Act of June 28, 1898, c. 517, 30 Stat. 505, and the supplemental agreement in the Act of July 1, 1902, c. 1362, 32 Stat. 641, *held*, free from misconstruction or misapplication of law.

The provisions of §§ 17 and 18 of the Act of June 28, 1898, *supra*, inhibiting enclosures and holdings of lands in excess of allottable quantities, were left in force as to the Choctaws and Chickasaws by the agreement in the 29th section which became effective through tribal ratification on August 24, 1898.

Choctaw and Chickasaw lands held by a widow and her minor children in excess of allottable quantities, and bearing certain meager and non-severable improvements, were surrendered by her in January, 1899, for an adequate consideration, to one who took possession, made valuable and lasting improvements and, in December, 1902, sold, maintaining possession meanwhile.

Held, (1) That in virtue of these transactions, and by force of §§ 17 and 18 of the Act of June 28, 1898, *supra*, the interests of the children were so devested that an applicant for allotment relying for priority on quitclaims of their rights in the land and improvements, executed in November and December, 1902, could not prevail over a prior applicant who had succeeded to the rights of the widow's surrenderee under his sale.

(2) That the failure of the children's guardian to join in the surrender was immaterial.

Sections 19 to 21 of the Act of July 1, 1902, *supra*, allowing until September 25, 1902, within which to reduce excessive enclosures and holdings, were not intended to permit of the revival and reassertion of long-dormant claims to the prejudice of persons entitled to allotments who had entered into possession and made valuable improvements.

43 Oklahoma, 749, affirmed.

THE case is stated in the opinion.

Mr. Alger Melton and *Mr. Joseph W. Bailey*, with whom *Mr. Reford Bond* and *Mr. C. B. Stuart* were on the brief, for plaintiffs in error.

Mr. F. E. Riddle, with whom *Mr. Harry Hammerly* was on the brief, for defendant in error.

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

This is a controversy arising out of conflicting applications for the allotment of four hundred and twenty acres of Choctaw and Chickasaw lands. The lands were subject to allotment and all the applicants possessed the requisite qualifications, so it was merely a question as to who had the better right to select the particular lands. The applicants were minors and are designated in the record as the Reynolds children and the Hill children. The former were the first to apply and the latter instituted a contest which ultimately reached the Secretary of the Interior. That officer sustained the claims of the Reynolds children and patents were issued to them. The Hill children then brought this suit to charge the others as trustees and to compel a conveyance. In the trial court the plaintiffs prevailed, but in the Supreme Court there was a judgment for the defendants. 43 Oklahoma, 749.

The chief contention of the plaintiffs is that the Secretary of the Interior misconstrued the law applicable to the facts conceded and proved and that this resulted in the issue of patents to one set of claimants when the other set was entitled to them. Under a familiar rule, if this were true, the plaintiffs would be entitled to the relief sought. *Ross* v. *Stewart*, 227 U. S. 530, 535. But was there any material misconstruction of the law by the Secretary? We say material misconstruction, because, if

his decision was otherwise right, its force was not lessened by anything he may have said concerning what was not material at the time.

The lands of the two tribes were being allotted in severalty among their members under the agreement set forth in § 29 of the Act of June 28, 1898, c. 517, 30 Stat. 505, and the supplemental agreement embodied in the Act of July 1, 1902, c. 1362, 32 Stat. 641. These agreements defined what should be a standard allotment, entitled each member to such an allotment to be selected by or for him, and permitted the selection to be so made as to include his improvements, if any, but without exceeding a standard allotment. When the conflicting applications therefor were made the lands in controversy were not wild or vacant but improved and occupied, and the issues in the contest all centered about the ownership of the improvements. Both sides claimed to own them and to have in consequence a preferred right of selection.

The facts found by the Secretary of the Interior—and his findings were not without evidence to sustain them—are as follows: These lands were part of a much larger body, containing twelve or fifteen thousand acres, which had been enclosed and occupied by one Campbell in his lifetime. He was a white man who had married into the Chickasaw tribe. Of the lands so enclosed he reduced twelve or fifteen hundred acres to cultivation and used the remainder for pasturing live stock. His dwelling and the improvements connected therewith were upon part of the enclosed lands but not upon those in controversy. He died in 1896 leaving a widow, two married daughters and five minor sons. A guardian for the minors was appointed but permitted matters to drift without any particular control by him. The widow and minor sons continued to occupy the home place, and she, with the guardian's assent, looked after the cultivation and renting of the tillable fields and made some use of the pasture land. In

January, 1899, for a consideration not challenged, she surrendered six hundred and forty acres of the enclosed land, with the improvements thereon, to one Blassingame. This tract embraced the lands in controversy. At that time the improvements on the latter consisted of a surrounding four-wire fence and two or three fields reduced to cultivation—the tillable ground being regarded as an improvement. Blassingame took possession of all the lands now in dispute, ditched a large part of them, brought practically all under cultivation and erected substantial buildings thereon, the estimated cost of this work being $2,500. He remained in possession until December, 1902, and then sold to one Brimmage. Two or three months later Brimmage sold to one Reynolds, who went into possession of all but about eighty acres, presently to be noticed, and afterwards made application for the allotment of the lands to his minor children, the contestees.

At no time during Blassingame's occupancy was there any serious effort by any of the Campbells or by the guardian to dispossess him. By a court decree he and his family had been adjudged to be members of the Chickasaw tribe and were accordingly entitled to share in the occupancy and use of the tribal lands. By a later decree they lost this status, but not until after the sale to Brimmage. The status of the latter, as also that of Reynolds, was such that either could hold whatever passed by Blassingame's sale.

In November and December, 1902, Campbell's widow, three of his sons who then had attained their majority, and the guardian of two of his sons who were still minors, sold and quit-claimed to one Hill all of their rights in the lands in controversy and the improvements thereon. Afterwards Hill made application to have the lands allotted to his minor children, the contestants. His status was such that he could hold whatever he received from the Campbells.

No improvements were added by Hill, save a short and unsubstantial fence, and when the contest was begun he had not been in possession of any part of the lands, save a tract of eighty acres or less. He had been in possession of it less than a year, and had entered without leave and in disregard of such rights as had arisen out of Blassingame's occupancy and improvement for nearly four years. In this way Reynolds was prevented from taking possession of this tract.

The members of the Campbell family all selected and received other lands for their allotments, so none of those in dispute were needed for that purpose.

Upon these facts the Secretary of the Interior concluded that the contestees, the Reynolds children, had the better claim to the improvements and therefore the better right to select the lands for their allotments. In this we perceive neither any misconstruction nor any misapplication of the law. We assume, of course, that upon Campbell's death in 1896 his family succeeded to his rights in these lands, that is, to his possessory claim and his improvements. But at best the improvements were meager, and continued occupancy was essential to sustain the possessory claim. This was the situation when the Act of June 28, 1898, *supra*, came into operation. It not only made provision for the allotment in severalty of the tribal lands, but directed the correction in the meantime of various practices respecting those lands that were deemed particularly objectionable. One of these was the practice of enclosing or holding possession of tribal lands greatly in excess of what would be the approximate or allottable share of the occupant and his family. By its 17th and 18th sections the act provided that after the expiration of nine months from its passage all such enclosures or holdings should be deemed unlawful and that proceedings should be taken to terminate them and to punish the offenders. The agreement set forth in the 29th section became ef-

fective through tribal ratification on August 24, 1898, (238 U. S. 308) and superseded many provisions of the act, so far as the Choctaws and Chickasaws were concerned, but it left the 17th and 18th sections in force as to them and made new and more elaborate provision for allotting their lands in severalty. The enclosure or holding of the Campbell family, embracing as it did twelve of fifteen thousand acres, came within the letter and spirit of the 17th and 18th sections; for, as was pointed out by the Secretary of the Interior, that acreage was several times greater than the approximate or allottable share of all the members of the family including the two married daughters. Thus it was essential that a considerable portion of the holding be surrendered, and the time for doing this was limited. The widow was the head of the family and apparently its only active agent. The guardian was inactive, and, besides, under the statute, 30 Stat. 507, the widow was to have precedence over him in selecting the lands to be allotted to the minor children. She therefore was in a position to exercise a real voice in determining which lands should be surrendered and which retained. It was in these circumstances that she surrendered to Blassingame the lands in controversy with the meager improvements thereon. Presumably the consideration was adequate, for no objection on that score was made. He went into possession in evident good faith and there was no real effort to disturb him. He made extensive, lasting and valuable improvements, the ownership of which plainly was in him. Upon no permissible theory did the Campbells have any right to them, legal or equitable, for they were made after the Campbell occupancy ended and at a time when its continuance would have been unlawful. By comparison the original improvements made by Campbell were inconsiderable, if not entirely negligible, and were such that they could not well be retained after the lands were surrendered. It follows

that Reynolds succeeded to the rights of Blassingame and that Hill took nothing by his purchase from the Campbells, made after Blassingame had been in possession almost four years, because they were then without any interest in the lands or the improvements.

But it is urged that §§ 19 to 21 of the supplemental agreement set forth in the Act of July 1, 1902, *supra*, permitted excessive enclosures or holdings to be reduced or corrected at any time within ninety days after its final ratification, which was on September 25, 1902, when Blassingame had been in undisturbed possession for considerably more than three years. Upon this point the Secretary of the Interior was of opinion that the agreement of 1902 "was certainly not intended to permit Indian citizens to revive and reassert claims long dormant, after others had entered into possession of and highly improved the lands." We concur in that view.

What we have said sufficiently covers the rulings of the Secretary of the Interior upon the questions of law which were material to the contest in hand. Criticism is made of some observations in his opinion upon other questions, but they need not be noticed here.

Judgment affirmed.

GASQUET *v.* LAPEYRE ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 116. Argued November 16, 1916.—Decided January 8, 1917.

The provision in § 9 of Article I of the Constitution guaranteeing the privilege of *habeas corpus* is not a limitation upon state action.

A decision of a state Supreme Court, involving only the construction of the state constitution and statutes respecting the jurisdiction of

state courts, can raise no question under the due process or equal protection clauses of the Fourteenth Amendment.

To invoke the full faith and credit clause and the act of Congress passed to carry it into effect, Article IV, § 1; Rev. Stats., § 905, on behalf of a judgment of one State in a court of another, it is necessary by allegation or proof, or in some other recognized mode, to bring to the attention of that court the law or usage which defines the effect of the judgment in the State of its rendition.

Assignments of error contrary to the foregoing propositions are frivolous.

Writ of error to review 136 Louisiana, 957, dismissed.

THE case is stated in the opinion.

Mr. William Winans Wall, with whom *Mr. J. C. Gilmore*, *Mr. Thos. Gilmore* and *Mr. Edward N. Pugh* were on the briefs, for plaintiff in error.

Mr. George Denegre, *Mr. Victor Leovy* and *Mr. Henry H. Chaffe* for defendants in error, submitted.

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

In a proceeding against the plaintiff in error, wherein he was fully heard, the civil district court of the parish of his residence and domicile pronounced a judgment of interdiction against him. He appealed to the Supreme Court of the State, which affirmed the judgment (136 Louisiana, 957), and thereafter he sued out this writ of error. Our jurisdiction is challenged by a motion to dismiss.

There are three assignments of error, and the facts essential to an understanding of two of them are these: After the judgment of interdiction and before the hearing upon the appeal the plaintiff in error, who was in custody under an order of the criminal district court of the parish committing him to an asylum as a dangerous insane person, secured his release from such custody through an

original proceeding in *habeas corpus* in the court of appeal of the parish, which adjudged that he had recovered his sanity. He then called the attention of the Supreme Court to this judgment and insisted that it was decisive of his sanity at a time subsequent to the judgment of interdiction and was *res judicata* of the issue presented on the appeal. But the Supreme Court held that under the state constitution and statutes the court of appeal was without jurisdiction and therefore its judgment was not *res judicata*. In the assignments of error it is said of this ruling, first that it practically suspended the privilege of the writ of *habeas corpus* contrary to § 9 of Article I of the Constitution of the United States, and, second, that it denied the plaintiff in error the due process and equal protection guaranteed by the Fourteenth Amendment, in that it did not give proper effect to certain provisions of the constitution and statutes of the State bearing upon the jurisdiction of the court of appeal and the Supreme Court. Both claims, in so far as the Federal Constitution is concerned, are so obviously ill founded and so certainly foreclosed by prior decisions that they afford no basis for invoking our jurisdiction. Section 9 of Article I, as has long been settled, is not restrictive of state, but only of national, action. *Munn* v. *Illinois*, 94 U. S. 113, 135; *Morgan* v. *Louisiana*, 118 U. S. 455, 467; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388, 400. This is also true of the Fifth Amendment. *Barron* v. *Baltimore*, 7 Pet. 243; *Booth* v. *Indiana*, 237 U. S. 391, 394; *Hunter* v. *Pittsburgh*, 207 U. S. 161, 176. And, as our decisions show, there is nothing in the clauses of the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of a state court under the constitution and statutes of the State into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court. *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389, 393;

Castillo v. *McConnico*, 168 U. S. 674, 683; *Rawlins* v. *Georgia*, 201 U. S. 638; *Burt* v. *Smith*, 203 U. S. 129, 135; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 280–281; *de Bearn* v. *Safe Deposit Co.*, 233 U. S. 24, 34; *McDonald* v. *Oregon R. R. & Navigation Co.*, *ibid.*, 665, 669–670; *Missouri* v. *Lewis*, 101 U. S. 22, 30.

The facts bearing upon the remaining assignment are as follows: After the judgment of affirmance by the Supreme Court and during the pendency of a petition for rehearing, the plaintiff in error, claiming that upon his release from custody by *habeas corpus* he had removed to, and become a resident and citizen of, Shelby County, Tennessee, petitioned the probate court of that county for an inquisition respecting his sanity. The court entertained the petition and within a day or two rendered a judgment thereon finding that the plaintiff in error had become a resident and citizen of Tennessee, adjudging that he was sane and able to control his person and property and declaring that any disability arising from the proceedings in Louisiana was thereby removed. He then brought the proceedings in Tennessee—all certified conformably to the law of Congress—to the attention of the Louisiana Supreme Court by a motion wherein he insisted that under the Constitution of the United States, Article IV, § 1, and the law passed by Congress to carry it into effect, Rev. Stats., § 905, the judgment in Tennessee was conclusive of his residence and citizenship in that State and of his sanity and ability to care for his person and property, and that in consequence the interdiction proceeding should be abated. But the motion was denied, along with the petition for a rehearing, and in the assignments of error it is said that in denying the motion the court declined to give the judgment in Tennessee the full faith and credit required by the Constitution and the law of Congress.

There are several reasons why this assignment affords

no basis for a review here, but the statement of one will suffice. What the Constitution and the congressional enactment require is that a judgment of a court of one State, if founded upon adequate jurisdiction of the parties and subject-matter, shall be given the same faith and credit in a court of another State that it has by law or usage in the courts of the State of its rendition. This presupposes that the law or usage in the latter State will be brought to the attention of the court in the other State by appropriate allegation and proof, or in some other recognized mode; for the courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws or usage of another State. *Hanley* v. *Donoghue*, 116 U. S. 1; *Chicago & Alton Railroad* v. *Wiggins Ferry Co.*, 119 U. S. 615; *Lloyd* v. *Matthews*, 155 U. S. 222, 227; *Western Indemnity Co.* v. *Rupp*, 235 U. S. 261, 275. Here the law or usage in Tennessee where the judgment was rendered was not in any way brought to the attention of the Louisiana court, and therefore an essential step in invoking the full faith and credit clause was omitted. In this situation the claim that the Louisiana court refused to give effect to that clause is so devoid of merit as to be frivolous.

Writ of error dismissed.

DICKSON *v.* LUCK LAND COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 600. Submitted December 6, 1916.—Decided January 8, 1917.

Issuance of a fee simple patent for an allotment in the White Earth Indian Reservation, Minnesota, under the clause of the Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1034, which declares that

such allotments when held by adult mixed-blood Indians shall be free of restrictions on alienation and patentable in fee, implies an administrative finding that the patentee was of age when the patent issued.

While this finding is decisive of the allottee's age for the purpose of sustaining his right to the title freed from the restrictions which Congress had imposed by the allotting acts, c. 119, § 5, 24 Stat. 388; c. 24, § 3, 25 Stat. 642, it does not conclusively establish his majority for the purpose of determining whether a deed of the land which he made after patent was subject, under the state law, to disaffirmance as a deed made in infancy.

The restrictions being removed and the fee simple patent issued, the allottee, pursuant to the Act of May 8, 1906, c. 2348, 34 Stat. 182, becomes subject to, and entitled to the benefit of, the laws of the State governing the transfer of real property, fixing the age of majority and declaring the disability of minors.

132 Minnesota, 396, affirmed.

THE case is stated in the opinion.

Mr. Frank Healy, Mr. Clyde R. White and *Mr. Charles C. Haupt* for plaintiff in error.

Mr. Marshall A. Spooner for defendant in error.

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

A tract of land in the White Earth Indian Reservation in the State of Minnesota is here in dispute. It was allotted and patented to a mixed-blood Chippewa Indian, and both parties claim under him. The allotment was made under legislation providing that the United States would hold the land in trust for the period of twenty-five years and at the expiration of that period would convey the same to the allottee or his heirs by patent in fee discharged of such trust and free of all charge or encumbrance, and also that if any conveyance should be made of the land, or if any contract should be made touching the same, before the expiration of the trust

period such conveyance or contract should be absolutely null and void. 24 Stat. 388, c. 119, § 5; 25 Stat. 642, c. 24, § 3. Afterwards, upon the allottee's application, a fee simple patent was issued to him under a provision in the Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1034, declaring: "That all restrictions as to the sale, incumbrance, or taxation for [of] allotments within the White Earth Reservation in the State of Minnesota, heretofore or hereafter held by adult mixed-blood Indians, are hereby removed, and . . . such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments." Following the issue of this patent, and on dates considerably separated, the allottee executed two deeds for the land, each to a distinct grantee. The plaintiff in this suit claims under the second deed and the defendant under the first. The object of the suit is to obtain an adjudication of these adverse claims. In the trial court the plaintiff prevailed and the judgment was affirmed. 132 Minnesota, 396.

In both courts the decision was put upon the ground that the first deed was made while the allottee was a minor and the second after he became an adult and that under the law of the State the deed given during his minority was disaffirmed and avoided by the one given after he became an adult. The only federal question presented or considered was whether the patent was conclusive of his having attained his majority at that time. The defendant contended that it was, but the ruling was the other way and the plaintiff was permitted to show the allottee's age by other evidence. The defendant concedes that, if the patent was not conclusive upon that point, the judgment must stand.

The validity of the patent is not assailed. On the contrary, both parties claim under it, one as much as the other. Nor is it questioned that the allottee received the full title freed from all the restrictions upon its disposal

which Congress had imposed. Thus the question for decision is whether the patent was to be taken as determining the allottee's age for any purpose other than that of fixing his right to receive the full title freed from all the restrictions imposed by Congress.

There is no mention of his age in the patent, and yet it must be taken as impliedly containing a finding that he was then an adult. This is so, because every patent for public or Indian lands carries with it an implied affirmation or finding of every fact made a prerequisite to its issue, and because the provision in the Act of 1907 made the majority of the allottee a prerequisite to the issue of this patent. But such implications, although appropriately and generally indulged in support of titles held under the Government's patents (*Steel* v. *Smelting Company,* 106 U. S. 447 450 *et seq.*), are not regarded as otherwise having any conclusive or controlling force. They are not judgments in the sense of the rules respecting estoppel by judgment, and we perceive no reason for giving them any greater force or influence than has been sanctioned by prior decisions.

The provision in the Act of 1907, under which this patent was issued, does not make for a different conclusion. In so far as it is applicable here, it does no more than to withdraw a particular class of allotments from the restrictions imposed by Congress and to authorize the immediate issue of fee simple patents for them. Although saying nothing on the point, it evidently intends that the administrative officers shall be satisfied in each instance before issuing the patent that the allotment belongs to the particular class; and so the patent when issued carries with it an implication that those officers found the allotment to be of that class. But the provision gives no warrant for thinking that this finding should have any greater effect or wider application than is accorded to the finding implied from the issue of other patents.

We conclude, therefore, that the administrative finding which this patent imports was not to be taken as decisive of the allottee's age for any purpose other than that of fixing his right to receive the full title freed from all the restrictions upon its disposal which Congress had imposed.

With those restrictions entirely removed and the fee simple patent issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State. And that Congress so intended is shown by the Act of May 8, 1906, c. 2348, 34 Stat. 182, which provides that when an Indian allottee is given a patent in fee for his allotment he "shall have the benefit of and be subject to the laws, both civil and criminal, of the State." Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment were those governing the transfer of real property, fixing the age of majority and declaring the disability of minors.

Judgment affirmed.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY ET AL. *v.* CLOUGH ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 87. Argued November 9, 10, 1916.—Decided January 8, 1917.

By the terms of the Indiana Railway Law of May 11, 1852, and amendments (1 Ind. Rev. Stats. 1852, p. 409, § 13; 2 Burns' Ann. Ind. Stats. 1914, §§ 5176 *et seq.*, § 5195), as construed by the Supreme Court of the State, the obligation assumed by companies deriving their franchises thereunder to construct their railways over streams, water-courses and canals "so as not to interfere with the free use of the same," etc., is a continuing obligation, under which such

companies must bear without compensation the burden of repairing and adjusting their roads and bridges when canals are made across their rights of way, or natural streams intersecting them are deepened, in the execution of public drainage projects, pursuant to the Drainage Act of March 11, 1907 (Laws 1907, p. 508; 3 Burns' Ann. Ind. Stats. 1914, § 6140).

Due process is not denied by refusing compensation for the temporary inconvenience, or the cost of railway reconstruction, resulting from the making of a drainage improvement across the rights of way of railway companies, when the improvement is made for the public benefit in the proper exercise of the state police power, and neither wantonly nor arbitrarily, when no land of the companies is taken, but their easements merely crossed, and when the duty of accommodating their railroads to such improvements is part of the obligation assumed in accepting their franchises from the State.

The state drainage law, § 3, as construed by the state court, allows compensation for damages to the roads and bridges of public corporations, viz., counties, which have not agreed to bear such damages themselves, but no compensation for like damages to private railway corporations which have made such agreements in advance, through their charter undertakings. *Held*, a substantial distinction, satisfying the equal protection clause of the Fourteenth Amendment.

182 Indiana, 178, affirmed.

THE case is stated in the opinion.

Mr. John B. Peterson and *Mr. J. A. Gavit*, with whom *Mr. Addison C. Harris* and *Mr. Robert J. Cary* were on the briefs, for plaintiffs in error.

Mr. John H. Gillett and *Mr. Frank B. Pattee*, with whom *Mr. Randall W. Burns* was on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Little Calumet River rises in LaPorte County, Indiana, flows westerly across that and the adjoining counties of Porter and Lake into the State of Illinois, and, after continuing its course for some distance in that State,

empties into the Big Grand Calumet, which in turn empties into Lake Michigan. In Indiana the river runs approximately parallel to the south shore of the lake. Intervening is a ridge of sandy land about one mile in width, 30 feet higher than the water level of the lake, and 10 feet higher than the river. The Lake Shore & Michigan Southern and the Chicago, Indiana & Southern companies own parallel railroad lines running along this ridge. Neither of these roads crosses the river in Indiana. The Michigan Central Railroad crosses the river in that State upon a steel bridge resting on abutments and piers. The Calumet Valley, in Porter and Lake counties, is a mile or more in width, lying between the ridge on the north and low hills on the south. The watershed drained by the river in Indiana is about 350 square miles. At times the river fails to carry within its banks all the water, and the overflows produce a marsh having an area of 14,000 acres. Under "An Act concerning drainage," approved March 11, 1907 (Laws 1907, p. 508; 3 Burns' Ann. Ind. Stats. 1914, § 6140), application was made by defendants in error, owners of lands affected by the overflows, to the Porter Circuit Court, for the establishment of a proposed plan of drainage, its essential features being the cutting of an artificial channel for a considerable distance along the course of the Little Calumet and at such a gradient as to reverse the direction of its flow, and the construction of an outlet for its waters in the form of an open ditch to run northwardly, cutting through the sandy ridge and emptying into the lake. Pursuant to the provisions of the act, the petition was referred to the drainage commissioners. They made a report in favor of the proposed plan, and assessed substantial damages, in excess of benefits, in favor of the Chicago, Indiana & Southern and the Lake Shore & Michigan Southern companies with respect to their rights of way. No benefits or damages were appraised to the Michigan Central. Under § 4 of the act certain land-

owners assessed with benefits filed remonstrances against the awards of damages to the former two companies. Each of the three companies filed remonstrances: the Lake Shore & Michigan Southern and the Chicago, Indiana & Southern upon the ground that the damages awarded to them were inadequate because the new ditch, where it was to cross their rights of way, would be 70 feet wide at the bottom, about 30 feet deep, and about 200 feet wide at the top, and the expense of bridging it, with the tracks, would in each instance be upwards of $100,000; the Michigan Central, because no damages were assessed in its favor although by the deepening of the channel of the river at its crossing it would be required to take out the present piers and abutments and erect new ones to support the bridge at a cost of about $60,000. Upon the commissioners' report and the remonstrances the matter came on for hearing before the Circuit Court, where findings were made setting forth the necessity for the drainage, stating the plan in detail, finding that it would be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits; that the proposed work would benefit the public health, would improve the public highways in several townships specified, and would be of public utility. It was further found that the Chicago, Indiana & Southern and Lake Shore & Michigan Southern companies, whose roads were to be crossed by the main ditch, had no property other than their right of way that would be affected or interfered with or touched by the drainage proceeding, and these companies would not be damaged by the construction of the proposed drain; and that at the point where the ditch was to pass under the bridge of the Michigan Central the natural channel of the stream would have to be deepened, and this would necessitate the rebuilding of the abutments and piers upon which the bridge rested, but that this company would neither be damaged nor benefited

by the proposed drain. A motion for a new trial having been overruled, a judgment was rendered confirming the report of the commissioners as modified by the court and ordering that the proposed work of drainage be established. The three companies appealed to the Supreme Court of Indiana, where the judgment was affirmed (182 Indiana, 178), and they bring the case here upon questions raised under the Fourteenth Amendment to the Federal Constitution.

The principal contention of the Lake Shore & Michigan Southern and the Chicago, Indiana & Southern companies is that since their railroads are not within the area to be drained, and neither contribute to the formation of the marsh nor are to be in anywise benefited by its drainage, their lands can be taken only through the exercise of the power of eminent domain, with appropriate compensation, and that a denial of such compensation is a taking of their property without due process of law. A right to compensation is asserted in behalf of the Michigan Central on the ground that its present bridge and abutments form no obstruction to the natural flow of the Little Calumet River.

It will be observed that none of the lands of any plaintiff in error is expropriated. The damage they suffer is confined to a temporary inconvenience in the use of their rights of way pending the construction of the drain and the necessity for making substantial expenditures of money in order to pass their railroads over the new watercourse. But the record shows that each of the companies was organized and had its existence under the general laws of the State for the incorporation of railroad companies, that is to say, an act approved May 11, 1852, and amendments thereto. 1 Ind. Rev. Stats. 1852, p. 409; 2 Burns' Ann. Ind. Stats. 1914, §§ 5176 *et seq.* By § 13 of this act (as found in Burns, § 5195) it is declared: "Every such corporation shall possess the general powers, and be subject

to the liabilities and restrictions expressed in the special powers following: . . . Fifth: To construct its road upon or across any stream of water, water-course, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

Concerning the duty thus imposed upon railroad companies with respect to highway crossings, it has been held by the Supreme Court of Indiana in a long line of cases that the duty is applicable not only to the original construction of a railroad across highways then in existence, but also where highways are laid out and opened across a railroad after its construction; that it is a continuing duty, requiring the railroad to keep pace with the times, with the increase of public travel, the change of methods and improvements of highways, and the public desire for the increased ease and convenience of the traveling public. *Louisville, New Albany & Chicago Ry. Co.* v. *Smith*, 91 Indiana, 119, 121; *Evansville &c. R. R. Co.* v. *Crist*, 116 Indiana, 446, 454; *Chicago &c. Ry. Co.* v. *State*, 158 Indiana, 189, 191; *Chicago &c. Ry. Co.* v. *State*, 159 Indiana, 237, 240; *Baltimore &c. R. R. Co.* v. *State*, 159 Indiana, 510, 519; *Lake Erie &c. R. R. Co.* v. *Shelley*, 163 Indiana, 36, 41; *Southern Indiana Ry. Co.* v. *McCarrell*, 163 Indiana, 469, 473; *Vandalia R. R. Co.* v. *State*, 166 Indiana, 219, 223; *Cincinnati &c. Ry. Co.* v. *Connersville*, 170 Indiana, 316, 323, affirmed by this court 218 U. S. 336; *New York &c. R. R. Co.* v. *Rhodes*, 171 Indiana, 521, 525; *Pittsburgh &c. Ry. Co.* v. *Gregg*, 181 Indiana, 42, 53.

But in the Railroad Act streams, watercourses, and canals are mentioned along with roads and highways. The terms employed are broad enough to include artificial

watercourses, whether employed for traffic, for irrigation, or for drainage. And accordingly it has been held by the Supreme Court of the State that with respect to a public ditch constructed under the drainage act of 1907 railroad companies are under the same duty as with respect to highways, and that the company acquires its right of way subject to the right of the State to extend such ditches across it, without compensation to the company for the interruption and inconvenience, if any, or for increased expense or risk, or for the cost of accommodating the railroad line to the crossing. *Chicago & Erie R. R. Co.* v. *Luddington*, 175 Indiana, 35, 38–40; *Wabash R. R. Co.* v. *Jackson*, 176 Indiana, 487, 490.

No question is made but that the settled law of the State is as we have stated it, and that the charter obligations of plaintiffs in error are such as we have defined. An attempt is made to distinguish the *Luddington Case* upon the ground that the railroad there in question was within the drainage district, and the *Jackson Case* upon the ground that the railroad had built an embankment across a valley without providing sufficient culverts to carry off the water of the creek in time of heavy rains. It is contended that since in the present case the Lake Shore & Michigan Southern and the Chicago, Indiana & Southern roads lie upon the top of the ridge between the Little Calumet River and Lake Michigan, and do not in anywise cause or contribute to the marsh, and are not benefited by the proposed drainage, they cannot lawfully be included within the drainage district. And as to the Michigan Central, it is argued that, since its bridge as heretofore constructed does not obstruct the natural flow of the stream, it cannot be subjected to any part of the cost of the drainage system. These distinctions, and a reference made in the same connection to *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, are aside from the real point of the case. The State is not proposing to

assess plaintiffs in error for benefits with respect to the drainage project, nor to tax them for its support. It is requiring them merely to bear the cost of constructing crossings for their railroad lines over the proposed new channel and outlet, "so as not to interfere with the free use of the same," and "in a sufficient manner not to unnecessarily impair its usefulness." With respect to this duty, if the State has a right to impose it in aid of the drainage project, the remoteness or proximity of the area to be drained is wholly immaterial.

In view of the obligations assumed by the respective companies when they accepted their franchises at the hands of the State, it is very clear that the State may exercise its police power in laying out an artificial watercourse across the rights of way without making compensation to the companies for the inconvenience and expense to which they are thereby subjected, unless, indeed, it be made to appear that the power is being exerted arbitrarily, or wantonly, or for private as distinguished from public benefit, or otherwise in disregard of the fundamental rights of the companies concerned, in either of which cases there would be an abuse rather than an exercise of the power, and the project could not lawfully be carried out against their opposition, with or without compensation.

In *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226, 252, where the city was condemning certain parts of the right of way of the railroad for the opening and widening of a street across it, and only nominal compensation was awarded, it was contended among other things that the company was deprived of its property without due process of law, because in ascertaining the compensation the cost of constructing gates and a tower for operating them, planking the crossing, filling between the rails, putting in an extra rail, and the annual expense of depreciations, maintenance, etc., were disregarded.

But the court held that since the company took its charter and laid its tracks subject to the condition that their use might be regulated by the State so as to insure the public safety, the exercise of that authority by the State was not subject to a condition that the company should be indemnified for the damage resulting from its exercise. In *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 582, 595, a plan of drainage required the enlarging and deepening of a natural watercourse over which the railway crossed by a bridge, and the plan could not be carried out without the removal of certain timbers and stones placed in the creek by the company when it constructed the foundation for the bridge, and these could not be removed without destroying the foundation and rendering it necessary to construct another bridge with an opening wide enough to carry the increased flow of the creek under the drainage system adopted. The court held it to be the duty of the railway company at its own expense to remove from the creek the bridge, culvert, timbers and stones placed there by it, and at its own expense to erect and maintain a new bridge to conform to the regulations established by the drainage commissioners under the authority of the State, and that the enforcement of such a requirement would not amount to a taking of private property for public use within the meaning of the Constitution. In *Cincinnati, Indianapolis & Western Ry. Co.* v. *Connersville*, 218 U. S. 336, 344, it was held that since the railway company accepted its franchise from the State subject to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets which had for their object the safety of the public or the promotion of the public convenience, the company had no right to be reimbursed for the moneys necessarily expended in constructing a bridge over a public street laid out through its embankment. In *Chicago, Milwaukee*

& St. Paul Ry. Co. v. *Minneapolis*, 232 U. S. 430, the same doctrine was applied, and held to sustain the refusal of compensation for the cost of constructing and maintaining a railroad bridge across a gap in the right of way made by the construction under the authority of the State of a canal to unite two lakes that formed a part of a public park.

It requires no argument to show that the establishment of a system of public drainage in the interest of the health and general welfare of the people is likewise an object that legitimately invokes the exercise of the police power of the State. *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453, 460; *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 561.

In the present case it is not and could not reasonably be contended that the State is exercising its power arbitrarily, or wantonly, or for a private benefit. It cannot be doubted that the general object of the drainage act of 1907 is to subserve the public interest. Its 2d section requires that petitioners for the establishment of a drainage project shall declare their opinion "that the public health will be improved, or that one or more public highways of the county, or street or streets of, or within the corporate limits of a city or town, will be benefited by the proposed drainage, or that the proposed work will be of public utility." By the 3d section the commissioners are required to consider whether this is true, and if not the petition is to be dismissed; and by § 4 it is made a sufficient ground of remonstrance, resulting if sustained in the dismissal of the proceedings, "that the proposed work will neither improve the public health nor benefit any public highway of the county, nor be of public utility." As to the particular project under consideration, it is specifically found, as we have seen, that a public benefit

will result. In the *Luddington Case,* 175 Indiana, 38, it was expressly declared that ditches established under this law are public ditches of the State whose construction and repair are matters of public or state concern. There exists, therefore, no basis for holding that by the judgment under review the property of any of the plaintiffs in error is taken without due process of law within the meaning of the Fourteenth Amendment.

The "equal protection" clause of the same Amendment is invoked upon the ground that whereas by § 3 of the drainage act (Laws 1907, p. 513; 3 Burns 1914, § 6142, p. 135) the commissioners are required to "assess the benefits or damages as the case may be to each separate tract of land to be affected thereby, and to easements held by railway or other corporations, as well as to cities, towns, or other public or private corporations, including any land, rights, easements or water power, injuriously or beneficially affected," there is discrimination in the judgment, in that an award is made in favor of Lake County for damage to bridges and highways, while compensation to plaintiffs in error for damages to their respective roads, and to the Michigan Central for damages to its bridge, is denied. But as has been held many times, the "equal protection" clause does not deprive the States of power to resort to classification for purposes of legislation; and unless it appears that a state law as construed and applied by the state court of last resort bases discriminations upon arbitrary distinctions, we cannot judicially declare that the State has refused to give equal protection of the laws. *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304, 315; *Missouri, Kansas & Texas Ry. Co.* v. *Cade,* 233 U. S. 642, 650. In the present case the Supreme Court of Indiana in effect held that § 3 of the drainage act did not entitle a railway company to damages in respect of its right of way which was not affected by the proposed drainage in any manner otherwise than by acceptance of its charter

it had agreed to submit to. There is a very evident and substantial basis for a distinction that denies compensation to a private corporation in such a case while at the same time allowing compensation to a public corporation that has made no such agreement.

Judgment affirmed.

HARNAGE ET AL. *v.* MARTIN ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 112. Argued December 19, 1916.—Decided January 8, 1917.

Of two qualified applicants for an allotment under § 11 of the Cherokee Agreement of 1902 (Act of July 1, 1902, c. 1375, 32 Stat. 716), the one owning the improvements on the tract in question, though junior in time of application, is entitled to prevail.

In such case a substantial equity in the improvements will suffice to hold the tract against a claimant whose interest in them is *nil.*

A decision of the Secretary of the Interior that one of two contesting claimants of an allotment under § 11 of the Cherokee Agreement, *supra,* was the owner of the improvements on the land, is conclusive, unless made without evidence to support it or otherwise the result of an error of law.

Where a community of interest in the possession and improvements of a tract of land existed among several members of a Cherokee family, an agreement among them that one should have a specific part of the land for her allotment, *held,* operative to pass an interest in the improvements on that parcel sufficient to give a preferential right to select it under § 11 of the Cherokee Agreement of 1902.

Section 18 of the Cherokee Agreement of 1902 recognized in terms the right of a tribal member to hold possession by his agent as well as by himself of land not exceeding the allottable quantity.

Certain proceedings before the Commissioner to the Five Civilized Tribes, and others in the United States Court for the Indian Territory, for the sale of the improvements upon the allotment here in

question, *held*, ineffectual against one who was not a party to those proceedings and who made application for the allotment, based on ownership of the improvements, before they were instituted.
40 Oklahoma, 341, affirmed.

THE case is stated in the opinion.

Mr. James A. Veasey, with whom *Mr. Lloyd A. Rowland* and *Mr. Jere P. O'Meara* were on the briefs, for plaintiffs in error.

Mr. Robert J. Boone, with whom *Mr. W. L. McKenzie* was on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an equity action involving the right to an allotment of land in the Cherokee Nation, containing about 77 acres. The plaintiff in error Harnage, and the defendant in error Martin, are members of the Cherokee Tribe, and rival claimants to the allotment. The other parties are two oil companies that claim under Harnage and Martin respectively, and admittedly have no higher rights than theirs. Harnage brought an action in one of the district courts of Oklahoma for the purpose of charging the legal title to the lands in question, which stood in Mrs. Martin, with a trust in his favor, upon the ground that the Secretary of the Interior, through a gross misapprehension of the facts or an error of law, had awarded the land to her, when under the provisions of the Cherokee Agreement and other acts of Congress pertaining to the subject it should have been awarded to him.

By the Agreement (Act of July 1, 1902, c. 1375, 32 Stat. 716, 717) it was provided as follows:

"Sec. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, . . . land equal in value to one hundred and ten acres of the average allottable lands of

the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

* * * * * * * *

"Sec. 18. It shall be unlawful after ninety days after the ratification of this Act by the Cherokees for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this Act shall be deemed guilty of a misdemeanor."

By §§ 74 and 75 (p. 727) the act was to take effect upon ratification by a majority of the legal voters of the Nation. It was thus ratified on August 7, 1902.

On May 13, 1904, Harnage made application to the Dawes Commission to have the land in controversy allotted to him, and his application was granted. Thirteen days later Mrs. Martin made a similar application, and this was refused on the ground of the prior allotment to Harnage; thereupon she instituted a contest before the Commission against the Harnage allotment. It came to trial before the Dawes Commissioner in September, 1907, and resulted in a decision in favor of Mrs. Martin. Harnage appealed to the Commissioner of Indian Affairs, who rendered a like decision, and this, on appeal to the Secretary of the Interior, was affirmed; and deeds for the land in contest were made to Mrs. Martin pursuant to the act.

Upon the trial of the equity case plaintiffs in error introduced a certified transcript of all proceedings and evidence in the contest proceeding, and this was the only

evidence offered that was at all pertinent to the question we have to decide. Defendants in error demurred to the evidence, and the demurrer was sustained and the bill of complaint dismissed. This judgment was affirmed by the Supreme Court of Oklahoma. 40 Oklahoma, 341.

Harnage having admittedly filed first upon the land in controversy, Mrs. Martin was entitled to prevail in the contest only by showing that at the time of the Harnage filing she was the owner of the improvements, within the meaning of § 11 of the Agreement, and for that reason entitled under the provisions of the same section to take this particular land for her allotment. It was found by the Commissioner to the Five Civilized Tribes who heard the contest and by the Commissioner of Indian Affairs and the Secretary of the Interior who heard the successive appeals that Mrs. Martin was the owner of the improvements; and the only question for our determination is whether this decision was without evidence to support it or was otherwise the result of some error of law on the part of those officers. *Ross* v. *Stewart*, 227 U. S. 530, 535; *Ross* v. *Day*, 232 U. S. 110, 117; *Johnson* v. *Riddle*, 240 U. S. 467, 474.

Each of the departmental decisions was made in writing, but the findings are somewhat informal, each appeal having resulted in adding something to what had been found before,—a fact not surprising since the testimony is very voluminous, occupying more than 500 pages of the printed transcript in this court. The following is an outline of the facts found: Mrs. Martin was the granddaughter of an Indian woman known as Mary Anderson, or Anson, afterwards Mary Thursday, and was the daughter of William Bob Anson, otherwise known as Wild Bill. She had a brother known as Sam Bob. All these parties were Delaware Indians, adopted into the Cherokee Tribe, and as such were entitled to certain Delaware payments from the Government. During Mrs. Martin's childhood she and

her brother and their parents resided with the grandmother, who was the head of the family, upon an improved tract of land known as the "old home place," located south and west of the land in controversy. Wild Bill died in 1889, and his wife about the same time; and, after this, such payments as were due to Wild Bill as a Delaware were paid to Mary Thursday, and also certain small payments that were due to the contestant. About the year 1891 contestant, then a child of about ten years, was removed by force or undue influence to the home of a Delaware named Frenchman, and kept there until the Delaware payments of 1891 and 1893, averaging over $500 each, were paid to the members of the tribe. The payments due to contestant were collected by Frenchman, who appropriated them to his own use, this having been his object in assuming control over the child. Later she was sent away to school at the expense of the Government, and afterwards returned to the vicinity of her home, where she supported herself by her labor. In November, 1898, when she was about eighteen years of age, she was married to George Martin, and shortly after this she and her husband visited Mary Thursday, and the latter then ascertained that contestant had not secured any land for future allotment. (This was after the establishment of the Dawes Commission, and after the passage of the Curtis Act of June 28, 1898 [c. 517, § 11, 30 Stat. 495–497] when the allotment of the Indian lands in the then Territory was in contemplation; *Woodward* v. *DeGraffenried,* 238 U. S. 284, 291.) During contestant's absence the original home place had been added to by the purchase in 1893 of the improvements on about 90 acres of land lying immediately north of it for $800, the purchase price having been paid by Mary Thursday and Sam Bob from the proceeds of the Delaware payments, and the bill of sale for the improvements having been made to them. The entire place then comprised about 200 acres of improvements. Mrs.

Thursday, recognizing an indebtedness to contestant on account of having received Delaware payments due to her and to her father, and there being sufficient land for herself and Sam Bob and contestant, gave to contestant a right to select the land in controversy, or at least to take as an allotment some portion of the home place, with the understanding that she, Mary Thursday, would hold it until the time for allotment, which was done. From the time of the making of this arrangement Mrs. Martin was recognized by her grandmother and her brother as having an interest in the place, that is, a right to share in the improvements to the extent necessary to entitle her to an allotment out of the land, notwithstanding her involuntary absence from home during her childhood. It was contended that Mary Thursday, at the time of the transaction referred to, was of unsound mind, but this was overruled as unsupported by the evidence.

It appears that before Mrs. Martin filed her allotment selection Mrs. Thursday had located her own allotment in the southern part of the home place, and Sam Bob had located his in the northern part, and the land lying between these was left for Mrs. Martin. This, in view of the previous agreement of Mrs. Thursday, was found to be equivalent to a transfer to Mrs. Martin of the specific improvements upon the intervening tract. The Department found that after the northern and southern portions of the farm were merged into one place there was a recognized community of interest among the members of the family growing out of their relationship and the commingling of their funds, whereby Mrs. Martin had an interest in every part of the family holdings, and that when Sam Bob elected to take his allotment in the northern part of the place and Mary Thursday to take hers in the southern part, they impliedly relinquished to the contestant as the remaining member of the family their interest in the tract of land lying between.

An agreement that Mrs. Martin should have a part of the Thursday place for her allotment might fairly be held to be equivalent to giving her a sufficient interest in the improvements to support a preferential right to the allotment, for by Cherokee law ownership of improvements entitled the owner to possession of the land; and in § 11 of the Curtis Act there was a proviso "that whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires." The same general policy was afterwards carried into § 11 of the Cherokee Agreement, with more particular recognition of ownership of the improvements as the decisive point.

The contention that the findings were unsupported by evidence cannot be sustained. The evidence is to some extent circumstantial, but it is sufficient. It was contradicted by Wallace Thursday, the husband of Mary, but his unreliability was clearly shown.

It is argued that under § 18 of the Agreement, Mrs. Thursday's possession, after November 5 of that year (90 days after date of ratification), of all lands in excess of the value of 110 acres of average allottable lands for herself and a like amount for each of her minor children, if any, was unlawful, and that because Mrs. Martin reached the age of twenty-one before the ratification of the Agreement Mrs. Thursday could not lawfully hold for her any part of the surplus lands. This is based upon a clear misinterpretation of § 18, the very terms of which permitted Mrs. Martin, as a member of the Cherokee Tribe, to hold possession, by herself or "through another," of lands not exceeding in value 110 acres of average allottable lands, and thus authorized her to hold the lands by her grandmother as her agent.

There is no question that the improvements upon the allotment in question, as well as upon the adjoining lands,

were substantial in value, and were such as under the tribal law carried a right of occupancy, and such as were recognized in § 11 of the Curtis Act and § 11 of the Agreement. There is nothing inconsistent with the policy of the latter act in giving to Mrs. Martin, as owner of a substantial equitable interest in the improvements that were upon the tract in question when the act was passed, a preferential right to select that as her allotment. The policy was to give recognition to the established laws and customs of the Cherokees (Const. Art. I, § 2; Laws, 1892, §§ 706, 761, 762), under which citizens of the Nation might and did enclose and improve portions of their common domain and thereby establish a prior right to the possession of those lands, transferable to another citizen by a sale of the improvements. The Agreement substituted a system of allotments with ownership of the soil in the place of a mere possessory right, and its provisions were intended to limit the quantity of land that might be held by or for a single citizen, but they recognized the superior equity of an owner of improvements over that of a citizen who had no such ownership, and the precise character of the ownership was of little consequence as against a party having none at all.

Among the records that were introduced in evidence in the equity suit was an application made in the year 1905 to the Commissioner to the Five Civilized Tribes by Wallace Thursday, acting as guardian of the person and estate of Sam Bob, a minor, and of Mary Thursday, an insane person, for the sale of the improvements upon the allotment in controversy as surplus holdings of those Indians, and certain orders made in the same year by the United States Court for the Northern District of the Indian Territory upon the application of Wallace Thursday authorizing him in the same capacity to sell the improvements to Harnage. But as Mrs. Martin was not a party to these proceedings, and they were taken long after

the filing of her application for allotment, they can have no effect as against her.

Since we are convinced that the decision of the Supreme Court of Oklahoma deprived plaintiffs in error of no right to which they were entitled under the laws of the United States, it results that the judgment must be and it is

Affirmed.

BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF BAKER, *v.* BAKER, ECCLES & COMPANY ET AL.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 115. Argued December 19, 1916.—Decided January 8, 1917.

The rule that the personal estate of an intestate has its *situs* at his domicile, and is subject to be administered and distributed according to the domiciliary laws, is merely a rule of the common law, which the States may adopt, modify or reject, as their policies dictate.

Each State has the power to control and administer the personal assets of an intestate found within her borders, such as debts due from a local corporation or the shares of its stock, to satisfy the rights of her own citizens in the distribution of such assets.

No State, therefore, has the power, by probate or other proceedings *in rem*, to fix the status as to administration, and determine the course of devolution, of personal property of an intestate situate beyond her borders and within the domain of another State.

Under the Fourteenth Amendment, the courts of one State are without power to determine by an action *in personam* the domicile of a decedent or the devolution of his personal assets situate in another State, as against persons, residents of the latter, who do not appear in the proceedings and are notified by publication only.

The full faith and credit clause of the Constitution and the act of Congress passed pursuant to it do not entitle a judgment *in personam*

to extra-territorial effect, if it be shown that it was rendered without jurisdiction over the person sought to be bound.
162 Kentucky, 683, affirmed.

THE case is stated in the opinion.

Mr. John A. Pitts, with whom *Mr. E. W. Ross* was on the briefs, for plaintiff in error.

Mr. Charles K. Wheeler, with whom *Mr. Daniel Henry Hughes* and *Mr. James Guthrie Wheeler* were on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The federal question presented in this record is whether the Court of Appeals of Kentucky gave such faith and credit to certain judicial proceedings of the State of Tennessee as were required by Article IV, § 1, of the Constitution, and the act of Congress passed in pursuance thereof. Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stats., § 905.

The facts are as follows: Charles Baker died in September, 1912, the owner of certain real and personal property in Hardin County, Tennessee, and of 270 shares of stock of Baker, Eccles & Company, a Kentucky corporation, of the par value of $27,000, and a claim of several thousand dollars against that corporation for surplus profits. He left a widow, Josie C. Baker, now plaintiff in error, and a mother, Augusta H. Baker, one of the defendants in error. He appears to have left no children or descendants, nor any considerable indebtedness, and the personal estate, if distributable according to the laws of Tennessee, would go entirely to the widow; if distributable according to the laws of Kentucky, it would go one-half to the widow, the other half to the mother. The place of his domicile, admittedly determinative of the law of distribution, was in controversy.

Shortly after his death the widow applied to the County Court of Hardin County, Tennessee, for letters of administration. The proceedings were *ex parte*, and her application was granted, the order of the court appointing her administratrix reciting that at the time of his death the residence of Charles Baker was in that county. Afterwards, and in December, 1912, the widow presented to the same court a settlement of her accounts as administratrix, and an order was made reciting that it appeared from proof that Charles Baker died intestate, and at the time of his death was a resident of Hardin County, Tennessee, and that he left no children or descendants of such surviving, but left surviving his widow, the said Josie C. Baker, and under the laws of Tennessee she, as widow, was entitled to all of the surplus personal property; whereupon it was ordered that she as administratrix transfer and deliver to herself as the widow of the deceased all of the personal estate in her possession, including the stock in the Kentucky corporation, the certificates for which she held. Subsequently, and on December 28, 1912, the widow individually and as administratrix filed in the Chancery Court of Hardin County, Tennessee, her bill of complaint against Mrs. Augusta H. Baker, the mother, as a non-resident of Tennessee and a resident of the State of Kentucky, and also against several persons who were residents of Tennessee, setting up her appointment as administratrix, averring that her husband died intestate a resident of and domiciled in Tennessee, leaving his widow as his sole heir and distributee, and his mother and a brother his only heirs at law. The bill further set up the widow's ownership of the stock in Baker, Eccles & Company, and averred that the mother was asserting an interest in one-half of the personal estate left by the intestate, upon the theory that he died a resident of Kentucky and that under the laws of that State the mother was entitled to one-half of his surplus personal estate.

The prayer was (*inter alia*) that the mother be brought before the court in the manner provided for non-residents and be required to assert whatever claim she might have to the estate left by the deceased; and that it might be adjudged that Charles Baker died a resident of Tennessee, and that complainant as his widow was the sole distributee and entitled to all of his personal estate. Upon the filing of the bill an order of publication was made citing Augusta H. Baker as a non-resident to make defense upon a day named, and, she having failed to appear, the bill was taken for confessed against her, and eventually a decree was made "that the said Charles Baker at the time of his death was a citizen of and had his domicile at Savannah, Tennessee, and that the complainant as his widow is his sole distributee, and as such entitled to all of the personal estate of the said Charles Baker, after payment of such debts as were owed by him at the time of his death," and also that the title to the stock of Baker, Eccles & Company was in complainant, and that she was entitled to have a new certificate or certificates in her own name issued by the corporation in lieu of the certificates issued to said Charles Baker, and was entitled to receive from the corporation the amount of the accumulated profits and surplus and other amounts due from it to the decedent.

Meanwhile, the County Court of McCracken County, Kentucky, had granted letters of administration to Mrs. Augusta H. Baker, the mother, and she as such administratrix filed a petition in the McCracken Circuit Court for a settlement of the estate, making the widow and Baker, Eccles & Company defendants. The widow did not appear, and a judgment was rendered that Charles Baker died a resident of McCracken County, Kentucky, and that under the law of that State the mother and the widow were each entitled to one-half of the surplus of the personal estate. The corporation was directed to cancel the 270 shares of stock issued to decedent and reissue

one-half of these to the widow, the other half to the mother. This judgment has only historical importance, since the Kentucky Court of Appeals in the present case held it invalid as against the widow because of failure to comply with the local law respecting notice to her.

In June, 1913, the widow, individually and as administratrix of Charles Baker, began a suit in equity in the McCracken Circuit Court, which resulted in the judgment now under review. Baker, Eccles & Company was made defendant. The widow's petition, after setting up the orders and judgments of the Tennessee courts and alleging her sole ownership of the personal estate of the deceased by virtue thereof, prayed that the corporation be required to transfer to her individually the 270 shares of stock adjudged to her by the Tennessee chancery decree, and also prayed judgment for $11,429.17, the alleged indebtedness due from the corporation to her husband at the time of his death. Baker, Eccles & Company filed an answer putting in issue all the averments of the petition. Mrs. Augusta H. Baker, the mother, came into the suit by an intervening petition, in which she averred that Charles Baker died a resident of the State of Kentucky, and that under the laws of that State she was entitled to one-half of the shares of stock and of the debt sued for, invoking the McCracken Circuit Court judgment as an adjudication to that effect. She further put in issue the validity of the orders and judgments in both the Tennessee courts, averring that so far as they determined that Charles Baker died a resident of that State and that his widow was entitled to the whole of his personalty after payment of his debts, they were void, because neither of the Tennessee courts had jurisdiction to make such orders or judgments. The pleadings having been made up, evidence was taken on the issue of fact as to the domicile of Charles Baker at the time of his death. Upon this evidence, the records of the judicial proceedings above mentioned, and a show-

ing of the pertinent Tennessee law, the case was submitted for hearing, and it was adjudged that the widow's petition be dismissed. The widow appealed to the Kentucky Court of Appeals, and that court, having determined the judgment of the McCracken Circuit Court in the mother's administration suit to be invalid as against the widow, held that the judgments of both Tennessee courts were invalid as against the mother because entered without process of law as against her; and then, passing upon the question of fact as to the domicile of Charles Baker, found upon the evidence that he was domiciled in the State of Kentucky and his personalty was distributable according to the laws of that State, and affirmed the judgment, with a modification directing the lower court to enter a judgment that Charles Baker died a resident of Kentucky, that his mother and his widow were each entitled to one-half of his personal estate situate in Kentucky at the time of his death after the payment of his debts, that Baker, Eccles & Company should cancel all certificates of stock issued to Charles Baker, and reissue one-half of these to the widow and the other half to the mother, and that the lower court embody in the judgment such other matters as would, after the payment of debts, distribute equally between the widow and the mother all other personal estate situate in Kentucky of which Charles Baker died possessed. 162 Kentucky, 683. To review this judgment upon the federal question, the widow brings the case here upon writ of error.

No question is made by defendants in error but that the Tennessee courts had general jurisdiction over the subject-matter, nor that the proceedings were in conformity with the Tennessee statutes respecting practice. The sole question is whether they were entitled under the Constitution of the United States and the act of Congress to recognition in the courts of Kentucky as adjudicating adversely the mother's asserted right to share as distributee in the

personal property situate in Kentucky, or as conclusively determining the fact of the domicile of the decedent as affecting that right, in view of the failure of the Tennessee courts to acquire jurisdiction over her person or over the corporation, Baker, Eccles & Company.

It is the fundamental contention of plaintiff in error that the personal estate of an intestate decedent is a legal unit, having its *situs* at the owner's domicile, that the title to the whole of it, wherever situate, is vested in the duly qualified domiciliary administrator, and not in the distributees, and that its distribution is governed by the law of the domicile of the deceased owner. *Wilkins* v. *Ellett*, 9 Wall. 740; 108 U. S. 256. Conceding that such is the general rule of law, it is so not because of any provision of the Federal Constitution, but only because the several States, or most of them, have adopted it from the common law into their respective systems. And the question remains, How is the fact of decedent's domicile to be judicially ascertained as a step in determining what law is to govern the distribution? Obviously, if fundamental principles of justice are to be observed, the ascertainment must be according to due process of law, that is, either by a proceeding *in rem* in a court having control of the estate, or by a proceeding *in personam* after service of process upon the parties to be affected by the judgment.

We have no concern with the effect of the Tennessee judgments upon the distribution of so much of decedent's personalty as was situate within that State. The present action affects only the ownership of shares of stock in a Kentucky corporation having no *situs* outside of its own State so far as appears, and a claim of indebtedness against the same corporation. For the purpose of founding administration, it is commonly held that simple contract debts are assets at the domicile of the debtor, even where a bill of exchange or promissory note has been given as evidence. *Wyman* v. *Halstead*, 109 U. S. 654, 656. The

State of the debtor's domicile may impose a succession tax. *Blackstone* v. *Miller*, 188 U. S. 189, 205. It is equally clear that the State which has created a corporation has such control over the transfer of its shares of stock that it may administer upon the shares of a deceased owner and tax the succession. See *Matter of Bronson*, 150 N. Y. 1, 9; *Matter of Fitch*, 160 N. Y. 87, 90; *Greves* v. *Shaw*, 173 Massachusetts, 205, 208; *Kingsbury* v. *Chapin*, 196 Massachusetts, 533, 535; *Dixon* v. *Russell*, 79 N. J. L. 490, 492; *Hopper* v. *Edwards*, 88 N. J. L. 471; *People* v. *Griffith*, 245 Illinois, 532. The rule generally adopted throughout the States is that an administrator appointed in one State has no power *virtute officii* over property in another. No State need allow property of a decedent to be taken without its borders until debts due to its own citizens have been satisfied; and there is nothing in the Constitution of the United States aside from the full faith and credit clause to prevent a State from giving a like protection to its own citizens or residents who are interested in the surplus after payments of debts. All of which goes to show, what plaintiff in error in effect acknowledged when she brought her present action in a Kentucky court, that the Tennessee judgments had no effect *in rem* upon the Kentucky assets now in controversy. She invokes the aid of those judgments as judgments *in personam*. But it is now too well settled to be open to further dispute that the "full faith and credit" clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.

This rule became established long before the adoption of the Fourteenth Amendment, as the result of applying fundamental principles of justice and the rules of international law as they existed among the States at the inception of the Government. Notwithstanding that *Mills* v.

Duryee (1813), 7 Cranch, 481, 484,—where, as the opinion shows, the defendant had full notice of the suit, was arrested, and gave bail,—was by some courts interpreted as holding that irrespective of such notice the act of Congress required a judgment under all circumstances to receive the same faith and credit in every other State as it had in the State of its origin (*Field* v. *Gibbs* [1815], Pet. C. C. 155, 158; Fed. Cas. No. 4766, 9 Fed. Cas. 15, 16; *Commonwealth* v. *Green* [1822], 17 Massachusetts, 515, 546), the view soon came to prevail in the state courts that the case was not authority for so broad a proposition, and that whenever a judgment of a state court was produced as evidence, the jurisdiction of the court rendering it was open to inquiry, and if it appeared that the court had no jurisdiction the judgment was entitled to no faith or credit.[1]

Mr. Justice Story, who wrote the opinion in *Mills* v. *Duryee*, in his treatise on the Conflict of the Laws, published in 1834 (§ 609), declared that the "full faith and credit" clause and the act of Congress did not prevent an inquiry into the jurisdiction of the court to pronounce the judgment, and this view was adopted and made the basis of decision by this court in *D'Arcy* v. *Ketchum* (1850), 11 How. 165, which was followed by *Thompson* v. *Whitman*, 18 Wall. 457, 459, with a review of many cases.

During the same period, however, it occasionally was

[1] *Borden* v. *Fitch* (1818), 15 Johns. (N. Y.) 121, 143, 144; *Aldrich* v. *Kinney* (1822), 4 Conn. 380, 383; *Hall* v. *Williams* (1828), 6 Pick. (Mass.) 232, 242–245; *Miller* v. *Miller* (1829), 1 Bail. (S. C.) 242, 248; *Hall* v. *Williams* (1833), 10 Me. (1 Fairf.) 278, 287; *Wernwag* v. *Pawling* (1833), 5 Gill & Johns. (Md.) 500, 507. See also *Phelps* v. *Holker* (1788), 1 Dall. 261, 264; *Curtis* v. *Martin* (1805), 2 N. J. L. (Pen.) 399, 405, 406*e*; *Rogers* v. *Coleman* (1808), 3 Ky. (Hard.) 413, 415; *Kilburn* v. *Woodworth* (1809), 5 Johns. 37, 41; *Fenton* v. *Garlick* (1811), 8 Johns. 194, 197; *Shumway* v. *Stillman* (1825, 1831), 4 Cow. 292, 294; 6 Wend. 447, 449, 453; *Starbuck* v. *Murray* (1830), 5 Wend. 148, 156; *Bissell* v. *Briggs* (1813), 9 Mass. 462, 468; *Whittier* v. *Wendell* (1834), 7 N. H. 257.

intimated, if not held, by some of the state courts, that a personal judgment effective within the territory of the State could be rendered against a non-resident defendant who did not appear and submit himself to the jurisdiction, provided notice of the suit had been served upon him in the State of his residence, or had been published in the State within which the court was situate, pursuant to the provisions of a local statute. See *Smith* v. *Colloty*, 69 N. J. L. 365, 371. As was said by Mr. Justice Field, speaking for this court in *Pennoyer* v. *Neff*, 95 U. S. 714, 732, it is difficult to see how such a judgment could legitimately have force even within the State. But until the adoption of the Fourteenth Amendment (1868) this remained a question of state law; the effect of the "due process" clause of that Amendment being, as was held in the case just mentioned, to establish it as the law for all the States that a judgment rendered against a non-resident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the State whose court had rendered it, and to make the assertion of its invalidity a matter of federal right.

The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard. *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436; *Grannis* v. *Ordean*, 234 U. S. 385, 394. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory.

So far as the case for plaintiff in error depends upon the adjudication of domicile by the County Court of Hardin County, Tennessee, for the mere purpose of appointing

an administratrix, it is controlled by *Thormann* v. *Frame*, 176 U. S. 350, and *Overby* v. *Gordon*, 177 U. S. 214, 227. But, it is pointed out, in this case the county court went beyond the bare appointment of an administratrix, and proceeded to a settlement and distribution of the estate. Moreover, plaintiff in error relies not merely upon this judgment, but upon the decree in the chancery court of the same county, which in form specifically determined her exclusive right to the Kentucky personalty. It results, however, from what we have already said that this right could not be conclusively established by any Tennessee court as against a resident of Kentucky who was not served with process and did not appear therein, and that the Kentucky courts did not go counter to the Federal Constitution and the act of Congress in refusing to give faith and credit to the Tennessee judgments.

In many forms, and with much emphasis, the plaintiff in error presses the argument *ab inconvenienti*. Starting from the proposition that the entire personalty of an intestate decedent wherever in fact located is a unit, having its legal *situs* at the owner's domicile, and that its distribution ought to be in accordance with the law of that domicile, it is argued: How is it possible to judicially determine that domicile under the theory of the Kentucky Court of Appeals in the case of an intestate entitled to personalty in several States having different laws of distribution, and with parties claiming to be distributees residing in different jurisdictions? Assuming a lawful grant of administration in each State wherein part of the personalty is located and some of the possible distributees reside, how, it is asked, is any one of these administrators, or any one of the claimants of a share in the whole estate, to have the place of the intestate's domicile settled authoritatively and the lawful distributees ascertained? The answer is clear: Unless all possible distributees can be brought within the jurisdiction of a single court having authority

to pass upon the subject-matter, either by service of process or by their voluntary appearance, it must in many cases be impossible to have a single controlling decision upon the question. In some cases, the ideal distribution of the entire personal estate as a unit may thus be interfered with; but whatever inconvenience may result is a necessary incident of the operation of the fundamental rule that a court of justice may not determine the personal rights of parties without giving them an opportunity to be heard.

Judgment affirmed.

NEWARK NATURAL GAS & FUEL COMPANY *v.* CITY OF NEWARK, OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 232. Argued December 4, 1916.—Decided January 8, 1917.

A city ordinance fixing the maximum rate chargeable by a gas company will not be adjudged confiscatory if at the time of the judicial inquiry the net profits derivable under the ordinance will give a fair return upon the then value of the company's property.

Plaintiff, a gas distributing company, whose rates were fixed by an ordinance, purchased its gas under a contract, which measured the vendor's compensation by a percentage of plaintiff's gross receipts. The contract antedated the ordinance and had several years to run when suit was commenced. Plaintiff contended that under the ordinance rate the contract was no longer profitable to its vendor. *Held*, that the effect of the ordinance upon the constitutional rights of the vendor was immaterial to plaintiff's case.

The contract expired before the evidence was closed. *Held*, that, for the purposes of this case, plaintiff not having shown what it paid afterwards, the contract might be assumed to measure plaintiff's probable expense for gas during the life of the ordinance.

92 Ohio St. 393, affirmed.

THE case is stated in the opinion.

Mr. James R. Fitzgibbon, with whom *Mr. Eugene Mackey, Mr. S. M. Douglass* and *Mr. Charles Montgomery* were on the brief, for plaintiff in error.

Mr. Frank A. Bolton, with whom *Mr. Edward Kibler* and *Mr. Ralph Norpell* were on the briefs, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The question upon which our jurisdiction is here invoked is whether an ordinance of the City of Newark, Ohio, passed March 6, 1911, fixing the maximum price that plaintiff in error might charge to consumers of natural gas in that city for a period of five years at 20 cents per thousand cubic feet, with 10% discount for prompt payment, a rate described as "18 cents net," is confiscatory, and therefore in violation of the "due process" clause of the Fourteenth Amendment. Plaintiff in error operates under a franchise granted by a city ordinance passed February 21, 1898, for a term of twenty-five years, which permitted a rate of 25 cents per thousand for a period of ten years from its passage, but within that period the company voluntarily introduced a net rate of 18 cents and maintained it for some years prior to the adoption of the ordinance of 1911. The company refused to accept the provisions of the latter ordinance and notified its customers that it would discontinue service unless the rate of 25 cents was paid. Thereupon the city filed a petition in the Court of Common Pleas of Licking County praying a mandatory injunction. The company answered that the ordinance provided no just compensation for the use of its property and therefore deprived it of its constitutional rights. Voluminous evidence was taken upon

this issue, and the court found the defense to be unfounded in fact, and made a decree in favor of the city, but without prejudice to the right of the company to apply for a modification "if at any time it should appear that said rate of 18¢ net does not render an adequate return to said defendant Company." An appeal was taken to the Court of Appeals and there heard upon the evidence taken in the Court of Common Pleas and additional evidence, and the same decree was entered as in the Court of Common Pleas. The Supreme Court of Ohio affirmed the decree. 92 Ohio St. 393.

The opinions of the state courts show that they gave careful consideration to the questions of the value of the property of plaintiff in error at the time of the inquiry, the total amount of net profits that could be earned under the rate fixed, and whether this would be sufficient to provide a fair return on the value of the property. The concurring judgments were based upon principles thoroughly established by repeated decisions of this court, *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 597, 598; *San Diego Land Company* v. *National City*, 174 U. S. 739, 754; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 48; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 163; and the finding that there was no confiscation is amply supported by the evidence. The reservation of the right to apply thereafter for a modification was in accord with the action of this court in the *Knoxville* and *Willcox Cases*, 212 U. S. p. 19, p. 55.

A distinction is sought to be based upon the fact that two companies are necessarily affected by the rate, a producing and a distributing company; it being contended that the state courts have ignored the cost of production. It appears that after the granting of the franchise of 1898 plaintiff in error, which theretofore had been both a producer and a distributor of gas, sold all of its property to

the stockholders of the Logan Natural Gas & Fuel Company, and thereafter confined its activities to distribution, the Logan Company being in control of production and transportation; and that in 1904 the Logan Company entered into a contract with plaintiff in error to furnish the gas needed to supply the city for a term of years, on the basis of a percentage of the aggregate readings of the consumers' meters, in the proportion of 70% of the gross receipts for the Logan Company and 30% for plaintiff in error. At the time the suit was commenced the contract had two or three years to run, while the limiting ordinance was to continue for five years. There is no contention that plaintiff in error could not operate profitably under the ordinance of 1911 so long as the contract remained in force; but it is said that because of changed conditions including the partial exhaustion of the gas producing field the contract was no longer profitable to the Logan Company under the rate permitted by the ordinance of 1911, the cost of production and transportation of natural gas alone being at that time, as is asserted, as much as the entire amount of the net rate of 18 cents allowed by the ordinance. But plaintiff in error cannot be heard here to assert the constitutional rights of the Logan Company (*Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544), and the pertinent question is what plaintiff in error would probably have to pay for gas during the life of the ordinance. The contract measured this so long as it continued in effect. And, although it expired some time before the closing of the evidence in the Court of Appeals, as the Supreme Court pointed out, no evidence was offered to show the rate paid by the Newark Company to the Logan Company after its expiration. The ordinance specified a period of five years, but by the decree this was made subject to the provision giving a right to plaintiff in error to apply for relief if it should appear that the 18 cent rate did not render an adequate return.

Plaintiff in error has failed to show that the ordinance has the effect of depriving it of property without due process of law within the meaning of the Fourteenth Amendment, and the judgment under review is

Affirmed.

LOUISVILLE BRIDGE COMPANY *v.* UNITED STATES.

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

No. 540. Argued December 8, 11, 1916.—Decided January 8, 1917.

The Acts of July 14, 1862, c. 167, 12 Stat. 569, and February 17, 1865, c. 38, 13 Stat. 431, under which appellant's bridge was built across the Ohio River, were not intended and did not operate to confer an irrepealable franchise to maintain the bridge as authorized and originally constructed, nor did they create a vested right demanding compensation under the Fifth Amendment when changes were subsequently required by Congress in the interest of navigation. *United States* v. *Parkersburg Branch R. Co.*, 134 Fed. Rep. 969; 143 Fed. Rep. 224, overruled. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, and *United States* v. *Baltimore & Ohio R. R. Co.*, 229 U. S. 244, distinguished.

When indefeasible private rights are sought to be derived from regulatory provisions made in the exercise of the power to regulate commerce, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised.

In construing the acts above cited, the court judicially notices their coincidence in time with the Civil War, the lack of bridges over the Ohio at Cincinnati, Louisville, and points west, the natural difficulties of crossing the stream, the urgent need of a bridge to transfer troops and supplies south, and the fact that financial disturbances made it difficult to secure capital for large undertakings.

The absence of an express reservation of the right to alter or repeal has not the same significance in acts of Congress as in state legislation, and in the acts above cited is without conclusive effect.

Acts like those here in question, being passed in the regulation of commerce for the guidance of future conduct, carry the suggestion of future changes; and, in their construction, it should be presumed that Congress intended to preserve its power to make future adjustments, in pace with commercial developments—assuming, but not deciding, that such power could be shackled or surrendered.

The Act of March 3, 1899, c. 425, 30 Stat. 1121, 1153, so repealed or modified the Acts of 1862 and 1865 as to include appellant's bridge within its operation.

The authority of the Secretary of War under the Act of 1899, to require changes, involves no unlawful delegation of legislative or judicial power.

233 Fed. Rep. 270, affirmed.

THE case is stated in the opinion.

Mr. William W. Crawford and *Mr. Lawrence Maxwell*, with whom *Mr. Charles H. Gibson* was on the brief, for appellant:

The power of Congress to regulate bridges is derived solely from the commerce clause, *Bridge Company* v. *United States*, 105 U. S. 475, 489; it is subject to the limitation of the Fifth Amendment that private property shall not be taken without compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 366.

The bridge in question was constructed under an irrevocable franchise. The Acts of 1862 and 1865 contain no reservation of the right to alter or amend, nor any suggestion that the property of the bridge builders is beyond the protection of the Fifth Amendment. They declare that the bridge shall be a lawful structure and a post route of the United States, and the 1862 Act provides that boats shall not "interfere with the elevation, construction or use of any of the bridges erected or legalized" thereunder. These facts clearly indicate that Congress

fully appreciated the permanency of the grant. In the absence of a reservation of the right to alter or amend, the grant of a corporate franchise is beyond the power of the State to impair. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 65. The construction of the Ohio Falls Bridge in accordance with the terms of the Acts of 1862 and 1865 constituted, therefore, an irrevocable contract between appellant and the United States, and vested in the former a property right of which it could not be deprived without payment of just compensation.

The claim made in the opinion of the court below that one Congress must transmit unfettered all constitutional powers to a succeeding Congress is without foundation. Congress may, if it sees fit, wholly destroy appellant's bridge under the power of eminent domain if the interests of navigation so require, but compensation must be paid.

Compliance with the order of the Secretary of War involves the destruction of appellant's bridge and its replacement with other property at an increased cost of over $400,000, and constitutes a "taking" within the purview of the Fifth Amendment. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177; *United States* v. *Lynah*, 188 U. S. 445, 468, 470; *Missouri Pacific R. R. Co.* v. *Nebraska*, 217 U. S. 205; *United States* v. *Welsh*, 217 U. S. 333; *Peabody* v. *United States*, 231 U. S. 531. See also *Monongahela Navigation Co.* v. *United States*, 148 U. S. 377.

The basis of the decision in *Bridge Company* v. *United States*, *supra*, was that if the exercise of the reserved power incidentally destroys property, it is a risk which the grantees assume in accepting the grant. Both that case and *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, involved structures built under acts of Congress which expressly reserved the power to alter or amend, and are not in point. Nor are *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Monongahela Bridge Co.* v. *United*

States, 216 U. S. 177, controlling here. Those cases concerned bridges built under state authority and without congressional sanction, and if, as stated in *Bridge Company* v. *United States*, the builders of a bridge "who act on state authority alone necessarily assume all the risk of legitimate congressional interference," it is obvious that when Congress has granted a right to construct bridges that are "lawful structures," without reserving the right to withdraw its assent thereafter, it is estopped to do so.

The Act of 1899, being a general act, is not to be construed as affecting appellant's special rights acquired under the Acts of 1862 and 1865. See *Washington* v. *Miller*, 235 U. S. 422, 428; *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483; *Southwestern Coal Co.* v. *McBride*, 185 U. S. 499. It does not, in terms, repeal the earlier acts.

Congress, by the Acts of 1862 and 1865, made a legislative finding that the bridge, as built, was not an "unreasonable" or "unlawful," but a "lawful" obstruction, if an obstruction at all. *Wheeling Bridge Case*, 18 How. 421, 432. The record shows that the bridge is really less of an obstruction to navigation at the falls than when it was built. The physical situation in 1914, then, not being materially different from what it was at the time of the passage of the Acts of 1862 and 1865, there is no justification for a reversal of the legislative decree. To apply § 18 of the 1899 Act to the Ohio Falls Bridge is to effect a reversal by the Secretary of the judgment of Congress on the fact, found by it in 1862 and 1865 on exactly the same evidence. If the Secretary's finding is sufficient to destroy the bridge, it is not the ascertainment of a fact which can be legally delegated to him, but the reversal of the legislative discretion vested in Congress alone.

The act applies to "any railroad or other bridge now constructed, or which may hereafter be constructed." In 1899 there were two classes of bridges to which the word

"now" could properly apply without affecting vested rights: (1) bridges theretofore built under state authority only, and (2) bridges theretofore built under congressional authority with a power of amendment or repeal reserved.

The power of the Secretary to order alterations in bridges constructed under the Act of 1862, without compensation, was denied in 22 Ops. A. G. 343, in which § 4 of the Act of 1890, similar to § 18 of the Act of 1899, was held to apply only to bridges built under acts of Congress in which the right to require changes was expressly reserved. With knowledge of this opinion, Congress did not see fit to change the wording of the authority given to the Secretary in § 18 of the Act of 1899, and presumably did not intend that the section should apply to bridges built under the Act of 1862. Not content with the opinion of the Attorney General, the government sought to enjoin the reconstruction of the bridge involved, but the bill was dismissed. *United States* v. *Baltimore & Ohio R. R. Co.*, unreported decision, referred to in 134 Fed. Rep. at p. 973. In 25 Ops. A. G. 194, § 18 of the 1899 Act was considered in connection with the Ohio Falls Bridge, and the section held inapplicable. It was also held inapplicable to bridges constructed under the 1862 Act in *United States* v. *Parkersburg Branch R. Co.*, 134 Fed. Rep. 969; affirmed in 143 Fed. Rep. 224, and other unreported cases referred to in 134 Fed. Rep. at p. 973, and *United States* v. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, (Southern District of Ohio), decided February 18, 1911, and the right to direct changes without compensation denied and the franchise rights of the company sustained.

United States v. *Baltimore & Ohio R. R. Co.*, 229 U. S. 244, in essence, supports the proposition that the Act of 1899 through the power of the Secretary under § 18 was not intended to apply to the "lawful structure" created under the Act of 1862. For though rested on the doctrine

of *res judicata*, the decision necessarily implied that the action of the Secretary taken under the 1899 Act after the former judgment was not tantamount to exercise of the discretion of Congress to make the lawful structure unlawful.

Mr. Assistant Attorney General Wallace for the United States.

Mr. Justice Pitney delivered the opinion of the court.

Appellant is the owner of a bridge across the Ohio River at Louisville, Kentucky, known as the "Ohio Falls Bridge," which was built under an act of Congress approved February 17, 1865, c. 38, 13 Stat. 431, supplementary to an act approved July 14, 1862, c. 167, 12 Stat. 569. The 1862 Act as amended allowed the bridge to be built under one of several plans detailed, and with a prescribed minimum width for spans and a minimum clearance height above the water. This act, in its fifth section, declared "That any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post-routes, . . . and the officers and crews of all vessels, boats, or rafts navigating the said Ohio River are required to regulate the use of the said vessels and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provisions of this act." The first section of the 1865 Act contained a proviso "that said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River;" the second section declared "that the bridge erected under the provisions of this act shall be a lawful structure, and shall be recognized and known as a post-route."

The Ohio Falls Bridge was built in all respects in ac-

cordance with the requirements of these acts, except that, instead of the minimum channel span of 300 feet prescribed, the builders made spans of 380 feet and 352¼ feet, respectively, and exceeded the clearance height of the highest of the authorized plans, thus expending $150,000 more than was necessary to comply with the letter of the law. The bridge was completed in the year 1870, and since then has been continuously in use as a railroad bridge, furnishing one of the principal thoroughfares across the Ohio River from north to south. Its superstructure now requires renewal, but this can be done without obstructing navigation any further than the bridge does at present and has done ever since its construction.

In the year 1914 the Secretary of War, proceeding under § 18 of an act of Congress approved March 3, 1899, c. 425, 30 Stat. 1121, 1153, gave notice to appellant that he had good reason to believe the bridge was an obstruction to navigation because of insufficient horizontal clearance of the channel span crossing the main navigable channel of the river and insufficient width of opening in the existing swing-span crossing the Louisville and Portland Canal, and appointed a time and place for a hearing upon this question. Appellant introduced no evidence at the hearing, but filed a protest against any action by the Secretary under the Act of 1899, on the ground that this act did not affect bridges constructed under the Acts of 1862 and 1865, or that, if it attempted to do so, it was unconstitutional. After the hearing the Secretary made an order notifying appellant to alter the bridge within three years, so as to provide an enlarged horizontal opening for the main navigable channel, and to change the swing-span across the canal to a lift-span having a prescribed horizontal clearance, and a prescribed vertical clearance when open. A further hearing and some correspondence having led to no result, appellant notified the Secretary of War in writing that it insisted on the right

to renew its superstructure on the existing masonry without changing the length of any of the existing spans, "so that when completed, it will not interfere with navigation any more than it does now," and that it intended to commence the work of renewal at once. Shortly thereafter the Attorney General filed a bill for an injunction in the District Court; appellant answered setting up its claims as above indicated; and the case was brought to a hearing upon stipulated facts presenting, as the sole question to be determined, the legality of the order of the Secretary of War as applied to the bridge in question. A final decree was made restraining appellant from reconstructing the superstructure of the bridge in a manner inconsistent with the provisions of the Secretary's order (233 Fed. Rep. 270), and the case comes here by direct appeal as permitted by § 18 of the 1899 Act.

Concisely stated, the position of appellant is that the Ohio Falls Bridge was constructed under an irrevocable franchise, and became upon its completion a lawful structure and the private property of appellant; that Congress had no power to require its removal except in the exercise of the federal authority to regulate commerce, and subject to the provision of the Fifth Amendment that private property shall not be taken for public use without just compensation; and that the Act of 1899, being a general act, does not by fair construction operate to repeal the special franchise conferred by the Acts of 1862 and 1865, and if it does it is unconstitutional because it fails to make provision for compensation.

The first and fundamental contention is rested in part upon facts of which we may take judicial notice, that when the Acts of 1862 and 1865 were passed the Civil War was in progress, and there was urgent need of a bridge over the Ohio River west of the Big Sandy (the eastern boundary of Kentucky) to provide for the transfer of troops and supplies from the north to the south; that there

were no bridges crossing the Ohio at either of the cities of Cincinnati or Louisville, or at any point west of them, and that the movement of troops and supplies was thereby greatly hampered; that the river at Louisville is approximately a mile wide, the current quite rapid on account of the Falls, and in winter frequently filled with ice, so as to render a bridge a pressing necessity; and that the war had disturbed somewhat the finances of the country, and capital for large undertakings was difficult to secure. But the argument lays especial stress upon the declaration that the bridge in question should be a lawful structure and recognized and known as a post route, and the fact that neither the original nor the supplemental acts contained any reservation of the right to alter, or amend, or revoke the franchise.

These are no doubt weighty considerations, and raise a grave question, but they do not necessarily dispose of it. Clearly, the acts were passed under the power of Congress to regulate commerce. That power is a very great power, and in its nature continuing, not being exhausted by any particular exercise. We need not go so far as to say that Congress could not in any case by contract or estoppel prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation. But when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised. As this court, speaking through Mr. Chief Justice Waite, declared in *Bridge Company* v. *United States*, 105 U. S. 470, 480: "Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and inter-state com-

merce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the government."

The absence of an express reservation of the right to alter or amend is not conclusive. As is well understood, reservations of this kind have a peculiar fitness in state legislation, being traceable historically to the decision of this court in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, that a corporate charter is a contract within the meaning of that clause of Article I, § 10, of the Constitution, which declares that no State shall pass any law impairing the obligation of contracts, so that a state law altering such a charter in a material respect without the consent of the corporation is unconstitutional and void; and the suggestion in the concurring opinion of Mr. Justice Story (p. 675) that the reservation of a power to alter or amend the charter would leave the State free to enact subsequent amendatory legislation. *Miller* v. *State*, 15 Wall. 478, 494; *Greenwood* v. *Freight Company*, 105 U. S. 13, 20; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 352. Congress is not prevented by the Constitution from passing laws that impair the obligation of contracts, and in its enactments the presence or absence of such a reservation has not the same peculiar significance that it has in state legislation. It is no doubt a circumstance, but not by any means conclusive.

At the time the Acts of 1862 and 1865 were passed it was not customary for Congress to include in legislation of this character an express reservation of a power of future control or repeal. In an act of August 31, 1852, §§ 6 and 7, c. 111, 10 Stat. 110, 112, certain bridges already in existence across the Ohio River were declared to be lawful

structures. The next acts of a similar character appear to have been those now under consideration. Contemporaneously with the second of these, an act was passed (c. 39, 13 Stat. 431) declaring a bridge then under construction across the Ohio between Cincinnati and Covington to be a lawful structure. In neither of these was there any express reservation of future control. In succeeding years [1] numerous bridge acts were passed containing in one form or another a reservation of the power to alter or amend the act or to withdraw the assent given. These provisions may well have been inserted from abundant caution, and because provisions of like character had become familiar in state legislation. But obviously they throw no direct light upon the intent of Congress in preceding legislation.

While scrutinizing the Acts of 1862 and 1865 in the effort to determine the legislative intent as therein expressed, we should primarily consider the fact that they were exertions of a power to regulate commerce. Such a regulation, designed as it is to furnish a guiding rule for future conduct, carries with it the suggestion that it may not always remain unchanged. And since our interstate and foreign commerce is a thing that grows with the growth of the people, and its instrumentalities change with the development and progress of the country, it was not natural that Congress, in enacting a regulation of such commerce, should intend to put shackles upon its own power in respect of future regulation. The act declared that the bridge when erected should be "a lawful structure"; but there are no words of perpetuity, nor any express covenant against a change in the law. There is a

[1] Acts of July 25, 1866, § 13, c. 246, 14 Stat. 244; February 27, 1867, c. 98, 14 Stat. 412; February 21, 1868, c. 10, 15 Stat. 37; July 6, 1868, c. 134, 15 Stat. 82; July 20, 1868, c. 179, 15 Stat. 121; February 19, 1869, c. 37, 15 Stat. 272; March 3, 1869, c. 139, 15 Stat. 336; Joint Resolution of March 3, 1869, 15 Stat. 347.

proviso in the 1865 Act that the bridge and draws shall be so constructed as not to interrupt the navigation of the river; an evident modification of that clause of the 1862 Act which required vessels to be so regulated as not to interfere with the bridge. It is possible to construe the proviso as referring solely to the time of original construction, and as satisfied if the bridge and draws did not then obstruct navigation; but this would disregard the fundamental rule that requires strict construction of such grants as against the private right. In the light of that rule, the true meaning rather is that the bridge and draws should be so constructed as not at any time to interrupt navigation. See *West Chicago Street R. R. Co.* v. *Chicago*, 201 U. S. 506, 515, 521. Indeed, the proviso seems to have been so interpreted by the recipients of the grant, for, as appears from the stipulation, the original builders of the bridge did not limit themselves to giving only what they were compelled by law to give, but at large expense to themselves exceeded the heights and widths that the act required.

It is true that Congress must have contemplated that a large investment of private capital would be necessary, and that the bridge when once constructed could not be abandoned or materially changed without a total or partial loss of value. This is a very grave consideration, and we have not at all overlooked it; but we cannot deem it controlling of the question presented. It may be assumed that the parties foresaw, what experience since has demonstrated, that it would be many years before changing conditions of navigation would render the bridge out of date, and that the investors were satisfied with the prospect of the profit to be gained from the use of the bridge in the meantime.

A circumstance perhaps bearing in the same direction is that appellant is a Kentucky corporation, chartered by an act of the legislature approved March 10, 1856 (Acts

1855-6, vol. 2, p. 426), which contains a proviso, "that said bridge shall be constructed so as not to obstruct navigation, further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal."

Reviewing the entire question, bearing in mind the nature of the subject-matter, the circumstances of the period of the enactments, and the language employed by Congress, and construing this strictly against the grantee as the familiar rule requires, we are constrained to hold that the Acts of 1862 and 1865 conferred upon appellant no irrepealable franchise to maintain its bridge precisely as it was originally constructed, and created no vested right entitling appellant to compensation under the Fifth Amendment in case Congress should thereafter, in the exercise of its power to regulate commerce, require changes to be made in the interest of navigation.

This being so, the authority of Congress to compel changes was precisely the same as if the bridge had been constructed under state legislation without license from Congress, as in *Union Bridge Co.* v. *United States*, 204 U. S. 364, 388, 400; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 193; or had been constructed under congressional consent or authorization coupled with an express reservation of the right of revocation or amendment, as in *Bridge Company* v. *United States*, 105 U. S. 470, 481; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 207. We are aware that a different result was reached by the Circuit Court and Circuit Court of Appeals in *United States* v. *Parkersburg Branch R. Co.*, 134 Fed. Rep. 969; 143 Fed. Rep. 224; and by the Circuit Court in some previous cases referred to in 134 Fed. Rep. 973. But, upon mature consideration, we have concluded that these decisions must be overruled.

Appellant cites *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, but it is plainly distinguishable.

There the Navigation Company under a state charter had constructed locks and dams in the Monongahela River, to the great improvement of its navigation, and by a supplement to its charter had been required to commence the construction of lock and dam No. 7 in such manner and on such plan as would extend the navigation from its then present terminus to the state line. This work was to complete the company's improvements in the State of Pennsylvania. Thereafter Congress, in 1881, appropriated $25,000 for improving the Monongahela River in West Virginia and Pennsylvania, with the proviso that the money should not be expended until the Navigation Company had undertaken in good faith the building of lock and dam No. 7 and had given assurance to the Secretary of War of its ability and purpose to complete the same. The company gave satisfactory assurance to the Secretary, commenced the work in 1882, and completed it in 1884. By Act of August 11, 1888, c. 860, 25 Stat. 400, 411, Congress authorized the Secretary of War to purchase this lock and dam from the company, and in the event of his inability to make a voluntary purchase within a specified limit of expense then to take proceedings for their condemnation, with a proviso that in estimating the sum to be paid by the United States the franchise of the corporation to collect tolls should not be considered or estimated. It appeared that the tolls received by the company for the use of its works including lock and dam No. 7 averaged $240,000 per annum, that the money value of the entire works and franchise was not less than $4,000,000, and that the actual toll receipts of lock and dam No. 7 were in excess of $2,800 per annum, and would probably increase in the near future. This court held the proviso excluding the franchise to collect tolls from consideration in the condemnation proceedings to be inconsistent with the Fifth Amendment (p. 336). But it will be observed that this was not a case of removing a struc-

ture from the river on the ground that it interfered with navigation, but a taking over of a structure and employing it in the public use as an instrumentality of navigation. In short, there was a clear taking of the property of the company for public use as property, and an attempt at the same time to exclude from consideration an essential element of its value when ascertaining the compensation to be paid. The case has no bearing upon the one at bar.

Reference is made also to our recent decision in *United States* v. *Baltimore & Ohio R. R. Co.*, 229 U. S. 244; and although this court merely affirmed the Circuit Court on the ground that the matter was *res judicata*, it is argued that we necessarily decided the questions raised in the present case in order to come to the conclusion that the question was one of *res judicata*. In view of the very plain language employed in the opinion (pp. 251, 254), the argument is baseless.

There remains only the contention that the Act of 1899, being a general act, does not by fair construction operate to repeal or modify the special rights conferred upon appellant by the Acts of 1862 and 1865. We deem this point likewise untenable. In terms the act applies without qualification to "any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States." It is argued that at the time of its passage there were two classes of bridges to which the term "now constructed" would properly apply without affecting any vested right, namely (1) bridges theretofore built under state authority only, and (2) bridges theretofore built under congressional authority with a power of amendment or repeal expressly reserved; and that full effect can be given to the language of § 18 without holding that it is a repeal by implication of the declaration of Congress in the Act of 1865 that the Ohio Falls Bridge as constructed was a lawful structure and a post route of the United States. But the 1899 Act

is not only unqualified in its terms, but from the nature of the subject-matter there is every reason for giving it a universal application. As we have seen, appellant had no indefeasible right to maintain its bridge as originally constructed, and the absence of an express right of repeal from the Acts of 1862 and 1865 has as little bearing upon the question of the practical justice or injustice of requiring an alteration in the bridge as it has upon the question of constitutional right. And of course, from the point of view of the requirements of navigation, the particular phraseology of the acts by which the construction of the different bridges was authorized is altogether insignificant.

It may be conceded that the declaration of Congress in the Act of 1865 that the bridge was a lawful structure was conclusive upon the question until Congress passed some inconsistent enactment. As was said by Mr. Justice Nelson, speaking for the court in the *Wheeling Bridge Case*, 18 How. at p. 430, although it may have been an obstruction in fact, it was not such in the contemplation of the law. But § 18 of the 1899 Act wrought a change in the law. (There were similar provisions in an act of August 11, 1888, § 9, c. 860, 25 Stat. 400, 424; and in an act of September 19, 1890, § 4, c. 907, 26 Stat. 426, 453; but we pass them by.) Congress thereby declared that whenever the Secretary of War should find any bridge theretofore or thereafter constructed over any of the navigable waterways of the United States to be an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, it should be the duty of the Secretary, after hearing the parties concerned, to take action looking to the removal or alteration of the bridge, so as to render navigation through or under it reasonably free, easy, and unobstructed. As this court repeatedly has held, this is not an unconstitutional delegation of legislative or judicial power to the Secretary. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 385;

Monongahela Bridge Co. v. *United States*, 216 U. S. 177, 192; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 205. The statute itself prescribed the general rule applicable to all navigable waters, and merely charged the Secretary of War with the duty of ascertaining in each case, upon notice to the parties concerned, whether the particular bridge came within the general rule. Of course the Secretary's finding must be based upon the conditions as they exist at the time he acts. But the law imposing this duty upon him speaks from the time of its enactment. And there is no real inconsistency between a declaration by Congress in 1865 that a certain bridge was a lawful structure and not an improper impediment to navigation, and a contrary finding by the Secretary of War in the year 1914.

Since we are constrained to hold that none of appellant's contentions is well founded, it results that the decree under review must be

Affirmed.

KNAUTH, NACHOD & KUHNE *v.* LATHAM & COMPANY ET AL.

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

JAFFE ET AL., SURVIVING MEMBERS OF THE FIRM OF KNAUTH, NACHOD & KUHNE, *v.* LOVELL, AS CUSTODIAN, &c., AND AS TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, ET AL.

JAFFE ET AL., SURVIVING MEMBERS OF THE FIRM OF KNAUTH, NACHOD & KUHNE, *v.* WESTPHALEN ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

Nos. 98, 259, 260. Submitted November 13, 1916.—Decided January 8, 1917.

A bill seeking to impress a trust upon personal property belonging to a bankrupt's estate, upon the theory that it was procured by means of moneys of which the plaintiff was defrauded by the bankrupt, must trace such moneys by adequate averments into the specific property sought to be affected.

Claimants seeking priority of payment from a bankrupt's estate upon the ground that moneys obtained from them fraudulently by the bankrupt went into his business and swelled the estate, must go to the bankruptcy court in which the estate is being administered; such claims are not adjudicable in suits for the recovery of the bankrupt's property in other jurisdictions.

219 Fed. Rep. 721, affirmed.

THE cases are stated in the opinion.

Mr. Julien T. Davies, Mr. Thomas M. Stevens, Mr. W. H. Watson and *Mr. George T. Hogg* for petitioners and appellants.

Mr. Walker B. Spencer and *Mr. Charles Payne Fenner* for Latham & Company *et al.*

Mr. Augustus Benners for Lovell.

Mr. Henry P. Dart, Mr. E. C. Maxwell and *Mr. Henry P. Dart, Jr.*, for appellees in No. 260.

Mr. Justice McReynolds delivered the opinion of the court.

Number 98.

Knight, Yancey and Company were duly adjudged bankrupts in the District Court, Northern District of Alabama, April 21, 1910. A few days later, in conjunction with a firm creditor, the receivers brought suit in the United States Circuit Court, Fifth Circuit, Southern District of Alabama, against Latham and Company, a French partnership, Frederick Leyland Steamship Company, Limited, Louisville & Nashville Railroad Company and others, seeking to recover 4200 bales of cotton about to be exported from Mobile, upon the ground that while insolvent the bankrupts had transferred it to Latham and Company in payment of prior indebtedness and with intent to prefer them. After being taken into possession by the United States Marshal, by order of court, the cotton was released, May 14, 1910, to Latham and Company, who executed a bond conditioned, "Now, therefore, if the obligors herein shall have forthcoming and deliver within sixty days from date of any final decree of this court said cotton to the proper officer of the court, or shall pay and satisfy such decree as may be rendered in the premises, then this obligation shall be null and void, otherwise to

remain in full force and effect." Later the trustee in bankruptcy was substituted as complainant.

July 1, 1910, Knauth, Nachod and Kuhne filed in the cause a so-called cross bill, subsequently amended, which on motion was dismissed both for want of equity upon its face and because the court lacked jurisdiction to entertain it. The Circuit Court of Appeals affirmed this action.

The amended cross bill is a mass of prolix and vagrant statements and allegations from which it is difficult to spell out any very definite theory. Apparently because $98,000—approximate market value of 1300 bales of cotton—had been fraudulently obtained from Knauth, Nachod and Kuhne by the bankrupts and used by them in their business, the former sought to impress a trust upon what the latter thereafter acquired, including the 4200 bales of cotton found at Mobile.

The allegations of the bill are wholly inadequate to trace the funds into any specific cotton, *Peters* v. *Bain*, 133 U. S. 670, 693; and the cross bill must be regarded as an attempt to secure from the estate priority of payment on account of money fraudulently obtained by the bankrupts and put into their business. Manifestly such a proceeding could not be entertained in the Southern District of Alabama. The estate was being administered in another court. *Mueller* v. *Nugent*, 184 U. S. 8; *Jones* v. *Springer*, 226 U. S. 153; *Acme Harvester Company* v. *Beekman Lumber Company*, 222 U. S. 300; *Lazarus* v. *Prentice*, 234 U. S. 267; *Jaffe* v. *Weld*, 208 N. Y. 593.

The judgment of the Circuit Court of Appeals is

Affirmed.

NUMBER 259.

The record contains the amended bill of complaint; motions to dismiss with objections thereto; final judgment of dismissal for want of jurisdiction; assignment of errors, etc.

Shortly after Knight, Yancey and Company were adjudged bankrupts, upon application of the receivers (May, 1910), the United States District Court, Northern District of Florida, enjoined the Louisville and Nashville Railroad from removing or disposing of 3600 bales of cotton in its possession at Pensacola; and in June thereafter the duly selected trustee instituted suit seeking to recover possession of the cotton upon the ground that it had been transferred with intent to prefer. By the court's direction 2635 bales were thereafter delivered to Latham and Company who claimed them as owners, a forthcoming bond having been given. The remainder—965 bales—was sold and proceeds deposited in the First National Bank of Pensacola to await final orders.

Subsequently appellants instituted an original proceeding claiming that the bankrupts had fraudulently obtained from them $98,000 and invested it in this or other cotton or otherwise, and that they were entitled to impress a trust upon the avails of such funds.

The involved and erratic allegations are wholly inadequate to show with sufficient definiteness that the funds were invested in the cotton at Pensacola; and the bill must be considered as an attempt to secure priority of payment out of the bankrupts' estate upon the theory that it was increased by appellants' money. There was no jurisdiction to entertain such a proceeding in the District Court in Florida; and the judgment below is accordingly

Affirmed.

NUMBER 260.

The record also consists of the amended bill, filed April 20, 1914; motions to dismiss with objections thereto; final judgment of dismissal for want of jurisdiction; assignments of error, etc.

At the instance of the receivers of Knight, Yancey and

Company, May, 1910, the Louisville and Nashville Railroad was enjoined by the United States District Court, Northern District of Florida, from removing or disposing of 1950 bales of cotton then in its possession at Pensacola, Florida, and claimed by Westphalen and Company. Afterwards that firm instituted an original suit to recover, pending which, under agreement, the cotton was sold and the proceeds deposited in two banks at Pensacola subject to final judgment. The proceedings were substantially the same as in Number 259 and like action was taken by the court. The judgment below is

Affirmed.

FURNESS, WITHY & COMPANY, LIMITED, *v.* YANG-TSZE INSURANCE ASSOCIATION, LIMITED, ET AL.

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

No. 106. Argued December 18, 19, 1916.—Decided January 8, 1917.

Petitions for writs of certiorari are at the risk of the parties making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the writ.

Such petitions should be carefully prepared, contain appropriate references to the record, and present with studied accuracy, brevity and clearness whatever is essential to ready and adequate understanding of points requiring the court's attention.

When the real situation is not set forth by the petition, a duty rests on opposing counsel to reveal it in their reply.

Writ of certiorari to review 215 Fed. Rep. 859, dismissed.

THE case is stated in the opinion.

Mr. Norman B. Beecher, with whom *Mr. Charles C. Burlingham* and *Mr. Roscoe H. Hupper* were on the briefs, for petitioner.

Mr. D. Roger Englar and *Mr. J. Parker Kirlin*, with whom *Mr. Lawrence Kneeland*, *Mr. John M. Woolsey* and *Mr. William H. McGrann* were on the briefs, for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The writ of certiorari was improvidently granted and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation to the situation had then been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the writ. *United States* v. *Rimer*, 220 U. S. 547; *State* v. *Water Commissioners*, 1 Vroom (30 N. J. L.), 247.

In February, 1912, the Yang-Tsze Insurance Association, Limited, filed its libel in the District Court at New York against Furness, Withy and Company, Limited, owner of the Pomaron, to recover damages consequent upon the sinking of the Alleghany. A judgment for libellant rendered June 13, 1913, was affirmed by the Circuit Court of Appeals in June, 1914; and on October 5, 1914, the Pomaron's owner instituted a proceeding in the same District Court for limitation of liability and the steps customary in such causes were regularly taken. April 12, 1915, the petitioner presented an original application here for a writ of certiorari to bring up the judgment of the Circuit Court of Appeals in the damage cause and this was denied April 19th.

It now appears that, on April 22, 1915, a final decree containing the following recitals was entered by the District Court in the limitation proceedings—"Whereas the petitioner and all the claimants herein have compromised and settled the issues between them, and in consideration of the said compromise and settlement it has been agreed between the petitioner and all the claimants:" (The terms follow.) "Whereas in consideration of the said compromise and settlement, the several claimants herein by agreement have fixed and adjusted the amounts of their several losses consequent on the said collision at the following sums, to-wit:" (The amounts are specified.) "Now on the subjoined admissions of correctness of the foregoing recitals and the subjoined consents and waivers of settlement in respect of the entry of this decree made by the proctors for all claimants herein . . . it is ordered, adjudged and decreed," etc.

The following signed by all the proctors is subjoined to the decree: "The undersigned proctors for all the parties herein hereby admit the truth of the recitals contained in the foregoing decree and consent to the entry thereof, without further notice."

Petitioner's second application for certiorari which was presented June 1, 1915, and granted on the 14th of that month, contains these statements:

"On May 10, 1915, as your petitioner is informed, this Court granted a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit upon the petition of Olaf Lie, master of the Norwegian steamship Selja, in a suit between said Olaf Lie, master, etc., and the San Francisco & Portland Steamship Company, etc."

"Your petitioner now renews its application for certiorari for the reason that the questions presented by its petition are identical with those presented by the petition of Olaf Lie. The principal question is whether under this Court's decision in *The Pennsylvania*, 19 Wall. 125, a

privileged vessel, which before a collision with a burdened vessel ported her helm in violation (*prima facie*, at least) of Article 21 of the International Regulations may be held responsible for the collision, . . ."

"Subsequent to the decision of the Circuit Court of Appeals your petitioner instituted proceedings for limitation of liability, which, after the denial by this Court of the original petition, were prosecuted to a decree under which payments were made to the respondents by the Clerk of the District Court. As these payments were made under compulsion they would be recoverable by your petitioner in the event that this Court should reverse the decision of the Circuit Court of Appeals."

In their memorandum opposing the second petition for certiorari, counsel for the Insurance Association said, "The case is settled and closed." And after referring to steps taken in the limitation proceeding and quoting from the decree therein, dated April 22, 1915, they added, "All the claimants have been paid the respective proportions of the fund ascertained to be due to them, and have executed receipts of discharge in the terms provided by the decree. The case is, therefore, finally closed and settled as between all the parties, and such settlements have been made without any reservation of rights on the part of the petitioner."

We were not advised by petition of June 1, 1915, or memorandum opposing it that the final decree in the limitation proceedings was based upon an express compromise agreement; otherwise the writ would not have been allowed. At the hearing counsel expressed different views concerning the ultimate effect of that decree and the reasons for its form; and they made it quite plain that there was no purpose to mislead us. Nevertheless, in the circumstances, we think it was incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation. The oversight has re-

sulted in unfortunate delay and needless consumption of time.

During the last term one hundred fifty-four petitions for certiorari were presented and acted upon. Because of recent legislation—Act of September 6, 1916, c. 448, 39 Stat. 726—their number hereafter may greatly increase. Such petitions go first to every member of the court for examination, and are then separately considered in conference. This duty must be promptly discharged. We are not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket.

Dismissed.

WILLIAMS, CHIEF, ET AL. *v.* CITY OF CHICAGO ET AL.

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

No. 128. Argued December 22, 1916.—Decided January 8, 1917.

At the date of the Treaty of Greenville, August 3, 1795, 7 Stat. 49, the right of the Pottawatomie Nation in lands on and near the shore of Lake Michigan now in Illinois was no more than a right of occupation.

If the occupancy ever extended to lands formerly submerged in the lake such as are the subject of this litigation, the court notices his-

torically that it was long ago abandoned and that for more than half a century no pretense of such occupancy has been made by the tribe. The treaty did no more than confirm the tribal right of occupancy, and when that was abandoned all interest of the tribe and its members was terminated.

THE case is stated in the opinion.

Mr. J. G. Grossberg, with whom *Mr. W. W. DeArmond* was on the briefs, for appellants.

Mr. Chester E. Cleveland, with whom *Mr. Samuel A. Ettelson* was on the brief, for the City of Chicago.

Mr. W. S. Horton, with whom *Mr. Robert Redfield*, *Mr. W. D. McKenzie* and *Mr. Francis O'Shaughnessy* were on the brief, for the Illinois Central Railroad Co. *et al.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The claim set up in this cause is without merit and the amended bill was properly dismissed, upon motion, for want of equity.

Complainants are eight Pottawatomie Indians, members of the Pokagon Band and residents of Michigan. They undertake to sue "on behalf of themselves and of all members of the Pokagon Band of Pottawatomie Indians, and of all other members of the Pottawatomie Nation of Indians, if any are entitled to join herein with them, and of all others, if any, who are entitled to join herein with them."

Defendants are the City of Chicago and certain corporations now occupying valuable lands within the geographical limits of Illinois, which have been reclaimed from Lake Michigan.

The bill proceeds upon this theory—

That from time immemorial, on August 3, 1795 and

thereafter, the Pottawatomie Indians were the owners and in possession as a sovereign nation, as their country, of large tracts of land around and along the shores of Lake Michigan, south of a line running from Milwaukee River, Wisconsin, to Grand River, Michigan, and extending, "east and west of said two points and including all of Lake Michigan which is south of said line"—a stretch of a hundred miles.

That by the Treaty of Peace entered into at Greenville, Ohio, August 3, 1795, the United States relinquished to the Pottawatomie and other tribes their claims to Indian lands westward of a designated line passing through the State of Ohio and lying, "northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the king of Great-Britain, in the treaty of peace made between them in the year of 1783."

That by later treaties the Pottawatomie Nation receded to the United States all such lands up to the shores of Lake Michigan, but those within the geographical limits of Illinois which were formerly beneath the waters of Lake Michigan, "whether reclaimed, artificially made, or now or formerly submerged . . . have remained and still are the property of these complainants, . . . and any attempts on the part of any persons, firms, and corporations to appropriate the same, or any part thereof were and are in violation of said treaties and of the rights of these complainants."

That in 1833, with the exception of the Pokagon Band, in pursuance of a treaty with the United States, the Pottawatomie Nation migrated west of the Mississippi River leaving that band in possession, occupation, control and sovereignty of so much of the nation's original country as remained unceded.

That the United States has refused to purchase the re-

claimed lands and consequently complainants are at liberty to occupy, sell, lease, or dispose of the same as their own in fee simple.

The bill prays that defendants be enjoined from occupying or building upon the specified land or from asserting any claim, title, or interest therein; that they be required to pay a reasonable compensation for its use; and that the complainants' title thereto be quieted, established and confirmed.

The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of occupancy. *Johnson* v. *McIntosh*, 8 Wheat. 543. If in any view it ever held possession of the property here in question we know historically that this was abandoned long ago and that for more than a half century it has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.

By the Treaty of Greenville the United States stipulated with the Pottawatomies and other Indians that generally in respect of a large territory westward of a line passing through Ohio, "The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and untill such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same." We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the

territory came to an end. *Johnson* v. *McIntosh*, 8 Wheat. 543, 584, 586, 588; *Mitchel* v. *United States*, 9 Pet. 711, 745; *United States* v. *Cook*, 19 Wall. 591, 592; *Beecher* v. *Wetherby*, 95 U. S. 517, 525.

It is unnecessary to consider other reasons suggested by counsel in support of the decree below.

Affirmed.

DEAN *v.* DAVIS, TRUSTEE IN BANKRUPTCY OF JONES, ET AL.

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

No. 70. Argued November 6, 7, 1916.—Decided January 8, 1917.

A transfer of property by an insolvent, made to secure a contemporaneous loan of money which the lender advances, and the insolvent obtains and uses, for the discharge of a prëexisting debt of the insolvent to a third party, in which the lender has no interest, is not a preference of the lender within § 60b of the Bankruptcy Act, as amended February 5, 1903, 32 Stat. 797, 800.

A transfer, the intent or obviously necessary effect of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, "hinders, delays, or defrauds creditors" within the meaning of § 67e.

An insolvent borrowed money of a relative and secured it by a contemporaneous mortgage of all his property, which was recorded. The money was sought, advanced and used to satisfy one of his preexisting debts and thus enable him to escape a criminal prosecution. Mortgagee and insolvent both knew of the insolvency, and the circumstances were such that both must have anticipated the suspension of business and bankruptcy which followed the recording of the mortgage. *Held*, that these facts warranted the District Court and Circuit Court of Appeals in concluding that the insolvent intended to defraud his creditors within the meaning of § 67e and that the mortgagee was not a purchaser or lienor in good

faith (§§ 67e, 67d). *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575, 582; *Coder* v. *Arts*, 213 U. S. 223, 244.

A decree avoiding a transfer as fraudulent will not be disturbed upon the ground that it exceeds the pleadings where the bill, though attacking the transfer mainly as an unlawful preference, contains enough with the answer to present the issue of fraud, where that issue was fully tried, and the question of variance is first raised in this court.

212 Fed. Rep. 88, affirmed.

THE case is stated in the opinion.

Mr. Wyndham R. Meredith, with whom *Mr. C. V. Meredith* was on the briefs, for appellant:

Appellees not having taken a cross appeal from the decision of the District Court that the mortgage was not a preference, that question was not before the Court of Appeals for decision and it was error to decide it. *Chittenden* v. *Brewster*, 2 Wall. 195; *Loudon* v. *Taxing District*, 104 U. S. 774; *Bolles* v. *Outing Co.*, 175 U. S. 268; *Mail Company* v. *Flanders*, 12 Wall. 134, 135; *Field* v. *Barber Asphalt Company*, 194 U. S. 621; *Pauly Jail Bldg. & Mfg. Co.* v. *Hemphill Co.*, 10 C. C. A. 600; *B. & L. Ass'n.* v. *Logan*, 14 C. C. A. 133–136; *Clark* v. *Killian*, 103 U. S. 766, 769; *United States* v. *Blackfeather*, 155 U. S. 180–186.

Mere knowledge by a lender that the money borrowed is to be applied by the insolvent to prefer a creditor does not make the security given invalid as a preference under § 60b of the Bankruptcy Act. *Coder* v. *Arts*, 213 U. S. 223; *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575; *Githens* v. *Shiffler*, 112 Fed. Rep. 505, 507; *In re Hersey*, 171 Fed. Rep. 1001; *George* v. *Grant*, 28 Hun. (N. Y.), 69, affirmed in 97 N. Y. 270; *In re Baar*, 213 Fed. Rep. 629–630. Under that section the person preferred must be a creditor. Collier on Bankruptcy, 10th ed., p. 813; *Stewart* v. *Platt*, 101 U. S. 731; *George* v. *Grant*, *supra*. It does not apply when the security is given to carry out a definite

promise which procured the loan. Loveland on Bankruptcy, 4th ed., p. 952; *Sexton* v. *Kessler & Co.*, 172 Fed. Rep. 535, 542–545; *Hauslet* v. *Harrison*, 105 U. S. 401; *Goodnough M. & S. Co.* v. *Galloway*, 156 Fed. Rep. 504–510; 171 Fed. Rep. 940–949; *In re Wolf*, 98 Fed. Rep. 84; *Walker* v. *Brown*, 165 U. S. 654, 664–665; *Davis* v. *Turner*, 120 Fed. Rep. 605; *Tomlinson* v. *Bank*, 145 Fed. Rep. 824; *Mills, Trustee*, v. *Virginia-Carolina Lumber Co.*, 164 Fed. Rep. 168; *Douglas* v. *Vogeler*, 6 Fed. Rep. 53; *In re Davidson*, 109 Fed. Rep. 882.

The transfer was not fraudulent. An intent to prefer is not an intent to defraud. It is not *per se* unlawful for an insolvent to borrow money to use in making a preference, and the lender, though aware of all the facts and even if he act as the borrower's agent in making the payment, *Crim* v. *Woodford*, 136 Fed. Rep. 34, commits no wrong in lending, or in taking security. Such transactions are not voidable under § 67e unless accompanied by actual intent to defraud, which must be clearly proved and was absent in this case. Institution of bankruptcy proceedings within four months does not relate back and convert what was a lawful transfer into a fraudulent conveyance. *Coder* v. *Arts, supra; Van Iderstine* v. *National Discount Co., supra; Githens* v. *Shiffler, supra; In re Hersey, supra; Stewart* v. *Dunham*, 115 U. S. 61; *Estes* v. *Gunter*, 122 U. S. 450; *Smith* v. *Craft*, 123 U. S. 436; *Huntley* v. *Kingman*, 152 U. S. 527; *Southern White Lead Co.* v. *Haas*, 73 Iowa, 399; Black on Bankruptcy, ed. 1914, § 459, p. 1002.

In Virginia it has been repeatedly held that an honest preference, even when operating to defeat the claims of other creditors, is entirely lawful and no evidence of an intent to hinder, delay or defraud creditors. *Johnson* v. *Lucas*, 103 Virginia, 36; *Johnson* v. *Witt Shoe Co.*, 103 Virginia, 611; *Alsop* v. *Catlett*, 92 Virginia, 364; *Harvey* v. *Anderson*, 2 Va. Dec. 385; *Williams* v. *Lord*, 75 Virginia,

390; *Lucas* v. *Clafflin*, 76 Virginia, 269; *Alexander Sav. Inst.* v. *Thomas*, 29 Gratt. 483, 490; *Skipwith* v. *Cunningham*, 8 Leigh, 271.

The Virginia statute relating to fraudulent conveyances is copied from 13th Elizabeth, from which the words "hinder, delay and defraud creditors," were adopted by Congress in the Bankruptcy Act. They mean the same in that act as in the English statute.

Transfers made in good faith to secure present loans protected by state statute are protected by § 67d. Collier on Bankruptcy, 9th ed., p. 950, and cases cited. The transaction in question is also unobjectionable because shown not to have diminished the value of the estate. See Collier on Bankruptcy, 10th ed., p. 803; Remington on Bankruptcy, §§ 1278, 1295, 1320; *Cook* v. *Tullis*, 18 Wall. 332; *Stewart* v. *Platt*, 101 U. S. 818; *Jaquith* v. *Alden*, 189 U. S. 78.

The charge that the bankrupt preferred the bank to avoid criminal prosecution, even if true, is immaterial, the debt paid being valid. *Peters* v. *Bain*, 133 U. S. 67; *Ex parte Stubbins*, 17 Ch. Div. (L. R. 1881), 670; *Ex parte Caldecott*, 4 Ch. Div. (L. R. 1876), 155; *Githins* v. *Shiffler*, 112 Fed. Rep. 505; *Tiffany* v. *Boatman's Institute*, 18 Wall. 388.

Mr. Bartlett Roper and *Mr. Richard B. Davis* for appellees, submitted.

Mr. Justice Brandeis delivered the opinion of the court.

The Bankruptcy Act, as amended February 5, 1903, provides in § 60b that if a debtor has within four months before the filing of the petition in bankruptcy made a transfer which the person receiving the same has reason to believe was intended to give a preference, the transfer

shall be voidable, and the trustee in bankruptcy may recover the property or its value. The act also provides in § 67e (30 Stat. 564) that if a debtor within four months before the filing of the petition in bankruptcy makes any transfer "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them," it shall be null and void except as to purchasers in good faith and for a present fair consideration; and that it shall be the duty of the trustee to recover the same.

R. Crawley Jones was a farmer and owner of a country store. A bank having discounted his notes bearing endorsements which it later concluded had been forged, demanded that Jones take up the notes. Fearing arrest he appealed through his father to his brother-in-law, Dean, for a loan of $1,600, promising to secure it by a mortgage of all his property, which he represented was worth more than five times that amount. Dean provided the money, and on September 3, 1909, acting in conjunction with Jones' father, "took up" the notes. Most of them were not yet due. A mortgage deed of trust dated September 3 was executed September 10, and recorded September 11. It covered practically all of Jones' property, including the stock in trade and accounts, store furnishings and fixtures, household furniture and goods, live stock, crops standing and cut and the farm itself, the last subject to a prior deed of trust. Four mortgage notes were given, payable respectively in seven, thirty, sixty and ninety days; with a proviso that upon default on any one all should become payable. The first note—and hence all—were overdue when the mortgage was recorded. On that day Dean directed that possession of the property be taken, which was done on September 13 (the twelfth being Sunday). Jones was at the time deeply insolvent and had many unsecured creditors. Some of these immediately challenged the validity of the mortgage. Within a few days an involuntary petition in bankruptcy was filed and

Jones was adjudicated a bankrupt. The mortgaged property was converted into cash under an agreement with general creditors that it should be deposited to await the ultimate determination of the rights of the parties. It yielded only $1,634—leaving nothing for the general creditors, if the mortgage is held valid.

Davis, the trustee in bankruptcy, brought a bill in equity to set aside the mortgage. The District Court granted the relief prayed for; and its decree was affirmed by the Circuit Court of Appeals. Both courts found the facts to be in substance as above stated and held the mortgage void under § 67e as having been made by Jones "with the intent and purpose on his part to hinder, delay, or defraud his creditors" to one not a "purchaser in good faith" within the meaning of the act. The Circuit Court of Appeals held the mortgage void also as a preference under § 60b. 212 Fed. Rep. 88. The case comes to this court upon appeal; Dean contending that the mortgage is not invalid under either § 60b or § 67e.

The mortgage was not voidable as a preference under § 60b. Preference implies paying or securing a pre-existing debt of the person preferred. The mortgage was given to secure Dean for a substantially contemporary advance. The bank, not Dean, was preferred. The use of Dean's money to accomplish this purpose could not convert the transaction into a preferring of Dean, although he knew of the debtor's insolvency. Mere circuity of arrangement will not save a transfer which effects a preference from being invalid as such. *National Bank of Newport* v. *National Herkimer County Bank*, 225 U. S. 178, 184. But a transfer to a third person is invalid under this section as a preference, only where that person was acting on behalf of the creditor, as in *In re Beerman*, 112 Fed. Rep. 663, and *Walters* v. *Zimmerman*, 208 Fed. Rep. 62; 220 Fed. Rep. 805. Here Dean acted on the debtor's behalf in providing the money and taking up the notes.

But under § 67e the basis of invalidity is much broader. It covers every transfer made by the bankrupt "within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them" "except as to purchasers in good faith and for a present fair consideration." As provided in § 67d, only "liens given or accepted in good faith and not in contemplation of or in fraud upon this Act" are unassailable. A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act "hinders, delays or defrauds creditors" within the meaning of § 67e. *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575, 582, points out the distinction between the intent to prefer and the intent to defraud. A transaction may be invalid both as a preference and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer. Making a mortgage to secure an advance with which the insolvent debtor intends to pay a preëxisting debt does not necessarily imply an intent to hinder, delay or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect "good faith." But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advanced is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made.

We cannot say that the facts found by the District Court and affirmed by the Circuit Court of Appeals were

not supported by the evidence, nor that these courts erred in concluding upon this evidence that the mortgage was made with the purpose and intent to hinder, delay or defraud Jones' creditors and that Dean was not as against general creditors "a purchaser in good faith." Jones knew that he was insolvent. He knew that he was making a preferential payment. He must have known that suspension of his business and bankruptcy would result from giving and recording a mortgage of all his property to secure a note which had matured before the mortgage was executed. The lower courts were justified in concluding that he intended the necessary consequences of his act; that he willingly sacrificed his property and his other creditors to avert a threatened criminal prosecution; and that Dean, who, knowing the facts, coöperated in the bankrupt's fraudulent purpose, lacked the saving good faith.

The conclusion reached by the lower courts is supported by many decisions of the several District Courts and Circuit Courts of Appeals, which are referred to in the margin.[1] It is in harmony with both the *Van Iderstine*

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[1] Cases holding that a mortgage is a fraudulent conveyance where taken as security for a loan which the lender knows is to be used to prefer favored creditors in fraud of the act: *Parker* v. *Sherman*, 212 Fed. Rep. 917 (C. C. A. 2d Circuit); *In re Soforenko*, 210 Fed. Rep. 562 (D. C. Mass.); *Johnson* v. *Dismukes*, 204 Fed. Rep. 382 (C. C. A. 5th Circuit); *Lumpkin* v. *Foley*, 204 Fed. Rep. 372 (C. C. A. 5th Circuit); *In re Lynden Mercantile Co.*, 156 Fed. Rep. 713 (D. C. Wash.); *Roberts* v. *Johnson*, 151 Fed. Rep. 567 (C. C. A. 4th Circuit); *In re Pease*, 129 Fed. Rep. 446 (D. C. Mich.). See also *Walters* v. *Zimmerman*, s. c. on appeal, 208 Fed. Rep. 62 (D. C. Ohio), 220 Fed. Rep. 805 (C. C. A. 6th Circuit).

Cases upholding the mortgage security because the lender did not know that the insolvent borrower intended to make improper payments to favored creditors—thus indicating that the mortgage would be fraudulent if such additional fact were shown: *Grinstead* v. *Union Savings & Trust Co.*, 190 Fed. Rep. 546 (C. C. A. 9th Circuit); *Powell* v.

Case, and *Coder* v. *Arts*, 213 U. S. 223, 244, upon which appellant particularly relies. In each of these cases this court refused to hold fraudulent in law a transfer which the Circuit Court of Appeals had found to be innocent in fact. In the *Van Iderstine Case*, where a pledge was held valid, the Circuit Court of Appeals had expressly found that the pledgee was without knowledge of the debtor's fraudulent intent, if such there was. In *Coder* v. *Arts*, where a mortgage was held valid, the Circuit Court of Appeals had found that in making the mortgage the debtor had no intent to hinder, delay or defraud creditors, and this court said that "in view of the finding of the Circuit Court of Appeals, it may be that [he], though including in the conveyance a large amount of his property, acted in good faith, with a view to preserving his estate and enabling him to meet his indebtedness." This court while declaring itself bound by the facts so found, was careful to express its dissent from the view "that the giving of the mortgage and its effect upon other creditors could not be

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Gate City Bank, 178 Fed. Rep. 609 (C. C. A. 8th Circuit); *In re Kullberg*, 176 Fed. Rep. 585 (D. C. Minn.); *Ohio Valley Bank Co.* v. *Mack*, 163 Fed. Rep. 155 (C. C. A. 6th Circuit); *Stedman* v. *Bank of Monroe*, 117 Fed. Rep. 237 (C. C. A. 8th Circuit); *In re Soudan Mfg. Co.*, 113 Fed. Rep. 804 (C. C. A. 7th Circuit).

In accord with this view are also the decisions which hold that a general assignment for the benefit of creditors, though without preferences, is void under § 67e because its necessary effect is to hinder, delay or defraud creditors in their rights and remedies under the Bankruptcy Act. *In re Gutwillig*, 90 Fed. Rep. 475; 92 Fed. Rep. 337; *Davis* v. *Bohle*, 92 Fed. Rep. 325; *Rumsey & Sikemier Co.* v. *Novelty & Machine Mfg. Co.*, 99 Fed. Rep. 699. See *Randolph* v. *Scruggs*, 190 U. S. 533, 536; *West Co.* v. *Lea*, 174 U. S. 590, 596.

It is difficult to reconcile the following cases or dicta in them with the great weight of authority and the decisions of this court. *In re Baar*, 213 Fed. Rep. 628 (C. C. A. 2nd Circuit); *In re Hersey*, 171 Fed. Rep. 1004 (D. C. Iowa); *Sargent* v. *Blake*, 160 Fed. Rep. 57 (C. C. A. 8th Circuit); *In re Bloch*, 142 Fed. Rep. 674 (C. C. A. 2nd Circuit); *Githens* v. *Shiffler*, 112 Fed. Rep. 505 (D. C. Pa.).

considered as an item of evidence in determining the question of fraud."

Dean contends also that relief should not have been granted under § 67e because the bill was framed under § 60b. The objection was not taken in the District Court, although the question of invalidity under § 67e was elaborately discussed on demurrer to the bill as well as upon final hearing. Twenty-five other errors were assigned on the appeal to the Circuit Court of Appeals. This objection was not raised then. It was insisted only that the evidence did not warrant the finding of fraudulent intent. Section 60b seems to have been mainly in the mind of the pleader when the bill of complaint was drafted, but not exclusively, for it alleges that the plaintiff as trustee was entitled "to recover property transferred by said bankrupt in fraud of his creditors." The answer expressly alleges that the mortgage was accepted "without any intent or purpose of aiding said Jones to defraud, delay or hinder his creditors, and not in contemplation of or in fraud of the bankrupt act, or any of its provisions, believing him to be solvent and that he would continue his business." The issue of fraudulent transfer was presented by the pleadings, was fully tried and was found against the appellant. No error was committed.

Decree affirmed.

WESTERN TRANSIT COMPANY *v.* A. C. LESLIE & COMPANY, LIMITED.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 104. Argued December 19, 20, 1916.—Decided January 8, 1917.

Plaintiff consigned goods from Michigan to New York City over a "lake and rail" route constituted of defendant's steamship line as far as Buffalo and the line of a railway company thence onward. Plaintiff paid the freight, obtaining a reduced rate allowed in the tariff for this route by agreeing in the bill of lading to a maximum valuation and release of larger damages. A separate tariff, filed by defendant pursuant to § 6 of the Act to Regulate Commerce, entitled plaintiff to have the goods stored for a time at Buffalo without extra charge before forwarding to New York and to divert them to some other destination upon readjustment of rates. By direction of plaintiff, defendant was holding the goods stored under this arrangement when a part was stolen.

Held (1) That defendant was liable as carrier and not as warehouseman.

(2) That the damages could not exceed the maximum value agreed in the bill of lading and upon which the freight rate was based.

(3) That a letter written by defendant to plaintiff while the goods were so stored, acknowledging their custody, and stating that they would be held subject to a circular enclosed with the letter and which but described the terms of the storage as they were stated in the separate tariff, did not operate to create a contract of warehousing independent of the contract of carriage.

Every shipper is charged with notice of terms of the interstate tariffs governing his shipments.

A shipper by his bill of lading valued several tons of goods at not to exceed $100 per ton, and agreed that this as a maximum should govern the computation of any loss or damage for which the carrier might become liable. *Held*, that the maximum liability of the carrier for the loss of a part was not the total valuation so fixed, but the value, at the ratio of $100 per ton, of the part lost.

165 App. Div. 947, reversed.

THE case is stated in the opinion.

Mr. Lester F. Gilbert for plaintiff in error.

Mr. Daniel J. Kenefick and *Mr. Charles B. Sears* for defendant in error, submitted.

Mr. Justice Brandeis delivered the opinion of the court.

The Western Transit Company, operating steamers between Buffalo and other points on the Great Lakes, formed, with the New York Central Railroad, a "lake and rail" line between Michigan and New York City. Among the privileges and facilities offered by this line was the right "in transit of free storage and diversion at Buffalo." That is, the shipper instead of sending his goods from Michigan through to New York City, was entitled, without the payment of any extra charge, to have them stored at Buffalo for a period, to await further orders and be forwarded later to New York. The shipper was also given the privilege of "diversion";—that is of changing the ultimate destination of the stored goods upon proper adjustment of the rate. On September 23, 1908, A. C. Leslie & Co., Limited, the plaintiff below, delivered to the Western Transit Co., the defendant below, at Houghton, Michigan, for shipment over this line to New York City, 25 tons of copper ingots, with direction to store the same upon arrival at Buffalo to await further shipping directions. The copper arrived there September 30, and was placed in the Transit Company's warehouse. Nearly four months later about one ton of it was stolen from the warehouse. An action was brought by the shipper in the City Court of Buffalo to recover its value. The Transit Company denied all liability; but the court found that the loss was due to its negligence and held the company liable for the full value of the copper lost. The judgment of the City Court was affirmed by the

Supreme Court of New York at special term and also by the Appellate Division of that court. 165 App. Div. 947. Applications for an appeal to the Court of Appeals of New York having been denied, both by the Appellate Division and by the Chief Judge of the Court of Appeals, a writ of error from this court was granted on the ground that the decision below involved a federal question, namely: the construction and effect of the bill of lading and of tariffs filed under the Act to Regulate Commerce as amended. Act 1906, c. 3591, 34 Stat. 584.

The question before this court relates solely to the measure of damages. The shipper contends that it is entitled to the full value of the copper lost, which was $271.38. The carrier contends that the damages recoverable are limited to $94.10; that is, the value *not to exceed $100 a ton.* In support of this limitation it relies upon the fact that freight was paid at the rate of 18 cents per ton under a bill of lading and a tariff which names the following rates from Houghton, Michigan, to New York City:

"Copper ingots . . . value not to exceed $100 a ton, 18c. per ton

Copper ingots . . . value not expressed..... 30c. per ton."

The shipper insists that it is enforcing the liability of the Transit Company not as carrier, but as warehouseman; and that the terms of its obligation as warehouseman are fixed, not by the bill of lading and the tariff provision quoted above, but wholly by the letter of November 26, 1908, and the circular therein referred to, which are copied in the margin.[1]

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[1] The Western Transit Company, N. Y. C. & H. R. R. Line of Steamers.

Buffalo, N. Y., Nov. 26, 1908.

Messrs. A. C. Leslie & Company, Montreal, Que.

GENTLEMEN: Replying to your letter of 24th, instant, would advise you that we have in store here, lot 1036 ingot bars of copper, marked M. M. 102, as well as lot of 979 ingot bars, marked M. M. 97.

The Transit Company filed with the Interstate Commerce Commission, in addition to its general tariffs covering "lake and rail" rates, a separate tariff known as I. C. C. No. 236, covering specifically storage and diversion privileges at Buffalo, as set forth in the circular copied in

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This copper came forward in our steamer, Buffalo, which unloaded here September 30th, and will be held here subject to our storage circular I. C. C. No. 236, copy of which I enclose.

Yours truly,

(Signed) EDWIN T. DOUGLASS,
General Manager.

I. C. C. No. 236, Superseding I. C. C. No. 231.

The Western Transit Company, New York Central & Hudson River R. R. Line.

General Office.

Copper and Copper Matte, Pig Lead and Spelter for Storage and Diversion at Buffalo.

The Western Transit Company will accept shipments of Copper and Copper Matte, Pig Lead and Spelter for storage and diversion at Buffalo, under the following rules:

1. The Western Transit Company, at request of owners, will furnish free storage on shipments of Copper and Copper Matte, Pig Lead and Spelter in transit, at Buffalo, for a period not exceeding four months.

2. If held longer than four months, it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty (30) or part thereof so held.

3. Shipments held under this arrangement will be at owner's risk, and will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake Ports.

4. Shipments ordered out of store will be charged at the through rate in effect at time the shipment originated, to points to which through rates are published by The Western Transit Company.

5. Shipments ordered to points to which no through rates are in effect via The Western Transit Company, will be charged at the local rate to and from Buffalo.

Issued May 15th, 1908.

Effective June 16th, 1908.

EDWIN T. DOUGLASS,
General Manager, Buffalo, N. Y.

the margin. The filing of this tariff was required by the act (see *Goldenberg* v. *Clyde S. S. Co.*, 20 I. C. C. 527) since the general tariff did not specify the details of the storage and diversion privileges. The Act to Regulate Commerce as amended provides expressly (§ 1) that the term transportation includes storage. And § 6 provides that a carrier must file with the Interstate Commerce Commission tariffs "showing all the rates, fares, and charges for transportation" and "shall also state separately all . . . storage charges, . . . all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates."

The bill of lading, in a form similar to that approved and recommended by the Interstate Commerce Commission (14 I. C. C. 346), contains the following, among other provisions:

"It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable."

* * * * * * * *

"To be held at Bflo. for orders.

"Value not to exceed $100.00 per net ton. Limited by written agreement.

"The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would

make the carrier liable, because of the lower rate thereby accorded for transportation."

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Conditions.

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"The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

The release valuation clause in an interstate bill of lading when based upon a difference in freight rates is valid. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509. The limitation of liability by means of such valuation contained in the bill of lading continues although the service of carrying has been completed and the goods are held by the carrier strictly as warehouseman. *Cleveland, Cincinnati, Chicago & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588. The provisions of the bill of lading govern even where the goods are allowed to remain in the carrier's warehouse after giving receipt therefor and payment of freight. The carrier and the shipper can make no alteration of the terms upon which goods are held under a tariff, until there has been an actual delivery of the goods to the consignee. *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632. The reasons are even more persuasive for holding that the terms of a bill of lading govern storage in transit, like that at Buffalo. The contention of the shipper that the letter of November 26 enclosing the circular created a contract of warehousing wholly independent of the contract of carriage is contrary to fact. The Transit Company's circular states "that free storage is furnished on shipments in transit" and that shipments "will not be accepted for storage unless arrangements are made with

the undersigned previous to forwarding from Western Lake Ports." Obviously free storage in transit was granted only to those who shipped over this "lake and rail" line. The shipper had enjoyed nearly two months' storage when the circular was received in answer to a letter of enquiry. It stated only what was contained in the tariff filed, which every shipper was bound to take notice of.

The contention was also made that the judgment below was correct, even if the bill of lading be held to govern the warehousing at Buffalo; because the agreed valuation clause properly construed fixes an amount far greater than the actual value for which judgment was rendered. The "released" or agreed valuation is "$100 per net ton." There were 25 tons in this shipment. It is insisted that, as the 25 tons constituted a single lot, $2,500 is recoverable for loss of or damage to the whole or to any part of the lot. This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery but a ratio. In *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 656, where the released valuation clause was applied to a shipment consisting of two boxes and a barrel, and one box was lost, this court said, the consignor and carrier must have understood the agreed valuation to mean that the package contained "household goods of the average value per hundredweight of five dollars." The ratio is more naturally applied where the whole shipment is homogeneous. Under this bill of lading the shipper is entitled to recover not more than $100 a ton for each or any ton damaged or lost.

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

CHALONER *v.* SHERMAN.

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

No. 121. Argued November 16, 17, 1916.—Decided January 8, 1917.

Omission of the statutes of New York concerning proceedings *de lunatico inquirendo* (Code of Civil Procedure, 1898, §§ 2320, *et seq.*), to provide expressly that notice of and opportunity to be heard at the inquisition shall be afforded to the alleged incompetent, *held*, not violative of the due process clause of the Fourteenth Amendment, it appearing by the decisions of the highest court of the State that the requisite notice and opportunity are otherwise impliedly afforded under the state law.

In proceedings under the New York statutes, *supra*, which resulted in the appointment of a committee of plaintiff's person and estate, the plaintiff, who was committed at a private hospital at the time, was served with notice of the application to appoint a commission to inquire into his mental capacity, of the inquisition, and of the motion to confirm its finding and appoint the committee. He was physically able to attend but did not appear, ask anyone to represent him or seek an adjournment. At the inquisition, the commission and jury, after hearing witnesses, concluded that his attendance was unnecessary, and did not require it, there being evidence that if enforced it would be detrimental to his mind. *Held*, that due process was satisfied, and that the order appointing the committee was not open to collateral attack.

Subsequently the court accepted the resignation of the committee and appointed another in his stead, without giving notice or affording opportunity to be heard to the plaintiff or the other persons interested in the original proceedings. *Held*, not violative of due process.

Orders of a state court declaring a person found within the State incapable of managing himself and his affairs and appointing a committee of his person and his property within the State are not assailable collaterally by proof that he was and remained a citizen and resident of another State, or that he was served in the proceedings through being corruptly lured into the first State and there illegally committed to a private hospital, or that the adjudication of insanity

was made on perjured evidence while he was actually sane, or that his sanity and competency have been established by a later adjudication of a court of his domicile and have since continued.

215 Fed. Rep. 867, affirmed.

THE case is stated in the opinion.

Mr. Edward F. Colladay and *Mr. Sidney J. Dudley* for the plaintiff in error, *Mr. John Armstrong Chaloner*, who also filed a brief.

Mr. Joseph H. Choate, Jr., for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is an action in which the plaintiff seeks damages for withholding his securities and moneys. The defendant sets up as justification that he received and held the property by virtue of two orders of the Supreme Court of New York appointing him committee of the person and estate of the plaintiff as one "incompetent to manage himself or his affairs." The validity and alleged effect of these orders were denied by plaintiff. The action was brought in 1904 in the Circuit Court of the United States for the Southern District of New York; was transferred to the District Court January, 1912, by virtue of Judicial Code, § 290, and was tried before a jury in that year. A verdict was directed for the defendant at the close of the plaintiff's case; and the judgment entered thereon was affirmed by the Circuit Court of Appeals. The case comes here upon writ of error.

The complaint alleges that the plaintiff is a citizen and resident of Virginia and the defendant a citizen and resident of New York; but federal jurisdiction was not rested solely on diversity of citizenship. The complaint alleged also that the orders of the Supreme Court of New

York upon which defendant relies are void as having been entered without due process of law in violation of the Federal Constitution. The contention was insisted upon in both the lower courts. This court has, therefore, jurisdiction to review the whole case. *Howard* v. *United States*, 184 U. S. 676, 681.

The orders under which defendant justifies were that of June 23, 1899, adjudging plaintiff incompetent, appointing a committee of his person and estate and naming one Butler as such; and that of November 19, 1901, appointing defendant as his successor. These orders were made under statutes of New York, the material portions of which are set forth in the margin.[1] The proceedings were

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[1] New York Code of Civil Procedure, 1898.

"§ 2320. *Jurisdiction; concurrent jurisdiction.*

"The jurisdiction of the supreme court extends to the custody of the person, and the care of the property, of a person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding or other cause. . . .

"§ 2322. *Committee may be appointed.*

"The jurisdiction, specified in the last two sections, must be exercised by means of a committee of the person, or a committee of the property, or of a particular portion of the property, of the incompetent person, appointed as prescribed in this title. The committee of the person and the committee of the property may be the same individual or different individuals, in the discretion of the court.

"§ 2323. *Application for committee, by whom made.*

"An application for the appointment of such a committee must be made by petition, which may be presented by any person. Except as provided in the next section, where the application is made to the supreme court, the petition must be presented at a special term held within the judicial district or to a justice of said court within such judicial district at chambers, where the person alleged to be incompetent resides; or if he is not a resident of the state, or the place of his residence can not be ascertained, where some of his property is situated or the state institution is situated of which he is an inmate.

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held in New York City where much of plaintiff's property was located. For over two years prior to the entry of the earlier order plaintiff had been an inmate of Bloomingdale,

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"§ 2325. *Contents, etc., of petition; proceedings upon presentation thereof.*

"The petition must be in writing, and verified by the affidavit of the petitioner, or his attorney, to the effect that the matters of fact therein stated are true. It must be accompanied with proof, by affidavit, that the case is one of those specified in this title. It must set forth the names and residences of the husband or wife, if any, and of the next of kin and heirs of the person alleged to be incompetent; as far as the same are known to the petitioner, or can, with reasonable diligence, be ascertained by him, and also the probable value of the property possessed and owned by the alleged incompetent person, and what property has been conveyed during said alleged incompetency and to whom, and its value and what consideration was paid for it, if any, or was agreed to be paid. The court must, unless sufficient reasons for dispensing therewith are set forth in the petition or accompanying affidavit, require notice of the presentation of the petition to be given to the husband or wife, if any, or to one or more of the relatives of the person alleged to be incompetent, or to an officer specified in the last section. When notice is required, it may be given in any manner which the court deems proper; and for that purpose, the hearing may be adjourned to a subsequent day, or to another term at which the petition might have been presented.

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"§ 2327. *Order for commission, or for trial by jury in court.*

"Unless an order is made as prescribed in the last section, if it presumptively appears, to the satisfaction of the court from the petition and the proofs accompanying it that the case is one of those specified in this title, and that a committee ought, in the exercise of a sound discretion, to be appointed, the court must make an order directing either.

"1. That a commission issue, as prescribed in the next section to one or more fit persons designated in the order, or

"2. That the question of fact arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury at a trial term of the court.

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"§ 2328. *Contents of commission.*

"The commission must direct the commissioners to cause the sheriff

a private hospital near that city. At each stage in the proceeding leading up to the order of June 23, he was personally served there with notice and was given an opportunity to be heard. Thus he had notice of the motion, on May 19, to appoint the commission *de lunatico inquirendo;* of the inquisition on June 12; and of the mo-

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of a county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subject of inquiry, or the manner of executing the commission, as the court directs to be inserted therein.

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"§ 2330. *Jury to be procured. Proceedings thereupon.*

"The commissioners, or a majority of them, must immediately issue a precept to the sheriff, designated in the commission, requiring him to notify, not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners, at a specified time, and place, within the county, to make inquiry, as commanded by the commission. . . .

"§ 2331. *Proceedings upon the hearing.*

"All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court, holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them, and issue a new precept to the sheriff, to procure another jury.

"§ 2332. *Return of inquisition and commission.*

"The inquisition must be signed by the jurors concurring therein, and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners, and filed with the clerk.

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"§ 2334. *Proceedings upon trial by jury in court.*

"Where an order is made, directing the trial, by a jury, at a trial

tion to confirm the inquisition and for appointment of a committee on June 23. Such notice and opportunity to be heard at the inquisition was required by the law of New York though not expressly recited in the statute; *Matter of Blewitt*, 131 N. Y. 541; *Gridley* v. *College of St. Francis Xavier*, 137 N. Y. 327; *Matter of Fox*, 138 App. Div. 43. Plaintiff was physically able to be present at this hearing. But he did not appear, did not send anyone to represent him, nor ask for an adjournment. At the inquisition the commission and the jury, after hearing witnesses, concluded that his attendance was unnecessary and did not require him to attend. There was evidence

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term, of the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, the order must state, distinctly and plainly, the questions of fact to be tried; which may be settled as where an order for a similar trial is made in an action. The court may, in that or in a subsequent order, direct that notice of the trial be given to such persons, and in such a manner as is deemed proper. The trial must be reviewed in the same manner, with like effect, and, except as otherwise directed in the order, the proceedings thereupon are, in all respects, the same, as where questions of fact are tried, pursuant to an order for that purpose. The court may make inquiry, by means of a reference or otherwise, as it thinks proper, with respect to any matter, not involved in the questions tried by the jury, the determination of which is necessary, in the course of the proceedings. The expenses of the trial, and of such an inquiry, must be paid by the petitioner.

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"§ 2339. *Committee under control of court; limitation of powers.*

"A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal, or resignation may be filled by the court. But a committee of the property can not alien, mortgage, or otherwise dispose of, real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title seventh of this chapter."

that his enforced attendance would be detrimental to his mental health.

As the plaintiff had notice and opportunity to be heard at each stage of these proceedings the essential elements of due process of law were fully met, and the court had jurisdiction to enter that order. It is not open to collateral attack, although plaintiff was then under commitment at Bloomingdale. See *Simon* v. *Craft*, 182 U. S. 427. The order of November 19, 1901, accepting Butler's resignation as committee and appointing defendant in his place, was made by the court without notice either to the plaintiff or to the other parties to the original proceedings. But this was a mere substitution of one officer of the court for another. No substantial right of the plaintiff was affected. Due process does not require notice and opportunity to be heard in such a proceeding; and the irregularity, if any, was not such as to prevent the court from exercising jurisdiction to determine the matter.

The validity of the orders was assailed and their effect contested also on other grounds. It was contended that plaintiff had been corruptly lured from his home in Virginia to New York in March, 1897, and then illegally committed to Bloomingdale and that he could not otherwise have been served in New York at all in the 1899 proceedings; that in 1899 plaintiff was a resident of Virginia; that the adjudication of incompetency in 1899 was made on perjured evidence; and that the plaintiff was then of sound mind and competent to manage his affairs. It was also contended that about November 6, 1901, the plaintiff being a citizen and resident of Albemarle County, Virginia, was adjudged by its county court to be of sound mind and capable of managing his person and estate; that he was such at the time of the commencement of this action and has been since. Much evidence was offered to support these contentions; but the facts if established could not overcome the defense presented by the orders

of the Supreme Court of New York. That court had jurisdiction because the plaintiff and his property were in New York; and the essentials of due process of law were met. The orders, consequently, are not void; and they are not subject to this collateral attack. See *United States* v. *Throckmorton*, 98 U. S. 61; *Hilton* v. *Guyot*, 159 U. S. 113, 207. If it be true that the orders ought to be set aside either because they were, as alleged, entered corruptly, irregularly, or inadvertently, or because owing to a change in plaintiff's condition a committee is no longer required, the remedy must be sought by a direct proceeding to that end. *Matter of Curtiss*, 137 App. Div. 584; 199 N. Y. 36. No evidence was introduced to prove that even an attempt was made to vacate or modify the orders. In this action of trover which seeks merely damages for alleged wrongful withholding of plaintiff's property, the existing orders constitute a complete defense. The evidence offered was properly excluded, and there was no error in directing a verdict for the defendant.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL. *v.* WILLIAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 637. Argued December 6, 1916.—Decided January 8, 1917.

Section 2 of the supplementary Safety Appliance Act of April 14, 1910, c. 160, 36 Stat. 298, requiring interstate railway carriers to equip their cars with secure running-boards, ladders, and hand-holds or grab-irons, became effective July 1, 1911.

The purpose of § 3 of the act is to standardize the appliances required by § 2, and the purpose of the proviso in it is to confer authority

on the Interstate Commerce Commission to extend the time within which the carriers may conform to the established standards, but it does not authorize the Commission to change the date upon which § 2 became effective.

72 So. Rep. 158, affirmed.

THE case is stated in the opinion.

Mr. Charles C. LeForgee, with whom *Mr. Blewett Lee*, *Mr. Charles N. Burch* and *Mr. Robert B. Mayes* were on the briefs, for plaintiffs in error.

Mr. M. F. Harrington and *Mr. William H. Watkins* for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

It will contribute to brevity in this opinion to designate the parties as they were in the state circuit court, the defendant in error as plaintiff and the railroad companies as defendants.

The plaintiff, a switchman in the employ of the defendants, was in the act of mounting, by means of a ladder, to the top of a box car to set the brake, when the hand hold or grab iron placed at the top of the ladder, and intended to be fastened securely to the roof of the car, gave way, causing him to fall to the ground and sustain injuries, for which he instituted suit in a circuit court of Mississippi, and recovered a judgment, which was affirmed by the Supreme Court of the State. This judgment is now here for review on writ of error.

Counsel for the defendants concede that the plaintiff pleaded and proved a case which entitles him to recover under the provisions of the supplement to the Federal Safety Appliance Act, approved April 14, 1910, if § 2 of that act was in effect at the time the accident to the plaintiff occurred on the night of March 15th, 1913; but they

claim that this section of the act was not in effect at that time, because it had been suspended until July 1st, 1916, by an order of the Interstate Commerce Commission, issued on March 13th, 1911, under the authority contained in the proviso of § 3 of the act.

Thus the sole question presented for decision is, Does the order issued by the Interstate Commerce Commission on March 13th, 1911, suspend the provisions of § 2 of the act under discussion until July 1st, 1916?

To answer this question requires an examination of §§ 2 and 3 of the Act of April 14, 1910, and of the order of the Interstate Commerce Commission of March 13th, 1911.

Section 2 of the act provides that on and after July 1st, 1911, "All cars" used by any common carrier subject to the act, "requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders," and it makes it unlawful to use cars not so equipped.

A box car could not properly be used without a secure ladder and since, by its terms, all cars having ladders must be equipped with secure hand holds, the application of this section (if it was not suspended) to the case at bar, the neglect of its requirements, and the liability of the defendants to the plaintiff for the result to him of such neglect are too clear for discussion. *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33.

Section 3 of the act provides that within six months from the passage of the act the Interstate Commerce Commission "shall designate the number, dimensions, location, and manner of application of the appliances *provided for by section two of this Act*" and shall give notice of such designation to all common carriers subject to the provisions of the act by such means as the Commission

may deem proper, and "thereafter said number, location, dimensions, and manner of application as designated by said commission, shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act;" and failure to conform its equipment to such standards shall subject the neglecting carrier to like penalty as failure to comply with any requirements of the act. Then follows this proviso, upon which the defendants rely, viz:

"*Provided,* That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier *shall comply with the provisions of this section* with respect to the equipment of cars actually in service upon the date of the passage of this act."

Pursuant to the command of this third section, the Interstate Commerce Commission, on March 13th, 1911, issued an order designating "the number, dimensions, location, and manner of application of the appliances provided for by section 2 of the act," and specifically describing the size, character, and location of ladders on "freight-train cars" and of hand holds to be maintained at the tops of such ladders. By the terms of this order carriers were granted an extension of five years from July 1st, 1911, in which to bring such safety appliances into compliance with the standards by it prescribed.

The claim of the defendant railway companies with respect to these two sections is built up wholly upon the assertion, it cannot properly be called argument, that because, in the part of § 3 just quoted, reference is made to § 2 for a description of the safety appliances to be standardized, therefore the whole of § 2 must be treated as so incorporated into § 3 as to be comprehended within the expression of the proviso giving power to the Interstate Commerce Commission to extend the period within which any common carrier "*shall comply with the provisions of*

this (the third) section," etc., and that § 2 was therefore suspended until July 1st, 1916, by the Commission's order of March 13th, 1911.

That this strained and artificial construction of the section cannot be allowed, may be made clear by a brief consideration of the terms and purposes of the two sections of the act.

The congressional purpose in enacting § 2 of the act is very plain. At the time the act was passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure hand holds or grab irons on their roofs at the tops of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair, into a statutory, an absolute and imperative duty, of making them "secure" and to enforce this duty by appropriately severe penalties. *Chicago, Burlington & Quincy Ry. Co.* v. *United States,* 220 U. S. 559.

It is equally clear that the purpose of the third section is to require that the safety appliances "provided for by section two of this Act" shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized, shall be of uniform size and character, and so far as ladders and hand holds are concerned, shall be placed as nearly as possible at a corresponding place on every car so that employees who work always in haste, and often in darkness and storm, may not be betrayed, to their injury or death, when they instinctively reach for the only protection which can avail them when confronted by such a crisis as often arises in their dangerous service. It is for such emergencies that these safety appliances are provided,—for service in those instant decisions upon which the safety of life or limb of a man so often depends in this perilous employment,—and therefore this law requires

that ultimately the location of these ladders and hand holds shall be absolutely fixed so that the employee will know certainly that night or day he will find them in like place and of like size and usefulness on all cars, from whatever line of railway or section of the country they may come. This highly important and humane purpose must not be defeated by finesse of construction such as is pressed upon our attention in the argument of this case.

To this primary purpose of protecting the life and limb of employees is added the purpose of protecting the lives of passengers and of securing the safety of property by requiring uniform standards as to other equipment of cars, such as coupling appliances, brakes and the like.

To change these safety appliances on all the cars in the country from what they were as contemplated by § 2,—"secure" but differing "in number, dimensions, location, and manner of application,"—to what they must be when standardized to meet the requirements provided for in § 3, was regarded by Congress as a work so great and so expensive that it wisely committed to the informed discretion of the Interstate Commerce Commission the power and duty of determining the length of time which the carriers should be allowed in which to accomplish it. To give this discretion to the Commission is the function, and the only function, of the proviso of § 3 and the claim that, by construction, power may be found in it to suspend § 2 is too forced and unnatural to be seriously considered.

This reading of the two sections makes them stand together as an expression of a consistent congressional purpose "to promote the safety of employees and travelers on railroads" on and after July 1st, 1911, by requiring that the safety appliances described in § 2 of the act shall be secure and efficient from that date, and by requiring as § 3 provides that these appliances shall be brought as speedily as may be to a uniform standard of location, size

and usefulness, to be prescribed by the Interstate Commerce Commission.

While the question we have considered has not been presented to this court before in precisely the form in which we have it here, yet § 2 of the act was treated by this court as in full force as of September 4, 1912, in *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, and the Supreme Court of the State of Minnesota in *Coleman* v. *Illinois Central R. R. Co.*, 132 Minnesota, 22, and the Supreme Court of Iowa in *Cook* v. *Union Pacific Ry. Co.*, 158 N. W. Rep. 521, while arriving at their conclusions by somewhat different analyses of the sections of the Act of April 14, 1910, have given to them precisely the meaning and effect which we are giving to them in this decision. It results that the judgment of the Supreme Court of Mississippi is

Affirmed.

BERRY ET AL., CONSTITUTING THE BOARD OF PAROLE OF IOWA, ET AL. *v.* DAVIS.[1]

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

No. 47. Submitted October 26, 1916.—Decided January 15, 1917.

When injunctive relief against action by state officials granted in the court below becomes superfluous and the case moot because of subsequent state legislation passed while the case is here pending, this

[1] On December 4, 1916, the Chief Justice made the following announcement:

"Attention is directed to the fact that the statute of Iowa of April 19, 1913, Supplement to Iowa Code, 1913, p. 1082, concerning which the appellee complained and the enforcement of which by the board of parole he sought by his suit to enjoin, has been repealed during the pendency of the case in this court (see Act of 1915, Supplemental

court will reverse and remand with directions to dismiss the bill without costs.

216 Fed. Rep. 413, reversed.

THE case is stated in the opinion.

Mr. George Cosson, Attorney General of the State of Iowa, and *Mr. Ross R. Mowry*, Assistant Attorney General of the State of Iowa, for appellants.

No appearance for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill to enjoin the State Board of Parole and the warden and physician of the state penitentiary at Fort Madison from performing vasectomy upon the plaintiff, the defendant in error, in pursuance of an Iowa statute approved April 19, 1913. 35 G. A., c. 187, § 1. Supplement to Code 1913, c. 19-B, § 2600-p. This act among other things directed the operation to be performed upon convicts in the penitentiary who had been twice convicted of felony, and on February 14, 1914, the Board had ordered it, upon the ground that the plaintiff had been twice so convicted. The bill was filed on March 11, 1914. On April 15, 1914, following an opinion of the Attorney General that both felonies must have been committed after the passage of the act, the order was laid on the table, and the warden and physician made affidavits, filed on April 22, that the operation would not be performed by them. Nevertheless, three judges, disregarding the fore-

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Supplement to Iowa Code, 1915, p. 238). In view of this fact permission is given the State through its Attorney General on or before January 1, 1917, by printed brief to point out the reasons, if any, which exist why the appeal in this case should not be dismissed."

going opinion and action, proceeded to issue a preliminary injunction as prayed in the bill. 216 Fed. Rep. 413.

An appeal was taken to this court in 1914. In 1915 the Act of 1913 was repealed, and the substituted act does not apply to the plaintiff. Supplemental Supplement to the Code of Iowa, 1915, c. 19-B, § 2600-s1. All possibility or threat of the operation has disappeared now, if not before, by the act of the State. Therefore upon the precedents we are not called upon to consider the propriety of the action of the District Court, but the proper course is to reverse the decree and remand the cause with directions that the bill be dismissed without costs to either party. *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 478; *Jones* v. *Montague*, 194 U. S. 147, 153; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Mills* v. *Green*, 159 U. S. 651, 658.

Decree reversed. Bill to be dismissed without costs to either party.

CAMINETTI *v.* UNITED STATES.

DIGGS *v.* UNITED STATES.

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

HAYS *v.* UNITED STATES.

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

Nos. 139, 163, 464. Argued November 13, 14, 1916.—Decided January 15, 1917.

The White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825, applies to any case in which a woman is transported in interstate commerce for the purpose of prostitution or concubinage; pecuniary

gain, either as a motive for the transportation or as an attendant of its object, is not an element in the offenses defined.

As so read the act is constitutional.

When the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or excuse for judicial construction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly.

Statutory words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them.

When an act provides that it shall be known and referred to by a designated name, the name can not be made the means of overriding the plain meaning of its other provisions.

The reports of congressional committees may be resorted to by the courts when the legislation to which they relate is doubtful and requires interpretation.

The meaning which this court had attributed to the words "any other immoral purpose" as used in the act concerning the importation of alien women, Act of February 20, 1907, c. 1134, 34 Stat. 898, 899, Congress must be presumed to have known when it employed the same words in a similar association in the White Slave Traffic Act.

The power of Congress under the commerce clause, including as it does authority to regulate the interstate transportation of passengers and to keep the channels of interstate commerce free from immoral and injurious uses, enables it to forbid the interstate transportation of women and girls for the immoral purposes of which the petitioners were convicted in these cases.

When an accused person voluntarily testifies in his own behalf and omits to deny or explain incriminating circumstances and events already in evidence in which he participated and concerning which he is fully informed, his silence subjects him to the inferences naturally to be drawn from it, and an instruction to that effect does not violate his rights under the Fifth Amendment or the Act of March 16, 1878, c. 37, 20 Stat. 30.

While it is the better practice in criminal cases for courts to caution juries against too much reliance on the testimony of accomplices and against believing such testimony without corroboration, mere failure to give such an instruction is not reversible error.

220 Fed. Rep. 545; 231 Fed. Rep. 106, affirmed.

THE cases are stated in the opinion.

Mr. Joseph W. Bailey, with whom *Mr. Marshall B. Woodworth* and *Mr. Robert T. Devlin* were on the brief, for petitioner in No. 163:

It was error to charge the jury that they might draw inferences against the defendant Diggs, from his failure to deny or explain incriminating acts in evidence. Constitution, Article V; Act of March 15, 1878, c. 37, 20 Stat. 30; *Balliet* v. *United States*, 129 Fed. Rep. 689, 696; *Myrick* v. *United States* and *Cunningham* v. *United States*, 219 Fed. Rep. 1; *Boyd* v. *United States*, 116 U. S. 616. In the United States courts and in the courts of some of the States, independently of statute, and especially in California, the right of cross-examination is restricted to matters inquired of in chief. Where a defendant does not go into a subject, but leaves it as the prosecution left it, the case as made against him derives no support from his silence. The fact, therefore, that defendant went upon the stand in this case did not justify the instructions complained of.

The practical effect was erroneously to contradict the presumption of innocence and shift the burden of proof.

The evidence authorized the jury to conclude that the women were accomplices. Cyc., vol. 12, pp. 447, 448, and cases cited; *People* v. *Coffey*, 161 California, 433, 447; *United States* v. *Holte*, 236 U. S. 140. It was the duty of the trial court to submit that question and to caution the jury. Cyc., vol. 12, p. 453; *Crawford* v. *United States*, 212 U. S. 183, 204, and numerous other cases. A refusal so to instruct is ground for reversal. *Solander* v. *People*, 2 Colorado, 48; *Cheatham* v. *State*, 67 Mississippi, 335; *People* v. *Sternberg*, 111 California, 11; *People* v. *Strybe*, 36 Pac. Rep. 3; *People* v. *Bonney*, 98 California, 278; Penal Code of California, § 1111; *Martin* v. *State*, 36 S. W. Rep. 587; Cyc., vol. 12, pp. 458, 459, and cases cited.

The issue should have been confined to the specific allegation of purpose, viz., that the woman was to become the defendant's concubine or mistress, which controls the

general terms "debauchery" and "other immoral purposes," in the indictment. For the meaning of "debauchery" see *State* v. *Reeves*, 97 Missouri, 668; *Suslak* v. *United States*, 213 Fed. Rep. 913, 917; *Athanasaw* v. *United States*, 227 U. S. 326. It is unnecessary for us to particularize the many indecent practices that come under the head of "debauchery" and "other immoral practices." It was for the purpose of reaching these that the act was passed.

See: "The Battle with the Slums," pp. 69–75, by Jacob A. Riis, N. Y., The Macmillan Company, 1902.

The case should be reversed for introduction of improper evidence and misconduct of counsel at the trial.

The trial court erred in compelling the defendant on cross-examination to go beyond his direct examination.

The White Slave Traffic Act is unconstitutional if extended to cases where no element of profit exists. *New York* v. *Miln*, 11 Pet. 102; *License Cases*, 5 How. 599; *Bowman* v. *Chicago &c. R. Co.*, 125 U. S. 489; *Lemon* v. *People*, 26 Barbour (N. Y.), 270, affirmed in 20 N. Y. 562; *Welton* v. *Missouri*, 91 U. S. 275; *Hall* v. *DeCuir*, 95 U. S. 485; *Weber* v. *Virginia*, 103 U. S. 344; *Passenger Cases*, 7 How. 283; *King* v. *American Transportation Co.*, 14 Fed. Cases, 512; *Boyse* v. *Anderson*, 2 Pet. 150. All cases heretofore upholding the law have involved actual traffic in women for gain. This traffic, as the court knows judicially, became so menacing that a conference of nations was convened at Paris, July 25, 1902, to concert measures of suppression. The resulting agreement was proclaimed by the President June 18, 1908, 35 Stat. pt. 2, 1979–1984. This the act of Congress was intended to effectuate. The nature of the white slave traffic and the meanings of the term are generally and judicially known. See New Standard Dictionary; *United States* v. *Hoke*, 187 Fed. Rep. 992, 1002. The court should take cognizance of the evil aimed at by the act. The Paris agreement, the proclamation, the

act itself in the title and §§ 6 and 8, and the committee's report all demonstrate that commercial traffic alone was in view. Commerce in the Constitution implies traffic and gain. Congress cannot regulate morals and thus usurp the state police power by forbidding the mere passage or transportation of passengers.

The following is a condensation of *Mr. Bailey's* petition for rehearing in the Caminetti Case.

The White Slave Traffic Act does not apply to the uncontested facts of this case. The question here is whether the purpose of Caminetti, being free from every element of coercion and commercialism, is within the prohibition of the statute. It is a question of classification, rather than of words. An act might be clearly within the language of a statute directed against voluntary vice, and yet that identical act would not be within precisely the same words in a statute directed against involuntary vice. Before we can decide whether a particular act is within the words of a statute, we must first decide whether the class of acts to which the particular act belongs is within the purpose of the statute. This principle of construction was sanctioned by this court in *Holy Trinity Church* v. *United States*, 143 U. S. 457, and the rule there announced has been received by the bench and bar as the law of the land for more than twenty years. In that case the court held that although the contract of employment was within the letter of the law, emphasized by particular expression, as well as by certain exceptions, Congress intended only to legislate against the importation of manual laborers under contract, and intellectual laborers were not within the statute. Here we say that Congress intended to legislate only against commercialized vice, and no conduct, however immoral, which is free from coercion and commercialism, is within the statute.

How did this court reach the conclusion that the Contract Labor Law includes only those who work with their hands, and not those who work with their brain? It did so by taking into account the title of the act, the evils which it was sought to remedy, the circumstances surrounding the appeal to Congress, and the report of the committee recommending its enactment. If it was proper to consider such matters in ascertaining the scope of a law which enforces its prohibitions by moderate fines, certainly the same course is even more proper with respect to a law which makes the citizen who violates it a felon; and as this court consulted the committee report in construing the Contract Labor Law, *a fortiori* it ought to adopt the same method in construing the White Slave Traffic Act, which, as it has been construed in this case, is the most drastic criminal law ever enacted by the American Congress. If there be any difference, the language was plainer in that case than in this. As there are no exceptions to accentuate the inclusion of all classes not specially excepted, we are justified in thinking that, even more than in the other case, the court ought to consider the report of the committee which prepared the White Slave Traffic Act.

The rule for construing statutes as announced in the *Holy Trinity Church Case* was not modified by the decision in *United States* v. *Bitty*, 208 U. S. 391. There was a difference in the facts of the two cases, and not any difference in the logic of the court. In the first case the court held that the contract was not within the statute, because, although within the letter of it, it was not within the purpose of it; and in the second case the court held that the offense was within the statute, because it was within both the letter and the purpose of it.

The court did not, in *United States* v. *Bitty*, consider the report of a congressional committee, for the very sufficient reason that there was no report from which the court

could have extracted the real meaning of the later law. If this court gathered the intention of Congress from the words of the statute in the Bitty case, it nevertheless sought the meaning of those words in the history of that statute. Mr. Justice Harlan devoted the first part of his opinion to a review of the legislation, which began with the Act of March 3, 1875—that being the first law which prohibited the importation of alien prostitutes—was followed by the Act of March 3, 1903, which still further enlarged the prohibitions, and culminated in the Act of February 20, 1907, where the words "or for any other immoral purpose" first appear. Those previous acts were reproduced in order to show by the successive changes in the law the purpose which Congress had in mind. I cannot perceive any difference in principle between investigating the history of a law and examining the report of a committee for the purpose of ascertaining whether Congress intended that the statute should include a certain class of persons or offenses.

Section 1 must be read in connection with § 8. Congress had some purpose in giving the statute a name, and the only imaginable purpose was to indicate the character of offenses which it was intended to punish. We must, therefore, so read the entire act as to give effect to that purpose, or we must find some other purpose which we can reasonably ascribe to Congress. If we are not able to discover any other purpose—and I cannot imagine any other—then it follows necessarily that the language of § 1 is limited by § 8 to cases within "the designation or description" of the latter. Certainly we cannot suppose that Congress, even though its only purpose was to give a name to this act, intended it to include offenses which the name clearly excludes. If Congress intended to include in this act cases of naked immorality, without any element of commerce or coercion, then to call it the "White Slave Traffic Act" was a misnomer; and we can hardly assume

that Congress would take the trouble of formally bestowing a name upon a statute and then misname it.

But while § 8, if regarded only as giving a name to the statute, must confine the language of § 1 to cases within the "designation or description" of the name thus given, I think it does more than merely christen the law. Its form and its phraseology combine to denote an office more important than that, and its incorporation in the statute was such an extraordinary legislative procedure that we must attach a more than ordinary significance to it. When Congress said "that this Act shall be known and referred to as the 'White Slave Traffic Act,'" it meant, if it meant anything, that it should be understood and construed as an act for the suppression of the white slave trade. But we must understand the true import of those words before we can classify cases as within or without them. We cannot, of course, expect to find their definition in the older dictionaries, for the vicious practices which have introduced them into our language are of recent origin; but we do find, in a modern dictionary of accepted authority, definitions of a "white slave" and of "white slavery," in both of which the sale of young and innocent girls for immoral purposes is an essential element. Congress has not, however, used those words in a sense which restricts them to young girls; but it has used them in a sense which makes gain or restraint a necessary part of their definition, and that is made manifest by the report of the committee which prepared the bill and recommended its passage. This definition is authoritative, and controls the act.

Such is the view expressed by the Attorney General of the United States in an official communication to one of his subordinates; and by Mr. Justice Lamar in *United States* v. *Holte*, 236 U. S. 140, 146, in his dissenting opinion. We have a right to say that the meaning of the statute is, to say the least, so doubtful that this court ought to em-

ploy every known and approved method of ascertaining exactly what it means.

We are clearly within the rule which permits, and even requires, the court to take into consideration the results which must ensue, if that question be decided one way rather than the other. To hold that the act includes mere escapades transforms into a felony what all of the States have regarded as a misdemeanor for many years, and renders men infamous for conduct which, at its worst, might be no more than a transgression of the moral law. Our humanity revolts at the thought of punishing a moral lapse as a felony, and no law which does so can be properly enforced. The punishments provided in this statute when applied to cases of fornication or adultery may not be deemed cruel and unusual within the 8th Amendment, but they are so nearly such in fact as to engage the benevolence of judges, peace officers, and juries against its strict enforcement. It has long been a maxim with us that in order to insure the due enforcement of any statute its penalties must bear some fair relation to the offenses which it seeks to prevent, and we must assume that our federal lawmakers understood it.

We cannot suppose that those who drafted this law, or that those who enacted it upon a full consideration, could not foresee its consequences, and we must, therefore, suppose that the Congress of the United States knew that it was arming blackmailers, both male and female, with such an effective instrument as this act furnishes them, if construed to embrace mere escapades. It is a part of the history of our time that the Department of Justice is even now covering this Republic with a dragnet in an effort to apprehend those who have been preying upon the weaknesses and vices of men and women.

If the act must be construed to include cases of mere immorality, free from all element of commerce or coercion, then Congress had no constitutional power to enact it.

In each of the decisions which have heretofore sustained the constitutionality of the act, some element of commerce or coercion was involved. Much as we may abhor the idea that women are bought and sold, or transported from State to State for the purpose of hiring or exploiting them for immoral purposes, such a traffic is as much interstate commerce as the shipment of horses or cattle. In those cases the women were actually the subject of interstate commerce, and those who transported them were therefore within the regulatory power of Congress; but in this case the woman accompanied the man without any such purpose on his part, and she was not, therefore, the subject of interstate commerce. She was undoubtedly engaged in interstate commerce, and Congress could regulate her conduct so far as it related to or affected interstate commerce; but as she was not the subject of interstate commerce, Congress had no jurisdiction over any person simply because she traveled from California to Nevada. I do not forget that this court has said that persons may be the subject of interstate commerce, but that expression was used in declaring the power of Congress to regulate common carriers in the transportation of persons, or in declaring the power of Congress to regulate the conduct of persons engaged in interstate commerce; and in no case will it be found that this court has ever intimated that a person may, as to himself or herself, be the subject of interstate commerce. In the case of interstate travel the power of Congress is over the traveler, and not over any other person or thing; but in the case of an interstate shipment the power of Congress is over the subject-matter, as well as over the shipper. I think we may safely say that as every person passing from State to State has a right to go without molestation, insult, or injury, Congress could pass a law prohibiting affrays, or the use of obscene language, on any coach carrying interstate passengers; but beyond the safety and

comfort of interstate passengers Congress cannot regulate the personal conduct of those who travel. The power is one over commerce, and is restrained by the very nature of it to commerce, in some substantial form.

How can a man violate an interstate commerce law when he does not travel himself, and does not send or receive anything from another State? It will not answer to say that he received the woman, because his interest in her was of that personal kind which is not reducible to commerce. The case would be entirely different if the woman whose transportation he had furnished was taken by him on the journey against her will or for the purpose of selling or exploiting her; for in that case she would be "the subject" of interstate commerce, and in transporting her from State to State he would be as much amenable to the commerce power of Congress as if he shipped a horse.

I will not insult the intelligence of the court by asking whether this law, if intended to apply to other than the real white slave traffic, is designed to regulate commerce or to regulate morals. If the law means that all immorality connected in any way with interstate transportation is within this act, then it is designed to regulate morals, not commerce; and if the Congress of the United States can, under the pretense of regulating commerce, take the morals of the people under federal control, it can, under the same pretense, gradually usurp the police powers of these States and finally destroy the States themselves.

Mr. Harry O. Glasser for petitioner in No. 464:

The word "prostitution" implies indiscriminate intercourse with men, *People* v. *Demousset*, 71 California, 611; *State* v. *Goodwin*, 33 Kansas, 538; *Carpenter* v. *People*, 8 Barbour (N. Y.), 603; *Van Dalsen* v. *Commonwealth*, 89 S. W. Rep. 255; *United States* v. *Smith*, 35 Fed. Rep. 490, and has been defined as involving the ideas of hire and

gain. *Munfill* v. *People*, 154 Illinois, 640; *State* v. *Gibson*, 111 Missouri, 97.

"Debauchery" signified originally an enticing away from employment or duty; later, a corruption of one's manners or morals, and as applied to women, merely seduction. *Koenig* v. *Nott*, 2 Hilt. (N. Y.) 323; Scott's Edition of Bailey's Dictionary (1755); McKenzie English Synonyms (London, 1854).

The words "other immoral practice" depend on the words preceding, embracing merely immoral acts which are analogous to prostitution and debauchery. As used in the statute, they apply to action which directly or indirectly involves gain. The true meaning is evidenced clearly by the definition of the act as the White Slave Traffic Act in § 8, which could have had no other purpose than to indicate the character of the offenses intended. All doubt on this subject is entirely removed by the report of the House Committee. Among other things the report makes very evident that the act was intended to combat an intolerable condition of affairs of recent origin due to modern transportation facilities. It could not, therefore, have been aimed at the practices of adultery and fornication.

Congress having no power to forbid these practices, the act must be construed within its power, that is, as relating to commerce or traffic in prostitutes. *United States* v. *Bitty*, 208 U. S. 393, related to an act passed to regulate the introduction of aliens into the country, which, as the court said, sought to keep out immigrants "whose permanent residence here would not be desirable, or for the common good." This was not necessarily based upon the commerce clause; the regulation of traffic and travel among citizens between different States is quite another thing, and so the intent of Congress in the alien act cannot be said to be the same as its intent in the White Slave Traffic Act, even though similar words are employed.

A definite evil was aimed at; not a general condition. *Holy Trinity Church* v. *United States*, 143 U. S. 457.

The conviction was not sustained by the indictment. The charges that the objects of the transactions complained of were prostitution and debauchery being in no respect made out, the conviction could only be sustained upon the charge that "other immoral practices" were in view. This allegation, merely following the generality of the statute, was insufficient. A conviction based on such a generality could not be pleaded against another indictment involving the same transaction.

The court should have warned the jury against the testimony of the woman as an accomplice, as requested by the petitioner.

That the woman transported is an accomplice, see *Holte* v. *United States*, 236 U. S. 140; *Reed* v. *State*, 63 Arkansas, 457; *People* v. *Collum*, 122 California, 186; *State* v. *Jones*, 115 Iowa, 113.

Mr. Assistant Attorney General Wallace for the United States.

Mr. Justice Day delivered the opinion of the court.

These three cases were argued together, and may be disposed of in a single opinion. In each of the cases there was a conviction and sentence for violation of the so-called White Slave Traffic Act of June 25, 1910, 36 Stat. 825, the judgments were affirmed by the Circuit Courts of Appeals, and writs of certiorari bring the cases here.

In the Caminetti case, the petitioner was indicted in the United States District Court for the Northern District of California, upon the sixth day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported and aiding and assisting in

obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of $1,500.00. Upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, that judgment was affirmed. 220 Fed. Rep. 545.

Diggs was indicted at the same time as was Caminetti, upon six counts, with only four of which are we concerned, inasmuch as there was no verdict upon the last two. The first count charged the defendant with transporting and causing to be transported and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his concubine and mistress. The second count charged him with a like offense as to another woman (the companion of Caminetti) in transportation, etc., from Sacramento to Reno that she might become the mistress and concubine of Caminetti. The third count charged him (Diggs) with procuring a ticket for the first mentioned woman from Sacramento to Reno in interstate commerce, with the intent that she should become his concubine and mistress. The fourth count made a like charge as to the girl companion of Caminetti. Upon trial and verdict of guilty on these four counts, he was sentenced to imprisonment for two years and to pay a fine of $2,000.00. As in the Caminetti case, that judgment was affirmed by the Circuit Court of Appeals. 220 Fed. Rep. 545.

In the Hays case, upon June 26th, 1914, an indictment

was returned in the United States District Court for the Western District of Oklahoma against Hays and another, charging violations of the act. The first count charged the said defendants with having, on March 17th, 1914, persuaded, induced, enticed and coerced a certain woman, unmarried and under the age of eighteen years, from Oklahoma City, Oklahoma, to the City of Wichita, Kansas, in interstate commerce and travel, for the purpose and with intent then and there to induce and coerce the said woman, and intending that she should be induced and coerced to engage in prostitution, debauchery and other immoral practices, and did then and there, in furtherance of such purposes, procure and furnish a railway ticket entitling her to passage over a line of railway, to wit, the Atchison, Topeka and Santa Fé Railway, and did then and there and thereby knowingly entice, and cause the said woman to go and to be carried and transported as a passenger in interstate commerce upon said line of railway. The second count charged that on the same date the defendants persuaded, induced, enticed and coerced the same woman to be transported from Oklahoma City to Wichita, Kansas, with the purpose and intent to induce and coerce her to engage in prostitution, debauchery and other immoral practices at and within the State of Kansas, and that they enticed her and caused her to go and be carried and transported as a passenger in interstate commerce from Oklahoma City, Oklahoma, to Wichita, Kansas, upon a line and route of a common carrier, to-wit, the Atchison, Topeka and Santa Fé Railway. Defendants were found guilty by a jury upon both counts, and Hays was sentenced to imprisonment for eighteen months. Upon writ of error to the Circuit Court of Appeals for the Eighth Circuit, judgment was affirmed. 231 Fed. Rep. 106.

It is contended that the act of Congress is intended to reach only "commercialized vice," or the traffic in women

for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which conviction was had, do not come within the statute.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.*, 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for "any other immoral purpose," or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to

them. To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to-wit, becoming a concubine or mistress, for which Caminetti and Diggs were convicted; or to transport an unmarried woman, under eighteen years of age, with the intent to induce her to engage in prostitution, debauchery and other immoral practices, for which Hays was convicted, would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine from being the execution of purposes within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

In *United States* v. *Bitty*, 208 U. S. 393, it was held that the act of Congress against the importation of alien women and girls for the purpose of prostitution "and any other immoral purpose" included the importation of an alien woman to live in concubinage with the person importing her. In that case this court said:

"All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one

man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.' *Murphy* v. *Ramsey*, 114 U. S. 15, 45. . . . Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose,' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 Lewis' Sutherland Stat. Const., § 423, and authorities cited. But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse."

This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and

must be presumed to have been known to Congress when it enacted the law here involved. (See the sections of the act [1] set forth in the margin.)

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[1] Sections 2, 3, and 4 of the act are as follows:

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished

But it is contended that though the words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation, and although the sections in which they appear do not in terms limit the offense defined and punished to acts of "commercialized vice," or the furnishing or procuring of transportation of women for debauchery, prostitution or immoral practices for hire, such limited purpose is to be attributed to Congress and engrafted upon the act in view of the language of § 8 and the report which accompanied the law upon its introduction into and subsequent passage by the House of Representatives.

In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body, *United States* v. *Fisher*, 2 Cranch, 358, 386; *Goodlett* v. *Louisville and Nashville Railroad*, 122 U. S. 391, 408; *Patterson* v. *Bark Eudora*, 190 U. S. 169, 172; *Cornell* v. *Coyne*, 192 U. S. 418, 430; *Lapina* v. *Williams*, 232 U. S. 78, 92, the title of this act embraces the regulation of interstate commerce "by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." It is true that

by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years, from any State or Territory or the District of Columbia, to any other State or Territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

§ 8 of the act provides that it shall be known and referred to as the "White-slave traffic Act," and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation, *Blake* v. *National Banks*, 23 Wall. 307, 319; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 42; *Chesapeake and Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 246; *Binns* v. *United States*, 194 U. S. 486, 495. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308.

The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately

addressed to the legislative branch of the government, which alone had authority to enact and may if it sees fit amend the law. *Lake County* v. *Rollins*, *supra*, p. 673.

It is further insisted that a different construction of the act than is to be gathered from reading it is necessary in order to save it from constitutional objections, fatal to its validity. The act has its constitutional sanction in the power of Congress over interstate commerce. The broad character of that authority was declared once for all in the judgment pronounced by this court, speaking by Chief Justice Marshall, in *Gibbons* v. *Odgen*, 9 Wheat. 1, and has since been steadily adhered to and applied to a variety of new conditions as they have arisen.

It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Moreover, this act has been sustained against objections affecting its constitutionality of the character now urged. *Hoke* v. *United States*, 227 U. S. 308; *Athanasaw* v. *United States*, 227 U. S. 326; *Wilson* v. *United States*, 232 U. S. 563. In the *Hoke Case*, the constitutional objections were given consideration and denied upon grounds fully stated in the opinion (pp. 308 *et seq.*). It is true that the particular case arose from a prosecution of one charged with

transporting a woman for the purposes of prostitution in violation of the act. But, holding as we do, that the purposes and practices for which the transportation in these cases was procured are equally within the denunciation of the act, what was said in the *Hoke Case* as to the power of Congress over the subject is as applicable now as it was then.

After reviewing the *Lottery Case*, 188 U. S. 321, 357, and other cases in this court decided since the decision of that case, it was said in the *Hoke Case* (p. 323):

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress."

Notwithstanding this disposition of the questions concerning the construction and constitutionality of the act, certain of the questions made are of sufficient gravity to require further consideration.

In the Diggs case, after referring to the fact that the defendant had taken the stand in his own behalf and that his testimony differed somewhat from that of the girls who had testified in the case, and instructing the jury that it was their province to ascertain the truth of the matter, the court further said: "After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the Government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with

which that trip was taken, contenting himself with merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness-stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness-stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice and virtually made him a witness against himself in derogation of rights secured by the Fifth Amendment to the Federal Constitution.

There is a difference of opinion expressed in the cases upon this subject, the Circuit Court of Appeals in the Eighth Circuit holding a contrary view, as also did the

Circuit Court of Appeals in the First Circuit. See *Balliet* v. *United States*, 129 Fed. Rep. 689; *Myrick* v. *United States*, 219 Fed. Rep. 1. We think the better reasoning supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, c. 37, 20 Stat. 30,) he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

The accused of all persons had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances and intent with which that trip was taken, and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden

of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf. We agree with the Circuit Court of Appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf.

See in this connection *Brown* v. *Walker*, 161 U. S. 591, 597; *Sawyer* v. *United States*, 202 U. S. 150, 165; *Powers* v. *United States*, 223 U. S. 303, 314.

It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In *Holmgren* v. *United States*, 217 U. S. 509, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop's Criminal Procedure, 2nd ed., § 1081, and cases cited in the note.

Much is said about the character of the testimony adduced and as to certain facts tending to establish the guilt or innocence of the accused. This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial

courts. Other objections are urged upon our attention, but we find in none of them a sufficient reason for reversing the judgments of the Circuit Courts of Appeals in these cases.

The judgment in each of the cases is

Affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

Mr. Justice McKenna, with whom concurred the Chief Justice and Mr. Justice Clarke, dissenting.

Undoubtedly in the investigation of the meaning of a statute we resort first to its words, and when clear they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject-matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

The transportation which is made unlawful is of a woman or girl "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." Our present concern is with the words "any other immoral practice," which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications. Are they controlled by those which

precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? "Immoral" is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the "Act shall be known and referred to as the 'White-slave traffic Act.'" And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act it has especial weight. *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 82. But it gives more than a title; it makes distinctive the purpose of the statute. The designation "White-slave traffic" has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances.

The author of the bill was Mr. Mann, and in reporting it from the House Committee on Interstate and Foreign Commerce he declared for the Committee that it was not

the purpose of the bill to interfere with or usurp in any way the police power of the States, and further that it was not the intention of the bill to regulate prostitution or the places where prostitution or immorality was practiced, which were said to be matters wholly within the power of the States and over which the federal government had no jurisdiction. And further explaining the bill, it was said that the sections of the act had been "so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution." And again:

"The White Slave Trade. A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution." House Report No. 47, 61st Cong., 2d sess., pp. 9, 10.

In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims.

In 1912 the sense of the Department of Justice was taken of the act in a case where a woman of 24 years went from Illinois, where she lived, to Minnesota at the solicitation and expense of a man. She was there met by him and engaged with him in immoral practices like those for which petitioners were convicted. The district attorney forwarded her statement to the Attorney General, with the comment that the element of traffic was absent from the

transaction and that therefore, in his opinion, it was not "within the spirit and intent of the Mann Act." [1] Replying, the Attorney General expressed his concurrence in the view of his subordinate.[2]

Of course, neither the declarations of the report of the Committee on Interstate Commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed besides of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity for the act and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of a committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the measure it recommends has the purpose it declares and will accomplish it as declared.

[1] "Careful consideration of the facts and circumstances as related by Miss Cox fails to convince me that her case came within the spirit and intent of the Mann act. The element of traffic is entirely absent from this transaction. It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of Ejusdem Generis. This view of the statute is the more reasonable when considered in connection with Section 8 where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain."

[2] "I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the federal courts unless other and different facts are presented to you."

This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. In *Holy Trinity Church* v. *United States*, 143 U. S. 457, there came to this court for construction an act of Congress which made it unlawful for any one in any of the United States "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . to perform labor or *service of any kind* [italics mine] in the United States, its Territories or the District of Columbia." The Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the City of New York and enter its service as rector and pastor. The church was proceeded against under the act and the Circuit Court held that it applied and rendered judgment accordingly. 36 Fed. Rep. 303.

It will be observed that the language of the statute is very comprehensive, fully as much so as the language of the act under review, having no limitation whatever from the context; and the Circuit Court, in submission to what the court considered its imperative quality, rendered judgment against the church. This court reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." And the learned Justice further said: "This has been often asserted, and the reports are full of cases illustrating its application."

It is hardly necessary to say that the application of the rule does not depend upon the objects of the legislation, to be applied or not applied as it may exclude or include good things or bad things. Its principle is the simple one that the words of a statute will be extended or restricted to execute its purpose.

Another pertinent illustration of the rule is *Reiche* v. *Smythe*, 13 Wall. 162, in which the court declared that if at times it was its duty to regard the words of a statute, at times it was also its duty to disregard them, limit or extend them, in order to execute the purpose of the statute. And applying the principle, it decided that in a tariff act the provision that a duty should be imposed on horses, etc., and other *live animals* imported from foreign countries should not include canary birds, ignoring the classification of nature. And so again in *Silver* v. *Ladd*, 7 Wall. 219, where the benefit of the Oregon Donation Act was extended by making the words "single man" used in the statute mean an unmarried woman, disregarding a difference of genders clearly expressed in the law.

The rule that these cases illustrate is a valuable one and in varying degrees has daily practice. It not only rescues legislation from absurdity (so far the opinion of the court admits its application), but it often rescues it from invalidity, a useful result in our dual form of governments and conflicting jurisdictions. It is the dictate of common sense. Language, even when most masterfully used, may miss sufficiency and give room for dispute. Is it a wonder therefore, that when used in the haste of legislation, in view of conditions perhaps only partly seen or not seen at all, the consequences, it may be, beyond present foresight, it often becomes necessary to apply the rule? And it is a rule of prudence and highest sense. It rescues from crudities, excesses and deficiencies, making legislation adequate to its special purpose, rendering unnecessary repeated qualifications and leaving the simple and best exposition of a law the mischief it was intended to redress. Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.

There is much in the present case to tempt to a violation of the rule. Any measure that protects the purity of

women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase "White-slave traffic." And it was such immorality that was in the legislative mind and not the other. The other is occasional, not habitual—inconspicuous—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. The purpose is studied, all effects measured, not left at random—one evil practice prevented, opportunity given to another. The present case warns against ascribing such improvidence to the statute under review. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage. The result is grave and should give us pause. It certainly will not be denied that legal authority justifies the rejection of a construction which leads to mischievous consequences, if the statute be susceptible of another construction.

United States v. *Bitty*, 208 U. S. 393, is not in opposition. The statute passed upon was a prohibition against the importation of alien women or girls, a statute, therefore, of broader purpose than the one under review. Besides, the statute finally passed upon was an amendment to a prior statute and the words construed were an addition to the

prior statute and necessarily, therefore, had an added effect. The first statute prohibited the importation of any alien woman or girl into the United States "*for the purposes of prostitution.*" The second statute repeated the words and added "*or for any other immoral purpose*" (italics mine). Necessarily there was an enlargement of purpose, and besides the act was directed against the importation of foreign corruption and was construed accordingly. The case, therefore, does not contradict the rule; it is an example of it.

For these reasons I dissent from the opinion and judgment of the court, expressing no opinion of the other propositions in the cases.

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE CLARKE concur in this dissent.

VON BAUMBACH, COLLECTOR OF INTERNAL REVENUE, *v.* SARGENT LAND COMPANY.

VON BAUMBACH, COLLECTOR OF INTERNAL REVENUE, *v.* SUTTON LAND COMPANY.

VON BAUMBACH, COLLECTOR OF INTERNAL REVENUE, *v.* KEARSARGE LAND COMPANY.

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

Nos. 286, 287, 288. Argued December 13, 14, 1916.—Decided January 15, 1917.

Corporations organized under the laws of Minnesota, not for charitable or eleemosynary purposes but for the pecuniary advantage of their shareholders, *held*, "organized for profit" within the meaning of the Corporation Tax Law of August 5, 1909.

The decision whether a corporation is carrying on business within the meaning of the Corporation Tax Law must depend in each instance upon the particular facts before the court; no particular amount of business is required.

A corporation which has not reduced its activities to owning and holding property and the distribution of its avails, but maintains its organization for continued efforts in pursuit of profit and for such activities as are therein essential, is carrying on business within the meaning of the act.

Respondent corporations, besides receiving and distributing among their shareholders the royalties from a number of outstanding long term "mining leases," employed another company to inspect the lessees' operations and keep them to their contracts, made some mining explorations at expense on other parts of their properties, sold or leased other parcels and sold some timber, *held*, that they were carrying on business within the meaning of the Corporation Tax Law.

Quære: Whether this court, in determining whether royalties under mining leases are income subject to the Corporation Tax Law, is constrained to follow the decisions of the highest court of the State in which the leased property is situate holding that such royalties are rents and profits.

The "mining leases" involved in these cases, were not equivalent to sales of property; and the moneys paid by the lessees to the respondents were not converted capital, but rents or royalties, and as such were income, proper to be included in measuring their taxes under the Corporation Tax Law. *Stratton's Independence* v. *Howbert*, 231 U. S. 399; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.

The depletion of a mine resulting from the removal of ore in the course of its operation is not a "depreciation of property" for which a deduction may be made under the Corporation Tax Law.

219 Fed. Rep. 31, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Wallace for petitioner:

The respondents were "doing business" within the meaning of the Corporation Tax Act. The cases fall within *Mitchell* v. *Clark Iron Co.*, 220 U. S. 107, 170; not within *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28. In the cases at bar the companies were

incorporated for the very purpose of getting, in the operation and management of mining leases, the advantage of a legal person over minors and undivided interests. The corporations supplied the main capital—the land. The lessees supplied the labor and, so to speak, the working capital. The product was divided between them. This arrangement constituted a community of interest between lessors and lessees and required the corporations to do what they did—namely, exercise a constant supervision over the business to see that they obtained their just royalties. This shows that the object of a mining lease is to divide up the mining business, the lessor furnishing most of the capital.

A mining lease is not a sale on installments, and the royalties thereon are income. See the full remarks of Lord Blackburn in *Coltness Iron Co.* v. *Black*, 6 App. Cas. 315, 335. As for the Pennsylvania cases relied on by the court below (219 Fed. Rep. 38, 39), see *Denniston* v. *Haddock*, 200 Pa. St. 426, 428; they oppose all the other authorities. Before the rights of the United States accrued, the Supreme Court of Minnesota had decided, in *State* v. *Evans*, 99 Minnesota, 220, that a mining lease is not a sale but a lease, and that the royalties on it are true rents or profits accruing from the land, and this was affirmed in *Boeing* v. *Owsley*, 122 Minnesota, 190, and in *Minnesota* v. *Royal Mineral Association*, 156 N. W. Rep. 128, notwithstanding the decision below. The decision in *State* v. *Evans* made a rule of property in Minnesota, and the Court of Appeals was bound to follow it.

The royalties or rentals, when received, constituted gross income of the lessors. *Mitchell* v. *Clark Iron Co.*, *supra*. Whether these "royalties" are called payments by installment of a debt, or conversion of capital from one form to another, they were, nevertheless, received by the companies during the taxing years from the business done by them with the advantages inherent in a corporate

organization. They were the gross income of the companies from such business, since gross income is nothing but gross money receipts or revenue. They are therefore within the very language of the act. *Anderson* v. *Forty-two Broadway Co.*, 239 U. S. 69. The distinction is plain between a casual conversion of capital, *Secretary of State* v. *Scoble* (1903), 1 K. B. 494 (1903) A. C. 299; *Stevens* v. *Hudson's Bay Co.*, 101 Law Times Rep. 96; *Gray* v. *Darlington*, 15 Wall. 63, 66, and a conversion occurring in the regular course of business. *Stratton's Independence, Ltd.*, v. *Howbert*, 231 U. S. 399, 414, 415; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 114.

"Depreciation" cannot be "allowed" under the act unless, and only to the extent that, actual deductions or payments have been made on account of it. Just as "income" must be an actual, not a hypothetical, receipt, so "outgo" must be an actual, not a hypothetical, payment. It seems clear that "depreciation," as defined by the act, is within the class "losses *actually* sustained within the year;" and it seems equally clear that a loss to be "*actually* sustained" must have caused some actual disservice or damage to the person concerned. *Baldwin Locomotive Works* v. *McCoach*, 215 Fed. Rep. 967, 969; 221 Fed. Rep. 59.

Depletion of capital cannot be deducted as "depreciation." The latter term does not naturally include the former. In the case of a mine the machinery, shafts, etc., depreciate, but we do not say that the deposit of mineral depreciates by being sold. The English decisions all seem to maintain, or, at least, countenance the view that depletion of capital cannot be deducted as depreciation. *Lee* v. *Neuchatel Asphalt Co.*, 41 Ch. Div. 1; *Wilmer* v. *McNamara & Co., Ltd.* (1895), 2 Ch. 245; *Coltness Iron Co.* v. *Black*, 6 App. Cas. 315; *Alianza Co.* v. *Bell* (1904), 2 K. B. 666 (1905), 1 K. B. 184 (1906), A. C. 18; *Kauri Timber Co., Ltd.*, v. *Commr. of Taxes* (1913), A. C. 771, 777. See

Boutwell on the direct and excise tax system of the United States, pp. 273, 274; *Stratton's Independence* v. *Howbert*, 207 Fed. Rep. 419, 421, 422; *Commonwealth* v. *Ocean Oil Co.*, 59 Pa. St. 61; *Commonwealth* v. *Penn Gas Coal Co.*, 62 Pa. St. 241; *Van Dyke* v. *Milwaukee*, 159 Wisconsin, 460. We know of no authority holding depletion of capital equivalent to "depreciation" other than the decision of the court below and that in the *Nipissing Mines Case*, 202 Fed. Rep. 803.

Mr. John R. Van Derlip, with whom *Mr. Burt F. Lum* and *Mr. Kenneth Taylor* were on the brief, for respondents.

The respondents were not corporations "organized for profit." The sole purpose of their organization was the liquidation of the assets contributed, in undivided portions, by the owners, with a view to the partition of the whole and to enable them to realize the money equivalent of their respective contributions, but with no view to dealing, speculating, trading, or gain. The act means that a corporation, to be subject to taxation, must be organized to make profit from the carrying on or doing of business. *Lewellyn* v. *Pittsburgh, B. & L. E. Ry. Co.*, 222 Fed. Rep. 177, 183, 184; *Smith* v. *Anderson*, L. R., 15 Ch. Div. 247. The words "organized for profit," do not merely distinguish between charitable corporations and all others. The suggestion that any corporation organized by private persons for their own advantage or interest is organized for profit is untenable. Such an interpretation is opposed to the common acceptation of the words, and renders them idle. For it is not sensibly conceivable that any persons would organize a corporation, unless it would be of some advantage to them. The tax is not a tax on incomes, nor on corporations which merely receive incomes from property. *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *McCoach* v. *Minehill &c. R. R. Co.*, 228 U. S. 295; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 149, 152. The receipt of inter-

est, rent, or other income is simply a concomitant of property ownership. *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 625, 626. "Profit" in this act signifies the gain from a commercial or other active business, involving "ordinary and necessary expenses" in the way of rentals, salaries and other outgoes and obligations. *Gray* v. *Darlington*, 15 Wall. 63; *People* v. *Board of Supervisors*, 4 Hill, 20. If the words "organized for profit" be ignored, the act would apply to every corporation carrying on or doing business, which, concededly, it does not.

Respondents were not "carrying on or doing business" during the years for which the tax was assessed. There was no substantial activity other than the receipt of moneys payable to them under the outstanding mining contracts and the distribution of such moneys to their stockholders. It was only because the act was limited to corporations doing business that its constitutionality was sustained. *Flint* v. *Stone-Tracy Co.*, *supra.*

In *Mitchell* v. *Clark Iron Co.*, 220 U. S. 107, 170, the question whether the Clark Iron Company was "doing business" within the meaning of the statute was not an issue. This court assumed that the company was continuing, after the passage and approval of the act, to make leases from time to time, an activity, which, if it existed, may be conceded to be doing business within the statute.

The amendment of the articles of incorporation in these cases conforms completely in its effect to the amendment made by the Minneapolis Syndicate in the *Zonne Case*, *supra*, and also in *Abrast Realty Co.* v. *Maxwell*, 206 Fed. Rep. 333; *s. c.*, 218 Fed. Rep. 457.

In every case the question is determined not by the power to act, but by the activities engaged in by the corporation. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 145, 151; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32; *Minehill &c. R. R. Co.* v. *McCoach*, 192

Fed. Rep. 670, 672; *Public Service Ry. Co.* v. *Herold*, 227 Fed. Rep. 500; *State Line Co.* v. *Davis*, 228 Fed. Rep. 246, 249.

Owning and caring for property and division of the income from it is not "doing business." Business must be actually done. So far as concerns the mining property, the contracts disqualified respondents from "doing business." The business was all done by the lessees. The petty licenses to squatters and the two or three sales of burned timber to save its value from destruction were of course merely incidental and negligible. So were the sales of land, which were trivial, incidental to ownership and made under a contract antedating respondents' ownership. Sales, or receipts of principal, interest or rents, as incidents of ownership, are not doing business.

Since the receipts of money under the mining contracts represented merely a conversion of capital assets without gain or profit, they were not "gross income." Respondents took and held the legal title, subject to the outstanding contracts, pursuant to which they could receive, and anticipate receiving, nothing except the moneys which should become payable thereunder. Even if the contracts were not sales of the ore, it does not follow that the receipts were income. Counsel here distinguished English cases, and cited *Caldwell* v. *Fulton*, 31 Pa. St. 475; *Harlan* v. *Lehigh C. & N. Co.*, 35 Pa. St. 287; *Citizens' Gas Co.* v. *Whitney*, 232 Pa. St. 592, and many other Pennsylvania decisions, and *Hook* v. *Garfield Coal Co.*, 112 Iowa, 210; *Wilson* v. *Youst*, 43 W. Va. 826; *Selvey* v. *Grafton Coal Co.*, 72 W. Va. 680; *Manning* v. *Frazier*, 96 Illinois, 279. The contracts are analogous to executory contracts of sale. *Genet* v. *D. & H. Canal Co.*, 136 N. Y. 593; *Browning* v. *Boswell*, 215 Fed. Rep. 826; *Kansas Natural Gas Co.* v. *Board*, 75 Kansas, 335.

The decisions of the Minnesota Supreme Court on the nature of such "mining leases" are not binding as a rule of

property or otherwise. All the cases cited to the contrary concerned private disputes in most instances governed by local laws or rules of property, and in none of them was the construction of a federal statute involved. The law in question is a federal taxing law which under the Constitution must operate with uniformity to be valid, and in applying it the federal courts must follow their own judgment.

Gross income and gross receipts are different things. There is no tax unless there are net profits. *Flint* v. *Stone-Tracy Co.*, 220 U. S. 145. If the receipts from the leases were income there would be no distinction under the act between income and "property or invested capital."

That proceeds of sales of capital are not income, see: *Stevens* v. *Hudson's Bay Co.*, 101 L. T. Rep. 96; *Secretary of State for India* v. *Scoble*, 89 L. T. Rep. 1; *Baldwin Locomotive Works* v. *McCoach*, 215 Fed. Rep. 967, 969.

That is capital which is owned by a taxpayer at the time of the incidence of the tax, and to the extent of its value at that time, money into which the property is afterward converted, is not to be considered as income which can form the basis of taxation.

The respondents were entitled to deduct the amount of the royalties as "a reasonable allowance for depreciation of property," under the act. Omission to enter them in a depreciation account was not material, and the Commissioner's regulation to the contrary was an unlawful extension of the act. The question of depreciation was one of fact. *Bailey* v. *Railroad Company*, 106 U. S. 109. As a fact the capital value of the contracts, as it was when the act took effect, was diminished by the amount of the subsequent payments. This was "depreciation," under the act. See the Income Tax Law of September 8, 1916, §§ 10 and 12, 39 Stat. 756.

Stratton's Independence v. *Howbert* is consistent with the foregoing propositions.

MR. JUSTICE DAY delivered the opinion of the court.

These three cases were argued and submitted together and involve practically the same facts. Suits were brought by the corporations named in the United States District Court for the District of Minnesota against the Collector of Internal Revenue, to recover certain taxes, paid under protest, assessed under the Corporation Tax Law of 1909, 36 Stat. 11, 112, for the years 1909, 1910 and 1911. The judgments in the District Court were for the respondents (207 Fed. Rep. 423), which judgments were affirmed in the Circuit Court of Appeals. 219 Fed. Rep. 31.

In 1890, John S. Pillsbury, George A. Pillsbury and Charles A. Pillsbury, doing business together as John S. Pillsbury & Company, were the owners of large tracts of lands in northern Minnesota, which had been acquired for the timber and from which the timber had been cut, being valuable after such severance of the timber for the mineral deposits contained therein. In the year named, the Pillsburys entered into an arrangement with John M. Longyear and Russell M. Bennett, authorizing the latter two to explore the lands for iron deposits. In 1892, Longyear and Bennett having discovered valuable deposits of iron ore, a half interest in something over ten thousand acres of the lands was conveyed to them, the lands thereafter being owned by the Pillsburys, John, George and Charles, each an undivided sixth, and John M. Longyear and Russell M. Bennett each an undivided fourth. In the year 1901, the Pillsburys having died, these corporations were formed under the laws of Minnesota. In 1906, the ownership of these leased lands was vested in the three corporations named as respondents in the proceedings. As originally organized, the nature of the business was stated to be "the buying, owning, exploring and developing, leasing, improving, selling and dealing in, lands, tenements and hereditaments, and the doing of all things

necessary or incidental to the things above specified." In December, 1909, the articles of incorporation were amended to read as follows: "The general purpose of the corporation is to unite in one ownership the undivided fractional interests of its various stockholders in lands, tenements and hereditaments, and to own such property, and, for the convenience of its stockholders, to receive, and distribute to them, the proceeds of any disposition of such property at such times, in such amounts, and in such manner, as the board of directors may determine."

All of the mining leases, hereinafter mentioned, with the exception of a contract with the Van Buren Mining Company, were executed before the organization of the corporations. Each of these instruments provided that the owners of the property demised to the lessees, exclusively, all the lands covered by the descriptions for the purpose of exploring for, mining and removing the merchantable iron ore which might be found therein for and during the period named, usually fifty years. The lessees were given exclusive right to occupy and control the demised premises and to erect all necessary buildings, structures and improvements thereon. Right was reserved to the lessors to enter for the purpose of measuring the amount of ore mined and removed and making observations of the operations in the mines. The lessees agreed to pay, in most cases, twenty-five cents per ton for all ore mined and removed, and to make such payments monthly for ore mined and shipped during the preceding month. The lessees agreed to mine and ship a specified quantity of ore in each year, and, in default of this, to pay the lessors for the minimum amount specified, and take credit therefor and apply such sums upon ore mined and shipped thereafter in excess of such minimum. The lessees were to pay the taxes and to keep the property free from encumbrances and liens. Right was reserved to

terminate the contract upon the failure of the lessees to comply with the terms thereof.

The form of the leases is shown in Exhibits 15 and 16, which were not in the printed record, owing to their length, but copies of which, pursuant to stipulation, have been sent to this court. An examination of Exhibit 16 shows that the lessees had the right to terminate and surrender the lease by giving the lessors, or those having their estate in the premises, sixty days' written notice, and executing sufficient conveyances releasing all interest and right of the lessees in the premises with any improvements thereon, and surrendering the same in good order and condition, etc., and that thereupon all liability of the lessees to taxes subsequently assessed on the demised premises or for rent thereof thereafter to accrue, or royalty on ores therefrom except on account of ores removed, should cease and determine; the lessees to be liable for all ores removed from the premises not theretofore paid for, and to pay for the premises rent or royalty for the year in which termination should be made, or the portion thereof which should have expired, at the rate of $12,500.00 per annum.

Since their organization the corporations have disposed of certain lands and have also disposed of the stumpage on some timber lands. Certain parcels were rented and leased, and a village was allowed to use part of the land for schoolhouse purposes, as well as another part for a public park.

To insure the proper carrying on of the mining operations, the companies employed another corporation, engaged in engineering and inspection of ore properties, to provide supervision and inspection of the work upon the respondents' properties, for which the inspecting company was paid from month to month, as statements were rendered.

The companies were assessed upon their gross income,

being the entire receipts of the companies from royalties on the leases collected in the years 1909, 1910, and 1911, and some sums received from the sales of lots, lands and stumpage, from which expenses and taxes were deducted, but no deduction was made upon account of the depletion of the ore in the properties, or on account of such sales.

The brief for the respondents states that these cases present for consideration four questions, which are:

"1. Are the respondents corporations organized for profit?

"2. Were the respondents carrying on or doing business during the years 1909, 1910, 1911?

"3. Were moneys received by the respondents during those years in payment for iron ore, under the contracts covering their mineral lands, gross income, or did they represent, in whole or in part, the conversion of the investment of the corporations from ore into money?

"4. If such moneys were gross income, are the respondents entitled to make any deduction therefrom on account of the depletion of their capital investment?"

As to the first question, whether these corporations were organized for profit, there can be no difficulty. They certainly do not come within the exceptional character of charitable or eleemosynary organizations excepted from the operation of the act. We need not dwell upon the obvious purpose of these corporations, organized under the provisions of the Minnesota statute concerning companies organized for profit, to pursue gain and to profit because of their operations.

As to the second question: were the respondents carrying on business, within the meaning of the Corporation Tax Act? This question was dealt with by this court in the first of the Corporation Tax Cases, *Flint* v. *Stone-Tracy Company*, 220 U. S. 107. As the tax was there held to be assessed upon the privilege of doing business in a corporate capacity, it became necessary to inquire what

it was to do business, and this court adopted with approval the definition, judicially approved in other cases, which included within the comprehensive term "business" "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit."

In that case a number of realty and mining companies were dealt with, and the Park Realty Company, organized to deal in real estate, and engaged at the time in the management and leasing of a certain hotel, was held to be engaged in business. It was also held that the Clark Iron Company, organized under the laws of Minnesota, and owning and leasing ore lands for the purpose of carrying on mining operations, and receiving a royalty depending upon the quantity of ore mined, was engaged in business.

At the same time, and decided with the main Corporation Tax Case, this court held, in the case of *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, that a corporation which owned a piece of real estate which had been leased for 130 years, at an annual rental of $61,000, and which had amended its articles of incorporation so as to limit its purposes to holding the title to the property mentioned, and, for the convenience of its stockholders, to receiving and distributing from time to time the rentals that accrued under the lease and the proceeds of any disposition of the land, was not engaged in doing business within the meaning of the act, by reason of the fact that the corporation had practically gone out of business and had disqualified itself from any activity in respect thereto.

The act next came before this court in the case of *McCoach, Collector*, v. *Minehill & Schuylkill Haven R. R. Co.*, 228 U. S. 295, in which it was held, distinguishing the case of the Park Realty Company, *supra*, and applying the case of *Zonne* v. *Minneapolis Syndicate*, *supra*, to the facts before the court, that a corporation which had leased all its property to another, and was doing only what was necessary to receive and distribute the income therefrom

among stockholders, was not doing business within the meaning of the act.

In *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, this court held that a corporation which merely kept up its organization, distributing rent received from a single lessee, was not doing business within the meaning of the act.

It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.

From the facts clearly established in these cases, we think these corporations were doing business, within the meaning of the act. They were organized for the purposes stated, and their activities included something more than the mere holding of property and the distribution of the receipts thereof. As was found by the District Court, the evidence shows that these three companies sold, during each of the years named, quantities of real estate, and the same were not small. They sold stumpage from some of the properties which had been burned over, leased certain properties in the village of Hibbing, and granted leases to squatters. One of the companies made explorations and incurred expenses in the matter of test pits. They employed another company to see that the mining operations were properly carried on, and that the lessees lived up to the engagements of their contracts. "All these things indicate," said the learned District Judge, "the doing of and engaging in business. It [the corporation] was doing

the business of handling a large property, selling lots, and seeing that the lessees lived up to their contracts. If that is not engaging in business, I do not know what is." We agree that it certainly was doing business, and, as the Corporation Tax Act requires no particular amount of business in order to bring a company within its terms, we think these activities brought the corporations in question within that line of decisions in this court which have held such corporations were doing business in a corporate capacity within the meaning of the law.

Next, is it true, as contended by the Government, that the payments for ore mined, under the contracts covering the mineral lands, are income, within the meaning of the act; or do they represent the conversion of the investment of the corporations from ore into money?

The nature of these mining leases has been the subject of some difference of opinion in the courts. The Circuit Court of Appeals in this case took the view announced in some of the earlier cases, notably in Pennsylvania, that the leases were such in name only, and were in fact conveyances of the ore in place as part of the realty, and that the so-called royalties merely represented payments for so much of the land and were in no just sense income, but mere conversions of the capital.

These lands are situated in Minnesota, and this character of lease has long been familiar in that State, as a means of securing the development and operation of mining properties. Some years before the passage of the Corporation Tax Act, the Supreme Court of Minnesota had dealt with the character of such instruments. In the case of *State* v. *Evans*, 99 Minnesota, 220, that court, after a review of the English and American cases, said (p. 227):

"The propriety of a lease for the purpose of developing and working mines is recognized by all of the cases, and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land,

and, further, that iron or other materials derived from the usual operation of open mines or quarries, constitute the rents and profits of the land, and belong to the tenant for life or years, and to the mortgagor after sale on foreclosure, and before the expiration of the time for redemption. The rule, however, has no application to unopened mines in the absence of a contract, express or implied, for opening and leasing them."

The same doctrine was held in *Boeing* v. *Owsley*, 122 Minnesota, 190, and in the late case of *State* v. *Royal Mineral Association*, 132 Minnesota, 232, in which the decision of the Circuit Court of Appeals in this case, that such leases were merely conveyances of the ore in place, was brought to the attention of the court, and that conclusion expressly denied, the Supreme Court of Minnesota saying:

"We adhere to the doctrine of the *Evans* and *Boeing Cases*, and hold these instruments leases. It follows logically that the amounts stipulated to be paid by the lessees are rents, and they were expressly held by this court to be rents in the *Boeing Case, supra*, a case which involved a construction of the very leases now before the court. They are 'the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows.' Lord Dennison, in *Queen* v. *Westbrook*, 10 Q. B. 178, 205."

These conclusions of the Supreme Court of Minnesota are not only made concerning contracts in that State, such as are here involved, but are supported by many authorities.[1] Ordinarily, and as between private parties, there

[1] *Raynolds* v. *Hanna*, 55 Fed. Rep. 783, 800, 801; *Tennessee Oil &c. Co.* v. *Brown*, 131 Fed. Rep. 696, 700 (opinion by Lurton, J.); *Browning* v. *Boswell*, 215 Fed. Rep. 826, 834; *Backer* v. *Penn Lubricating Co.*, 162 Fed. Rep. 627; *Young* v. *Ellis*, 91 Va. 297; *Gartside* v. *Outley*, 58 Ill. 210; *Genet* v. *Delaware and Hudson Canal Co.*, 136 N. Y. 593, 602; *Lacey* v. *Newcomb*, 95 Iowa, 287; *Austin* v. *Huntsville Coal & Mining Co.*, 72 Mo. 535; *Brown* v. *Fowler*, 65 Ohio St. 507, 521; *Queen* v. *Westbrook*, 10 Q. B. 178, 205.

is no question of the duty of the federal court to follow these decisions of the Minnesota Supreme Court, as a rule of real property long established by state decisions. *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, 360. Whether in considering this federal statute we should be constrained to follow the established law of the State, as is contended by the Government, we do not need to determine. The decisive question in this case is whether the payments made as so-called royalties amount to income so as to bring such payments within the scope of the Corporation Tax Act of 1909. The prior decisions of this court in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, and *Stanton* v. *Baltic Mining Company*, 240 U. S. 103, in which the *Stratton Case* was followed and approved, are decisive of this question. In the *Stratton Case*, certain questions were certified to this court from the Circuit Court of Appeals for the Eighth Circuit. The case was tried upon an agreed statement of facts, from which it appeared, "as to the year 1909, that the company extracted from its lands during the year certain ores bearing gold and other precious metals, which were sold by it for sums largely in excess of the cost of mining, extracting, and marketing the same, that the gross sales amounted to $284,682.85, the cost of extracting, mining and marketing amounted to $190,939.42, and 'the value of said ores so extracted in the year 1909, when in place in said mine and before extraction thereof, was $93,743.43.' With respect to the operations of the company for the year 1910, the agreed facts were practically the same, except as to dates and amounts. It does not appear that the so-called 'value of the ore in place,' or any other sum, was actually charged off upon the books of the company as depreciation." The Circuit Court of Appeals certified three questions to this court: "I. Does Section 38 of the Act of Congress, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,'

approved August 5, 1909 (36 Stat., p. 11), apply to mining corporations? II. Are the proceeds of ores mined by a corporation from its own premises income within the meaning of the aforementioned Act of Congress? III. If the proceeds from ore sales are to be treated as income, is such a corporation entitled to deduct the value of such ore in place and before it is mined as depreciation within the meaning of Section 38 of said Act of Congress?" This court answered the first and second questions certified in the affirmative, and the third question in the negative. In that case, as here, it was contended that the proceeds of the mining operations resulting from a conversion of the capital represented by real estate into capital represented by cash are in no true sense income. As to this contention, this court said:

"The peculiar character of mining property is sufficiently obvious. Prior to development it may present to the naked eye a mere tract of land with barren surface, and of no practical value except for what may be found beneath. Then follow excavation, discovery, development, extraction of ores, resulting eventually, if the process be thorough, in the complete exhaustion of the mineral contents so far as they are worth removing. Theoretically, and according to the argument, the entire value of the mine, as ultimately developed, existed from the beginning. Practically, however, and from the commercial standpoint, the value—that is, the exchangeable or market value—depends upon different considerations. Beginning from little, when the existence, character and extent of the ore deposits are problematical, it may increase steadily or rapidly so long as discovery and development outrun depletion, and the wiping out of the value by the practical exhaustion of the mine may be deferred for a long term of years. While not ignoring the importance of such considerations, we do not think they afford the sole test for determining the legislative intent."

This court held that it was not correct to say that a mining corporation was not engaged in business, but was merely occupied in converting its capital assets from one form to another, and that while a sale outright of a mining property might be fairly described as a conversion of the capital from land into money, the process of mining is, in a sense, equivalent to a manufacturing process, and however the operation shall be described, the transaction is indubitably "business" within the meaning of the Act of 1909, and the gains derived from it are properly the income from business, derived from capital, from labor, or from both combined. Further, "as to the alleged inequality of operation between mining corporations and others, it is of course true that the revenues derived from the working of mines result to some extent in the exhaustion of the capital. But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income. So it may be said of many manufacturing corporations that are clearly subject to the act of 1909, especially of those that have to do with the production of patented articles; although it may be foretold from the beginning that the manufacture will be profitable only for a limited time, at the end of which the capital value of the plant must be subject to material depletion, the annual gains of such corporations are certainly to be taken as income for the purpose of measuring the amount of the tax."

It is contended that this case is inapplicable, because the facts disclose that the ores were being mined by a corporation upon its own premises. In our view, this makes no difference in the application of the principles upon which the case was decided. We think that the payments made by the lessees to the corporations now before the court were not in substance the proceeds of an outright sale of a mining property, but, in view of the

terms of these instruments, were in fact rents or royalties to be paid upon entering into the premises and discovering, developing and removing the mineral resources thereof, and as such must be held now as then, to come fairly within the term income as intended to be reached and taxed under the terms of the Corporation Tax Act.

In *Stanton* v. *Baltic Mining Company, supra*, the Income Tax Law of 1913 was before the court, and it was contended that the clause in that act, limiting the mines to a maximum depreciation allowance of five per cent. of their annual gross receipts or output of ore deposits, was unconstitutional, or, if that provision was inseparable from the rest of the act, the entire Income Tax Law, as applied to mining companies, was unconstitutional. Replying to the argument advanced by the mining company in that case, this court said that it rested upon the wholly fallacious assumption that, looked at from the point of view of substance, a tax on the product of a mine was necessarily a tax upon the property because of its ownership unless adequate allowance be made for the exhaustion of the ore body resulting from the working of the mine; and, further,

"We say wholly fallacious assumption because independently of the effect of the operation of the Sixteenth Amendment it was settled in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, that such a tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations."

We think it results from the principles announced in these decisions that in such cases as are now under consideration, the corporation being within the meaning of the act organized for profit and doing business, it is subject to the tax upon its income derived from the royalties under these leases.

This brings us to the fourth and last question in the case, as to whether allowance should be made for deprecia-

tion on account of the depletion of the property by removing the ores from the mines in question.

The contention of respondents in this behalf is, that if the court shall find that the moneys received by them under their mining contracts can be deemed gross income, in whole or in part, they are entitled to deduct therefrom, as a reasonable allowance for depreciation, the full amount of the money so received, for the reason that they represent a mere transmutation of capital assets, being, in legal effect, the selling price of their rights in the mineral deposits on or before January 1, 1909, and which, by virtue of the mining contracts then outstanding, had been previously sold for the exact amounts of such receipts.

The statement of facts in the case of *Stratton's Independence, supra,* as the court states on pages 418 and 419, developed from the certificate, was:

"From that certificate it appears that the case was submitted to the trial court and a verdict directed upon an agreed statement of facts, and in that statement the gross proceeds of the sale of the ores during the year were diminished by the moneys expended in extracting, mining, and marketing the ores, and the precise difference was taken to be the value of the ores when in place in the mine. . . .

"It is clear that a definition of the 'value of the ore in place' has been intentionally adopted that excludes all allowance of profit upon the process of mining, and attributes the entire profit upon the mining operations to the mine itself. In short, the parties propose to estimate the depreciation of the mining property attributable to the extraction of ores according to principles that would be applicable if the ores had been removed by a trespasser."

It is true that in the case of *Stratton's Independence, supra,* the decision upon the question of depreciation was predicated upon the facts stated in the certificate presented to the court, and it was said, at page 422:

"It would therefore be improper for us at this time to enter into the question whether the clause, 'a reasonable allowance for depreciation of property, if any,' calls for an allowance on that account in making up the tax, where no depreciation is charged in practical bookkeeping; or the question whether depreciation, when allowable, may properly be based upon the depletion of the ore supply estimated otherwise than in the mode shown by the agreed statement of facts herein; for to do this would be to attribute a different meaning to the term 'value of the ore in place' than the parties have put upon it, and to instruct the Circuit Court of Appeals respecting a question about which instruction has not been requested, and concerning which it does not appear that any issue is depending before that court."

It therefore follows that we have the question of depreciation in this case presented under somewhat different circumstances than were outlined in the opinion in the case of *Stratton's Independence.*

The statute permits deduction of "all losses actually sustained within the year . . . including a reasonable allowance for depreciation of property." What was here meant by "depreciation of property"? We think Congress used the expression in its ordinary and usual sense as understood by business men. It is common knowledge that business concerns usually keep a depreciation account, in which is charged off the annual losses for wear and tear, and obsolescence of structures, machinery and personalty in use in the business. We do not think Congress intended to cover the necessary depreciation of a mine by exhaustion of the ores in determining the income to be assessed under the statute by including such exhaustion within the allowance made for depreciation. It would be a strained use of the term depreciation to say that, where ore is taken from a mine in the operation of the property, depreciation, as generally understood in

business circles, follows. True, the value of the mine is lessened from the partial exhaustion of the property, and, owing to its peculiar character, cannot be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction arising from the fact that the mining property is being continually reduced by the removal of the minerals. But such consideration will not justify this court in attributing to depreciation a sense which we do not believe Congress intended to give to it in the Act of 1909.

It may be admitted that a fair argument arises from equitable considerations that, owing to the nature of mining property, an allowance in assessing taxes upon income should be made for the removal of the ore deposits from time to time. Congress recognized this fact in passing the Income Tax section of the Tariff Act of 1913, § II, 38 Stat. 166, 167, when it permitted "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, 5 per centum of the gross value at the mine of the output for the year for which the computation is made;" and in the Income Tax Law of September 8, 1916, 39 Stat. 756, 769, a reasonable allowance is made in the cases of mines for depletion thereof, "not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made." These provisions were not in the Act of 1909, and, as we have said, we think that Congress, in that act, used the term "depreciation" in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation.

No contention is made in the brief for an allowance because of sales of stumpage, lots and lands belonging to

the companies, as an exhaustion of the capital assets, and evidently the case was brought for the purpose of testing the right of the companies to deduct the royalties agreed to be paid to them upon the removal of the minerals from the lands from the sums for which they were severally assessed.

For the reasons stated, we think the Circuit Court of Appeals and the District Court erred in the judgments rendered, and the same will be reversed and the cases remanded to the District Court for further proceedings, if any are sought, upon claim of right to deduct the value of the lands, lots and stumpage sold from the assessments made.

Judgments reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of these cases.

THOMAS CUSACK COMPANY *v.* CITY OF CHICAGO ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 126. Argued December 20, 21, 1916.—Decided January 15, 1917.

The Fifth Amendment relates to national action only.

A city ordinance, which has been upheld by the highest court of the State as valid under the state legislation, is to be regarded by this court as a law of the State and is to be tested accordingly.

Such an ordinance, when dealing with a subject within the police power, must be upheld unless shown to be clearly unreasonable, arbitrary or discriminatory.

A city, exercising the police power, may prohibit the erection of billboards in residence districts, in the interest of the safety, morality, health and decency of the community.

Such a prohibition is not to be deemed unduly discriminatory because not including fences and other structures, found less likely to become a source of public injury.

An ordinance prohibiting billboards is not invalidated by a provision which removes the prohibition as to any billboard the erection of which is first consented to by the owners of a majority of the frontage on both sides of the street in the block in which it is to be erected. *Eubank* v. *Richmond*, 226 U. S. 137, distinguished.

He who is not injured by the operation of a law or ordinance can not be said to be deprived by it of either constitutional right or of property.

267 Illinois, 344, affirmed.

THE case is stated in the opinion.

Mr. John S. Hummer, with whom *Mr. James E. McGrath* was on the brief, for plaintiff in error.

Mr. Loring R. Hoover and *Mr. Chester E. Cleveland*, with whom *Mr. Samuel A. Ettelson* was on the brief, for defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this proceeding the plaintiff in error, a corporation engaged in "outdoor advertising," claims that § 707 of article 23 of an ordinance of the City of Chicago, governing the erection and maintenance of billboards in that city, is unconstitutional.

This section is as follows:

"707. Frontage consents required. It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or sign-

board is to be erected, constructed or located. Such written consents shall be filed with the Commissioner of Buildings before a permit shall be issued for the erection, construction or location of such billboard or signboard."

The plaintiff in error expressly concedes in this court that it is within the police power of the City of Chicago to exercise within the city limits a reasonable regulation and control over the construction and maintenance of bil boards and other similar structures. But it is contended that the section quoted is in terms " an arbitrary, unrestrained" exercise of power which, if given effect, could be used without any regard "to the safety, health, morals, comfort or welfare of the public" and that it therefore offends against the Fifth and Fourteenth Amendments to the Constitution of the United States.

Obviously, claims made under the Fifth Amendment need not be considered, *Livingston* v. *Moore*, 7 Pet. 469, 551; *Lloyd* v. *Dollison*, 194 U. S. 445, and there remains only the question whether the ordinance, if enforced, would work "a denial to the plaintiff in error of the equal protection of the laws" or would "deprive it of its property without due process of law."

The claimed infirmity in the ordinance consists in the requirement that before any billboard or signboard of over twelve square feet in area may be erected in any block in which one-half of the buildings are used exclusively for residence purposes the owners of a majority of the frontage of the property on both sides of the street in such block shall consent in writing thereto. This, it is claimed, is not an exercise by the city of power to regulate or control the construction and maintenance of billboards, but is a delegation of legislative power to the owners of a majority of the frontage of the property in the block "to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors."

The Supreme Court of the State of Illinois sustained the validity of the ordinance in an opinion (267 Illinois, 344) which declares that the act of the legislature of that State, passed in 1912, Hurd's Stat. 1913, c. 24, par. 696, is a clear legislative declaration that the subject of billboard advertising shall be subject to municipal control.

It is settled for this court by this decision that the ordinance assailed is within the scope of the power conferred on the City of Chicago by the legislature, that it is to be treated as proceeding from the law-making power of the State, and that, therefore, it is a valid ordinance unless the record shows it to be clearly unreasonable and arbitrary. *Reinman* v. *Little Rock*, 237 U. S. 171.

Upon the question of the reasonableness of the ordinance, much evidence was introduced upon the trial of the case, from which the Supreme Court finds that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals. As bearing upon the limitation of the requirement of the section to blocks "used exclusively for residence purposes," the court finds that the trial court erroneously refused to allow testimony to be introduced tending to show that residence sections of the city did not have as full police or fire protection as other sections have, and that the streets of such sections are more frequented by unprotected women and children than, and are not so well lighted as, other sections of the city are, and that most of the crimes against women and children are offenses against their persons.

Neglecting the testimony, which was excluded by the trial court, there remains sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves, *St. Louis*

Gunning Advertising Co. v. *St. Louis*, 235 Missouri, 99, and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, morality, health and decency of the community.

The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be erected in such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected. The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler* v. *Judges of Registration*, 179 U. S. 405; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations, which are properly the subject of regulation in the exercise of the police power, is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons, *Swift* v. *People*, 162 Illinois, 534, and as to the location of garages, *People* v. *Ericsson*, 263 Illinois, 368. Such treatment is plainly applicable to offensive structures.

The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with *Armour & Company* v. *North Dakota*, 240 U. S. 510, 514, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police

power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 30. And this, for the reasons stated, cannot be said of the ordinance which we have here.

The plaintiff in error relies chiefly upon *Eubank* v. *Richmond*, 226 U. S. 137. A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances.

It results that the judgment of the Supreme Court of Illinois will be

Affirmed.

Dissenting: MR. JUSTICE MCKENNA.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* MIMS, ADMINISTRATRIX OF MIMS.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 242. Argued December 4, 1916.—Decided January 15, 1917.

This court is without jurisdiction to review a judgment of a state court under Rev. Stats., § 709, Jud. Code, § 237, upon the ground that a federal right was denied, when the claim of federal right relied on was refused consideration in that court because it was not asserted at a proper time or in a proper manner under the established state system of pleading and practice.

The decision of the state court that a claim of federal right was not so presented is binding on this court when not rendered in a spirit of evasion for the purpose of defeating the federal right.

In accordance with the foregoing principles, a party desiring to secure the benefits of the Federal Employers' Liability Act in an action in a state court, must claim them in apt time and in an appropriate manner under the state rules of pleading and practice.

Writ of error to review 100 S. Car. 375, dismissed.

THE case is stated in the opinion.

Mr. Frederic D. McKenney, with whom *Mr. P. A. Willcox, Mr. L. W. McLemore* and *Mr. Douglas McKay* were on the brief, for plaintiff in error.

Mr. William S. Nelson, with whom *Mr. J. Team Gettys, Mr. John H. Clifton* and *Mr. Jo-Berry Sloan Lyles* were on the briefs, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

On December 10th, 1910, John J. Mims, a car inspector in the employ of the plaintiff in error, when attempting to cross a track to inspect a train of cars which had just

arrived, was run down and killed by a switching engine at a public crossing in the City of Sumter, South Carolina.

In April following this suit was commenced by the filing of a complaint, which charges actionable negligence and alleges that the defendant owned and operated a line of railway described as wholly within the State of South Carolina. There is nothing in the complaint tending to state a cause of action under the federal law. To this complaint the defendant filed an answer which is a specific denial under the South Carolina Code of Civil Procedure and which contains two separate defenses. The first defense admits that Mims was killed at the time alleged, admits the paragraph alleging that the defendant, at the time of the accident complained of, owned and operated the line of railroad described as being wholly within the State of South Carolina, and denies all the other allegations of the complaint. The second defense is one of contributory negligence.

Upon this complaint and answer the case went to trial and when the testimony was all introduced the trial court granted a non-suit, which was reversed by the Supreme Court of the State with an order remanding the case for a new trial.

When the case was called for the second trial the defendant asked leave to amend its answer by pleading "gross and wilful contributory negligence" on the part of deceased, which was granted, and the trial proceeded until plaintiff rested her case.

Up to this time no claim had been made by defendant and no facts had been pleaded or evidence offered by either party from which it could be inferred that the deceased at the time of his death was engaged in interstate commerce, or that the Federal Employers' Liability Act was in any manner applicable to the case.

When the plaintiff rested her case on the second trial, the defendant for the first time offered to introduce

testimony which it is claimed, if admitted, would have tended to prove that the train which the deceased was in the act of approaching to inspect when he was killed "was engaged in interstate commerce and that the deceased was in this respect and otherwise engaged in interstate commerce." The trial court rejected this proffer of testimony on the ground that it came too late and was not relevant to any issue tendered by the pleadings in the case. No application was made for leave to amend the answer by adding the claim under the federal law.

The practice differs in the courts of the various States as to what testimony may be introduced under "a specific denial," such as was filed in this case, and the Supreme Court of South Carolina, while recognizing fully the ruling character of the Federal Employers' Liability Act when the facts making it applicable are properly pleaded, yet, upon full and obviously candid and competent consideration, decided, as we have seen, that under the settled rules of pleading in that State the evidence tendered was not admissible. The essential justice of this decision, which is the fundamental thing, commends it to our favor. The evidence admitted in the case shows that the train which the deceased was about to inspect when he was killed was a local freight train, with a run habitually, and on the morning of the accident complained of, wholly within the State of South Carolina. If the relation of the deceased to the traffic which this intrastate train carried was such as to give an interstate character to his service, that fact must have been known to the defendant from the day the accident occurred, and it could not possibly have been known to the plaintiff, and therefore surprise and delay certainly, and possibly defeat of plaintiff's claim under statutes of limitation, must have been the inevitable result of permitting the introduction of the proffered testimony late in the second trial, without the federal

right claimed from it having been "specially set up and claimed" in the answer of the defendant.

The plaintiff recovered a judgment, which the Supreme Court affirmed.

This epitome of the action of the state court shows that the claim under the federal statute now made was not presented until after the plaintiff had rested in the second trial of the case after it had been to the Supreme Court, and after the defendant, upon the opening of this second trial, had amended its answer by adding a third defense, without mentioning or in any manner attempting to plead the federal claim. Even at this stage of the trial the assertion of the claim consisted only in a tender of testimony, without any application to amend the answer.

To become the basis of a proceeding in error from this court to the Supreme Court of a State "a right, privilege or immunity" claimed under a statute of the United States must be "especially set up or claimed," and must be denied by the state court. Rev. Stats., § 709; Judicial Code, § 237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. *Central Vermont Railway Co.* v. *White*, 238 U. S. 507; *John, Guardian,* v. *Paullin,* 231 U. S. 583; *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148; *Layton* v. *Missouri*, 187 U. S. 356.

The plaintiff in error mistakenly argues that under recent decisions of this court it is not necessary to claim the benefits of the Federal Employers' Liability Act in a

pleading in a state court in order to obtain a review here of a decision denying or refusing to consider such a claim. Reference to the decisions relied upon shows that the federal right was in terms claimed in the petition in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, and *Grand Trunk Western Ry. Co.* v. *Lindsay*, 233 U. S. 42; and that in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hesterly*, 228 U. S. 702, the decision proceeds upon the statement that, since the Supreme Court of the State held the federal question sufficiently raised and decided it, the objection that it was not saved was not open in this court. While it is true that the reports show that in *St. Louis, San Francisco & Texas Ry. Co.* v. *Seale*, 229 U. S. 156, and in *Toledo, St. Louis & Western R. R. Co.* v. *Slavin*, 236 U. S. 454, the federal act was not specially referred to in the pleadings, yet they were in such form that the trial court, either without objection or over objection which the Supreme Court of the State refused to sustain, admitted testimony making it necessary to apply the federal act in deciding each case. This, of course, was equivalent to holding that the pleadings in the trial court were in a form to justify the introduction of testimony in support of the federal claim, under the system of practice and pleading prevailing in the courts of the two States in which the cases were decided. This brings these decisions clearly within the principle of the conclusion we are announcing in this case.

While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which

this court can review, *Baldwin* v. *Kansas*, 129 U. S. 52, *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, and therefore, for want of jurisdiction, the writ of error is

Dismissed.

UNITED STATES *v.* AMERICAN-ASIATIC STEAMSHIP COMPANY ET AL.

UNITED STATES *v.* PRINCE LINE, LIMITED, ET AL.

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

Nos. 138, 169. Motions to reverse and remand with instructions to dismiss petitions without prejudice. Submitted December 4, 1916.—Decided January 22, 1917.

The agreements between British, German and American steamship companies which were assailed as contrary to the Anti-Trust Act of July 2, 1890, having necessarily been dissolved by the European War, and the questions raised by the bills having thereby become moot when the decrees of the court below were entered, the decrees are reversed and the cases remanded with directions to dismiss the bills without prejudice—as in *United States* v. *Hamburg-American Co.*, 239 U. S. 466.

220 Fed. Rep. 230, reversed.

THE case is stated in the opinion.

The Solicitor General and *Mr. Assistant to the Attorney General Todd* for the United States, in support of the motions.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

The United States sued to restrain the carrying out of agreements between British, German and American steam-

ship companies who were defendants, on the ground that they were in violation of the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209. Overruling the contention that that act did not relate to contracts concerning ocean carriage, the court entered decrees against the United States in both cases dismissing the bills for want of equity on the ground that the assailed agreements were not in conflict with the Anti-Trust Act except as to a particular discrimination found to have been practiced in one of the cases which was provided against. 220 Fed. Rep. 230. At the time this action was taken by the court below, as the result of the European War, the assailed agreements had been dissolved and the questions raised by the bills were therefore purely moot, as directly decided to be the case as to a similar situation in *United States* v. *Hamburg-American Co.*, 239 U. S. 466.

Under these circumstances the request now made by the United States that the doctrine announced in the *Hamburg-American Case* be applied to both of these cases and the relief afforded in that case be awarded, is well founded and must be granted. It follows, therefore, that the decrees below must be reversed and the cases be remanded to the court below with directions to dismiss the bills without prejudice to the right of the United States in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act.

And it is so ordered.

HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO *v.* GEIGER-JONES COMPANY.[1]

HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO *v.* COULTRAP.

HALL, SUPERINTENDENT OF BANKS AND BANKING OF THE STATE OF OHIO ET AL. *v.* ROSE ET AL.

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

Nos. 438, 439, 440. Argued October 16, 17, 1916.—Decided January 22, 1917.

The Ohio "Blue Sky Law," Supplement to Page & Adams' Ann. Gen. Code of Ohio, 1916, vol. 2, §§ 6373-1 to 6373-24, examined as to its constitutionality and upheld.

In the exercise of the power to prevent fraud and imposition, *Hutchinson Ice Cream Co.* v. *Iowa*, *ante*, 153, a State may forbid dealing in stocks and other securities within its borders without a license, and subject the business to executive supervision.

The liability of a business to regulation is not necessarily dependent upon its liability to be abolished under the police power.

Under the so-called "Blue Sky Law" of Ohio, dealers within its provisions (including companies floating their own issues) are not licensed to sell stocks and other securities unless an executive officer designated is satisfied of the good business repute of the applicants and their agents, and licenses, when issued, may be revoked by him upon ascertaining that the licensees are of bad business repute, have violated any provision of the act, or have engaged, or are about to engage, under favor of their licenses, in illegitimate business or fraudu-

[1] These cases, together with *Caldwell et al.* v. *Sioux Falls Stock Yards Co. et al.*, *post*, 559, involving the "Blue Sky Law" of South Dakota, and *Merrick et al.* v. *Halsey & Co. et al.*, *post*, 568, involving the "Blue Sky Law" of Michigan, have been styled for convenience "The Blue Sky Cases."

lent transactions; his findings, however, are made subject to judicial review. *Held*, that the powers thus conferred are not arbitrary but consistent with due process under the Fourteenth Amendment. *Gundling* v. *Chicago*, 177 U. S. 183.

The fact that the statute designates a particular court to review the executive findings does not affect its validity.

It is to be presumed that the executive officer will act properly in the public interest, and not wantonly or arbitrarily.

Whether there is a constitutional liberty to buy securities on one's own judgment of value without governmental interposition to protect from bad bargains—will not be determined at the suit of parties whose rights are involved only from the standpoint of sellers; but *Quære:* Whether the state power does not extend to such guardianship over buyers.

The equal protection clause of the Fourteenth Amendment leaves the States at liberty to regulate those activities which they deem conspicuous sources of existing evils, without embracing others which, but for this distinction, would fall in the same class.

A state law designed to prevent fraud in the selling of securities, which affects securities coming from other States only in requiring that persons dealing in them within the State shall be first licensed, shall file information concerning them and be subject in such dealing to executive supervision, is not invalid as a direct burden on interstate commerce.

Quære: As to when and under what circumstances securities transported into a State may be held to have lost their interstate character?

230 Fed. Rep. 233, reversed.

THESE cases were heard together in the District Court and there disposed of in one opinion. They were argued and submitted together here. The bills of complaint attacked from different angles the so-called Blue Sky Law of the State of Ohio, which provides:

"Sec. 6373–1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association

(except corporations not for profit,) or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided. . . .

"Sec. 6373–2. . . . The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except:

"(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is a *bona fide* owner of the security and disposes of his own property for his own account;

* * * * * * * *

"As used in this act, the term 'company' shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; . . ."

The Geiger-Jones Company is an Ohio corporation, licensed to do the business of buying and selling investment securities and of buying and selling the stocks and bonds of industrial corporations. It has a regularly established clientage, it alleges, of about 11,000 persons residing in the State of Ohio and other States and has sold and there are now outstanding in the hands of persons to whom it has sold securities of about twenty to twenty-five million dollars, par value, and has stockholders in Ohio and other States. That the securities above referred to consist of securities of over twenty corporations of Ohio and other States and foreign countries. That it is still selling such

securities and is and has been engaged in intrastate, interstate and foreign commerce.

The appellee, Don C. Coultrap, in No. 439 repeats the allegations made by Geiger-Jones Company, with enumeration of some of the companies in whose stocks and securities that corporation is engaged in dealing, and alleges that he is the owner and holder of its stocks and of the stocks of other companies and is engaged in buying and selling and offering to sell such stocks in the State of Ohio and in the State of Pennsylvania, and in the course of such transactions travels back and forth between those States and conducts a correspondence from Pennsylvania to Ohio and receives certificates evidencing the ownership of stock from the State of Ohio and sends them from Pennsylvania to Ohio.

William R. Rose, one of the appellees in No. 440, alleges himself to be a citizen of Ohio and engaged in that State in the business of buying and selling investment securities and particularly the stocks and bonds of industrial corporations and that he has built up and maintained a large and profitable business and an enviable reputation.

The RiChard Auto Manufacturing Company, the other appellee, is a corporation of West Virginia but has its principal place of business in Cleveland, Ohio, and has a contract to manufacture and is ready to manufacture automobiles under certain patents obtained by Francois RiChard as soon as and not until the stock of the company can be put upon the market and a sufficient amount realized therefrom for such purposes.

That on September 25, 1914, and prior thereto, Rose was actively engaged in buying and selling stocks and bonds of industrial corporations and investment securities in general, and particularly the stock of the RiChard Auto Manufacturing Company, of which company he was the secretary, and for which business he had unusual aptitude and was able to prosecute more successfully "than any

other man whose services were available to said corporation."

That on September 25th he was arrested upon an affidavit filed by one H. R. Young, a subordinate and deputy of the state superintendent of banks and banking for the State of Ohio, under whose immediate direction and control he was then acting. Rose, upon being taken before a magistrate, waived examination and was "bound over to the grand jury" of Cuyahoga County, which jury subsequently returned an indictment against him for violation of the law.

The grievance alleged in Nos. 438 and 439 is that under the laws of the State the Attorney General is threatening to give an opinion to Hall, the superintendent of banks and banking, that the law is valid and that it is the duty of Hall to cancel appellees' license and that this will result in irreparable injury to appellees and to their security holders from the publicity they will obtain. And it is apprehended that Hall will act on such advice, believing that he is bound by the opinion of the Attorney General.

The statute is attached to the bills and is asserted to be unconstitutional, invalid and void and the particulars are enumerated to be that it will deprive appellees of their property without due process of law, deny them the equal protection of the laws, impose burdens on interstate commerce, confer executive powers, delegate such powers and legislative powers in violation of the constitution of Ohio. Appellees consider themselves remediless except in equity and pray injunctions interlocutory and permanent.

The complaint of Rose and the Auto Company is that Hall, superintendent of banks and banking, is actively engaged in the prosecution of the proceedings against Rose and has, together with the prosecuting attorney, interfered with, interrupted and completely prevented Rose from carrying on his business in the State of Ohio and especially in attempting upon his part to dispose of and

sell the stock of the Auto Company, and that the prosecuting attorney and the sheriff of Cuyahoga County, unless restrained, will assist and actively coöperate with Hall, to the great and irreparable injury of both Rose and the Auto Company.

The charge is amplified by details which it is unnecessary to give and the law is charged to be unconstitutional in the same particulars as those enumerated by the Geiger-Jones Company.

Injunctions temporary and perpetual are prayed.

The District Court in the Geiger-Jones case considered that it was without power to enjoin the Attorney General but decided that it could and should under the charges of the bill restrain Hall from further action under the law, the restraint to continue until the hearing and determination of the applications of the respective complainants for interlocutory injunctions.

The applications subsequently came to be heard before three judges, and Hall and all of his employees and subordinates were enjoined from attempting to enforce the provisions of the law. There was an exception in No. 440 as follows: " . . . except such proceedings as may be deemed proper in any criminal action pending against said complainants or either of them when the complaint in this cause was filed." The injunctions in all the cases were to continue until final decision or further order of the court. The court declared the law to be obnoxious to all of the charges made by the respective complainants against it. 230 Fed. Rep. 233.

Mr. Edward C. Turner, Attorney General of the State of Ohio, for appellants.

Mr. John A. Shauck and *Mr. Timothy S. Hogan,* with whom *Mr. A. M. McCarty, Mr. E. N. Huggins, Mr. M. B. Johnson, Mr. H. H. Johnson* and *Mr. Francis R. Marvin* were on the briefs, for appellees:

Cases of the type of *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, involving insurance and other kinds of business upon which the public is peculiarly dependent and which are not made up of ordinary commercial transactions, and cases like *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, involving methods of business which by their very nature are harmful, have no application to a law like this which assumes to regulate and forbid the normal contracts of commerce.

The act is clearly void (1) because it permits the commissioner arbitrarily, by granting or refusing licenses, to tolerate or destroy the right to carry on an ordinary calling and to exercise a guaranteed right of contract, (2) because it authorizes him to place forbidden restrictions and burdens on the conduct of business after a license has been obtained, and (3) because of the provisions which invest him with arbitrary power to revoke licenses.

Another vice which pervades the entire act is the requirement that before obtaining a license an applicant shall consent to be sued in a particular county and file an irrevocable authority with a state officer to accept service of process. This denies the equal protection of the state laws which, as to other defendants, make a different and more favorable provision as to both venue and service.

There is no attempt to exercise legislative power in prescribing the qualifications of the person who may be entitled to receive a license to exercise dominion over his own property or to engage in interstate commerce. Both standards of qualification in a licensee and compliance with them are left to the exclusive and arbitrary will of the commissioner. Whether the act is condemned as a forbidden attempt to delegate legislative power, as has been done in some cases, or as an attempt to confer arbitrary power, as in others, it is in this respect violative of all the guarantees which we invoke.

The applicant for a license has no right to a hearing upon his application, nor has the holder of a license a right to be heard upon notice looking to its revocation.

The applicant must submit to the commissioner the particulars of his business and business agencies. The commissioner may make such further investigation as he may deem necessary concerning good repute, and then, if he be satisfied in that regard and the fees and expenses demanded are paid, the applicant may have a license to deal in the securities, and not otherwise. Less flagrant legislation has been condemned in numerous cases, among which are *Harmon* v. *State*, 66 Ohio St. 249; *City of Richmond* v. *Dudley*, 129 Indiana, 112; *Bills* v. *City of Goshen*, 117 Indiana, 221; *Mayor* v. *Radecke*, 49 Maryland, 217; *State* v. *Tenent*, 110 N. Car. 609; *Gambad* v. *Deering*, 84 Wisconsin, 585; *Cicero Lumber Co.* v. *Town of Cicero*, 176 Illinois, 9; *Noel* v. *People*, 187 Illinois, 587; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Moskowitz* v. *Jenkins*, 202 N. Y. 53.

The proclaimed virtue of the act is its vice. While in form it conditions and, under circumstances which are likely to arise, it prohibits sales, at the same time it necessarily prevents purchases, and thereby shields contemplating purchasers from the exercise of their own defective judgments. For it is to be borne in mind that the terms of the act operate upon honest sales as well as those which are fraudulent. In all transactions within its purview it places the citizens of the State under guardianship and deprives them of dominion over their property which is an essential element of its ownership. See *Smith* v. *Burlingame*, 4 Mason, 121.

The act is also objectionable for the very numerous discriminations which deny the equal protection of the laws under the Fourteenth Amendment.

The prevention of fraud is within the power of the legis-

lature without interfering with the freedom of normal commerce.

Bearing in mind the principles announced in *Hannibal & St. Joseph R. R. Co.* v. *Husen*, 95 U. S. 465, and in *Welton* v. *Missouri*, 91 U. S. 275, it is plain that the act contravenes the commerce clause. *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, 213–216; *Lottery Case*, 188 U. S. 321; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.*, 156 Fed. Rep. 1.

Nathan v. *Louisiana*, 8 How. 73, and *Paul* v. *Virginia*, 8 Wall. 168, are not opposed to this contention.

Transportation is by no means the only element of commerce. *Lyng* v. *Michigan*, 135 U. S. 161; Story on the Constitution, § 1072. Commerce is intercourse and traffic. When an order comes from another State to a dealer in Ohio for stocks and bonds, the sale occurs at his place of business, and this sale is one of the ingredients of the transaction, which is interstate commerce. The act regulates and conditions the right to effect such sale. Thus it appears that the very first element of interstate commerce is prohibited unless permitted by the State. Also, if the dealer is prohibited from selling, the result is to prohibit him from importing securities for sale. The act, therefore, forbids all traffic in articles of interstate commerce so long as sales are to be effected in Ohio. *Buck Stove & Range Co.* v. *Vickers*, *supra*.

The business being predominantly private and therefore not subject to the police power of the State in any instance, the latter cannot afford a justification for this interference with interstate commerce. *Adams Express Co.* v. *New York*, 232 U. S. 314; *Haskell* v. *Cowham*, 109 C. C. A. 235; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75.

The amendment of the constitution of Ohio is without effect in this case.

Mr. George Cosson, Attorney General of the State of Iowa, and *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ* on behalf of the National Association of Attorneys General of the United States.

Mr. George W. Wickersham, *Mr. Robert R. Reed* and *Mr. Charles K. Allen*, by leave of court, filed a brief as *amici curiæ* on behalf of the Investment Bankers Association of America.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

It will be observed that these cases bring here for judgment an asserted conflict between national power and state power, and bring, besides, power of the State as limited or forbidden by the National Constitution.

The assertion of such conflict and limitation is an ever-recurring one; and yet it is approached as if it were a new thing under the sun. The primary postulate of the State is that the law under review is an exercise of the police power of the State, and that power, we have said, is the least limitable of the exercises of government. *Sligh* v. *Kirkwood*, 237 U. S. 52. We get no accurate idea of its limitations by opposing to it the declarations of the Fourteenth Amendment that no person shall be deprived of his life, liberty or property without due process of law or denied the equal protection of the laws. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110. A stricter inquiry is necessary, and we must consider what it is of life, liberty and property that the Constitution protects.

What life is and what may or may not affect it, we have quite accurate tests; and what liberty is in its outside sense, and, in like sense, what property is. We know that it is of the essence of liberty—indeed, we may say, of life—that there shall be freedom of conduct, and yet there may

be limitations upon such freedom. We know that in the concept of property there are the rights of its acquisition, disposition and enjoyment—in a word, dominion over it. Yet all of these rights may be regulated. Such are the declarations of the cases, become platitudes by frequent repetition and many instances of application.

The question then is, Is the statute of Ohio within the principles declared? The statute is a restraint upon the disposition of certain property, and requires dealers in securities evidencing title to or interest in such property to obtain a license—a requirement simple enough in itself and yet of itself asserted to be an illegal control of a private business, made especially so by the conditions which are imposed. These conditions, summarized, are as follows:

To obtain the license there must be filed with the superintendent of banks and banking (termed in the act "commissioner") application for such license, together with information in such form as the commissioner shall determine, setting forth:

"(a) The names and addresses of the directors and officers if such applicant be a corporation or association and of all partners if it be a partnership, and of the person if the applicant be an individual, together with names and addresses of all agents of such applicant assisting in the disposal of such securities;

"(b) Location of the applicant's principal office and of his principal office in the state, if any;

"(c) The general plan and character of the business of said applicant, together with references which the 'commissioner' shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant, directors, officers, partners and agents.

"If the applicant be a corporation organized under the laws of any other state, territory or government, or have its principal place of business therein, it shall also file a copy of its articles of incorporation, certified by the proper

officer of such state, territory or government, and of its regulations and by-laws; and if it be an unincorporated association, a certified copy of its articles of association, or deed of settlement."

The applicant is also required to file a written instrument irrevocably consenting to be sued in a particular county and, if personal service there cannot be had, consenting to service upon the sheriff of the county.

It is also provided that all of the applications shall be published in a daily newspaper and if the commissioner be satisfied that the applicant is of good business repute, he shall, upon payment of certain fees, register the applicant as a licensed dealer in securities. Pending disposition of the application temporary permission to transact business may be given. Yearly renewals of the licenses are provided for.

The commissioner may revoke a license upon ascertaining that the licensee: (a) is of bad business repute; (b) has violated any provision of the act; or (c) has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions.

It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed, that is, to use the language of a cited case, "speculative schemes which have no more basis than so many feet of 'blue sky'"; or, as stated by counsel in another case, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations." Even if the descriptions be regarded as rhetorical, the existence of evil is

indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government and that the appreciation of the consequences of it is not open for our review. *The Trading Stamp Cases*, 240 U. S. 342, 391. Therefore, the purpose being legal, the question only remains whether the manner in which it is accomplished is illegal. This is contended, and the provisions which render the law void are found, it is stated, in: (1) Power conferred upon the commissioner to grant or refuse licenses; (2) the authority given the commissioner to place forbidden restrictions and burdens on the conduct of the business of one who has obtained a license.

The basis of these contentions is that the law confers arbitrary power upon the commissioner. In considering the contentions we must keep in mind that the law is addressed to a complex situation. Its purpose is, as we have seen, to give a basis for judgment of the securities offered the purchasing public; assure credit where it is deserved and confidence to investment and trading; prevent deception and save credulity and ignorance from imposition, as far as this can be done by the approved reputation of the seller of the securities and authoritative information.

It may, however, be said that character establishes itself and neither needs nor can be compelled to accept the stamp of government, and it is asserted that the "normal investment business of the country" and its "individual transactions" are not subject to "executive control," the broad contention being made that as such business cannot be prohibited it cannot be regulated. This, indeed, is the basic principle of the opposition to the statute. It is expressed in many ways, and the various provisions of the statute—those that are explicit in direction to the commissioner and those that commit discretion to him—are said to so burden and complicate "normal business as to

make it difficult if not impossible to carry it on in a normal way, if at all."

As broadly made, we cannot assent to these propositions. The reason and extent of the law we have indicated and the control to which individual transactions are subjected, and we think both are within the competency of the State. It is to be remembered that the value of securities consists in what they represent, and to determine such value is a complex problem even to the most skillful and informed.

We have very lately decided a case upon the principle of the power of the State to prevent frauds and impositions. *Hutchinson Ice Cream Co.* v. *Iowa*, *ante*, p. 153. The principle applies as well to securities as to material products, the provisions of the law necessarily varying with the objects. As to material products the purpose may be accomplished by a requirement of inherent purity. The intangibility of securities, they being representatives or purporting to be representatives of something else, of property, it may be, in distant states and countries, schemes of plausible pretensions, requires a difference of provision and the integrity of the securities can only be assured by the probity of the dealers in them and the information which may be given of them. This assurance the State has deemed necessary for its welfare to require; and the requirement is not unreasonable or inappropriate. It extends to the general market something of the safeguards that are given to trading upon the exchanges and stock boards of the country, safeguards that experience has adopted as advantageous. Inconvenience may be caused and supervision and surveillance, but this must yield to the public welfare; and against counsel's alarm of consequences, we set the judgment of the State.

We turn back, therefore, to consider the more specific objections to the law. The basis of them is, as we have seen, the power conferred upon the commissioner, which is

asserted to be arbitrary. The objection is somewhat difficult to handle. It centers in the provision that requires the commissioner, as a condition of a license, to "be satisfied of the good repute in business of such applicant and named agents," and in the power given him to revoke the license or refuse to renew it upon ascertaining that the licensee "is of bad business repute; has violated any provision of this act or has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions." It is especially objected that as to these requirements no standard is given to guide or determine the decision of the commissioner. Therefore, it is contended that the discretion thus vested in the commissioner leaves "room for the play and action of purely personal and arbitrary power."

We are a little surprised that it should be implied that there is anything recondite in a business reputation or its existence as a fact which should require much investigation. If in special cases there may be controversy, those cases the statute takes care of; an adverse judgment by the commissioner is reviewable by the courts. Section 6373–8. So also as to the other judgments.

Besides it is certainly apparent that if the conditions are within the power of the State to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissions are instances. But the contention may be answered by authority. In *Gundling* v. *Chicago*, 177 U. S. 183, an ordinance of the City of Chicago was passed on which required a license of dealers in cigarettes and as a condition

of the license that the applicant, if a single individual, all of the members of the firm, if a co-partnership, and any person or persons in charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained. To this case may be added *Red "C" Oil Manufacturing Co.* v. *North Carolina*, 222 U. S. 380, 394, and cases cited; *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230; *Brazee* v. *Michigan*, 241 U. S. 340, 341. See also *Reetz* v. *Michigan*, 188 U. S. 505; *Lieberman* v. *Van De Carr*, 199 U. S. 552.

The discretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review we must accord to the commissioner a proper sense of duty and the presumption that the functions entrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license to or take one away from a reputable dealer (*Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 545); and, as we have said, in cases where there can be a dispute of fact, the statute provides for judicial review, and we see no legal objection to the designation of a particular court for such review.

We are not disposed to give serious attention to the contention that while the statute in form prohibits sales "it at the same time necessarily prevents purchases, and thereby shields contemplating purchasers from loss of property by the exercise of their own defective judgment," and puts them as well as the sellers under guardianship. If we may suppose that such purchasers would assert a liberty to form a "defective judgment" and resent means of information as a limitation of their freedom, we must wait until they themselves appear to do so. Besides, there are examples in legislation of unsolicited protection, and there is much in the business we are con-

sidering which urges to an imitation of the examples. It is not wise to put out of view the tendencies of the business and that it tempts to and facilitates speculative judgments, if the purpose be trading, improvident judgments, if the purpose be investment. Whatever detriment may come from such judgments the law may be powerless to prevent; but against counterfeits of value the law can give protection, and such is the purpose of the statute under review. It must be judged of upon that consideration, not upon the assertion of an absolute liberty of conduct which does not exist.

Discriminations are asserted against the statute which extend, it is contended, to denying appellees the equal protection of the laws. Counsel enumerates them as follows:

"Prominent among such discriminations are between the cases where more or less than fifty per cent. of an issue of bonds is included in the sale to one person; between securities which have and which have not been authorized by the public service commission of this state; between the securities issued by a bank, trust company, a building and loan association organized under the laws of this state and those which are not; between an *owner* who sells his securities in a single transaction and one who disposes of them in successive transactions; between a bank or trust company who sells at a commission of not more than two per cent. and one which sells at a higher commission; against securities when any part of the proceeds to be derived from the sale are to be applied in payment for patents, services, good will or for property not located in this state; in providing for such delays in the issuance of a license and in the subsequent conduct of business thereunder as to substantially hinder, and in many cases naturally arising, to utterly prevent sales; in discriminating between securities which have and which have not been published in regular market reports; be-

tween sales where in a single transaction the sale is for five thousand dollars or more; in discriminations against securities issued by taxing subdivisions of other states; between securities upon which there has and has not been a default as to principal or interest; against securities which have not from time to time for six months been published in the regular market reports or the news columns of a daily newspaper of general circulation in the state; where the securities are or are not of manufacturing or transportation companies in the hands of *bona fide* purchasers prior to March 1st, 1914, where such companies were, on that date and shall be at the time of the proposed sale, going concerns; between cases where the information contemplated is or is not contained in a standard manual of information approved by the commissioner; where the disposal is or is not made for a commission of less than one per cent. of the par value thereof by a licensee who is a member of a regularly organized and recognized stock exchange and who has an established and lawfully conducted business in this state regularly open for public patronage as such; between cases in which the vendor proposes to sell securities for which he has and those for which he has not paid ninety per cent. of the price at which they are to be sold by him; where the securities are or are not those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, etc., and the whole or a part of the property upon which such securities are predicated are located within this state."

We cannot give separate attention to the asserted discriminations. It is enough to say that they are within the power of classification which a State has. A State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does

not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160. The cases were cited from which those propositions were deduced. To the same effect is *Armour & Company* v. *North Dakota*, 240 U. S. 510, 517.

The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore contravenes the commerce clause of the Constitution of the United States. There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. So much is a truism; there can only be controversy about its application. The language of the statute is: "Except as otherwise provided in this act, no dealer shall, *within this state*, dispose" of certain securities "issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit) . . . without first being licensed so to do as hereinafter provided."

The provisions of the law, it will be observed, apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed (§§ 6373–9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall

be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally. *Hatch* v. *Reardon*, 204 U. S. 152; *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *Engel* v. *O'Malley*, 219 U. S. 128; *Brodnax* v. *Missouri*, *id.* 285; *Banker Brothers Co.* v. *Pennsylvania*, 222 U. S. 210; *Savage* v. *Jones*, 225 U. S. 501; *Standard Stock Food Co.* v. *Wright*, *id.* 540; *Trading Stamp Cases*, *supra*. With these cases *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, and the *Lottery Case*, 188 U. S. 321, are not in discordance.

We might, indeed, ask, When do the designated securities cease migration in interstate commerce and settle to the jurisdiction of the State? Material things, choses in possession, pass out of interstate commerce when they emerge from the original package. Do choses in action have a longer immunity? It is to be remembered that though they may differ in manner of transfer, they are in the same form in the hands of the purchaser as they are in the hands of the seller, and in the hands of both as they are brought into the State. We ask again, Do they never pass out of interstate commerce? Have they always the freedom of the State? Is there no point of time at which the State can expose the evil that they may mask? Is anything more necessary for the supremacy of the national power than that they be kept free when in actual trans-

portation, subjected to the jurisdiction of the State only when they are attempted to be sold to the individual purchaser? The questions are pertinent, the answer to them one way or the other, of consequence; but we may pass them, for regarding the securities as still in interstate commerce after their transportation to the State is ended and they have reached the hands of dealers in them, their interstate character is only incidentally affected by the statute.

Decree reversed and the cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE MCREYNOLDS dissents.

CALDWELL, AS ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA AND *EX OFFICIO* MEMBER OF THE STATE SECURITIES COMMISSION OF THE STATE OF SOUTH DAKOTA, ET AL. *v.* SIOUX FALLS STOCK YARDS COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 386. Argued October 16, 17, 1916.—Decided January 22, 1917.

The South Dakota "Blue Sky Law," Laws of 1915, c. 275, is the same in principle as the laws of Ohio and Michigan involved in *Hall* v. *Geiger-Jones Co.*, *ante*, 539, and *Merrick* v. *Halsey & Co.*, *post*, 568, and is sustained over constitutional objections, for the reasons assigned in those cases, as applied to a Colorado corporation seeking to raise capital by sales of its own shares, and to individuals dealing in such shares.

When a statute regulating complainant's business is alleged to be un-

constitutional and its effect, if the business be continued in disregard of it, will be to visit him with repeated criminal prosecutions involving heavy fines and imprisonment, the remedy at law is not adequate.

A suit to enjoin state officials from instituting criminal proceedings in enforcement of such a statute is not a suit against the State.

Reversed. For decree below see 230 Fed. Rep. 236, note.

THE case is stated in the opinion.

Mr. Clarence C. Caldwell, Attorney General of the State of South Dakota, with whom *Mr. Byron S. Payne*, Assistant Attorney General of the State of South Dakota, was on the brief, for appellants.

Mr. George J. Danforth, with whom *Mr. Hugh S. Gamble*, *Mr. Frank McLaughlin* and *Mr. Edward E. Wagner* were on the brief, for appellees:

The act denies to the appellees due process of law, in violation of the Fourteenth Amendment and the South Dakota constitution, § 2, Article 6.

A complete analysis of its provisions shows that this is not a law to prevent fraud in the sale of stocks and bonds. It is a law designed for the sole purpose of regulating the control of the sale of stocks and bonds to a point of absolute prohibition. The stocks and bonds that are sold under the permit given by the commission are no more protected against the fraud and deceit of the agent in selling them than are those that are sold without a permit. The law is purely an attempt to regulate profit and loss and to try to guarantee the citizens of South Dakota against a possible mistake in judgment. It is simply an effort to prevent the citizens of this State from entering into a legitimate enterprise for gain, if they so desire, and to guard their pocketbooks. The law does not provide any penalty for fraud, but simply contains a prohibition against and provides a penalty for tendering for sale an article of commerce, however honestly it may

be tendered. Herein lies the vice of the statute, and herein does it differ from all laws regulating commercial transactions, which have been upheld by the court under the guise of police regulations.

The State Securities Commission is not merely an administrative board vested with certain discretionary powers, but is rather a court before which evidence must be taken, examined and weighed, and with authority greater than was ever conferred upon any judicial tribunal in this country.

The very right to make a contract is taken away from the individual unless the individual or corporation or association receives the stamp of approval of the commission upon the contract.

For a century or more the business of trading in horses has been recognized as a line of business in which fraud was frequently practiced. There would be just as much sense in having the State Securities Commission put its stamp of approval upon every horse trade as there would be to have it set up its judgment against the skilled investor, simply because an occasional person has lost his money by reason of a stock transaction. *Ex parte Hawley*, 22 S. Dak. 23.

The act is an unlawful interference with interstate commerce. *Catlin & Powell* v. *Schuppert*, 110 N. W. Rep. 818; *Hatch* v. *Reardon*, 204 U. S. 152; *International Textbook Co.* v. *Pigg*, 217 U. S. 91.

The statute denies to the appellees the equal protection of the law. It exempts state and national banks and loan associations and certain other classes.

The act attempts to delegate both legislative and judicial power to the State Securities Commission, and is not an inspection law. *Phœnix Insurance Co.* v. *Perkins*, 101 N. W. Rep. 1110; *Sioux Falls* v. *Kirby*, 6 S. Dak. 62; *Hewitt* v. *Board of Medical Examiners*, 84 Pac. Rep. 39; *Mathews* v. *Murphy*, 63 S. W. Rep. 785.

In the case at bar, the law distinctly provides that all that is necessary for the Securities Commission to find is that in its opinion the sale of stocks, bonds, etc., might work fraud upon the purchaser. A pure and absolute discretionary power is given to the commission. First, as to the granting of the permit, and, Second, as to the revocation of the permit after it is granted. There is no standard fixed to guide the commission in granting the permit, nor is there any standard prescribed as the reason for the revocation of the permit.

Mr. George Cosson, Attorney General of the State of Iowa, and *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ* on behalf of the National Association of Attorneys General of the United States.

Mr. Justice McKenna delivered the opinion of the court.

This case was argued and submitted with Nos. 438, 439 and 440, just decided, *ante*, 539, and with No. 413, *post*, 568, which concerns a statute of Michigan of like kind, the opinion in which is to follow. It involves the same general questions as those cases and is presented to review a decree of the District Court enjoining appellants from enforcing a statute of the State of South Dakota relating to the sale of securities. The act (§ 23) makes violations of its provisions a misdemeanor and criminal prosecutions under the act were the particular actions of the officers of the State that the appellees prayed to be enjoined.

After a consideration of the pleadings and argument the court, consisting of three judges, expressed the view that the statute violated the Constitution of the United States, and cited in confirmation *Alabama & N. O. Transportation Co.* v. *Doyle*, 210 Fed. Rep. 173; *Wm. R. Compton Co.* v.

Allen, 216 Fed. Rep. 537, and *Bracey* v. *Darst*, 218 Fed. Rep. 482.

The court decreed that the appellants be enjoined from instituting and prosecuting any actions, civil or criminal, against complainants (appellees) under the statute for alleged violations thereof, and from taking any proceedings for its enforcement except such as might be deemed proper by them in the criminal actions already pending.

The Sioux Falls Stock Yards Company is a Colorado corporation, having its principal place of business at the City of Denver, and the Morleys are residents and citizens of Iowa.

The Stock Yards Company was at the times mentioned in the bill engaged in building and constructing a stock yard in Sioux Falls, South Dakota, and in selling a certain amount of its capital stock for raising sufficient capital for that purpose. The Morleys, at such time, were engaged in the buying and selling of stock and especially in selling the stock of the Stock Yards Company to various farmers and other purchasers, such sales being necessary to complete the construction of the stock yard and also necessary to enable the Morleys to earn a livelihood.

Six informations were filed against appellees at the instigation of appellants for violations of the statute and it is alleged that appellees will be prosecuted immediately under such informations and will be further prosecuted.

The statute, it is alleged, is an infraction of the Fourteenth Amendment of the Constitution of the United States and imposes a burden upon and practically amounts to a prohibition of interstate commerce and hence offends the commerce clause of the Constitution of the United States; and "that it attempts to vest in and delegate to the said so-called State Securities Commission judicial powers unauthorized by law."

Against the bill appellants urge, besides asserting the validity of the statute, three defenses: (1) That com-

plainants have a plain, speedy and adequate remedy at law; (2) the suit is one against the State; (3) that the plea of the unconstitutionality of the statute was made in the criminal actions.

The three defenses are without merit. Six informations have already been filed against appellees and as many more may be brought as there may be violations of the statute, and a conviction of each may bear a fine of $1000 or imprisonment, or both.

The suit manifestly is not one against the State, and the decree appealed from does not enjoin criminal actions commenced before the filing of the bill. We therefore pass to the merits.

A summary of the statute is all that is necessary. Its purpose as declared in its title is to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the State. It creates a commission called the State Securities Commission, of which the appellants—except Hanson, who is prosecuting attorney of Turner County—are members.

Those dealing in securities—and they may be persons, corporations, co-partnerships, companies or associations, incorporated or unincorporated—shall be known, it is provided, "as a domestic investment company." Those resident of or organized in any other State, Territory or government shall be known "as a foreign investment company."

Certain securities are exempt from the provisions of the act and information as to those to which it applies must be furnished to the commission as follows: If the securities are of the dealer's own issue a statement must be filed with the commission showing in full detail (1) the plan upon which it proposes to transact business, (2) a copy of all contracts, stocks and bonds which it proposes to make with or sell to contributors or customers, together with a copy of its prospectus and of the proposed advertisements of its

securities; which statement shall also show its name and location and main office; (3) the names and addresses of its officers and an itemized account of its financial condition and the amount of its assets and liabilities; (4) such other information as the commission may require; (5) if a foreign corporation, a copy of the law under which it was incorporated; (6) a copy of its charter and certain other papers relating to its constitution and organization. A filing fee is provided for of not less than $10 nor more than $100. The described papers are to be verified and, if of record, certified to. If a foreign corporation, the applicant must file its irrevocable consent to suits against it by service of summons upon the public examiner.

The commission is authorized to require further information than that mentioned above and to make an appraisal of the property of the applicant at the expense of the applicant.

If the commission find from the statements filed and the reports of the investigations conducted by it that the securities or investment contracts offered for sale would in its opinion work a fraud upon the purchaser, the commission shall disapprove of their sale and notify the company by registered mail of its findings and disapproval, and it shall be unlawful for the company to sell such securities and they shall not be sold in the State. If, however, the proposed plan of business and the securities are not of that character their sale shall be approved and a certificate issued of permission to sell.

The person who is authorized to sell the securities designated in the act is termed a "dealer" in them, and he shall not sell or offer them for sale until he shall have filed a list of the same in the office of the commission. The term "dealer," it is provided, shall not include an owner nor issuer of securities when the sale of them is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created

by law lawfully sells securities "impressed with such trust." A "dealer" is required to furnish practically the same information as that required of corporations. All authorized agents of a "dealer" or investment company shall be registered with the commission and if the "dealer" be a nonresident or a corporation other than a domestic corporation he shall at the time he registers with the commission file with it a written, duly authenticated appointment of the public examiner of the State as his or its agent in the State upon whom process or pleadings may be served for or on behalf of the "dealer," which appointment shall be irrevocable. Upon compliance with the terms of the act the commission shall issue to such "dealer" a license which shall be good until revoked by the commission for good cause upon notice to the "dealer" and after a hearing duly had.

There is a provision for keeping accounts, payment of fines and other details, and it is provided that if, after permission has been issued authorizing the sale of the designated securities it shall be made to appear to the commission from an examination of an investment company that the further sale of the securities would work a fraud upon the purchaser, the commission may make an order revoking the license of the company and, pending the hearing, suspend the right of the company.

It is unlawful for a dealer or investment company to sell or offer for sale securities other than those approved by the commission or to transact business on any other plan than that set forth in the statements and papers required to be filed with the commission; or to circulate advertisements or other documents in the State differing in any way from the copy filed with the commission; or until the same has been approved by the commission. And no dealer shall sell or offer for sale securities of an investment company until such company has complied with the act. He may, however, if such investment company has not

itself complied with the act, make application for a license.

Records of the commission shall be public records and they shall be so arranged and preserved as to facilitate their examination, except that the commission may in its discretion withhold information relating to the private affairs of persons or corporations when in its judgment the same shall not be required for the public welfare, or any information relative to any matter that may be at issue in any court, unless upon an order of the court. Except as so provided the commission may furnish to those who may apply therefor any information regarding any investment company or its affairs.

Annual statements are required to be filed by investment companies, domestic or foreign, in such form and containing such information as the commission may demand; and failure to do so forfeits its permit.

The Supreme Court of the State upon petition of any person aggrieved may review by certiorari any final order or determination of the commission. The issue of the writ shall not, however, unless specifically ordered by the court, operate as a stay of proceedings.

Violations of the act are made misdemeanors punishable by a fine of not more than $1000 or imprisonment for not more than one year, or both fine and imprisonment. And it is provided that if any section of the act be declared unconstitutional or unauthorized the other sections shall not be vacated thereby.

The statute of South Dakota differs in some details from the statute of Ohio, but in its purpose and general provisions it is the same. There is urged against it, as was urged against the Ohio statute, that it violates the Fourteenth Amendment and the commerce clause of the Constitution of the United States. The argument to support these contentions, while affluent in citation of cases, is not so circumstantial as that which is presented against

the Michigan statute. Therefore, we shall rest this case upon our opinion in Nos. 438, 439 and 440, reserving to the Michigan case our reply to the more specific objections.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE MCREYNOLDS dissents.

MERRICK ET AL. *v.* N. W. HALSEY & COMPANY ET AL., AND THE WEIS FIBRE CONTAINER CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 413. Argued October 16, 17, 1916.—Decided January 22, 1917.

The Michigan "Blue Sky Law," Act No. 46, Public Acts, 1915, p. 63, is the same in principle as the laws of Ohio and South Dakota, involved in *Hall* v. *Geiger-Jones Co.*, *ante*, 539, and *Caldwell* v. *Sioux Falls Stock Yards Co.*, *ante*, 559, and is sustained over constitutional objections for the same reasons.

Whether the dealing in stocks and other securities, or sale of their own issues by corporations, require governmental regulation for the prevention of fraud, and whether such regulation should be by executive control or otherwise, are questions for the state legislature, and unless its judgment in these regards, or the execution of it, be palpably arbitrary, the courts will not interfere.

It is not a function of this court to pass upon the expediency or adequacy of legislation.

The purpose of the Michigan statute is to protect investors in securities not from financial loss generally but from fraud.

In prevention of fraud, the regulatory power of a State is not necessarily confined to those classes of business which by their nature or as generally conducted involve or encourage fraud; it may extend to those in which fraud usually, when it arises, is occasional and

confined to individual transactions, but which may nevertheless be conducted for fraudulent purposes.

The limitations of the Constitution are not so rigid as to render state legislation inadequate to the changing conditions of life.

Section 3 of the Michigan act, which exempts from its operation securities "listed in any standard manual of information" approved by the securities commission, *held*, not to render the act unduly discriminatory or involve unlawful delegation of power.

The act complies with the requirement of the Michigan constitution that no law shall embrace more than one object, which shall be expressed in its title.

228 Fed. Rep. 805, reversed.

THE question in the case is the validity of the Blue Sky Law (using this designation for convenience) of the State of Michigan. The law is almost identical with that of South Dakota, which is the subject of the decision in No. 386, *ante*, 559. The pleadings are elaborate and practically defy synopsis. There are direct complainants and intervening complainants, expressing the grievances of dealers in the State and outside of the State, and of persons who would like to be dealers in the State but are deterred, they allege, by the expense of the undertaking. The law, therefore, is assailed from all points and in all aspects.

The original bill includes in it as parties corporations, individuals, co-partnerships, residents and citizens of different States, all engaged in the investment banking business and in the business of buying and selling stocks, bonds and other securities, and offering them for sale in Michigan and who have contracted from time to time to sell such securities for the owners thereof and for the issuers thereof. They have expended large sums of money in advertising their business and have a valuable good will and an extensive clientele and have acquired valuable information as to the conduct of their business and as to the names and addresses of persons, firms and corporations who buy the designated securities in Michigan. They send into the State their agents and employees, who there

solicit orders for the securities and transmit such orders to complainants, at Chicago, Illinois, which orders are accepted and the securities so purchased are transmitted to Michigan. Their representations of the securities are true representations, they allege, and that they have been solicited to sell and have contracted to sell them, but have been informed that they cannot be permitted to sell them without complying with the Michigan statute.

The various provisions of the statute are set out, with details as to the manner of its operation; the irrelevancy of it is asserted, the useless labor of it—in some cases the impossibility of it—and in other cases its unreasonableness; and it is further asserted that its exaction of matters of confidence and its requirements invade and destroy property rights, curtail freedom of contract and otherwise seriously damage complainants' business and property. All of this is alleged with industrious and elaborate detail.

The other charges of invalidity against the act are: (1) It is in violation of the constitution of Michigan, which provides that no law shall embrace more than one object, which shall be expressed in its title, with specifications. (2) It offends against the Fourteenth Amendment of the Constitution of the United States, especial stress being put upon the exceptions of the statute, which are asserted to be discriminations in violation of the equal protection of the laws guaranteed by that amendment. (3) It imposes a burden on interstate commerce in violation of § 8, Article I, of the Constitution of the United States.

Under the latter objection there is elaborate specification of particulars which exhibit, with the specifications under the other objections, every shade of meaning, purpose or effect that ingenuity can ascribe to the statute—indeed, every provision of the statute is reviewed and charged with some form of illegality. However, the attacks may be condensed in the charge that the statute is a violation of the prohibitions of the Fourteenth Amend-

ment of state action because of its restrictions or prohibitions of a lawful business; and a violation of the commerce clause of the Constitution because the designated securities are articles of commerce and as such entitled to unmolested transportation between the States, and that the statute is a direct burden upon them in many cases, prohibitive in others—with the addition that the statute delegates legislative power to the commission created by it, inflicts cruel and unusual punishments and imposes penalties whose object is to deter from a test of its validity; and inflicts cruel and unusual punishments in violation of the constitution of Michigan.

It is also alleged that in a suit entitled *Alabama & N. O. Transportation Co.* v. *Doyle,* in the District Court for the Eastern District of Michigan, the statute, of which the statute under review is an amendment, was declared unconstitutional and void, the opinion in which case is reported in 210 Fed. Rep. 173, and that the statute there passed upon is similar in all illegal particulars to the present statute. A remedy in equity is asserted because of alleged irreparable injury and on account of the penalties imposed, and an injunction is prayed against the enforcement of the act.

At the same time that the bill outlined above was filed another bill was filed by the Weis Fibre Container Corporation, a corporation of South Dakota, whose purpose is to manufacture, buy and sell paper or fibre containers and similar products. It is not an investment company but a manufacturing company. Its securities are not supervised or regulated by any public service board or commission and the proceeds from the sale of its stocks and securities are employed in the prosecution of its business and are not otherwise invested. The corporation is duly authorized to do business in Michigan; its stock is valuable, and it has offered it for sale in Michigan directly and through agents and employees; and it is alleged that the

representations made in regard thereto are true. It has solicited various persons in Michigan to offer its stock for sale and they have informed it that its stocks cannot be sold in Michigan unless full compliance is made with the statute.

The bill attacks the statute for the illegalities detailed in the other bill and, considering that the only remedy is in equity, prays an injunction against the enforcement of the act.

A restraining order was issued entitled in both cases. Subsequently, on September 16, 1915, a partnership, organized and existing under the laws of the State of Ohio, having the name of Otis & Company and composed of citizens of Colorado and Ohio, filed a petition in intervention.

That company is a dealer in bonds and other securities in Michigan and such bonds and securities are of the kind which the statute of the State regulates. It also sends agents into the State to solicit orders for such securities and transmits orders to its offices in Cleveland, Ohio.

It asserts identity of situation with the complainants in the other bills and adopts their charges against the statute and prays to be made a party complainant to the cause and for the benefit of the restraining order issued therein and for such other relief as the court may deem meet.

A demurrer was filed to the bills and a motion made for injunction. The company was given the benefit of the restraining order and a like benefit was given to all others who might petition to intervene, the restraining order to continue until the disposition of the motion which had been made for injunction. The injunction was subsequently granted (228 Fed. Rep. 805) and to review it this appeal is prosecuted.

There was a partnership under the name of Remick, Hodges & Company, Remick and Hodges being residents of New York and March a resident of New Jersey, having their office at the City of New York and engaged in buying

and selling stocks, bonds and other securities. Their business is known as investment banking and is carried on in New York and by their agents there and elsewhere and by mail with various corporations, associations and persons throughout the United States and in the State of Michigan. They own many of such securities which they have offered and are offering for sale and desire to continue to offer to their customers in the State of Michigan. They have no place of business in the State and are not at the present time sending agents into the State but are endeavoring to sell securities there; but the volume of such business is not sufficient to justify them to attempt to comply with the statute of the State and the statute, if enforced against them, will have the effect of preventing them from making any further offers in the State and from attempting to establish or develop any business therein, and they are excluded thereby from interstate commerce in such securities which they have heretofore enjoyed.

They allege themselves to be in like situation with complainants and adopt the allegations of complainants' bills, and especially complain of the penalties which may be enforced against them and their agents and pray to come into the suit as parties.

The causes were subsequently consolidated by a *nunc pro tunc* order.

The injunctions restrained the defendants from enforcing the act and from beginning or instituting any action, civil or criminal, against complainants "based upon or pursuant to such act."

Mr. Grant Fellows, Attorney General of the State of Michigan, for appellants.

Mr. George W. Wickersham and *Mr. Robert R. Reed*, with whom *Mr. Charles K. Allen* was on the briefs, for

appellees other than the Weis Fibre Container Corporation *et al.*:

One who "in the course of continued or successive transactions of a similar nature" offers or sells stocks, bonds or other securities owned by him, cannot be prohibited from continuing such "business" except under executive license, subject to revocation. In its every act and aspect, the business represents simply a varying number of transactions, each of which is an individual transaction and a matter of individual right. This business, and the issuing of stocks and bonds by corporations, is no more "affected by a public interest" than the business of buying and selling groceries. *Alabama & N. O. Transportation Co.* v. *Doyle,* 210 Fed. Rep. 173, 179. The professed aim of "blue-sky" legislation is to eliminate the "get-rich-quick" fakirs. The present act by its terms is directed against the great normal business and the bulk of individual transactions involving the sale and re-sale of outstanding securities amounting to billions of dollars in amount. No effort whatever has been made to confine its operation to securities involving elements suggestive of fraud and danger. It includes the "get-rich-quick" promoter in the same way that an act directed against the purchase and sale of any wearing apparel would include the street peddler in paper collars.

There has nowhere at any time been any suggestion of any wide-spread fraud in the sale or distribution of so-called investment securities. There are in fact many businesses where fraud is supposed to be more prevalent, including as instances horse trading and the automobile business. In practically every contractual transaction fraud is possible, and its prevention a proper subject for legislative action. If, upon a legislative assumption of the prevalence of fraud in any general business (as distinguished from a limited or special method of doing business) the entire business and the right to carry it on may

be made the subject of discretionary executive license, then no business can be judicially protected from the assertion of this power.

So far as we have been able to discover, no case has ever reached this court where the power of executive license was asserted except against a business clearly subject to the power of prohibition. Many such cases have, however, been before the state courts and the acts held unconstitutional. *People* v. *Berrien*, 124 Michigan, 664, 666; *People* v. *Warden*, 157 N. Y. 116, 123; *People* v. *Jenkins*, 202 N. Y. 53, 57; *Chaddock* v. *Day*, 75 Michigan, 527; *Lochner* v. *New York*, 198 U. S. 45, 63; *Bessette* v. *People*, 193 Illinois, 334.

In a special sense "police power" relates only to "great public needs," represented by "public peace, health, morals and safety." The term has also been more broadly used as synonymous with governmental power. Its use in the different classes of cases by no means implies that legislation to promote the public convenience may authorize the executive to seize the person or property of the individual in the same way as is permitted to legislation relating to public health; nor, that legislation to prevent fraud in individual transactions of purchase and sale may take the form of subjecting the right to engage in such transactions to discretionary executive license. In *Powell* v. *Pennsylvania*, 127 U. S. 678, the act was rested primarily on the protection of the public health. See also *Plumley* v. *Massachusetts*, 155 U. S. 461. *Rast* v. *Van Deman*, 240 U. S. 342, dealt with a prohibition of a particular and novel method of doing business, conceivably pregnant with a special danger to the public. In the present case we have a prohibition of an entire business consisting primarily of a succession of normal individual transactions. The right is asserted, not to prohibit specific methods of carrying on this business nor of requiring specific safeguards against fraud, but of prohibiting the

whole business, unless in the first instance the right to engage in it is granted by an administrative officer or board upon its determination of the essentially administrative question as to the character of the individual.

Unless we start with the proposition that the right to sell securities owned by individuals as a business is not an inherent right, it is difficult to conceive of any other principle upon which such power may be upheld. The determination as to the character of the individual must be essentially an individual determination of the particular officer or board. It applies not alone against local dealers known in the community, but against dealers of other States and remote cities. Once such a jurisdiction is held to be legally vested in an administrative officer, its exercise becomes potentially arbitrary beyond the power of real protection in the courts—a power of complete control over a business which is essentially individual and competitive. Such a power once asserted and exercised is bound to destroy the normal interstate business in the sale of securities.

Leaving aside some of the smaller and exceptional classes of business and local nuisances subject to municipal regulation, and dealing with the important businesses which have been held subject to discretionary administrative control, such as the railroads, banks, insurance, and liquor business, it is, we believe, correct to say that they are subject to complete power of prohibition against the individual; that they may be confined to corporations; and that they may be taken over and operated by the State. Each is susceptible to administrative control, and if necessary of complete ownership and operation by the State.

The business of dealing in the stocks and bonds of corporations is not within the principle laid down in *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, and the cases upon which it was decided. *Munn* v. *Illinois*, 94

U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *People* v. *Budd*, 117 N. Y. 1, 27. The facts submitted in the present case show that there is no mature universal sense of the people regarding the regulation of the sales of stocks and bonds. The legislation flared up suddenly under popular agitation and has died down as rapidly. An equally widespread clamor easily might be cultivated regarding the management of department stores, or of any of the other manifold activities of business life which the Constitution and free institutions protect from the meddlesome interference of governmental bureaucracy. See *American Surety Co.* v. *Shallenberger*, 183 Fed. Rep. 636, 639; *German Alliance Insurance Co.* v. *Barnes*, 189 Fed. Rep. 769, 778; *German Alliance Insurance Co.* v. *Hale*, 219 U. S. 307.

The prohibition against making a particular offering or sale except upon a "certificate of authority" from a state commission is invalid. Even though a fraudulent intent cannot justly be ascribed to the promoter, yet if in the opinion of the commission he has deceived himself and is deceiving others as to the merits and prospects of his scheme, which is in its opinion unsafe, then it would in its opinion "work a fraud on the purchaser," deceive him and cause him loss. This deception and this loss, though unintended, the act plans to prevent. This is the crux of the act. The purpose is to protect a minority of "investors," looking for vast gains, against a danger existing in a small minority of transactions. It prohibits a hundred transactions, because, one of them may be fraudulent, and compels the ninety-nine innocent parties to get a permit and pay a fee, and to establish their honesty and the sound basis of their proposition before they can sell a share of stock. Where not completely prohibitive in the first instance, it will become so as to any normal offering of investment securities the moment the commission exercises its uncontrolled discretion of conducting an ex-

tended investigation of the property and business at the expense of the applicant.

Dealing with the substance, we have a delegation of complete power, including the legislative and the judicial. The thing prohibited is not fraud. It is the transaction. It is made a matter of license, instead of a matter of right without a license. A whole field of ordinary legislation is abandoned to the actual government and control of an administrative commission. This field is the prevention of fraud or improvidence in the sale or purchase of securities.

This deprives the person both of liberty and property without due process of law. It is not within the police power. *Chicago* v. *Netcher*, 183 Illinois, 104, 110; *State* v. *Indiana Oil Co.*, 120 Indiana, 575, 583; *People* v. *Jenkins*, 202 N. Y. 53, 57. The case is not like the case of banks, which invite the savings of whole communities and perform quasi-public service. The investments are essentially individual, and the fraud, if practiced, is individual. The losses sustained by fraud, as distinguished from losses due to wide-spread depressions and panics, are individual. The evil in its essence is simply an important one of the many individual wrongs which should be the subject of effective remedial legislation. See *People* v. *Vandell*, 146 N. Y. Supp. 992, 994.

Over quasi-public businesses and matters of public right, the tendency of modern decisions is to re-assert, rather than to create, the full power necessary to their effective control. There are also, of course, other subjects of prohibition and administrative control, distinct from any business, such as the control over the use of streets and public places, and the far-reaching control necessary at times for the protection of the public health, peace and safety, to which may be added the control over foreign commerce and over aliens which has been vested in the President, and the control given various officials or boards

over governmental agencies, such as the post office, and governmental property, including public parks and reservations. As to each and all of these subjects, the control rests solely on the original principle of necessity on which it was first asserted, and is historically and constitutionally an administrative power, the vesting and conditions of which are subject to law, that is to legislative grant and control. Such control not being legislative in its nature, an act vesting it in an administrator is in no sense a delegation of legislative power. Upon this principle we explain *Lieberman* v. *Van De Carr*, 199 U. S. 552; *Gundling* v. *Chicago*, 177 U. S. 183; *Engel* v. *O'Malley*, 219 U. S. 128; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; *Locke's Appeal*, 72 Pa. St. 491; *Field* v. *Clark*, 143 U. S. 649; *Buttfield* v. *Stranahan*, 192 U. S. 470; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Grimaud*, 220 U. S. 506; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Fong Yue Ting* v. *United States*, 149 U. S. 698, and like cases, as distinguished from *Yick Wo* v. *Hopkins*, 118 U. S. 370.

In all these cases, though we think and speak of a delegation of legislative power, it is a vesting of administrative power not within either the letter or spirit of the constitutional rule of prohibition against the delegation of such power. See also *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Ekiu* v. *United States*, 142 U. S. 65, citing *United States* v. *Jung Ah Lung*, 124 U. S. 621. This broad power cannot exist, it cannot be judicially recognized as it has been recognized, if the principle and precedents on which it rests are to be held applicable to the entire field of remedial legislation.

The so-called standard manual feature of the act is unconstitutional and void. The act is utterly unreasonable—an unnecessary and arbitrary interference with private rights, in violation of due process of law. *Gundling* v. *Chicago, supra.* Section 8 prohibits the sale of stock in

Michigan if upon investigation the commission disagrees with the value which has been placed upon the property by the authorities of the issuing State. This and the power given the commission to make detailed examination of investment companies' property and affairs at the expense of such company and to make an appraisal at the like expense of its properties, is utterly unreasonable, and, as applied to the normal business, potentially prohibitive.

The act impairs the freedom of commerce between the States. There would be no question on this point but for the forced construction attempted to be placed upon *Nathan* v. *Louisiana*, 8 How. 73, and *Paul* v. *Virginia*, 8 Wall. 168. So far as the latter case goes, the distinction is plain between a policy of insurance, which is a contract between the parties having nothing to do with interstate commerce, except that the parties may reside in different States, and the case of stocks and bonds as subjects of interstate sale. The former case depended on the right of a State to tax its own citizens for the prosecution of any particular business or profession within the State. It is negligible as applied to the present statute. The interstate sale of securities falls clearly within the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189. The sale of stocks and bonds when issued and offered for sale by a dealer in New York or Chicago to an investor in Michigan, represents something more than the contract of insurance dealt with in *Paul* v. *Virginia*. It is a "subject of trade and barter offered in the market as something having existence in value independent of the parties to them," that is, of the parties to the transaction of purchase and sale. "They are not commodities," but it is not necessary that a thing be a "commodity" in order to be a subject of sale or commerce. *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Darnell* v. *Indiana*, 226 U. S. 390; *Lottery Case*, 188 U. S. 321. The attempt to rely upon the inspection cases is hardly serious enough

to require an answer. Generally speaking, a defect in personal property may be discovered by inspection. A fraud in the issuance of sale of stocks cannot be so discovered. What is here attempted is investigation of all questions relating to the soundness of enterprises and values of securities. See *People* v. *Compagnie Gen. Transatlantique,* 107 U. S. 59, 62; *Turner* v. *Maryland,* 107 U. S. 38; *Patapsco Guano Co.* v. *North Carolina,* 171 U. S. 345.

Laws like this have been condemned by fourteen federal judges in the following cases. *Alabama & N. O. Transportation Co.* v. *Doyle,* 210 Fed. Rep. 173; *Compton Co.* v. *Allen,* 216 Fed. Rep. 537; *Bracey* v. *Darst,* 218 Fed. Rep. 482; *Sioux Falls Stock Yards Co.* v. *Caldwell* (before this court), 230 Fed. Rep. 236; *Halsey & Co.* v. *Merrick* (this case), 228 Fed. Rep. 805; *Sater* v. *Hollister* (before this court), 230 Fed. Rep. 233.

Nowhere in the lower federal courts or in the supreme court of any of the States has there been any dissent by even a single judge to the principle announced in the first Michigan case, holding the act void as applied to ordinary dealers in investment securities.

Mr. Hal H. Smith filed a brief for the Weis Fibre Container Corporation *et al.,* appellees:

The regulation of the dealer and his calling is incidental to the main purpose of the act which is the regulation and prohibition, unless in compliance with the act, of the issue of stock and bonds by corporations and the making of loans in certain forms by individuals, co-partnerships and associations. The burden of the law falls somewhat upon the dealer but its heaviest load rests upon the issuer of the stocks, bonds or securities and the issuer may be any person, corporate or otherwise, engaged in any business whatever, except only the exempted classes.

The issue and sale of securities is a part of the freedom

guaranteed by the Fourteenth Amendment to the Federal Constitution and by the constitution of Michigan. It is in effect the making of contracts "proper, necessary and essential" to the pursuit of lawful livelihoods or avocations. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Kuhn* v. *Detroit*, 70 Michigan, 537; *Valentine* v. *Circuit Judge*, 124 Michigan, 664.

The right to issue stock, to execute bonds and to secure their payment by the pledge of property is of no value unless the stock and bonds can thereafter be negotiated. This the law prevents except under heavy restrictions.

The law lays its burden not only upon the specific transaction and the particular investment company. By its sweeping definition of investment companies, it regulates all manner of business enterprises and all kinds of manufacturing and mercantile pursuits. *Moredock* v. *Kirby*, 118 Fed. Rep. 180; *Valentine* v. *Circuit Judge*, *supra*.

The purpose of the statute is not to regulate fraud, but rather to prevent financial loss. But even if it were otherwise, regulation of all business for the purpose of reaching the occasional fraud is clearly not justified. The fraud must be a necessary incident to the particular business, or the business must lend itself with peculiar ease to deception, else the business cannot be regulated—only the fraud. *Tyroler* v. *Warden*, 157 N. Y. 116.

This law subjects to the commission's authority all secured commercial paper. It regulates the issue and sale of corporate securities. To say now that all corporate business and these securities are so frequently the vehicles of fraud and lend themselves so easily to deception that their entire issue and all their sale must be regulated as this law regulates them, is to declare the very basis of modern business to be fraudulent. *Valentine* v. *Circuit Judge*, *supra*.

The court has power to determine for itself that no necessity exists for this statute. *People* v. *Smith*, 108 Michi-

gan, 527. We insist that its very basis is "unreasonable and purely arbitrary." *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342. Even if some law would be justified, we submit that the restrictions and burdens of this one do arbitrarily and unnecessarily interfere with constitutional rights; it absolutely suspends the issue, negotiation and sale of the securities for a period limited only by the whim of the commission. The provision of § 8 for an appraisal is another requirement so unreasonable and drastic as to be beyond the power of the State.

The requirement that all foreign investment companies must consent to the jurisdiction of all the courts of the State is another unreasonable restriction. It is settled that a corporation cannot be required so to submit itself. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205. It violates the constitutional right of nonresident individuals by depriving them of the immunity allowed to citizens of this State, since citizens of Michigan must be sued by personal service. *Moredock* v. *Kirby, supra; Caldwell* v. *Armour*, 1 Penn. (Del.) 545; see 9 Fed. Statutes Ann., p. 176.

The law cannot be defended as a licensing law. It deals with individual transactions. A new application must be made on each new security. The test of the permission is not the character of the dealer or his solvency. It is the character of the security. The dealer is not licensed. The dealer who is licensed can only sell approved securities.

Nor is it an inspection statute. *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59; *Sligh* v. *Kirkwood*, 237 U. S. 52, 59, and other cases.

The act is in conflict with the commerce clause; vests arbitrary power in the commission; its title covers more than one subject, and does not express the object, in violation of § 21, Article 5, of the Michigan constitution; it is class legislation; delegates legislative authority; and

attempts to confer judicial powers, in violation of the Michigan constitution.

Mr. George Cosson, Attorney General of the State of Iowa, and *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, by leave of court, filed a brief as *amici curiæ* on behalf of the National Association of Attorneys General of the United States.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The statute of Michigan is the same as the statutes of South Dakota and Ohio, and our reply to the attacks made upon it might be rested upon our discussion of those statutes.

But in the present case, as we have said elsewhere, the arguments, while fundamentally the same, are in some respects more circumstantial. All the supposed consequences of the law are dilated upon—wherein, as it is contended, it meddles with or burdens a business asserted to be legitimate, wherein it prohibits or gives power to an executive officer to arbitrarily prohibit such business, and wherein it confuses legislative and executive powers, and in these ways and other ways, as it is further contended, transgresses the Constitution of the United States. Many cases are cited to support the contentions and publicists are avouched to the same end. In our discussion we cannot be as elaborate in details as counsel, nor is it necessary. There are certain outside propositions upon which all others may be regarded as dependent. These propositions were considered in the other cases and we need now only supplement what was there said.

The appellants justify the law by the police power of the State and its comprehensive reach. Replying, appellees urge against it the limitations of the Fourteenth Amend-

ment and the national supremacy over interstate commerce; and applying the Fourteenth Amendment, assert in many ways (we select one and upon it the changes are rung) that the issue of the securities "is in effect the making of contracts 'proper and necessary and essential' to the pursuit of lawful livelihoods or avocations," and cannot be "made the subject of discretionary executive license," controlling thereby individual transactions.

The assertion encounters immediately many cases in which laws have been sustained limiting the making of contracts and regulating business through executive agencies and necessarily controlling individual transactions. Indeed, there are too many for even marginal citation. They, however, are attempted to be distinguished or restricted. It is said by counsel that they "deal with administrative control over matters of public right or public grant or existing at public sufferance." And it is admitted that "the Legislature may deal drastically with many matters of private right, to prevent or redress individual wrongs." It is further admitted that "drastic remedies may be prescribed *by law* [italics ours] for evils deemed by the Legislature to require them." Excluding the proposition so expressed from application to the Michigan law, it is insisted that the business to which it applies "neither requires nor justifies, nor is susceptible of, administrative or executive control for the purpose of preventing a wrong or injury by one individual to another." Of course, the implication, if not the direct assertion, is that the business of dealing in securities has not that character. Neither the principle nor the assertion is very tangible. The first incidence of any evil from a business or conduct is upon some individual and through the individual (let us say individuals, for necessarily there are more than one) upon the community, nor can it be affected in any other way. Besides, it is for the State to judge in such circumstances and the judgment and its

execution would have to be palpably arbitrary to justify the interference of the courts. Counsel, indeed, frankly concedes the evil of "get-rich-quick" schemes and quotes the banking commissioner of the State of Kansas for the statement that the "Blue Sky" law of that State had saved the people of the State $6,000,000 since its enactment and that between 1400 and 1500 companies had been investigated by the department and less than 400 of the number granted permits to sell securities in the State. Counsel also quotes the confidence of the commissioner in the efficacy of the law and that it will "eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised."

Against this statement, however, counsel cites the view expressed by the British Board of Trade of the inexpediency of an official investigation "into the soundness, good faith, and prospects" of companies. Upon this difference in views we are not called upon to express an opinion for, as we have said, the judgment is for the State to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the State has determined that the business of dealing in securities shall have administrative supervision, and 26 States have expressed like judgments.

Much may be said against these judgments, as much has been said, and decisions of the courts have been cited against them. We are not insensible to the strength of both, but we cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every new regulation of business or conduct meets challenge and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a State and its expression in laws must vary with circumstances. And this capacity for growth and adaptation we said, through Mr. Justice

Matthews, in *Hurtado* v. *California*, 110 U. S. 516, 530, is the "peculiar boast and excellence of the common law." It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer, in *Muller* v. *Oregon*, 208 U. S. 412, 420, that "it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action." This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law. We may feel the difficulties of the new applications which are invoked, the strength of the contentions and the arguments which support or oppose them, but our surest recourse is in what has been done, and in the pending case we have analogies if not exact examples to guide us. So guided and so informed, we think the statute under review is within the power of the State. It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the State by such considerations would make it impotent to discharge its function. It costs something to be governed.

But counsel say that the conditions imposed either are not adequate to such purpose or transcend what is necessary for it. Indeed, it is asserted that the statute has not that purpose, "but rather to prevent financial loss." The assertion is against the declaration of the title of the statute and against the words of its body, and cannot be justified by assigning to it the purpose of the law which it amends; nor can we assent to the contention that such purpose must be inferred from § 8 or other provisions which point, it is said, to the probability of financial loss, not fraud. The act must be considered from its declared

purpose and as a whole, not from detached portions which can be easily overwhelmed when assigned a false character.

It is, however, said that, assuming the statute have such purpose, the fraud referred to is not a proper object for the police power, and it is asked, "Can the occasional fraud, that fraud which arises in the individual transaction, justify a law regulating the business of which the single transaction is a part? Or must it be fraud which is incidental to the business, a fraud which the business itself, from its character and the manner in which it is generally conducted, invites and encourages?" And, quoting from *People ex rel. Tyroler* v. *Warden*, 157 N. Y. 116, 123, "It is a novel legislation indeed that attempts to take away from all the people the right to conduct a business because there are wrongdoers in it." To the latter we say the right to do business is not taken away; the other we have already answered and need only add that we cannot upon such considerations limit the power of the State. The State must adapt its legislation to evils as they appear and is not helpless because of their forms.

Engel v. *O'Malley*, 219 U. S. 128, was not decided because fraud was incidental to the business of banking by individuals or partnerships but because fraud could be practiced in it and that hence it could be licensed. Nor was it decided in *Allen* v. *Riley*, 203 U. S. 347, that the transfer of patent rights was of itself illegal or that any particular transfer would be deceptive, but that some transfers might be; and so a statute of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid. Nor did we hesitate to hold valid the regulation of the business of employment agencies. It was a lawful business and would not in instances be injuriously conducted; but in instances it might be, and because it might be, with injurious consequences, its regulation was provided. This court sus-

tained the regulation and the condition that it was to be enforced according to the legal discretion of a commissioner. *Brazee* v. *Michigan*, 241 U. S. 340. See also *Brodnax* v. *Missouri*, 219 U. S. 285. Other cases might be cited of similar import.

It may be that there are better ways to meet the evils at which the statute is directed and counsel have felt it incumbent upon them to suggest a better way. We can only reply that it is not our function to decide between measures and upon a comparison of their utility and adequacy determine their legality.

The contentions upon the discriminations of the statute we rest upon the comment made on like contentions in the other cases. A special emphasis, however, is put by appellees upon the adoption by the commission of "so-called 'standard manuals of investment.'" The adoption of these manuals, it is said, is justified by the commission under § 3 which enumerates the securities that are exempt from the law, among others, "(h) securities which are listed in any standard manual of information approved by said commission." The provision is attacked as "'the Michigan idea' of providing an easy way out of the act at all times." And further, "It is not so much an exemption of existing standard securities as a working exemption available for new offerings to be listed as issued." And again, "It is to be a permanent means of exempting new securities from the act." Even this, it is asserted, is not all of the power that is given for discrimination, for it is pointed out that the commission may call for additional information than that contained in the manuals and may, pending the filing of the information, suspend the sale of the securities and may also suspend, either temporarily or permanently, the sale of any securities listed in such manuals after a hearing upon notice, if the commission shall find that the sale of such securities would work a fraud upon the purchasers thereof.

The exemption and the provision are declared to be unconstitutional and it seems to be intimated that in the flexibility of what is considered their subterfuge a vicious character is not only given to the act but constituted its inducement, and therefore brings the act down with it, for without it, it is insisted, the statute would not have been enacted. We cannot agree either to the characterization of the provision or its effect. The first would attribute a sinister purpose to the legislation of which there is no indication, the second would give too much importance to a subordinate provision, one that is only ancillary or convenient to the main purpose.

The contentions based on the exemption and provision are a part of that which accuses the law of conferring arbitrary discretion upon the commission and committing to its will the existence or extinction of the business. The accusation is formidable in words but it is the same that has been made many times. It is answered by the comment and the cases cited in the opinion in the other cases. Besides, we repeat, there is a presumption against wanton action by the commission, and if there should be such disregard of duty a remedy in the courts is explicitly given, and if it were not given it would necessarily be implied.

Objection is made that the title of the act does not indicate its provisions and that the act hence violates the constitution of Michigan. The objection is untenable and does not call for particular notice.

Answer to the contention that the statute is an interference with interstate commerce we leave to our opinion in Nos. 438, 439 and 440, *ante*, 539.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE MCREYNOLDS dissents.

HERBERT ET AL. *v.* THE SHANLEY COMPANY.

JOHN CHURCH COMPANY *v.* HILLIARD HOTEL COMPANY ET AL.

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

Nos. 427, 433. Argued January 10, 1917.—Decided January 22, 1917.

The performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it but as an incident of other entertainment for which the public pays, infringes the exclusive right of the owner of the copyright to perform the work publicly for profit, under the Act of March 4, 1909, c. 320, § 1 (e), 35 Stat. 1075.

221 Fed. Rep. 229; 229 Fed. Rep. 340, reversed.

THE cases are stated in the opinion.

Mr. Nathan Burkan, with whom *Mr. Wm. J. Hughes* was on the brief, for petitioners in No. 427:

In support of the proposition that the performance was "for profit," see the opinion of Lacombe, J., sitting in the District Court in *John Church Co.* v. *Hilliard Hotel Co.*, 221 Fed. Rep. 229; *Sarpy* v. *Holland*, 99 Law Times, 317; *Weistblatt* v. *Bingham*, 58 Misc. (N. Y.) 328; *Wall* v. *Taylor*, *Wall* v. *Martin*, 52 L. J. Q. B. (n. s. Pt. 2), 558, 559; and *Pierce* v. *Milwaukee & St. Paul R. R. Co.*, 23 Wisconsin, 387.

Section 28 of the Copyright Law specifies in what instances musical works may be freely performed. House Report No. 2222, 60th Cong., 2d sess., p. 16; *White Smith Co.* v. *Apollo Co.*, 209 U. S. 16.

By the separate publication of the vocal number containing one copyright notice which correctly states the year when both the entire opera and the separate number

were copyrighted and the name of the proprietor of both copyrights, all rights secured by the copyright in the entire opera, including the dramatic performing right, are preserved with respect to the vocal number. *West Publishing Co.* v. *Edward Thompson Co.*, 176 Fed. Rep. 833, 837.

The performance was an infringement of the exclusive dramatic performing right secured by § 1 (d). The opera is a "drama." Drone on Copyright, p. 589; *The Iolanthe Case*, 15 Fed. Rep. 439, 442; Copyright Act, §§ 5 (d), 25 (b), subdiv. Fourth. The dramatic right extends to every material part of the opera. Section 3. Any unlicensed performance in any manner of a dramatic work infringes. *Mayor* v. *Eden Musee Co.*, 102 N. Y. 593, 595; *Russell* v. *Smith*, 12 Q. B. 217, 236.

Selling copies of the separate number gave no implied license to perform it publicly. Act, § 41; § 1 (a), (b), (d), (e); *Chappell* v. *Boosey*, 21 Ch. Div. (1882), 232–236.

Mr. Louis J. Vorhaus, with whom *Mr. Moses H. Grossman* and *Mr. William Grossman* were on the brief, for petitioner in No. 433.

Mr. Levi Cooke, with whom *Mr. A. S. Gilbert* and *Mr. Francis Gilbert* were on the brief, for respondent in No. 427:

The vocal number is not a dramatico-musical composition. *Fuller* v. *Blackpool Winter Garden*, 2 Q. B. (1895), 429, 442.

The dramatic performing right was not infringed. Copyright Act, § 5 (d), (e); Copyright Office Regulations, 8-d, 9, 10-e; Bowker on Copyright, pp. 162, 163.

The performance was not "for profit." It is not the purpose for which a free performance is given, but the fact whether or not it is free, which determines whether the performance is "for profit" within the purview of the act. The music was not a necessary incident to the service of food, and the guest who paid for a meal could not insist

on music while he ate. The time and place of performance, and whether any performance at all was given, rested in the discretion of the hotel. Music was furnished only at certain times and meals at all hours, with no difference in the charge therefor when music was furnished. While the purpose was to amuse and attract guests, whether it was actually accomplished is a matter of pure conjecture; the song "Sweethearts" may have driven more patrons from the dining-room than it lured into it.

The words "for profit" are expressly defined in § 1 of the act, with reference to coin-operated machines. The legislative intent is the same in each case. The *Sarpy Case*, 99 Law Times, 317, is distinguishable, and *Weistblatt* v. *Bingham*, 58 Misc. (N. Y.) 328, is overcome by *People* v. *Martin*, 137 N. Y. Supp. 377; *People* v. *Wacke*, 77 Misc. (N. Y.) 196; and *People* v. *Royal*, 23 App. Div. 258.

The enumeration in § 28 is not exclusive. To so hold would render the provisions of § 1 (e) meaningless.

Congress did not intend the far-reaching consequences of a decision sustaining appellant's contention.

Mr. Charles J. Campbell, with whom *Mr. Frank A. K. Boland* and *Mr. Levi Cooke* were on the brief, for respondents in No. 433.

Mr. Justice Holmes delivered the opinion of the court.

These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. Act of March 4, 1909, c. 320, § 1 (e), 35 Stat. 1075. The last numbered case was decided before the other and may be stated first. The plaintiff owns the copyright of a lyric comedy in which is a march called "From Maine to Oregon." It took out a

separate copyright for the march and published it separately. The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of guests during meal times, in the way now common, by an orchestra employed and paid by the company. It was held by the Circuit Court of Appeals, reversing the decision of the District Court, that this was not a performance for profit within the meaning of the act. 221 Fed. Rep. 229. 136 C. C. A. 639.

The other case is similar so far as the present discussion is concerned. The plaintiffs were the composers and owners of a comic opera entitled "Sweethearts," containing a song of the same title as a leading feature in the performance. There is a copyright for the opera and also one for the song which is published and sold separately. This the Shanley Company caused to be sung by professional singers, upon a stage in its restaurant on Broadway, accompanied by an orchestra. The District Court after holding that by the separate publication the plaintiffs' rights were limited to those conferred by the separate copyright, a matter that it will not be necessary to discuss, followed the decision in 221 Fed. Rep. 229, as to public performance for profit. 222 Fed. Rep. 344. The decree was affirmed by the Circuit Court of Appeals. 229 Fed. Rep. 340. 143 C. C. A. 460.

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are

expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.

Decrees reversed.

BOARD OF TRUSTEES OF THE SEVILLETA DE LA JOYA GRANT, FOR THE BENEFIT OF THE OWNERS IN COMMON THEREOF, *v.* BOARD OF TRUSTEES OF THE BELEN LAND GRANT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

No. 129. Argued December 22, 1916.—Decided January 22, 1917.

The Court of Private Land Claims derived all of its powers from the Act of March 3, 1891, c. 539, 26 Stat. 854.

Under that act the Court of Private Land Claims had no jurisdiction in confirming a grant and supervising its survey to extend the confirmation and boundaries over land included in another grant confirmed by Congress and patented before the passage of the act, or to alter the boundaries of such other grant as so confirmed and as described in the patent.

So *held*, where both grants were complete and perfect before the Mexican cession, and the grant confirmed by Congress was senior in time of grant.

Such jurisdiction could not be conferred on the Court of Private Land Claims by consent of the owners of the grant confirmed by Congress.

20 N. Mex. 145, affirmed.

THE case is stated in the opinion.

Mr. Neill B. Field for plaintiff in error.

Mr. Samuel Herrick, with whom *Mr. R. P. Barnes* and *Mr. J. L. Nicholas* were on the brief, for defendant in error.

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

This is an action in ejectment to recover the area in conflict between two land grants in New Mexico respectively known as the La Joya and the Belen, the plaintiff being the owner of the former and the defendant of the latter. The defendant prevailed and the judgment was affirmed. 20 N. Mex. 145.

The facts are these: Both grants were complete and perfect at the time of the Mexican cession and both were subsequently confirmed, the Belen in 1858 by an act of Congress, c. 5, 11 Stat. 374, and the La Joya in 1893 by a decree of the Court of Private Land Claims under the Act of March 3, 1891, c. 539, 26 Stat. 854. The Belen was the older grant and was patented in 1871, long before the proceeding for the confirmation of the La Joya grant was begun. Shortly after the decree confirming it was rendered the La Joya grant was surveyed preparatory to issuing a patent for it. Objections to the survey were made by two persons interested in the Belen grant, and the survey, with the objections, was laid before the Court of Private Land Claims as was required by the Act of 1891. The objections were to the effect that the survey erroneously placed the northern boundary of the La Joya grant within the Belen grant and thereby wrongly brought the two largely in conflict. After a hearing the court found the objections well grounded, ordered a resurvey of the La Joya grant and particularly designated what should be deemed its northern boundary. A resurvey conforming to that direc-

tion received the court's approval, and a patent for that grant was then issued. While the resurvey greatly reduced the area in conflict, it still left the northern boundary of the La Joya grant within the Belen grant, and a conflict of about 11,000 acres remained.

Without questioning the superiority which otherwise would result from the seniority of the Belen grant, the plaintiff insisted that the action of the Court of Private Land Claims in directing what should be deemed the northern boundary of the La Joya grant, and in approving the resurvey wherein that direction was followed, amounted to an adjudication of the true location of the common boundary between the grants and was conclusive upon the owners of the Belen grant. But the state courts held the contention untenable in view of the provisions of the Act of 1891, and that ruling is the only one called in question here.

The Court of Private Land Claims derived all of its powers from the Act of 1891, the express purpose of which was to provide for and secure the adjudication of Spanish and Mexican land claims as between the claimants and the United States. The act divided the claims into two principal classes. One class, particularly described in § 6, embraced those which were "not already complete and perfect," and the other, particularly described in § 8, embraced those which were "complete and perfect" at the time of the Mexican cession. The La Joya grant belonged to the latter class, respecting which it was specially provided in § 8 that the court's confirmation should not include any land "that shall have been disposed of by the United States," nor have "any effect other or further than as a release of all claim of title by the United States," and that "no private right of any person as between himself and other claimants or persons" should be "in any manner affected thereby." And in § 13 it was generally provided in respect of both classes of claims that all the

proceedings in the court should be conducted and decided subject to certain enumerated restrictions, among which were the following: "Fourth. No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority. Fifth. No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

In view of these provisions it is very plain that the Court of Private Land Claims was without any power to revise the action of Congress in confirming a particular grant, or to confirm another grant for the same lands or any part of them, or to determine the rights of private persons, as between themselves, to such lands. This court has frequently so held and has pointed out that a decision by that court sustaining a claim for lands, as to which Congress already had confirmed another claim, would not conclude anyone, but would be void, because in excess of the court's power. *United States* v. *Conway*, 175 U. S. 60; *Ainsa* v. *New Mexico & Arizona R. R. Co.*, *ibid.* 76, 90; *Las Animas Land Grant Co.* v. *United States*, 179 U. S. 201, 205–206; *United States* v. *Baca*, 184 U. S. 653, 659. In the last case it was said:

"The manifest intent of Congress appears to have been that with any land, of the right to which Congress, in the exercise of its lawful discretion, had itself assumed the decision, the Court of Private Land Claims should have nothing to do. The whole jurisdiction conferred upon that court is to confirm or reject claims presented to it, coming within the act. All the powers conferred upon it are incident to the exercise of that jurisdiction. When it has

no jurisdiction to confirm or reject, it has no authority to inquire into or pass upon the case, beyond the decision of the question of jurisdiction. The peremptory declaration of Congress, that 'no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by Congress,' necessarily prohibits the court from passing upon the merits of any such claim."

In confirming the La Joya grant and supervising its survey the court proceeded in evident contravention of that prohibition, for it extended the confirmation and survey to about 11,000 acres of lands within the Belen grant which had been confirmed by Congress and patented long before the Act of 1891 was passed. In this respect, therefore, the court overstepped its jurisdiction and its action was void.

As making for a different conclusion the plaintiff contends, first, that consistently with the limitations imposed it was quite admissible for the court to determine and establish the common boundary between the two grants, and, second, that by protesting against the original survey the owners of the Belen grant invited the court to act in the matter and therefore were bound by its decision. But neither contention can be sustained. The Court of Private Land Claims was bound to respect the Belen grant as confirmed by Congress and described in the patent. It was not given any power to reduce the area of that grant or to make any decisions respecting its boundaries that would affect private rights in the grant. On the contrary, it was prohibited from doing so. And, of course, the owners of the grant could not by any act or consent of theirs enlarge the power of the court as defined in the act creating it.

It follows that the state courts rightly refused to regard the action of the Court of Private Land Claims as in any way conclusive of the rights of the owners of the Belen grant in the area in conflict.

Whether the persons who appeared in the La Joya proceeding and objected to the original survey were authorized to represent or speak for all who were interested in the Belen grant seems to have been a disputed question, but as its decision would not affect the result here it requires no further notice.

Judgment affirmed.

SECOND NATIONAL BANK OF CINCINNATI, OHIO, *v.* FIRST NATIONAL BANK OF OKEANA, OHIO.

ERROR TO THE SUPERIOR COURT OF CINCINNATI, STATE OF OHIO.

No. 491. Argued January 25, 1917.—Decided February 5, 1917.

When the highest state court has refused to exercise its discretion to review a judgment of an intermediate appellate tribunal, it is to the latter that the writ of error under Judicial Code, § 237, should be directed. *Stratton* v. *Stratton*, 239 U. S. 55; *Valley Steamship Co.* v. *Wattawa*, 241 U. S. 642.

The Ohio Court of Appeals affirmed a judgment of the Superior Court of Cincinnati, upon the record coming from the latter, and ordered that a special mandate be sent to that court "to carry this judgment into effect," without directing it to enter any judgment of its own. *Held*, that the writ of error under § 237 should have been directed to the Court of Appeals and not to the Superior Court.

THE case is stated in the opinion.

Mr. Landon L. Forchheimer, with whom *Mr. Ferdinand Jelke, Jr.*, was on the brief, for plaintiff in error.

Mr. Edward P. Moulinier for defendant in error.

Memorandum opinion by MR. JUSTICE DAY.

This writ of error must be dismissed. It appears from the record that the action was commenced in the Superior Court of Cincinnati to recover the sum of $5,000.00 for money which, it was alleged, the Cincinnati Bank was to loan for the First National Bank of Okeana. Issues were made up and a trial had in the Superior Court, which resulted in a verdict and judgment against the Cincinnati Bank. Petition in error was filed and the case taken to the Court of Appeals, wherein it was heard upon the record, and the judgment of the Superior Court of Cincinnati was affirmed. After a general judgment of affirmance, the Court of Appeals ordered "that a special mandate be sent to the Superior Court of Cincinnati to carry this judgment into execution." An application by motion was made to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court for review. That motion was overruled.

Thereupon a petition for the allowance of a writ of error from this court was presented, which recited that the constitution and laws of the State of Ohio and the decision of the Supreme Court in *City of Akron* v. *Roth*, 88 Ohio St. 456, show that the Supreme Court of Ohio has no jurisdiction of the case in view of its refusal to direct the Court of Appeals to certify its record to that court, and that on February 1, 1916, the record of the case was returned to the Superior Court of Cincinnati with the mandate of the Court of Appeals affirming the judgment of the Superior Court of Cincinnati, and a writ of error was asked to bring up for review the order and judgment of the Superior Court. A writ of error was allowed and issued, running to the Superior Court of Cincinnati, reciting that it was the highest court of record in the State in which a decision in the cause could be had. In pursuance of that writ the record was certified from the Superior Court of Cincinnati to this court.

The Judicial Code, § 237, provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, etc., may be re-examined and reversed or affirmed in this court upon writ of error.

We are of opinion that in this case the writ of error should have been directed to the Court of Appeals, as that, under the constitution and laws of the State of Ohio, is the highest court in which a final judgment could be rendered in this case in view of the refusal of the Supreme Court of Ohio to grant the motion to certify to it the record of the Court of Appeals. *Stratton* v. *Stratton*, 239 U. S. 55; *Valley Steamship Co.* v. *Wattawa*, 241 U. S. 642.

By the new constitution of Ohio and subsequent legislation, a system of courts of original and appellate jurisdiction was established in that State. Section 1576, General Code, as amended, 103 Ohio Laws, 415, provides, among other things, that "the superior court of Cincinnati, in respect to the form and manner of all pleadings therein, and the force and effect of its judgments, orders, or decrees, is a court of general jurisdiction." Section 12247 provides that "a judgment rendered or final order made by a court of common pleas or by the superior court of Cincinnati, or by a judge of either of such courts, may be reversed, vacated or modified, by the court of appeals having jurisdiction in the county wherein the common pleas or superior court is located, for errors appearing on the record." Section 1684 provides that "the supreme court or the court of appeals may remand its final decrees, judgments, or orders, in cases brought before it on error or appeal, to the court below, for specific or general execution thereof, or to the inferior courts for further proceedings therein."

Reference to the record in this case shows that the Court of Appeals ordered "that a special mandate be sent to the Superior Court of Cincinnati to carry this judgment into execution;" that is, to carry into effect the judgment of the Court of Appeals. There was no direction that the Superior Court enter any judgment in the case; on the contrary, its judgment was specifically affirmed upon the record sent to the Court of Appeals, and the only mandate directed was to carry into effect in the Superior Court, by execution, the judgment of the Court of Appeals.

In this state of the record, it is clear that the writ of error in this case, when allowed, should have been directed to the Court of Appeals, requiring it to certify to this court its proceeding and judgment for review here, that court being the highest court of the State in which a judgment in the case could be rendered.

It follows that the writ of error in this case must be dismissed.

Dismissed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 64. Argued November 3, 1916.—Decided February 5, 1917.

Following the court below, it is *held*, that a law of West Virginia, viz., Acts 1881, c. 17, §§ 69, 71; Code 1913, c. 54, §§ 2983, 2995, in declaring that "railroads" shall be public highways "free to all persons for the transportation of their persons and property," embraces a branch line constructed and operated under it, and imposes on the carrier with respect to such line a continuing franchise obligation to

transport passengers as well as freight; and that such obligation may be enforced by state action although the carrier has long operated the branch in freight traffic only and never in any other.

The duty to provide adequate transportation facilities for the public, which arises with the acceptance and accompanies the enjoyment of the privileges which a railroad company receives from a State, cannot be avoided merely upon the ground that performance will be attended by some pecuniary loss.

In passing upon the reasonableness of a state order requiring transportation service, the fact that a pecuniary loss will result to the carrier is not the only circumstance to be considered; the nature and extent of the carrier's intrastate business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are to be considered also.

75 W. Va. 100, affirmed.

THE case is stated in the opinion.

Mr. F. B. Enslow, with whom *Mr. H. Fitzpatrick* was on the briefs, for plaintiff in error.

Mr. S. B. Avis and *Mr. F. C. Pifer* for defendant in error, submitted.

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

This was a proceeding under the laws of West Virginia (Acts 1913, c. 9, § 16) to suspend and vacate an order of the Public Service Commission of that State requiring the Chesapeake & Ohio Railway Company to install and maintain upon a branch line in that State a passenger service consisting of two passenger trains daily each way. The order was assailed on several grounds, one of these being that it was violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Appeals of the State held that none of the objections was tenable, 75

W. Va. 100, and the railway company brought the case here.

In so far as the decision turned upon questions of state law it is controlling, our power of review being restricted to the federal question. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 75.

The order was made after a full hearing wherein the railway company was permitted to present all the evidence which it regarded as helpful. There was but little conflict in the evidence and the facts which must here be regarded as proved are these: The railway company is a Virginia corporation and owns and operates several lines of railroad in West Virginia, including a main line along the Kanawha River. This line consists of two tracks, one on the north side of the river for west-bound trains and one on the south side for trains that are east-bound. Among the stations on the north side is one called Hawks Nest, and across the river is another called MacDougal, the two being connected by a railroad bridge. The main line and these stations are used for both freight and passenger traffic. The company also owns and operates a standard gauge branch line extending from MacDougal and Hawks Nest to the town of Ansted, a little more than two miles, and thence another mile to some extensively operated coal mines. This is the branch line to which the order in question relates. Ansted has a population of twelve hundred or more and is the trading center for a population of six thousand. The branch line was constructed in 1890 and has been used for freight traffic only, that is to say, for hauling empty cars to the coal mines and loaded cars from the mines to the main line, and for carrying other freight between the main line and Ansted. The railway company has a freight station at Ansted in charge of an agent and helper, and also maintains a telegraph service there. There is no other railroad at that place and the nearest passenger stations are Hawks Nest and MacDougal. In

the year preceding the order the number of passengers taking the main line passenger trains at these stations was 12,714, and of this number ninety per cent. came from Ansted. In the same year the shipments of coal and other freight over the branch line aggregated 242,280 tons.

From an operating standpoint there is no serious obstacle to installing upon the branch line the service which the order requires, but the curves and grades are such that particular attention must be given to making the road-bed secure and to providing suitable devices for controlling the trains. Isolatedly considered, such a passenger service would not presently be remunerative but would entail a pecuniary loss, and how long this would continue to be true can only be conjectured. But beyond this the effect from a revenue standpoint of installing such a service is not shown. It does not appear either that the company's intrastate passenger business in that State would not yield a reasonable return, or that the traffic, freight and passenger, passing over the branch line to and from points on the main line would not do so.

In support of its position that the order is essentially unreasonable and arbitrary, and therefore repugnant to the due process and equal protection clauses of the Fourteenth Amendment, the railway company contends that the order requires a passenger service to be installed and maintained upon the branch line when that line never has been devoted to anything other than the transportation of freight and when the service ordered, if separately considered, cannot be rendered without pecuniary loss.

It well may be that the power of regulation which a State possesses over private property devoted to public use gives no warrant for requiring that an existing line of railroad lawfully devoted to a particular public use, such as carrying freight, shall be devoted to a further public use, such as carrying passengers, *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595; but, even if this

be so, it has no bearing on the validity of the order in question.

As the opinion of the state court shows, the act whereby the railway company was granted the right to construct and operate the branch line did not leave the company free to devote it to freight service only or to passenger service only, but declared that it should be a public highway and "free to all persons for the transportation of their persons and property," subject to the payment of the lawful charges for such transportation. Acts 1881, c. 17, §§ 69, 71; Code 1913, c. 54, §§ 2983, 2995. True, the section containing this declaration speaks of "railroads" without particularly mentioning branch lines, but that it embraces the latter is shown by the state court's opinion, which says that this branch line, when constructed, "became an integral part of the extensive Chesapeake & Ohio system, and must be treated and controlled as such, and not merely as a segregated part of it." Thus, in legal contemplation, the branch line was devoted to the transportation of passengers as well as of freight, even though actually used only for the latter. An obligation to use it for both was imposed by law, and so could not be thrown off or extinguished by any act or omission of the railway company. It follows that the order, instead of enlarging the public purpose to which the line was devoted, does no more than to prevent a part of that purpose from being neglected.

One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26;

Missouri Pacific Ry. Co. v. *Kansas*, 216 U. S. 262, 279; *Oregon Railroad & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 529; *Chicago, Burlington & Quincy R. R. Co.* v. *Wisconsin Railroad Commission*, 237 U. S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. Cases *supra*. Applying these criteria to the order in question, we think it is not shown to be unreasonable.

Judgment affirmed.

DECISIONS PER CURIAM, FROM OCTOBER 9, 1916, TO FEBRUARY 5, 1917, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 67. THE HART STEEL COMPANY ET AL., PETITIONERS, *v.* THE RAILROAD SUPPLY COMPANY; and

No. 95. THE RAILROAD SUPPLY COMPANY, PETITIONER, *v.* ELYRIA IRON & STEEL COMPANY. Motion to pass submitted October 9, 1916. Decided October 16, 1916. *Per Curiam.* No ground is stated to support the motion to pass these cases other than the fact that the continuance asked for is assented to by the counsel for both parties. But as the cases were called last term and this is therefore the second term at which they are subject to call, under Rule 19 the mere consent of counsel without otherwise adequate showing is insufficient to justify the granting of the motion to pass and it is therefore denied, without prejudice, however, to the right to renew the same upon the making of a proper showing. *Mr. Frank F. Reed, Mr. Francis M. Phelps, Mr. Edward S. Rogers* and *Mr. Frederick P. Fish* for The Hart Steel Company *et al.* *Mr. Taylor E. Brown, Mr. C. C. Linthicum* and *Mr. Clarence E. Mehlhope* for The Railroad Supply Company.

No. —. Original. *Ex parte:* IN THE MATTER OF CLAIR D. VALLETTE and ALFRED B. QUINTON, PETITIONERS. Submitted October 9, 1916. Decided October 16, 1916. Petition for a hearing on motion for leave to file bill of complaint in the name of The United States *v.* The State of Florida denied. *Mr. Alfred B. Quinton* and *Mr. Clair D. Vallette* for the petitioners.

No. 316. Thomas Patrick Keyes, Plaintiff in Error, *v.* The People of the State of Illinois. In error to the Supreme Court of the State of Illinois. Motion to dismiss or affirm submitted October 16, 1916. Decided October 23, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Bergmann* v. *Backer*, 157 U. S. 655, 656; *Caldwell* v. *Texas*, 137 U. S. 692; *Howard* v. *Fleming*, 191 U. S. 126, 135; (2) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Overton* v. *Oklahoma*, 235 U. S. 31. *Mr. Chas. H. Soelke* for the plaintiff in error. *Mr. Patrick J. Lucey* and *Mr. Lester H. Strawn* for the defendant in error.

No. 346. Joseph W. Bull, Appellant, *v.* Hugh Campbell, Jr. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted October 16, 1916. Decided October 23, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Shulthis* v. *McDougal*, 225 U. S. 561; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575; (2) *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Hull* v. *Burr*, 234 U. S. 712, 720; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618, 621. *Mr. John R. Van Derlip* for the appellant. *Mr. S. E. Ellsworth* for the appellee.

No. 453. Louisville & Nashville Railroad Company, Plaintiff in Error, *v.* C. L. Croan et al. In error to the Court of Appeals of the State of Kentucky. Submitted pursuant to 20th rule October 12, 1916. Decided October 23, 1916. *Per Curiam.* Judgment reversed with costs upon the authority of *Northern Pacific Railway*

v. *Wall*, 241 U. S. 87; *Cincinnati & Pacific Railway* v. *Rankin*, 241 U. S. 319. *Mr. Chas. H. Moorman* and *Mr. Benjamin D. Warfield* for the plaintiff in error. *Mr. William W. Crawford* for the defendants in error.

No. 484. The Missouri, Kansas & Texas Railway Company of Texas et al., Plaintiffs in Error, *v.* Mrs. Emma A. Cassady, Administratrix, &c. In error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas. Motion to dismiss or affirm submitted October 10, 1916. Decided October 23, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Railway Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673–674; *Great Northern Railway Co.* v. *Knapp*, 240 U. S. 464. *Mr. Joseph M. Bryson*, *Mr. Alexander Britton*, and *Mr. Evans Browne* for the plaintiffs in error. *Mr. H. L. Stuart* for the defendant in error.

No. 507. John G. Christopher et al., Plaintiffs in Error, *v.* Jane Mungen and Henry Mungen, her Husband. In error to the Supreme Court of the State of Florida. Motion to dismiss or affirm submitted October 9, 1916. Decided October 23, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 470; *Mellon* v. *McCafferty*, 239 U. S. 134; (2) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Parker* v. *McLain*, 237 U. S. 469. *Mr. George C. Bedell* for the plaintiffs in error. *Mr. Nathan P. Bryan* and *Mr. J. T. G. Crawford* for the defendants in error.

No. 3. Mary Helen Brown, Plaintiff in Error, *v.* The City of New York. In error to the District Court of the United States for the Southern District of New York. Argued October 20, 1916. Decided October 30, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consol. Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658; *Parker* v. *McLain*, 237 U. S. 469, 471–472; (2) *Shoemaker* v. *United States*, 147 U. S. 282, 321; *Prosser* v. *Northern Pacific R. R.*, 152 U. S. 59; *Bauman* v. *Ross*, 167 U. S. 548, 596; *Ramapo Water Co.* v. *City of New York*, 236 U. S. 579. *Mr. Omri F. Hibbard, Mr. N. T. M. Melliss* and *Mr. Nathan I. Sachs* for the plaintiff in error. *Mr. Terence Farley* for the defendant in error.

No. 28. Right Reverend Libert Hubert Boeynaems, Bishop of Zeugma, Vicar Apostolic of Hawaii, Trustee, Plaintiff in Error, *v.* L. Ah Leong. In error to the Supreme Court of the Territory of Hawaii. Submitted October 23, 1916. Decided October 30, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Lewis & Cooke* v. *Atcherley*, 222 U. S. 285, 294; *John Ii Estate* v. *Brown*, 235 U. S. 342, 349; *Kapiolani Estate* v. *Atcherley*, 238 U. S. 119, 136; *Cardona* v. *Quinones*, 240 U. S. 83, 88. *Mr. Lorrin Andrews* for the plaintiff in error. *Mr. David L. Withington* for the defendant in error.

No. 31. Southern Railway, Carolina Division, Plaintiff in Error, *v.* Fannie G. Driggs and her Husband, H. D. Driggs; and

No. 32. SOUTHERN RAILWAY, CAROLINA DIVISION, PLAINTIFF IN ERROR, *v.* HUBERT DRIGGS, BY HIS GUARDIAN AD LITEM, H. D. DRIGGS. In error to the Supreme Court of the State of South Carolina. Submitted October 25, 1916. Decided October 30, 1916. *Per Curiam.* Judgments reversed with costs upon the authority of *Kansas City Southern Ry.* v. *Carl*, 227 U. S. 639, 653; *Boston & Maine R. Co.* v. *Hooker*, 233 U. S. 97, 110–113; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97–98. *Mr. Benjamin Lindsay Abney* and *Mr. John K. Graves* for the plaintiff in error. *Mr. Stanwix G. Mayfield* for the defendants in error.

No. 36. MARTIN H. FREE, PLAINTIFF IN ERROR, *v.* THE WESTERN UNION TELEGRAPH COMPANY. In error to the Supreme Court of the State of Wisconsin. Argued October 25 and 26, 1916. Decided October 30, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consol. Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658; *Parker* v. *McLain*, 237 U. S. 469, 471–472; (2) *John* v. *Paullin*, 231 U. S. 583, 585–586; *McDonald* v. *Oregon R. & Nav. Co.*, 233 U. S. 665, 669–670; (3) *Simon* v. *Craft*, 182 U. S. 427, 437; *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230. *Mr. B. I. Salinger* and *Mr. Frederick S. Tyler* for the plaintiff in error. *Mr. Rush Taggart, Mr. George H. Fearons* and *Mr. Francis Raymond Stark* for the defendant in error.

No. 41. THE CITY OF MONTGOMERY, PLAINTIFF IN ERROR, *v.* R. H. GREENE ET AL.; and

No. 42. THE CITY OF MONTGOMERY, PLAINTIFF IN ERROR, *v.* W. R. McDADE ET AL. In error to the Supreme Court of the State of Alabama. Argued for plaintiff in error October 27, 1916. Decided October 30, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consol. Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658; *Parker* v. *McLain*, 237 U. S. 469, 471–472; (2) *Stewart* v. *Kansas City*, 239 U. S. 14, 16; *County of Sioux* v. *Newton Rule*, 241 U. S. 640. *Mr. W. A. Gunter* for the plaintiff in error. No appearance for the defendants in error.

No. 82. ILLINOIS SURETY COMPANY, APPELLANT, *v.* FRANK MILLER ET AL. Appeal from the District Court of the United States for the Eastern District of New York. Argued for appellees and submitted for appellant November 9, 1916. Decided November 13, 1916. *Per Curiam.* Dismissed for want of jurisdiction, with five per cent damages, upon the authority of *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 331; *Brown* v. *Alton Water Co.*, 222 U. S. 325; *Metropolitan Water Co.* v. *Kaw Valley District*, 223 U. S. 519; *Union Trust Co.* v. *Westhus*, 228 U. S. 379; *Shapiro* v. *United States*, 235 U. S. 412. *Mr. L. Laflin Kellogg* and *Mr. Nelson L. Keach* for the appellant. *Mr. H. W. Goodrich, Mr. Arthur M. Allen, Mr. George R. Coughlan, Mr. George W. Bristol, Mr. Henry E. Mattison* and *Mr. Frederick P. King* for the appellees.

No. 86. VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* NATHANIEL G. STRINGER. In error to the Supreme Court of the State of Indiana. Argued for the

plaintiff in error November 9, 1916. Decided November 13, 1916. *Per Curiam.* Dismissed for want of jurisdiction, with five per cent damages, upon the authority of *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389; *Texas & New Orleans R. R.* v. *Miller*, 221 U. S. 408, 416; *Washington* v. *Miller*, 235 U. S. 422, 429; *Wabash Railroad Co.* v. *Hayes*, 234 U. S. 86. *Mr. Samuel O. Pickens, Mr. F. D. McKenney, Mr. Charles W. Moores* and *Mr. R. F. Davidson* for the plaintiff in error. *Mr. Wyman J. Beckett* for the defendant in error.

No. 90. Martin Hanson, Plaintiff in Error, *v.* Great Northern Railway Company. In error to the Supreme Court of the State of Minnesota. Argued for the plaintiff in error and submitted for the defendant in error November 13, 1916. Decided December 4, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Railway Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, this day decided, *ante*, 169. *Mr. Charles Loring, Mr. Samuel Herrick* and *Mr. William E. Rowe* for the plaintiff in error. *Mr. E. C. Lindley* and *Mr. A. L. Janes* for the defendant in error.

No. 113. William Briggs, Plaintiff in Error, *v.* The State of Kansas. In error to the Supreme Court of the State of Kansas. Submitted November 15, 1916. Decided December 4, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Dreyer* v. *Illinois*, 187 U. S. 71, 83–84; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 225; (2) *Baldwin* v. *Kansas*, 129 U. S. 52;

Spies v. *Illinois*, 123 U. S. 131; *Jacobi* v. *Alabama*, 187 U. S. 133; (3) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Manhattan Life Insurance Co.* v. *Cohen*, 234 U. S. 123, 137; (4) *Moore* v. *Missouri*, 159 U. S. 673; *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *West Virginia*, 224 U. S. 616; *Carlesi* v. *New York*, 233 U. S. 51. *Mr. A. M. Harvey* for the plaintiff in error. *Mr. James P. Coleman* for the defendant in error.

No. 127. GIDEON DIXON ET AL., APPELLANTS, *v.* GEORGE W. GOETHALS ET AL. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. Motion to dismiss or affirm submitted November 20, 1916. Decided December 4, 1916. *Per Curiam.* Judgment affirmed with costs upon the authority of *McCollum* v. *Eager*, 2 How. 61; *Thomas* v. *Wooldridge*, 23 Wall. 283; *Buffington* v. *Harvey*, 95 U. S. 99; *Rexford* v. *Brunswick-Balke-Collander Co.*, 228 U. S. 339, 346. *Mr. Benjamin T. Waldo* and *Mr. Challen B. Ellis* for the appellants. *The Attorney General* and *The Solicitor General* for the appellees.

No. 474. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* JOHN M. BOLCH. In error to the Supreme Court of the State of Washington. Motion to dismiss submitted November 13, 1916. Decided December 4, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Haseltine* v. *Central National Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99; *Thompson* v. *St.*

Louis, 241 U. S. 637. *Mr. Heman H. Field* for the plaintiff in error. *Mr. Merritt J. Gordon* for the defendant in error.

No. —. Original. THE NEW YORK ELECTRIC LINES COMPANY, PETITIONER, *v.* WILLIAM J. GAYNOR ET AL., BOARD OF ESTIMATE AND APPORTIONMENT OF THE CITY OF NEW YORK ET AL. On application for a writ of error to the Supreme Court of the State of New York for the County of New York. Submitted November 20, 1916. Decided December 11, 1916. *Per Curiam.* The writ of error prayed for is denied upon the authority of (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 541; *Mellon Co.* v. *McCafferty*, 239 U. S. 134; (2) *Yazoo & Mississippi Valley Ry. Co.* v. *Adams*, 180 U. S. 26; *Beals* v. *Cone*, 188 U. S. 184; *Wood* v. *Chesborough*, 228 U. S. 672; (3) *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 314; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380, 382. See *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179. *Mr. Alexander S. Bacon* for the petitioner.

No. 586. EIGHTEEN PACKAGES OF DENTAL INSTRUMENTS, ETC., APPELLANT AND PLAINTIFF IN ERROR, *v.* THE UNITED STATES. Appeal from and in error to the United States Circuit Court of Appeals for the Third Circuit. Motion to dismiss submitted December 4, 1916. Decided December 11, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *The United States* v. *Krall*, 174 U. S. 385, 391; *Macfarland* v. *Brown*,

187 U. S. 239; *United States* v. *Beatty*, 232 U. S. 463, 466. *Mr. John A. Kratz* for the appellant and plaintiff in error. *The Attorney General* and *The Solicitor General* for the appellee and defendant in error.

No. 699. JOHN T. BEECROFT, PLAINTIFF IN ERROR, *v.* THE GREAT NORTHERN RAILWAY COMPANY. In error to the District Court of Lyon County, State of Minnesota. Argued December 6, 1916. Decided December 11, 1916. *Per Curiam.* Judgment affirmed with costs on the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, *ante*, 169. *Mr. Tom Davis* and *Mr. Ernest A. Michel* for the plaintiff in error. *Mr. E. C. Lindley*, *Mr. A. L. Janes* and *Mr. M. L. Countryman* for the defendant in error.

No. 120. CHARLES SCHWEINLER PRESS, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF THE STATE OF NEW YORK. In error to the Court of Special Sessions, First District, New York City, State of New York. Argument commenced November 16, 1915. Decided December 18, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe*, 222 U. S. 185; *Louisiana Navigation Company* v. *Oyster Commission of Louisiana*, 226 U. S. 99; *Thompson* v. *St. Louis*, 241 U. S. 637. *Mr. Alfred E. Ommen* for the plaintiff in error. *Mr. Robert S. Johnstone* and *Mr. Leonard J. Oberman* for the defendant in error.

No. 535. THE WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* J. H. PUCKETT. In error to the Supreme Court of the State of Oklahoma. Motion to dismiss submitted December 11, 1916. Decided December 18, 1916. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Dower* v. *Richards*, 151 U. S. 658, 668 *et seq.*; *Thayer* v. *Spratt*, 189 U. S. 346, 353; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 97; *Kerfoot* v. *Farmers' & Merchants' Bank*, 218 U. S. 281, 288; (2) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658; *Parker* v. *McLain*, 237 U. S. 469, 471–472. *Mr. Joseph M. Bryson*, *Mr. Alexander Britton* and *Mr. Evans Browne* for the plaintiff in error. *Mr. C. B. Stuart*, *Mr. A. C. Cruce*, *Mr. M. K. Cruce* and *Mr. Weldon M. Bailey* for the defendant in error.

No. 130. U. S. JOINES, PLAINTIFF IN ERROR, *v.* W. S. COMBS ET AL. In error to the Supreme Court of the State of Oklahoma. Submitted December 19, 1916. Decided January 8, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Holden Land Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 541; *Mellon Co.* v. *McCafferty*, 239 U. S. 134. *Mr. C. B. Stuart*, *Mr. A. C. Cruce*, *Mr. M. K. Cruce*, *Mr. W. I. Cruce* and *Mr. W. R. Bleakmore* for the plaintiff in error. *Mr. J. H. Everest* and *Mr. R. M. Campbell* for the defendants in error.

No. 421. THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* EMMA F. NASH, AS

ADMINISTRATRIX OF THE ESTATE OF JOHN EVERETT NASH, DECEASED. In error to the Supreme Court of the State of Minnesota. Argued December 5, 1916. Decided January 8, 1917. *Per Curiam.* Judgment reversed with costs upon the authority of *Delaware, Lackawanna & Western Railroad Co.* v. *Yurkonis*, 238 U. S. 439; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington*, 241 U. S. 177, 180. See *Illinois Central R. R. Co.* v. *Cousins*, 241 U. S. 641. *Mr. William H. Bremner* and *Mr. Frederick M. Miner* for the plaintiff in error. *Mr. Humphrey Barton* for the defendant in error.

No. 564. ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* ELIZABETH A. MULLIGAN, AS ADMINISTRATRIX OF THE ESTATE OF W. E. MULLIGAN, DECEASED. In error to the Supreme Court of the State of South Carolina. Motion to dismiss or affirm or place on summary docket submitted January 8, 1917. Decided January 15, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Railway Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668; *Great Northern Railway Co.* v. *Knapp*, 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, *ante*, 169. *Mr. P. A. Willcox, Mr. Frederic D. McKenney* and *Mr. Douglas McKay* for the plaintiff in error. *Mr. Benjamin E. Pierce* for the defendant in error.

No. 218. J. FRED KATZMAIER, TRUSTEE IN BANKRUPTCY OF HARMON BROS., APPELLANT, *v.* MUNSEY TRUST COMPANY, RECEIVER; ILLINOIS SURETY COMPANY, AND WILLIAM G. MCADOO, SECRETARY OF THE TREASURY.

Appeal from the Supreme Court of the District of Columbia. Motion to dismiss or affirm submitted January 8, 1917. Decided January 15, 1917. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Coder* v. *Arts*, 213 U. S. 223, 234–235; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 118 *et seq.*; *James* v. *Stone & Company*, 227 U. S. 410; *Swift & Co.* v. *Hoover*, *ante*, 107. *Mr. Mortimer C. Rhone* for the appellant. *The Attorney General*, *Mr. Assistant Attorney General Warren* and *Mr. Bynum E. Hinton* for the appellees.

No. 651. The Arizona Eastern Railroad Company and Epes Randolph and L. H. Manning, its Sureties, Plaintiffs in Error, *v.* W. N. Bryan. In error to the Supreme Court of the State of Arizona. Motion to dismiss or affirm or place on the summary docket submitted January 9, 1917. Decided January 15, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of (1) *Chicago Junction Railway Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line* v. *Padgett*, 236 U. S. 668; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, *ante*, 169; (2) *Norfolk & Western Railway Co.* v. *Earnest*, 229 U. S. 114, 121–122. *Mr. Eugene S. Ives* for the plaintiffs in error. *Mr. Thomas Armstrong, Jr.*, *Mr. Ernest W. Lewis* and *Mr. G. P. Bullard* for the defendant in error.

No. 30. The Chicago & Alton Railroad Company, Appellant, *v.* The United States; and

No. 58. The Yazoo & Mississippi Valley Railroad Company, Appellant, *v.* The United States. Appeals from the Court of Claims. Argued April 9 and 12, 1915. Restored to docket for reargument June 1, 1915. Re-

argued December 14 and 15, 1916. Decided January 15, 1917. *Per Curiam.* Judgments affirmed by an equally divided court. *Mr. Benjamin Carter, Mr. Jacob M. Dickinson, Mr. Alexander Britton, Mr. John G. Johnson, Mr. R. Walton Moore* and *Mr. John S. Barbour* for the appellant in No. 30. *Mr. R. Walton Moore, Mr. John S. Barbour, Mr. Alexander Britton, Mr. Evans Browne, Mr. F. W. Clements* and *Mr. F. D. McKenney* for the appellant in No. 58. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Thompson* for the appellee. *Mr. R. S. Knapp, Mr. F. Carter Pope, Mr. L. T. Michener* and *Mr. H. M. Friend* filed briefs as *amici curiæ.*

No. ——. Original. *Ex parte:* IN THE MATTER OF ST. LOUIS, KANSAS CITY & COLORADO RAILROAD COMPANY. Submitted January 15, 1917. Decided January 22, 1917. Motions for leave to file petitions for writs of prohibition and mandamus denied, without prejudice in any respect to relief on appeal or otherwise on the merits. *Mr. Thomas P. Littlepage, Mr. Paul E. Walker, Mr. James C. Jones, Mr. Lon O. Hocker, Mr. Frank H. Sullivan* and *Mr. Marcus L. Bell* for the petitioner.

No. 27. THE SUN LIFE ASSURANCE COMPANY OF CANADA, PLAINTIFF IN ERROR, *v.* LUISA RIVERA. In error to the District Court of the United States for the District of Porto Rico. Motion to dismiss submitted January 15, 1917. Decided January 29, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of rule 6, paragraph 5; *Nadal* v. *May,* 233 U. S. 447, 454; *Cardona* v. *Quinones,* 240 U. S. 83, 88. *Mr. Cay Coll Cuchi* for the plaintiff in error. *Mr. Willis Sweet* for the defendant in error.

No. 378. Old Dominion Iron & Nail Works Company, Plaintiff in Error, *v.* Chesapeake & Ohio Railway Company and City of Richmond. In error to the Supreme Court of Appeals of the State of Virginia. Motion to dismiss submitted January 15, 1917. Decided January 29, 1917. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of (1) *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Mellon Company* v. *McCafferty*, 239 U. S. 134; (2) *Pierce* v. *Southern Railway*, 171 U. S. 641; *Preston* v. *Chicago*, 226 U. S. 447, 450; *Wood* v. *Chesbrough*, 228 U. S. 672, 677; (3) *Moran* v. *Horsky*, 178 U. S. 205. *Mr. Eppa Hunton, Jr.*, *Mr. E. Randolph Williams* and *Mr. Henry W. Anderson* for the plaintiff in error. *Mr. H. R. Pollard* and *Mr. Henry Taylor, Jr.*, for the defendants in error.

No. 565. The Minneapolis & St. Louis Railroad Company, Plaintiff in Error, *v.* Bertha L. Thompson, as Administratrix of the Estate of Charles E. Thompson, Deceased. In error to the Supreme Court of the State of Minnesota. Argued January 26, 1917. Decided January 29, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Railway Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668; *Great Northern Railway Co.* v. *Knapp*, 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre, ante*, 169. *Mr. William H. Bremner* and *Mr. Frederick M. Miner* for the plaintiff in error. *Mr. Humphrey Barton* for the defendant in error.

No. 631. The Baltimore & Ohio Railroad Company, Plaintiff in Error, *v.* David Branson. In error to the

Court of Appeals of the State of Maryland. Argued January 26, 1917. Decided January 29, 1917. *Per Curiam.* Judgment reversed with costs upon the authority of *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.,* 239 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* v. *Harrington,* 241 U. S. 177, 180; *Minneapolis & St. Louis R. R. Co.* v. *Winters, ante,* 353. *Mr. George A. Pearre, Mr. Duncan K. Brent* and *Mr. A. Taylor Smith* for the plaintiff in error. *Mr. Albert A. Doub, Mr. F. Brooke Whiting* and *Mr. George Lewis Eppler* for the defendant in error.

No. 695. Great Northern Railway Company, Plaintiff in Error, *v.* Anna Roach, as Administratrix, etc. In error to the Supreme Court of the State of Minnesota. Argued January 29, 1917. Decided February 5, 1917. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Railway Co.* v. *King,* 222 U. S. 222; *Seaboard Air Line Railway* v. *Padgett,* 236 U. S. 668; *Great Northern Railway Co.* v. *Knapp,* 240 U. S. 464; *Baltimore & Ohio R. R. Co.* v. *Whitacre, ante,* 169. *Mr. A. L. Janes, Mr. E. C. Lindley* and *Mr. M. L. Countryman* for the plaintiff in error. *Mr. Ernest W. Michel* and *Mr. Tom Davis* for the defendant in error.

No. —. Original. *Ex parte:* In the Matter of Joseph Marshall, Petitioner. Submitted January 25, 1917. Decided February 5, 1917. Motion for leave to file petition for writ of habeas corpus and that petitioner be admitted to bail denied. *Mr. W. C. Bowers, 2d,* for the petitioner.

No. —. Original. *Ex parte:* IN THE MATTER OF JOHN P. WHITE, AS PRESIDENT, AND WILLIAM GREEN, AS SECRETARY TREASURER, OF UNITED MINE WORKERS OF AMERICA, ET AL., PETITIONERS. Submitted January 29, 1917. Decided February 5, 1917. Motion for leave to file petition for writ of prohibition denied. *Mr. Henry Warrum* and *Mr. George L. Grant* for the petitioners.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM OCTOBER 9, 1916, TO FEBRUARY 5, 1917.

No. 511. UNITED DRUG COMPANY, PETITIONER, *v.* THEODORE RECTANUS COMPANY. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Frederick L. Emery* for the petitioner. No appearance for the respondent.

No. 570. THE T. H. SYMINGTON COMPANY, PETITIONER, *v.* THE NATIONAL MALLEABLE CASTINGS COMPANY ET AL. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Melville Church* and *Mr. Gilbert P. Ridder* for the petitioner. No appearance for the respondents.

No. 622. MEMPHIS STREET RAILWAY COMPANY, PETITIONER, *v.* J. W. BOBO, ADMINISTRATOR, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted.

Mr. Luke E. Wright and *Mr. Roan Waring* for the petitioner. *Mr. Caruthers Ewing* and *Mr. Ike W. Crabtree* for the respondent.

No. 623. MEMPHIS STREET RAILWAY COMPANY, PETITIONER, *v.* S. C. MOORE, ADMINISTRATOR, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Luke E. Wright* and *Mr. Roan Waring* for the petitioner. *Mr. Caruthers Ewing* and *Mr. Ike W. Crabtree* for the respondent.

No. 639. MRS. LAURA L. BUNCH, PETITIONER, *v.* J. S. MALONEY, AS TRUSTEE, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. J. F. Loughborough* and *Mr. V. M. Miles* for the petitioner. *Mr. J. M. Moore* for the respondent.

No. 665. SUPREME COUNCIL OF THE ROYAL ARCANUM, PETITIONER, *v.* SUE B. BEHREND. October 16, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Philip Walker* and *Mr. Howard C. Wiggins* for the petitioner. *Mr. W. Gwynn Gardiner* for the respondent.

No. 669. JOHN H. FRIEDRICHSEN, PETITIONER, *v.* G. H. RENARD, ETC., ET AL. October 16, 1916. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Wm. V. Allen* and *Mr. W. C. Bibb* for the petitioner. *Mr. R. E. Evans* and *Mr. William D. Funk* for the respondents.

No. 675. GRINNELL WASHING MACHINE COMPANY, PETITIONER, *v.* E. E. JOHNSON COMPANY. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Chas. C. Linthicum* and *Mr. Melville Church* for the petitioner. *Mr. Taylor E. Brown* and *Mr. Clarence E. Mehlhope* for the respondent.

No. 506. JOHN J. MEYERS ET AL., PETITIONERS, *v.* THE UNITED STATES. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Gilbert D. Lamb* and *Mr. Edward K. Sumerwell* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 513. LEHIGH VALLEY RAILROAD COMPANY, PETITIONER, *v.* CARL KILMER. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. D. W. Baker*, *Mr. Frederick M. Pelzman* and *Mr. David Wiener* for the petitioner. *Mr. Walter W. Magee* for the respondent.

No. 514. LEHIGH VALLEY RAILROAD COMPANY, PETITIONER, *v.* EDGAR A. EMENS, AS EXECUTOR, ETC. Octo-

ber 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. D. W. Baker, Mr. Frederick M. Pelzman* and *Mr. David Wiener* for the petitioner. *Mr. Walter W. Magee* for the respondent.

No. 515. LEHIGH VALLEY RAILROAD COMPANY, PETITIONER, *v.* EDGAR A. EMENS, AS EXECUTOR, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. D. W. Baker, Mr. Frederick M. Pelzman* and *Mr. David Wiener* for the petitioner. *Mr. Walter W. Magee* for the respondent.

No. 518. MONTGOMERY TRACTION COMPANY, PETITIONER, *v.* MONTGOMERY LIGHT & WATER POWER COMPANY. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gregory L. Smith* and *Mr. Ray Rushton* for the petitioner. *Mr. R. E. Steiner, Mr. John R. Tyson* and *Mr. Benjamin P. Crum* for the respondent.

No. 566. THE MILLER RUBBER COMPANY ET AL., PETITIONERS, *v.* CITIZENS TRUST & SAVINGS BANK, AS TRUSTEE, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edwin A. Krauthoff* and *Mr. Winfield Scott Bixler* for the petitioners. *Mr. Henry S. Van Dyke* for the respondent.

No. 574. SILVER KING COALITION MINES COMPANY, PETITIONER, *v.* CONKLING MINING COMPANY. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William Howard Dickson, Mr. Curtis H. Lindley, Mr. Thomas Marioneaux* and *Mr. A. C. Ellis, Jr.*, for the petitioner. *Mr. Edward B. Critchlow, Mr. William D. McHugh* and *Mr. William H. King* for the respondent.

No. 579. CHICAGO TITLE & TRUST COMPANY, TRUSTEE, ETC., PETITIONER, *v.* FRED J. ZUTTERMEISTER. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Chas. L. Bartlett* and *Mr. George Gillette* for the petitioner. *Mr. Harry C. Kinney* for the respondent.

No. 583. WILLIAM W. CRAWFORD, TRUSTEE, PETITIONER, *v.* WASHINGTON NORTHERN RAILROAD COMPANY ET AL. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Jas. A. Kerr* and *Mr. E. S. McChord* for the petitioner. *Mr. Zera Snow* and *Mr. Wallace McCamant* for the respondents.

No. 588. AIMEE L. HANSON, PETITIONER, *v.* WALTER L. HANSON. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Nash Rockwood* and *Mr. Frederic D. McKenney* for the petitioner. *Mr. Ralph S. Rounds* for the respondent.

No. 592. WILLIAM L. TAYLOR ET AL., PETITIONERS, *v.* CHARLES H. KIMMERLE, TRUSTEE, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harris F. Williams* for the petitioners. *Mr. Clyde W. Ketcham* for the respondent.

No. 614. THE STURM & DILLARD COMPANY, PETITIONER, *v.* MIKE MERKO. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward S. Jouett* for the petitioner. No appearance for the respondent.

No. 640. BEVERLY R. ROBINSON, AS TRUSTEE, ETC., PETITIONER, *v.* CHARLES F. ROE. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter C. Noyes* and *Mr. B. W. B. Brown* for the petitioner. *Mr. Henry W. Taft* for the respondent.

No. 648. DAISY M. LINKOUS, ADMINISTRATRIX, ETC., PETITIONER, *v.* THE VIRGINIAN RAILWAY COMPANY. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. J. Henson* and *Mr. Walter L. Welborn* for the petitioner. *Mr. Walter H. Taylor* for the respondent.

No. 666. THE GILCHRIST COMPANY, PETITIONER, *v.* ERIE SPECIALTY COMPANY. October 16, 1916. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Chas. H. Riordan* for the petitioner. *Mr. J. C. Sturgeon* for the respondent.

No. 670. SPRING GARDEN INSURANCE COMPANY OF PHILADELPHIA, PA., PETITIONER, *v.* T. GILBERT WOOD, ETC., ET AL. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George Bryan* and *Mr. Gustavus Remak, Jr.*, for the petitioner. *Mr. Fred Harper* for the respondents.

No. 671. DAVID CLEMENT, AS ADMINISTRATOR, ETC., PETITIONER, *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Burton K. Wheeler* and *Mr. H. Lowndes Maury* for the petitioner. No appearance for the respondents.

No. 673. FLORENCE C. DINWIDDIE ET AL., PETITIONERS, *v.* NATHAN HAZEL METZGER ET AL. October 16, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. A. A. Hoehling, Jr., Mr. Stanton C. Peelle* and *Mr. C. F. R. Ogleby* for the petitioners. *Mr. Victor H. Wallace* and *Mr. J. J. Darlington* for the respondents.

No. 674. ATLAS PORTLAND CEMENT COMPANY, PETITIONER, *v.* FRED W. HAGEN. October 16, 1916. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Geo. A. Mahan* and *Mr. Dulaney Mahan* for the petitioner. *Mr. Elliott W. Major* for the respondent.

No. 678. W. A. GAGE & COMPANY ET AL., PETITIONERS, *v.* ROBERT WILSON, ETC., AS TRUSTEE, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter P. Armstrong* for the petitioners. *Mr. Ike W. Crabtree* for the respondent.

No. 702. COMMERCIAL TRUST & SAVINGS BANK ET AL., PETITIONERS, *v.* ROBERT WILSON, ETC., AS TRUSTEE, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. J. Livingston, Mr. W. P. Metcalf* and *Mr. William H. Fitzhugh* for the petitioners. *Mr. Ike W. Crabtree* for the respondent.

No. 703. INTERSTATE BANKING & TRUST COMPANY, PETITIONER, *v.* ROBERT WILSON, ETC., AS TRUSTEE, ETC. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Luke E. Wright, Mr. J. W. Cutrer* and *Mr. Roan Waring* for the petitioner. *Mr. Ike W. Crabtree* for the respondent.

No. 687. FRANK LEDVINKA, PETITIONER, *v.* THE UNITED STATES. October 16, 1916. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alton B. Parker* and *Mr. John C. Palmer, Jr.*, for the petitioner. No brief for the respondent.

No. 688. JAMES OATES, PETITIONER, *v.* THE UNITED STATES. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alton B. Parker* and *Mr. John C. Palmer, Jr.*, for the petitioner. No brief for the respondent.

No. 689. HIRAM STEPHENS, PETITIONER, *v.* THE UNITED STATES. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alton B. Parker* and *Mr. John C. Palmer, Jr.*, for the petitioner. No brief for the respondent.

No. 690. FANNEY SULLENS, PETITIONER, *v.* THE UNITED STATES. October 16, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alton B. Parker* and *Mr. John C. Palmer, Jr.*, for the petitioner. No brief for the respondent.

No. 629. CHICAGO & NORTHWESTERN RAILWAY COMPANY, PETITIONER, *v.* THE UNITED STATES. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. *Mr. William G. Wheeler* and *Mr. Charles A. Vilas* for the petitioner. No brief for the respondent.

No. 719. The United States, Petitioner, *v.* Iver Engebretsen Ness. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. *Mr. Denis N. Kelleher* for the respondent.

No. 691. The State of Ohio, Petitioner, *v.* Aaron A. Ferris, Receiver, etc. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward C. Turner* and *Mr. Clarence D. Laylin* for the petitioner. *Mr. Aaron A. Ferris* for the respondent.

No. 693. The Town of Newbern et al., Petitioners, *v.* The National Bank of Barnesville, Ohio. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Marion G. Evans* and *Mr. Elias Gates* for the petitioners. *Mr. William R. Collins* for the respondent.

No. 694. Charles W. Parker et al., Petitioners, *v.* Edgar W. Ross, Guardian, etc. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John R. Montgomery* and *Mr. Louis E. Hart* for the petitioners. *Mr. Harrison Musgrave* and *Mr. W. S. Oppenheim* for the respondent.

No. 704. KEYSTONE COAL & COKE COMPANY, PETITIONER, *v.* MICHAEL FEKETE, ETC.;

No. 705. KEYSTONE COAL & COKE COMPANY, PETITIONER, *v.* FRANK THRY, ETC.;

No. 706. KEYSTONE COAL & COKE COMPANY, PETITIONER, *v.* ANNA HELMLINGER, ETC.; and

No. 707. KEYSTONE COAL & COKE COMPANY, PETITIONER, *v.* ADAM MULLER. October 23, 1916. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James S. Morehead, Mr. Berkeley Pierce* and *Mr. William Ryall* for the petitioner. *Mr. George H. Eichelberger* for the respondents.

No. 708. F. F. SLOCOMB & COMPANY, INC., PETITIONER, *v.* A. C. LAYMAN MACHINE COMPANY. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Hayward Fairbanks* for the petitioner. *Mr. William Steell Jackson* and *Mr. Charles Howson* for the respondent.

No. 711. ELLIOTT VARNISH COMPANY, PETITIONER, *v.* SEARS, ROEBUCK & COMPANY. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles C. Carlin, Mr. Walter H. Chamberlin* and *Mr. D. S. Wegg* for the petitioner. *Mr. Lincoln B. Smith* for the respondent.

No. 501. SUN COMPANY, PETITIONER, *v.* VINTON PETROLEUM COMPANY. October 23, 1916. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William A. Vinson* and *Mr. E. E. Townes* for the petitioner. *Mr. W. D. Gordon* for the respondent.

No. 537. JAMES B. SMITH ET AL., PETITIONERS, *v.* THE UNITED STATES. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. A. Hoehling, Jr.*, and *Mr. Peter F. Dunne* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 616. WILLIAM LEWIS ET AL., EXECUTORS, ETC., PETITIONERS, *v.* CALEDONIAN INSURANCE COMPANY ET AL. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. A. A. Moore* for the petitioners. *Mr. Carroll G. Walter* for the respondents.

No. 701. STANLEY LORD, MASTER, ETC., PETITIONER, *v.* WILLIAM LEDWITCH ET AL. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert M. Hughes* for the petitioner. *Mr. J. Winston Read* and *Mr. Allan D. Jones* for the respondents.

No. 709. CLARENCE GRIGGS ET AL., ETC., PETITIONERS, *v.* HON. PAGE MORRIS, UNITED STATES DISTRICT JUDGE, ETC. October 23, 1916. Petition for a writ of certiorari

to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William H. Bois* and *Mr. Frederic D. McKenney* for the petitioners. *Mr. Thomas Kneeland* for the respondent.

No. 716. E. Clemens Horst Company, Petitioner, *v.* Pabst Brewing Company. October 23, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leon T. Lewis* for the petitioner. *Mr. Frederic D. McKenney*, *Mr. Willett M. Spooner* and *Mr. Frank H. Powers* for the respondent.

No. 715. Motion Picture Patents Company, Petitioner, *v.* Universal Film Manufacturing Company et al. October 30, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Melville Church* for the petitioner. *Mr. Edmund Wetmore* and *Mr. Oscar W. Jeffrey* for the respondents.

No. 717. John W. Thompson, Petitioner, *v.* The Franklin National Bank. October 30, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George H. Lamar* and *Mr. William E. Davis* for the petitioner. *Mr. John Ridout* for the respondent.

No. 728. Ennis-Brown Company, Petitioner, *v.* Central Pacific Railway Company. October 30, 1916. Petition for a writ of certiorari to the United States Cir-

cuit Court of Appeals for the Ninth Circuit denied. *Mr. Burrell G. White* for the petitioner. *Mr. William R. Harr, Mr. Charles H. Bates, Mr. W. H. Devlin* and *Mr. Robert T. Devlin* for the respondent.

No. 603. Henry F. Marshall, Petitioner, *v.* Samuel W. Backus, Commissioner of Immigration, etc. November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Henry Ash* for the petitioner. No brief for the respondent.

No. 721. Thomas Ewing, Commissioner of Patents, Petitioner, *v.* The United States ex rel. The Fowler Car Company. November 6, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Warren* for the petitioner. *Mr. Charles C. Linthicum* and *Mr. Melville Church* for the respondent.

No. 742. L. A. Westerman Company, Petitioner, *v.* The Dispatch Printing Company. November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Curtis C. Williams* for the petitioner. No appearance for the respondent.

No. 743. Edgar F. Luckenbach et al., Petitioners, *v.* W. J. McCahan Sugar Refining Company et al.

November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Peter S. Carter* and *Mr. Charles C. Burlingham* for the petitioners. *Mr. J. Parker Kirlin* and *Mr. Mark W. McClay, Jr.*, for the respondents.

No. 575. YEE SUEY, PETITIONER, *v.* F. W. BERKSHIRE, SUPERVISING INSPECTOR OF IMMIGRATION, ETC. November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Waters Davis* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 533. BEN FRANKFURT, PETITIONER, *v.* THE UNITED STATES. November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James M. Edwards* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Warren* for the respondent.

No. 598. WILLIAM R. STAATS COMPANY ET AL., PETITIONERS, *v.* SECURITY TRUST & SAVINGS BANK, AS TRUSTEE, ETC. November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. W. O'Melveny* for the petitioners. *Mr. Jefferson P. Chandler* for the respondent.

No. 611. COMMERCIAL SECURITY COMPANY ET AL., PETITIONERS, *v.* STEWART N. DUNNING, TRUSTEE, ETC.

November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry A. Heiser* for the petitioners. *Mr. Lucius F. Robinson* for the respondent.

No. 677. NATHAN A. HUGHES ET AL., PETITIONERS, *v.* THE UNITED STATES. November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack*, *Mr. John Winfred Pope* and *Mr. Charles F. Greenwood* for the petitioners. *The Attorney General* and *The Solicitor General* for the respondent.

No. 749. WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, PETITIONER, *v.* WAGNER ELECTRIC MANUFACTURING COMPANY. November 6, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul Bakewell* and *Mr. Thomas B. Kerr* for the petitioner. *Mr. Melville Church* and *Mr. Edwin E. Huffman* for the respondent.

No. 729. E. G. STEELE ET AL., PETITIONERS, *v.* HIGHLAND PARK MANUFACTURING COMPANY. November 13, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph A. McCullough* and *Mr. John A. Marion* for the petitioners. *Mr. Charles W. Tillett* and *Mr. Thomas C. Guthrie* for the respondent.

No. 740. HELOISE MCCENEY WILLS, PETITIONER, *v.* SAMUEL MADDOX ET AL. November 13, 1916. Petition

for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. R. B. Dickey, Mr. D. W. Baker* and *Mr. Martin Conroy* for the petitioner. *Mr. A. S. Worthington* and *Mr. H. Prescott Gâtley* for the respondents.

No. 757. G. S. Nicholas & Company et al., Petitioners, *v.* The United States. November 20, 1916. Petition for a writ of certiorari to the United States Court of Customs Appeals granted. *Mr. Albert H. Washburn* and *Mr. W. P. Preble* for the petitioners. No brief for the respondent.

No. 758. Alex. D. Shaw & Company et al., Petitioners, *v.* The United States. November 20, 1916. Petition for a writ of certiorari to the United States Court of Customs Appeals granted. *Mr. W. P. Preble* and *Mr. Albert H. Washburn* for the petitioners. No brief for the respondent.

No. 769. F. Vitelli & Son, Petitioners, *v.* The United States. November 20, 1916. Petition for a writ of certiorari to the United States Court of Customs Appeals granted. *Mr. Albert M. Yuzzolino* for the petitioners. No brief for the respondent.

No. 770. F. Vitelli & Son, Petitioners, *v.* The United States. November 20, 1916. Petition for a writ of certiorari to the United States Court of Customs Appeals granted. *Mr. Albert M. Yuzzolino* for the petitioners. No brief for the respondent.

No. 663. LAM FUNG YEN, PETITIONER, *v.* G. OLIVER FRICK, UNITED STATES IMMIGRATION INSPECTOR, ETC. November 20, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. E. J. Henning* for the petitioner. No brief for the respondent.

No. 731. CHAUTAUQUA INSTITUTION, PETITIONER, *v.* JOHN L. ZIMMERMAN ET AL. November 20, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thornton M. Hinkle* for the petitioner. *Mr. J. Warren Keifer* for the respondents.

No. 763. JAMES W. CAMPBELL, PETITIONER, *v.* CHARLES M. CAMPBELL ET AL. November 20, 1916. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. William Henry White* for the petitioner. *Mr. John Ridout* for the respondents.

No. 773. COMPAGNIE GENERALE TRANSATLANTIQUE, PETITIONER, *v.* TERESA M. BUMP. November 20, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph P. Nolan* and *Mr. John M. Nolan* for the petitioner. *Mr. Frederick E. Mygatt* for the respondent.

No. 524. PAUL SCHARRENBERG, PETITIONER, *v.* THE DOLLAR STEAMSHIP COMPANY ET AL. December 4, 1916.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. J. H. Ralston* and *Mr. William E. Richardson* for the petitioner. No appearance for the respondents.

No. 759. GEORGE W. CALDWELL ET AL., PETITIONERS, *v.* NORTHWESTERN TERRA COTTA COMPANY. December 4, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. H. Ralston* and *Mr. William E. Richardson* for the petitioners. *Mr. Edgar H. Scott* for the respondent.

No. 761. THE VICTOR-AMERICAN FUEL COMPANY, PETITIONER, *v.* PAUL TOMLJANOVICH, PER PRO AMI. December 4, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Caldwell Yeaman* for the petitioner. *Mr. George S. Klock* for the respondent.

No. 790. S. A. HAYES, COLLECTOR, ETC., PETITIONER, *v.* THE GAULEY MOUNTAIN COAL COMPANY. December 11, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted. *The Attorney General* and *The Solicitor General* for the petitioner. No appearance for the respondent.

No. 567. H. H. HAINES, RECEIVER, ETC., PETITIONER, *v.* THE BUCKEYE WHEEL COMPANY ET AL. December 11, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

Mr. Harry L. Gordon and *Mr. John D. Ellis* for the petitioner. *Mr. Joseph W. O'Hara* and *Mr. Province M. Pogue* for the respondents.

No. 609. National Bank of Commerce of Rochester *v.* Wilbur B. Grandison, as Trustee, etc. December 11, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Eugene Van Voorhis* and *Mr. James M. E. O'Grady* for the petitioner. *Mr. Thomas C. Burke* for the respondent.

No. 753. Q. Broom et al., Petitioners, *v.* J. R. Chapman et al. December 11, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William D. Gordon* for the petitioners. *Mr. J. W. Terry, Mr. H. M. Garwood, Mr. Alexander Britton* and *Mr. Evans Browne* for the respondents.

No. 782. John Schroeder Lumber Company, Petitioner, *v.* Ramey Lumber Company, Limited. December 18, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Nathan Pereles, Jr.*, and *Mr. Frank M. Hoyt* for the petitioner. No appearance for the respondent.

No. 803. Lo Pong, Alias Lo Bong, Petitioner, *v.* James R. Dunn, Inspector, etc. December 18, 1916.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John H. Brickenstein* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 809. W. H. WATLINGTON, PETITIONER, *v.* THE UNITED STATES. December 18, 1916. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Carlos Bee* and *Mr. S. W. Hayes* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 784. ROBERT F. WERK ET AL., PETITIONERS, *v.* F. THOMAS PARKER ET AL., ETC. January 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. T. Hart Anderson* for the petitioners. *Mr. Frederick S. Drake* for the respondents.

No. 789. UNION FISH COMPANY, PETITIONER, *v.* JOHN W. ERICKSON. January 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. G. S. Arnold* for the petitioner. No appearance for the respondent.

No. 791. ALEXANDER M. EMERSON, PETITIONER, *v.* WARREN E. SWEETSER. January 8, 1917. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Henry Wheeler* for the petitioner. No appearance for the respondent.

No. 792. ALFRED P. LOWELL, PETITIONER, *v.* WARREN E. SWEETSER. January 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted. *Mr. Henry Wheeler* for the petitioner. No appearance for the respondent.

No. 771. THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER, *v.* ALICE FRANCIS BROWN ET AL. January 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Francis I. Gowen* and *Mr. Frederic D. McKenney* for the petitioner. *Mr. Thomas Raeburn White* and *Mr. W. C. Dennis* for the respondents.

No. 817. CAROLINE F. HOGG, PETITIONER, *v.* LASCELLES C. MAXWELL ET AL., ETC. January 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William G. Cooke* and *Mr. Louis A. Seitz* for the petitioner. *Mr. William A. W. Stewart* for the respondents.

No. 818. WILLIAM J. CREEKMORE, PETITIONER, *v.* THE UNITED STATES. January 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals

for the Eighth Circuit denied. *Mr. C. B. Stuart, Mr. M. K. Cruce, Mr. A. C. Cruce, Mr. J. C. Denton, Mr. Frank Lee, Mr. E. G. McAdams* and *Mr. Norman R. Haskell* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 824. C. C. SAMSON ET AL., PETITIONERS, *v.* WILLIAM GARLAND. January 8, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Albert R. Moore* and *Mr. William H. Oppenheimer* for the petitioners. *Mr. William D. Mitchell* and *Mr. Pierce Butler* for the respondent.

No. 780. ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* MRS. MARSHALL LANIS, ADMINISTRATRIX, ETC. January 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. Gustave Lemle, Mr. Hunter C. Leake, Mr. Blewett Lee* and *Mr. R. V. Fletcher* for the plaintiff in error in support of the petition. No appearance for the defendant in error.

No. 783. DR. PAUL OESTING, ALIAS PAUL ALLEN, PETITIONER, *v.* THE UNITED STATES. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles J. Heggerty* and *Mr. James Raleigh Kelly* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 801. J. F. WETZEL, PETITIONER, *v.* THE UNITED STATES. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. O. P. Stidger* and *Mr. David A. Baer* for the petitioner. *The Attorney General, The Solicitor General* and *Mr. Assistant Attorney General Wallace* for the respondent.

No. 810. ALASKA PACIFIC FISHERIES, PETITIONER, *v.* THE TERRITORY OF ALASKA. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harvey M. Friend* for the petitioner. *Mr. George B. Grigsby* for the respondent.

No. 811. ALASKA MEXICAN GOLD MINING COMPANY, PETITIONER, *v.* THE TERRITORY OF ALASKA. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harvey M. Friend* for the petitioner. *Mr. George B. Grigsby* for the respondent.

No. 812. ALASKA PACIFIC FISHERIES, PETITIONER, *v.* THE TERRITORY OF ALASKA. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harvey M. Friend* for the petitioner. *Mr. George B. Grigsby* for the respondent.

No. 815. ALASKA SALMON COMPANY, PETITIONER, *v.* THE TERRITORY OF ALASKA. January 15, 1917. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Warren Gregory, Mr. George H. Whipple, Mr. E. S. McChord* and *Mr. W. H. Boyle* for the petitioner. *Mr. George B. Grigsby* for the respondent.

No. 819. American Bank of Alaska, Petitioner, *v.* Edwin Richards. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles J. Heggerty* and *Mr. James Raleigh Kelly* for the petitioner. *Mr. W. H. Metson* for the respondent.

No. 828. Detroit Iron & Steel Company, Petitioner, *v.* James D. Carey. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George B. Marty* and *Mr. Charles R. Miller* for the petitioner. *Mr. Albert Lynn Lawrence* for the respondent.

No. 831. Omaha Iron Store Company, Petitioner, *v.* Moline Plow Company. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Otto Raymond Barnett* for the petitioner. *Mr. Samuel Walker Banning* and *Mr. Thomas A. Banning* for the respondent.

No. 838. The Delaware, Lackawanna & Western Railroad Company, Petitioner, *v.* Sound Transporta-

TION COMPANY. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Jenney*, *Mr. Austin J. McMahon* and *Mr. Louis Marshall* for the petitioner. *Mr. J. D. Carpenter, Jr.*, and *Mr. B. G. Paskus* for the respondent.

No. 843. ROBERT EDWARD BAKER ET AL., TRUSTEES, ETC., PETITIONERS, *v.* J. J. DUNLOP. January 15, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Conrad H. Syme*, *Mr. Edwin P. Cox* and *Mr. Richard H. Mann* for the petitioners. No appearance for the respondent.

No. 851. THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PETITIONER, *v.* T. D. DAVIS. January 15, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. William H. Bremner* and *Mr. Frederick M. Minor* for the petitioner. No appearance for the respondent.

No. 821. LAWRENCE MAXWELL ET AL., PETITIONERS, *v.* CHARLOTTE JANE ISABELLE MCDONALD ET AL. January 22, 1917. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. F. D. McKenney*, *Mr. J. S. Flannery*, *Mr. Frederick de Courcy Faust* and *Mr. Charles F. Wilson* for the petitioners. *Mr. Benjamin S. Minor* and *Mr. Colley W. Bell* for the respondents.

No. 822. THE HEWITT COMPANY, PETITIONER, *v.* THE UNITED STATES METALLIC PACKING COMPANY. January 22, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James H. Pierce* and *Mr. George P. Fisher* for the petitioner. *Mr. Francis T. Chambers* for the respondent.

No. 867. AMERICAN-HAWAIIAN STEAMSHIP COMPANY, ETC., PETITIONER, *v.* STRATHALBYN STEAMSHIP COMPANY, LIMITED, ETC. January 22, 1917. Motion for leave to present petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted and the petition denied on the merits and the motion for delay to give further notice consequently denied. *Mr. W. H. Bogle* and *Mr. Carroll B. Graves* for the petitioner. No appearance for the respondent.

No. 862. T. COLEMAN DU PONT, PETITIONER, *v.* GEORGE N. GARDINER, JR., ET AL., EXECUTORS, ETC. January 29, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Julius F. Workum* for the petitioner. *Mr. F. Laughlin Kellogg* and *Mr. Alfred C. Pette* for the respondents.

No. 869. ADRIAN BAKKER, PETITIONER, *v.* NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY, SUED AS HOLLAND-AMERICAN LINE. January 29, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Roger*

Foster for the petitioner. *Mr. Charles C. Burlingham* for the respondent.

No. 871. LASSWELL LAND & LUMBER COMPANY, PETITIONER, *v.* LEE WILSON & COMPANY. January 29, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles B. Williams* and *Mr. J. P. Tribble* for the petitioner. *Mr. Frank H. Sullivan* and *Mr. Allen Hughes* for the respondent.

No. 887. SAMUEL J. MASTERS ET AL., PETITIONERS, *v.* EDWARD W. MOLLOHAN, TRUSTEE. January 29, 1917. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Daniel W. Baker, Mr. W. J. Lambert* and *Mr. E. L. Gies* for the petitioners. *Mr. W. Gwynn Gardiner* for the respondent.

No. 842. ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILWAY COMPANY, PETITIONER, *v.* WILLIAM J. SCHUERMAN. February 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. T. M. Pierce* and *Mr. Walter M. Hezel* for the petitioner. *Mr. W. C. Marshall* for the respondent.

No. 861. THE STATE BANK OF CLEARWATER, NEBR., PETITIONER, *v.* J. Q. INGRAM, TRUSTEE, ETC. February 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

Mr. Arthur F. Mullen and *Mr. E. C. Brandenburg* for the petitioner. *Mr. R. E. Evans* for the respondent.

No. 884. SAMUEL BERNSTEIN, PETITIONER, *v.* THE UNITED STATES. February 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert H. Talley* for the petitioner. No brief for the respondent.

No. 886. ILLINOIS CENTRAL RAILROAD COMPANY ET AL., PETITIONERS, *v.* V. P. MESSINA. February 5, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. H. D. Minor, Mr. Edward Mayes, Mr. Robert V. Fletcher, Mr. Blewett Lee* and *Mr. Charles N. Burch* for the petitioners. *Mr. William H. Watkins* and *Mr. Harry Peyton* for the respondent.

No. 888. UNITED MINE WORKERS OF AMERICA, PETITIONER, *v.* A. S. DOWD, RECEIVER, ETC., ET AL. February 5, 1917. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry Warrum, Mr. George L. Grant* and *Mr. Webb Covington* for the petitioner. *Mr. Henry S. Drinker, Jr., Mr. Roger B. Hull* and *Mr. James B. McDonough* for the respondents.

No. 904. ERA BOND, PETITIONER, *v.* OTTO S. LANGUM, SHERIFF, ETC. February 5, 1917. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Ernest S. Carey* for the petitioner. No appearance for the respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 9, 1916, TO FEBRUARY 5, 1917.

No. 309. JOHN Z. LOWE, JR., COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR, *v.* SAMUEL T. HUBBARD ET AL. In error to the District Court of the United States for the Southern District of New York. October 9, 1916. Dismissed with costs, on motion of *Mr. Solicitor General Davis* for the plaintiff in error. *The Attorney General* and *The Solicitor General* for the plaintiff in error. *Mr. David Hunter Miller* and *Mr. Gordon Auchincloss* for the defendants in error.

No. 388. JOHN Z. LOWE, JR., COLLECTOR OF UNITED STATES INTERNAL REVENUE, ETC., PLAINTIFF IN ERROR, *v.* STEPHEN M. WELD ET AL. In error to the District Court of the United States for the Southern District of New York. October 9, 1916. Dismissed with costs, on motion of *Mr. Solicitor General Davis* for the plaintiff in error. *The Attorney General* and *The Solicitor General* for the plaintiff in error. *Mr. David Hunter Miller* and *Mr. Gordon Auchincloss* for the defendants in error.

No. 5. Original. THE STATE OF MINNESOTA, COMPLAINANT, *v.* THE STATE OF WISCONSIN. October 9, 1916. Dismissed on motion of *Mr. Lyndon A. Smith* for the complainant. *Mr. Lyndon A. Smith* for the complainant. *Mr. W. C. Owen* for the defendant.

No. 137. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF

KANSAS EX REL. S. M. BREWSTER, ATTORNEY GENERAL, ETC., ET AL. In error to the Supreme Court of the State of Kansas. October 9, 1916. Dismissed with costs, on authority of counsel for the plaintiff in error. *Mr. Robert Dunlap* for the plaintiff in error. No appearance for the defendants in error.

No. 199. TERRE HAUTE, INDIANAPOLIS & EASTERN TRACTION COMPANY, PLAINTIFF IN ERROR, *v.* ELMIRA C. WEDDLE, ADMINISTRATRIX, ETC. In error to the Supreme Court of the State of Indiana. October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Ferdinand Winter* and *Mr. W. H. Latta* for the plaintiff in error. *Mr. Richard M. Milburn* for the defendant in error.

Nos. 224 and 225. FLORIDA EAST COAST RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF FLORIDA EX REL. R. HUDSON BURR ET AL., ETC. In error to the Supreme Court of the State of Florida. October 9, 1916. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. Frederick C. Bryan* and *Mr. Alexander St. Clair Abrams* for the plaintiff in error. No appearance for the defendants in error.

No. 238. WALTER BOWEN & COMPANY, INC., PLAINTIFF IN ERROR, *v.* THE STATE OF WASHINGTON. In error to the Supreme Court of the State of Washington. October 9, 1916. Dismissed per stipulation. *Mr. W. H. Bogle* and *Mr. Carroll B. Graves* for the plaintiff in error. *Mr. W. V. Tanner* for the defendant in error.

No. 261. S. B. HOVEY ET AL., RECEIVERS, ETC., PLAINTIFFS IN ERROR, *v.* FAYETTE TANKERSLEY. In error to the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas. October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Herbert S. Garrett* for the plaintiffs in error. No appearance for the defendant in error.

No. 352. SERAPION CRIBE ET AL., APPELLANTS, *v.* R. E. MANLY ET AL. Appeal from the Supreme Court of the Philippine Islands. October 9, 1916. Dismissed with costs, on motion of counsel for the appellants. *Mr. A. D. Gibbs* for the appellants. No appearance for the appellees.

No. 448. JOHN GRANT LYMAN, APPELLANT, *v.* THOMAS D. MCCARTHY, MARSHAL, ETC. Appeal from the District Court of the United States for the Southern District of New York. October 9, 1916. Dismissed with costs, on motion of counsel for the appellant. *Mr. Henry A. Wise* and *Mr. Frederick S. Tyler* for the appellant. *The Attorney General* for the appellee.

No. 517. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* W. C. ELLENWOOD. In error to the Supreme Court of the State of Arkansas. October 9, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. A. L. Burford* and *Mr. Edward A. Haid* for the plaintiff in error. No appearance for the defendant in error.

No. 117. Southern Railway Company, Plaintiff in Error, *v.* B. B. Saunders, Administrator, etc. In error to the Supreme Court of the State of North Carolina. October 12, 1916. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. L. E. Jeffries* for the plaintiff in error. *Mr. Jas. S. Manning* and *Mr. W. W. Kitchin* for the defendant in error.

No. 122. Abraham Feinberg, Plaintiff in Error, *v.* John Quinn, Jr. In error to the Supreme Judicial Court of the State of Massachusetts. October 18, 1916. Dismissed without costs to either party, per stipulation. *Mr. Lee M. Friedman* for the plaintiff in error. *Mr. Arthur D. Hill* for the defendant in error.

No. 6. The City of Monroe, Plaintiff in Error, *v.* The State of Louisiana ex rel. The Parish Board of School Directors of the Parish of Ouachita, Louisiana. In error to the Supreme Court of the State of Louisiana. October 18, 1916. Dismissed with costs pursuant to the nineteenth rule. *Mr. S. L. Herold* and *Mr. John C. Theus* for the plaintiff in error. No appearance for the defendant in error.

No. 12. John F. Colburn, Plaintiff in Error, *v.* Charles T. Wilder, Tax Assessor, etc. In error to the Supreme Court of the Territory of Hawaii. October 18, 1916. Dismissed with costs pursuant to the nineteenth rule. *Mr. Clarence W. Ashford* for the plaintiff in error. *Mr. C. R. Hemenway* for the defendant in error.

No. 173. Oswald Mehlos, Plaintiff in Error, *v.* The City of Milwaukee et al. In error to the Supreme Court of the State of Wisconsin. October 19, 1916. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. Wm. B. Reuben* for the plaintiff in error. No appearance for the defendants in error.

No. 397. The Chesapeake & Ohio Railway Company, Plaintiff in Error, *v.* George Robert Kornhoff. In error to the Court of Appeals of the State of Kentucky. October 19, 1916. Dismissed with costs on motion of counsel for the plaintiff in error. *Mr. John Galvin* for the plaintiff in error. No appearance for the defendant in error.

No. 16. John F. Cubbins, Appellant, *v.* The Mississippi River Commission et al. Appeal from the District Court of the United States for the Eastern District of Louisiana. October 19, 1916. Dismissed with costs pursuant to the tenth rule. *Mr. Barnette E. Moses* for the appellant. *The Attorney General* for the appellees.

No. 17. John F. Cubbins, Appellant, *v.* Cotton Belt Levee District No. 1 et al. Appeal from the District Court of the United States for the Eastern District of Arkansas. October 19, 1916. Dismissed with costs pursuant to the tenth rule. *Mr. Barnette E. Moses* for the appellant. No appearance for the appellees.

No. 228. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Plaintiff in Error, *v.*

FARMERS TRUST & SAVINGS COMPANY, ADMINISTRATOR, ETC. In error to the Supreme Court of the State of Indiana. October 23, 1916. Dismissed with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error. No appearance for the defendant in error.

No. 57. THE UNITED STATES, APPELLANT AND PLAINTIFF IN ERROR, *v.* THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY. Appeal from and in error to the District Court of the United States for the Middle District of Tennessee. October 27, 1916. Dismissed, pursuant to the nineteenth rule. *The Attorney General* for the appellant and plaintiff in error. *Mr. Helm Bruce* for the appellee and defendant in error.

No. 307. NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* WILFRED L. GIFFORD. In error to the Supreme Court of the State of Idaho. October 30, 1916. Dismissed with costs, on motion of *Mr. Alexander Britton* in behalf of counsel for the plaintiff in error. *Mr. James E. Babb*, *Mr. C. W. Bunn* and *Mr. Alexander Britton* for the plaintiff in error. No appearance for the defendant in error.

No. 473. CLARA P. BOBB, PLAINTIFF IN ERROR, *v.* ALFRED C. F. MEYER. In error to the Supreme Court of the State of Missouri. November 6, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. Thomas J. Rowe* for the plaintiff in error. No appearance for the defendant in error.

No. 80. ARTHUR J. MCDONALD, AS EXECUTOR, ET AL., PLAINTIFFS IN ERROR, *v.* J. T. MCDONALD ET AL. In error to the Supreme Court of the State of Arizona. November 6, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Roy D. Keehn* for the plaintiffs in error. *Mr. Selim M. Franklin* for the defendants in error.

No. 768. CENTRAL TRUST COMPANY OF NEW YORK, AS TRUSTEE, ETC., APPELLANT, *v.* THE UNITED STATES. Appeal from the District Court of the United States for the Southern District of Ohio. November 8, 1916. Dismissed with costs, on motion of counsel for the appellant. *Mr. Arthur H. Van Brunt* for the appellant. *The Attorney General* for the appellee.

No. 83. FRANCIS J. TORRANCE, TRUSTEE, ETC., ET AL., PLAINTIFFS IN ERROR, *v.* FIRST-SECOND NATIONAL BANK OF PITTSBURGH. In error to the District Court of the United States for the Western District of Pennsylvania. November 9, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Alvin A. Morris* for the plaintiffs in error. No appearance for the defendant in error.

No. 96. P. P. DABNEY ET AL., PLAINTIFFS IN ERROR, *v.* CITY LAND COMPANY. In error to the Supreme Court of the State of Oregon. November 10, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles W. Fulton* and *Mr. Guy C. H. Corliss* for the plaintiffs in error. *Mr. Alfred E. Clark* for the defendant in error.

No. 97. P. P. DABNEY ET AL., PLAINTIFFS IN ERROR, *v.* JOHN H. MIDDLETON ET AL., AS EXECUTORS, ETC. In error to the Supreme Court of the State of Oregon. November 10, 1916. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles W. Fulton* and *Mr. Guy C. H. Corliss* for the plaintiffs in error. *Mr. Alfred E. Clark* for the defendants in error.

No. 102. HIRAM CHASE, APPELLANT, *v.* PETER HANSEN. Appeal from the District Court of the United States for the District of Nebraska. November 14, 1916. Dismissed with costs, pursuant to the sixteenth rule, on motion of *Mr. C. J. Kappler* for the appellee. *Mr. Hiram Chase* for the appellant. *Mr. Charles J. Kappler* for the appellee.

No. 589. AMERICAN BONDING COMPANY OF BALTIMORE, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA TO THE USE OF CAESAR FRANCINI ET AL. In error to the United States Circuit Court of Appeals for the Third Circuit. November 14, 1916. Dismissed, per stipulation. *Francis B. Bracken* for the plaintiff in error. *Mr. William M. Hargest* for the defendants in error.

No. 354. THE UNITED STATES, APPELLANT, *v.* E. DOWDEN ET AL. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. November 20, 1916. Dismissed, on motion of *Mr. Solicitor General Davis* for the appellant. *The Attorney General* for the appellant. *Mr. Reford Bond* for the appellees.

No. 91. WELLS, FARGO & COMPANY EXPRESS, PLAINTIFF IN ERROR, *v.* THE STATE OF OKLAHOMA;

No. 92. THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF OKLAHOMA; and

No. 93. UNITED STATES EXPRESS COMPANY, PLAINTIFF IN ERROR, *v.* THE STATE OF OKLAHOMA. In error to the Supreme Court of the State of Oklahoma. November 20, 1916. Dismissed, on motion of counsel for the plaintiffs in error. *Mr. S. T. Bledsoe* for the plaintiffs in error. *Mr. T. B. Harrison* for the plaintiff in error in No. 92. No appearance for the defendant in error.

No. 209. VANDALIA RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* JOHN A. HOLLAND. In error to the Supreme Court of the State of Indiana. December 4, 1916. Dismissed with costs on motion of *Mr. Frederic D. McKenney* for the plaintiff in error. *Mr. Samuel O. Pickens* and *Mr. Frederic D. McKenney* for the plaintiff in error. *Mr. Martin M. Hugg* and *Mr. Wyman J. Beckett* for the defendant in error.

No. 174. FRED E. BARNEY, PLAINTIFF IN ERROR, *v.* CHARLES M. WAY, AS RECEIVER, ETC. In error to the Supreme Court of the State of Minnesota. December 4, 1916. Dismissed per stipulation. *Mr. H. V. Mercer* for the plaintiff in error. *Mr. James E. Trask* for the defendant in error.

No. 182. JORGE DARD Y TEILLARD ET AL., HEIRS AT LAW OF EUGENIA TEILLARD, DECEASED, ET AL., APPELLANTS, *v.* ENRIQUE GREEN ET AL. Appeal from the Dis-

trict Court of the United States for Porto Rico. December 4, 1916. Dismissed with costs on motion of counsel for the appellants. *Mr. Francis H. Dexter* for the appellants. *Mr. Edward S. Paine* for the appellees.

No. 146. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* WILLIAM SKINNER ET AL. In error to the District Court of the United States for the Southern District of New York. December 11, 1916. Dismissed, on motion of *Mr. Solicitor General Davis* for the plaintiff in error. *The Attorney General* for the plaintiff in error. No appearance for the defendants in error.

No. 181. THE UNITED STATES, PLAINTIFF IN ERROR, *v.* JOHN L. BILLARD. In error to the District Court of the United States for the Southern District of New York. December 11, 1916. Dismissed, on motion of *Mr. Solicitor General Davis* for the plaintiff in error. *The Attorney General* for the plaintiff in error. No appearance for the defendant in error.

No. 141. ARMOUR PACKING COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* THE STATE OF MISSOURI, ON THE RELATION OF JOHN T. BARKER, ATTORNEY GENERAL. In error to the Supreme Court of the State of Missouri. December 12, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Frank Hagerman* for the plaintiffs in error. *Mr. John T. Barker* for the defendant in error.

No. 114. THE MANUFACTURERS LIGHT & HEAT COMPANY ET AL., APPELLANTS, *v.* LEE OTT ET AL., PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA. Appeal from the District Court of the United States for the Northern District of West Virginia. December 15, 1916. Dismissed with costs, on motion of counsel for the appellants. *Mr. Charles McCamic, Mr. A. Leo Weil, Mr. J. M. Clarke, Mr. George E. Price, Mr. B. M. Ambler, Mr. P. C. Knox, Mr. Frederick DeCourcy Faust* and *Mr. Charles F. Wilson* for the appellants. *Mr. S. B. Avis, Mr. A. A. Lilly* and *Mr. J. B. Sommerville* for the appellees.

No. 622. MEMPHIS STREET RAILWAY COMPANY, PETITIONER, *v.* J. W. BOBO, ADMINISTRATOR, ETC. On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. December 19, 1916. Dismissed with costs, on motion of counsel for the petitioner. *Mr. Luke E. Wright* and *Mr. Roane Waring* for the petitioner. *Mr. Caruthers Ewing* and *Mr. Ike W. Crabtree* for the respondent.

No. 853. JUAN GATMAITAN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. January 8, 1917. Docketed and dismissed, on motion of *Mr. Solicitor General Davis* for the defendant in error. *The Attorney General* and *The Solicitor General* for the defendant in error. No one opposing.

No. 854. LORENZO SONG CHONGCO, PLAINTIFF IN ERROR, *v.* THE UNITED STATES. In error to the Supreme Court of the Philippine Islands. January 8, 1917. Dock-

eted and dismissed, on motion of *Mr. Solicitor General Davis* for the defendant in error. *The Attorney General* and *The Solicitor General* for the defendant in error. No one opposing.

No. —. Original. THE REPUBLIC OF CUBA, PLAINTIFF, *v.* THE STATE OF NORTH CAROLINA. Submitted November 6, 1916. Withdrawn January 8, 1917. Motion for leave to file declaration withdrawn on motion of *Mr. Barry Mohun* in behalf of counsel for the plaintiff. *Mr. Howard Thayer Kingsbury, Mr. Frederic R. Coudert* and *Mr. Marcus H. Burnstine* for the plaintiff.

No. 332. BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT ET AL., APPELLANTS, *v.* EAST TENNESSEE TELEPHONE COMPANY. Appeal from the District Court of the United States for the Eastern District of Kentucky. January 8, 1917. Dismissed per stipulation of counsel. *Mr. F. M. Dailey* for the appellants. *Mr. Alexander Pope Humphrey* for the appellee.

No. 380. LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT, *v.* WESTERN UNION TELEGRAPH COMPANY. Appeal from the District Court of the United States for the Eastern District of Kentucky. January 8, 1917. Dismissed with costs, on motion of counsel for the appellant. *Mr. Henry L. Stone, Mr. Edward S. Jouett* and *Mr. James B. Wright* for the appellant. *Mr. A. E. Richards, Mr. Rush Taggart* and *Mr. Alexander Pope Humphrey* for the appellee.

No. 613. WILLIE HOPE, PLAINTIFF IN ERROR, *v.* W. F. FOLEY ET AL. In error to the Supreme Court of the State of Oklahoma. January 8, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. George S. Ramsey*, *Mr. Edgar A. DeMeules* and *Mr. Malcolm E. Rosser* for the plaintiff in error. No appearance for the defendants in error.

No. 304. ST. LOUIS UNION TRUST COMPANY, PETITIONER, *v.* MARY E. MELLON. On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. January 12, 1917. Dismissed at costs of respondent, per stipulation. *Mr. W. F. Wilson* and *Mr. Enoch A. Chase* for the petitioner. *Mr. J. H. Everest* and *Mr. R. M. Campbell* for the respondent.

No. 186. PUBLIC SERVICE GAS COMPANY, PLAINTIFF IN ERROR, *v.* BOARD OF PUBLIC UTILITIES COMMISSIONERS OF THE STATE OF NEW JERSEY ET AL. In error to the Court of Errors and Appeals of the State of New Jersey. January 19, 1917. Dismissed with costs, per stipulation, on motion of *Mr. E. A. Armstrong* for the plaintiff in error. *Mr. Frank Bergen* and *Mr. Thomas N. McCarter* for the plaintiff in error. *Mr. L. Edward Herrmann*, *Mr. Edward F. Merrey* and *Mr. Albert O. Miller, Jr.*, for the defendants in error.

No. 187. PUBLIC SERVICE GAS COMPANY, PLAINTIFF IN ERROR, *v.* CITY OF PATERSON ET AL. In error to the Court of Errors and Appeals of the State of New Jersey. Jan-

uary 19, 1917. Dismissed with costs, per stipulation, on motion of *Mr. E. A. Armstrong* for the plaintiff in error. *Mr. Frank Bergen* and *Mr. Thomas N. McCarter* for the plaintiff in error. *Mr. L. Edward Herrmann, Mr. Edward F. Merrey* and *Mr. Albert O. Miller, Jr.*, for the defendants in error.

No. 188. PUBLIC SERVICE GAS COMPANY, PLAINTIFF IN ERROR, *v.* CITY OF PASSAIC ET AL. In error to the Court of Errors and Appeals of the State of New Jersey. January 19, 1917. Dismissed with costs, per stipulation, on motion of *Mr. E. A. Armstrong* for the plaintiff in error. *Mr. Frank Bergen* and *Mr. Thomas McCarter* for the plaintiff in error. *Mr. L. Edward Herrmann* and *Mr. Albert O. Miller* for the defendants in error.

No. 653. PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* E. R. LANGILL AND G. A. EDMISTON, AS LANGILL & EDMISTON. In error to the Supreme Court of the State of Pennsylvania. January 22, 1917. Dismissed with costs, on motion of *Mr. Frederic D. McKenney* for the plaintiff in error. *Mr. Frederic D. McKenney* and *Mr. H. W. Bikle* for the plaintiff in error. No appearance for the defendants in error.

No. 308. THE BALTIMORE & OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* WILLIAM C. HAGEN. In error to the Court of Appeals for the Fifth District, Licking County, State of Ohio. January 22, 1917. Dismissed, per stipulation of counsel. *Mr. Alfred A. Frazier, Mr.*

George E. Hamilton, Mr. John W. Yerkes, Mr. John J. Hamilton and *Mr. Edward Kibler* for the plaintiff in error. *Mr. Rufus S. Day* and *Mr. F. S. Monnett* for the defendant in error.

No. 444. Jay C. Ziegler et al., Appellants, *v.* Carnegie Trust Company et al. Appeal from the District Court of the United States for the Southern District of New York. January 25, 1917. Dismissed, per stipulation. *Mr. Donald C. Strachan* for the appellants. *Mr. Joseph A. Kellogg* for the appellees.

No. 175. St. Louis, Iron Mountain & Southern Railway Company, Plaintiff in Error, *v.* Annie Rodgers, as Administratrix, etc. In error to the Supreme Court of the State of Arkansas. February 1, 1917. Dismissed with costs, on motion of counsel for the plaintiff in error. *Mr. E. B. Kinsworthy* and *Mr. R. E. Wiley* for the plaintiff in error. *Mr. Thomas C. McRae* and *Mr. William V. Tompkins* for the defendant in error.

CASES DISPOSED OF IN VACATION.

No. 134. C. C. Chesnut, Plaintiff in Error, *v.* Margaret Capey. In error to the Supreme Court of the State of Oklahoma. August 22, 1916. Dismissed pursuant to the 28th rule. *Mr. O. L. Rider* for the plaintiff in error. *Mr. C. B. Stuart, Mr. A. C. Cruce* and *Mr. M. K. Cruce* for the defendant in error.

No. 191. Missouri, Kansas & Texas Railway Company, Plaintiff in Error, *v.* The State of Kansas ex rel. S. M. Brewster, Attorney General, et al. In error to the Supreme Court of the State of Kansas. June 26, 1916. Dismissed pursuant to the 28th rule. *Mr. Joseph M. Bryson* for the plaintiff in error. *Mr. James P. Coleman* for the defendants in error.

No. 193. St. Louis & San Francisco Railroad Company, Plaintiff in Error, *v.* Mary C. Smith, Administratrix of Wm. M. Smith, Deceased. In error to the Supreme Court of the State of Kansas. July 6, 1916. Dismissed pursuant to the 28th rule. *Mr. R. R. Vermilion* for the plaintiff in error. *Mr. A. M. Keene* and *Mr. E. C. Brandenburg* for the defendant in error.

No. 274. Duluth Street Railway Company, Plaintiff in Error, *v.* Railroad Commission of Wisconsin. In error to the Supreme Court of the State of Wisconsin. June 29, 1916. Dismissed pursuant to the 28th rule. *Mr. Edwin S. Mack* for the plaintiff in error. *Mr. Walter Drew* and *Mr. Walter C. Owen* for the defendant in error.

No. 424. Fidelity & Deposit Company of Maryland, Plaintiff in Error, *v.* The United States of America to the Use of William T. Fowden, etc. In error to the United States Circuit Court of Appeals for the Third Circuit. July 7, 1916. Dismissed pursuant to the 28th rule. *Mr. Thomas A. Whelan* for the plaintiff in error. *Mr. George Harbaugh Stein* for the defendant in error.

No. 455. The Chesapeake & Ohio Railway Company, Plaintiff in Error, *v.* F. H. Cooper. In error to the Court of Appeals of the State of Kentucky. July 10, 1916. Dismissed pursuant to the 28th rule. *Mr. E. L. Worthington, Mr. W. D. Cochran* and *Mr. LeWright Browning* for the plaintiff in error. *Mr. Allan D. Cole* for the defendant in error.

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For construction. See **Statutes,** 1–5.
See also **Constitutional Law,** 48–52.
Enjoining criminal proceedings. See **Injunction,** 2, 3.

1. Mandamus to compel imposition of sentence. *Ex parte United States* 27

2. District Judge may not refuse sentence on proper verdict. *Id.*

3. Parol System within power of Congress. *Id.*

4. Common-law powers to indefinitely suspend or refuse sentence on proper verdict not in courts. *Id.*

5. *Semble*, Courts have inherent power to delay or recall sentence for proper enforcement of law, or in aid of pardoning power. *Id.*

6. A "motion to quash" based upon former adjudication that previous indictment for same offense was barred by statute of limitations, *held*, in substance, a plea in bar. *United States* v. *Oppenheimer* 85

7. A plea of the statute of limitations is a plea to the merits and judgment that prosecution is barred goes to defendant's rights in substantive law. *Id.*

8. Such a judgment is a conclusive bar to second prosecution for same offense. *Id.*

9. When a demurrer is filed between plea and arraignment without withdrawing plea, and jury is sworn, court in its discretion may dismiss jury, decide demurrer, and, overruling it, rearraign defendant and swear same jury again. *Lovato* v. *New Mexico* 199

10. Silence of accused on certain points may give rise to inferences against him when he voluntarily testifies on others, and court may so instruct jury. *Caminetti* v. *United States* .. 470

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11. While better practice in criminal cases for courts to caution juries against too much reliance on testimony of accomplices and against believing such testimony without corroboration, mere failure to give such an instruction is not reversible error. *Id.*

DAMAGES. See **Carriers,** 4, 6, 8; **Employers' Liability Act,** 13, 14; **Interstate Commerce Acts,** 1, 8, 9, 17, 20, 21, 24, 27.

DEED:

Disaffirmance. See **Indians,** 11.

DELEGATION OF LEGISLATIVE POWER. See **Constitutional Law,** IV.

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Private detective business subject to state regulation. *Lehon* v. *Atlanta* 53

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No appeal to this court from refusal of District Supreme Court to adjudicate a bankrupt. *Swift & Co.* v. *Hoover* 107

DRAINAGE LAWS:

State may cross railroads with improvements, under police power. *Lake Shore &c. Ry.* v. *Clough* 375

" DRUGLESS PRACTITIONERS ":

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EMINENT DOMAIN:

1. Expense incident to crossing railroad with state drainage

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improvements requires no compensation if contemplated by railroad's charter obligations. *Lake Shore &c. Ry.* v. *Clough* . . 375

2. Requiring destruction or alteration of bridge under commerce power not a taking when grant of franchise is subject to implied power of alteration or repeal. *Louisville Bridge Co.* v. *United States.* 409

EMPLOYERS' LIABILITY ACT:

1. The return part of round trip train service is not given interstate character by facts that interstate commerce is carried outbound and the service mainly devoted to it. *Illinois Cent. R. R.* v. *Peery* 292

2. Making up conductor's report on such return trip not employment in interstate commerce. *Id.*

3. Not intrastate character of moving car but purpose of movement of it in which employee is injured determines whether he is engaged in interstate commerce. *Louis. & Nash. R. R.* v. *Parker* 13

4. On conflicting evidence, purpose of a car movement is for jury, and benefits of the act may be waived if party does not ask to have it so determined. *Id.*

5. To gain benefits of act in state court, party must claim them in proper time and way under state procedure. *Atlantic Coast Line R. R.* v. *Mims* 532

6. When state court applies the federal act to action governed by state law, the error is not ground for reversing judgment upon complaint of party who did not oppose but invoked and relied upon application of the federal act. *Minneapolis & St. Louis R. R.* v. *Winters* 353

7. In such circumstances, however, this court will not pass upon questions concerning negligence and assumption of risk if facts touching plaintiff's employment are stated and agreed and fail to make case within federal act. *Id.*

8. In absence of clear error concurrent findings of state courts on sufficiency of evidence concerning negligence, assumption of risk and employment in interstate commerce will not be disturbed. *Balt. & Ohio R. R.* v. *Whitacre* 169

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9. Injury occurred while plaintiff was repairing engine which had been used in interstate commerce before injury and was so used afterwards, but there was nothing to show that it was permanently or specially devoted to such commerce, or assigned to it at the time. *Held,* not a case within the act. *Minneapolis & St. Louis R. R.* v. *Winters* 353

10. Essential that person injured be employed at time of injury in some task of interstate commerce; mere expectation of such employment not enough. *Erie R. R.* v. *Welsh* 303

11. Employee, subject to be employed in either interstate or intrastate commerce as directed by superior, was injured while in quest of orders, and, but for injury, would have received orders requiring him immediately to make up interstate train. *Held,* not interstate commerce. *Id.*

12. Defenses of contributory negligence and assumption of risk eliminated when proximate cause of injury is physical exhaustion attributable to violation of Hours of Service Act. *Balt. & Ohio R. R.* v. *Wilson* 295

See **Hours of Service Act.**

13. Pain and suffering substantially contemporaneous with death or mere incidents to it, and short periods of insensibility intervening between fatal injuries and death, afford no basis for separate estimation or award of damages under the act as amended Apr. 5, 1910. *Great Northern Ry.* v. *Capital Trust Co* 144

14. When personal representative unites claim for injury suffered by decedent with claim for losses resulting to beneficiaries from his death, damages recoverable under former claim are limited to such as reasonably compensate for loss and suffering of injured person while he lived; error to permit jury to increase them by taking account of his premature death and of what he would have earned or accomplished in natural span of his life. *Id.*

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** XI, (4.)

EQUITY. See **Injunction; Trusts; Indians,** 6.

ESTOPPEL:

Taking inconsistent positions. See **Practice and Procedure,** 4.

EVIDENCE. See **Judicial Notice; Presumption.** PAGE

Burden of proof. See **Patents for Inventions,** 4.
Evidence of fraudulent mortgage. See **Bankruptcy Act,** 7.
Evidence of interstate commerce. See **Employers' Liability Act.**

1. A carrier is entitled to have its tariffs on file considered as evidence bearing on baggage liability. *New York Central &c. R. R.* v. *Beaham*. 148

2. How must copies of tariffs be certified to be admissible? *Id.*

3. Evidence that carrier has cars out on other lines does not tend to show compliance with duty to furnish adequate supply to shippers. *Pennsylvania R. R.* v. *Sonman Coal Co*..... 120

4. A written exhibit used before Interstate Commerce Commission in proceedings for award, held admissible as tending to prove award erroneous. *Pennsylvania R. R.* v. *Jacoby & Co*.. 89

EXECUTORS AND ADMINISTRATORS:

1. At common law executors have implied authority to pass title to personal assets of the estate—a rule which has not been modified in Wisconsin. *Williams* v. *Cobb*. 307

2. A transfer of bank shares by an executor to himself as testamentary trustee passes title whether authorized or not. *Id.*

3. The rule that personal estate has situs at decedent's domicile and is subject to administration and distribution according to domiciliary law, is but a common-law rule which each State may alter to suit its own policy. *Baker* v. *Baker, Eccles & Co*..... 394

4. Power of States to administer and distribute local assets such as debts, and shares of local corporations. *Id.*

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act.**

FINDINGS OF FACT. See **Practice and Procedure, V.**

FOOD LAWS. See **Constitutional Law,** 75–77.

FRANCHISE AND LICENSE. See **Constitutional Law,** 38–40, 70, 82, 84, 89. PAGE

1. Grantee has benefits flowing from logical application of a strict construction. *Detroit United Ry.* v. *Michigan* 238

2. Ordinances fixing fares on all lines within a city *held* not to include lines subsequently acquired by street railway company within territory subsequently annexed to city. *Id.*

3. Granted by Congress to bridge navigable streams subject to strict construction as to alteration or repeal. *Louisville Bridge Co.* v. *United States* 409

4. License to use street for railway track not irrevocable though long enjoyed. *Seaboard Air Line Ry.* v. *Raleigh* 15

5. What seems on its face a mere license by a municipality may not be converted into a contract by resort to general implications. *Id.*

6. Apparent license to corporation implied into contract only when essential to the corporate duties and powers. *Id.*

7. A franchise obligation to reconstruct over water courses, may require railway company to bear inconvenience and expense resulting from state drainage improvements crossing line and interfering with old bridges. *Lake Shore &c. Ry.* v. *Clough* 375

8. When under franchise obligation to carry both passengers and freight, on branch line, carrier cannot escape as to passengers by devoting branch to freight only. *Ches. & Ohio Ry.* v. *Public Service Comm.* 603

9. Pecuniary loss is not *per se* an excuse for not performing franchise obligation to carry passengers as well as freight. *Id.*

10. What amounts to joint ownership of terminal facilities. See *Louis. & Nash. R. R.* v. *United States* 60

FRAUD. See **Pleading.**

Fraudulent transfers. See **Bankruptcy Act, 5–7.**
Fixing trust on personalty. See **Trusts.**
Fraud as basis for exercise of state police power. See **Constitutional Law,** 66, 75–77.

FRAUD—*Continued.* PAGE

1. It is constructive fraud for member of "syndicate," formed to buy up shares of a corporation, when acting for the other members in the purchase, secretly to turn in shares of his own applying them on his subscription to the "syndicate." *Sim* v. *Edenborn*. 131

2. Such fraud entitles other members to rescind; they may sue the agent for the amounts they entrusted to him, tendering him the shares they received in return. *Id.*

FRAUDULENT CONVEYANCE. See **Bankruptcy Act,** 5–7.

GARNISHMENT. See **Contracts,** 3.

1. Under the statutes of Connecticut, garnishment of deposits in ordinary savings bank without stockholders subject to a fiduciary duty to hold and invest for benefit of depositors all funds that it receives and to pay over to them net income beyond enough to constitute a small safety fund (Gen. Stats., §§ 3440, 3441), reaches not only principal of the deposits but also the dividends that accrue after service of the writ. *Savings Bank of Danbury* v. *Loewe* 357

2. The lien is not affected by an assignment of the savings accounts made after the service. *Id.*

GUARDIAN AND WARD. See **Indians,** 3.

HABEAS CORPUS. See **Constitutional Law,** 45.

HAWAII:

Review of judgment of Supreme Court of, by this court and Circuit Court of Appeals. See **Jurisdiction,** 13.

HEADLIGHTS:

On locomotives. Regulation of by State. *Vandalia R. R.* v. *Public Service Comm* 255

HIGHWAYS:

Use of by automobiles of nonresidents, subject to state regulation and taxation. *Kane* v. *New Jersey* 160

HOURS OF SERVICE ACT:

1. Failure to report delinquencies to Interstate Commerce Commission, due to honest mistake, *held* not subject to penal-

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ties under Interstate Commerce Act. *United States* v. *Northern Pacific Ry* 190

2. The rest period fixed is a minimum; the act requires sufficient rest to repair the fatigue caused by excessive hours. *Balt. & Ohio R. R.* v. *Wilson* 295

ICE CREAM:
Standardizing. See **Constitutional Law, 75–77.**

INCOME. See **Corporation Tax Act.**

INDIANS:
1. Sections 19 to 21 of Act of July 1, 1902, allowing until Sept. 25, 1902, within which to reduce excessive enclosures and holdings, were not intended to permit revival of dormant claims to prejudice of persons entitled to allotments who had entered into possession and made valuable improvements. *Hill* v. *Reynolds* 361

2. The provisions of §§ 17 and 18 of Act of June 28, 1898, inhibiting enclosures and holdings in excess of allottable quantities, were left in force as to Choctaws and Chickasaws by agreement in § 29 which became effective through tribal ratification Aug. 24, 1898. *Id.*

3. A widow may act for herself and minor children in relinquishing to another their excess possessory rights and improvements, and their grantee, maintaining the possession and increasing the improvements, has prior right of selection over junior vendee of children and guardian. *Id.*

4. An agreement among Indians holding possession and improvements, that one shall have part of the land for allotment, may suffice to give interest in improvements thereon supporting preferential right of selection under § 11 of the 1902 Cherokee Agreement. *Harnage* v. *Martin* 386

5. Of two qualified applicants for allotment under § 11 of the Cherokee Agreement of 1902, the one owning improvements on tract, though junior in time of application, is entitled to prevail. *Id.*

6. A substantial equity in improvements will suffice to hold tract against claimant whose interest in them is *nil*. *Id.*

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7. A decision of Secretary of the Interior that one of two contesting claimants of allotment under § 11 of Cherokee Agreement, *supra*, was owner of improvements, is conclusive, unless made without evidence or otherwise result of error of law. *Id.*

8. Section 18 of Cherokee Agreement of 1902 recognized in terms right of tribal member to hold possession by agent as well as by himself of land not exceeding allottable quantity. *Id.*

9. An Indian who buys improvements and bases on them a selection of allotment, is not prejudiced by later proceedings in court and before Commissioner of the Five Civilized Tribes, for sale of improvements, if not a party. *Id.*

10. Issuance of fee simple patent for allotment in White Earth Indian Reservation, Minnesota, under clause of Act of Mar. 1, 1907, which declares that such allotments when held by adult mixed-bloods shall be free of restrictions on alienation and patentable in fee, implies finding that patentee was of age when patent issued. *Dickson* v. *Luck Land Co* 371

11. While this finding is decisive of allottee's age for purpose of sustaining his right to title freed from the restrictions which Congress had imposed by allotting acts, it does not conclusively establish his majority for purpose of determining whether deed of the land which he made after patent was subject, under state law, to disaffirmance as deed made in infancy. *Id.*

12. The restrictions being removed and fee patent issued, allottee, pursuant to Act of May 8, 1906, becomes subject to, and entitled to benefit of, laws of State governing transfer of real property, fixing age of majority and declaring disability of minors. *Id.*

13. At date of Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49, right of Pottawatomie Nation in lands on and near shore of Lake Michigan now in Illinois was no more than right of occupation. *Williams* v. *Chicago* 434

14. If the occupancy ever extended to lands formerly submerged in lake, the court notices historically that it was long ago abandoned and that for more than half a century no pretense of such occupancy has been made by tribe. *Id.*

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15. The treaty did no more than confirm tribal right of occupancy, and when that was abandoned all interest of tribe and members terminated. *Id.*

INFANCY. See **Indians,** 3, 10–12.

INJUNCTION:

1. When patent rights have been infringed and sound reason exists for believing infringement may be resumed, the case is remediable in equity by an injunction, with an accounting for past profits. *Goshen Mfg. Co.* v. *Myers Mfg. Co* 202

See **Patents for Inventions.**

2. When statute regulating complainant's business is alleged to be unconstitutional and its effect, if business be continued in disregard of it, will be to visit him with repeated criminal prosecutions involving heavy fines and imprisonment, the remedy at law is not adequate. *Caldwell* v. *Stock Yards Co* ... 559

3. A suit to enjoin state officials from instituting criminal proceedings in enforcement of such a statute is not a suit against State. *Id.*

4. Decree of injunction may be reversed and suit dismissed when case becomes moot because of legislation pending appeal. *Berry* v. *Davis* 468

5. Correctness of refusal of state court to enjoin state action touching interstate commerce tested by federal laws then in force. *Vandalia R. R.* v. *Public Service Comm.* 255

6. Whether party should have injunction to permit continual shipping of liquor into State may depend on condition of law as it develops by time of decision by this court. *Clark Distilling Co.* v. *Western Maryland Ry* 311

INSANITY. See **Constitutional Law,** 59, 60; **Judgments.**

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INSTRUCTIONS TO JURY:

1. Requests must be accurate in recitals of facts. *Balt. & Ohio R. R.* v. *Whitacre* 169

2. When party entitled to specific instruction on vital point,

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error in refusing not cured by generalities in charge. *Pennsylvania R. R.* v. *Jacoby & Co* 89
On accomplices. See **Criminal Law,** 11.
On inferences from failure of accused to explain when testifying. See **Criminal Law,** 10.

INTERIOR DEPARTMENT. Conclusiveness of findings. See **Indians,** 7, 10–12.
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INTERNATIONAL LAW:
War renders moot agreements concerning trade, between ship-owners of this and the belligerent countries. *United States* v. *American-Asiatic S. S. Co* 537

INTERSTATE COMMERCE. See **Constitutional Law,** VI; **Employers' Liability Act; Hours of Service Act; Interstate Commerce Acts; Safety Appliance Act.**

INTERSTATE COMMERCE ACTS. See **Carriers,** 9.

I. **Powers of and Proceedings before Commission.** See **Hours of Service Act; Safety Appliance Act,** 4.

1. Under §§ 8, 9 and 16 Commission may award all damages properly attributable to excessive rates. *Louis. & Nash. R. R.* v. *Ohio Valley Tie Co* 288
See 27, *infra.*

2. May determine validity of carriers' rule of car distribution for past transactions as well as future. *Pennsylvania R. R.* v. *Stineman Coal Co* 298

3. Action against interstate carrier for damages caused by unfair and discriminatory departures from rule of car distribution in times of car shortage may be prosecuted in a federal or state court (§ 22); remedy by §§ 8 and 9 not exclusive. *Pennsylvania R. R.* v. *Sonman Coal Co* 120
Pennsylvania R. R. v. *Stineman Coal Co* 298

4. When rule of car distribution has been held invalid by Commission in due proceedings, the matter can not be revived in action for damages for purpose of raising administrative question and ousting jurisdiction of court. *Pennsylvania R. R.* v. *Stineman Coal Co* 298

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5. Commission may require carriers owning joint terminal if they switch non-competitive goods to switch competitive also upon being paid reasonable compensation, taking into account cost of terminal. *Louis. & Nash. R. R.* v. *United States* 60

6. No question of discrimination being involved, the Commission may not compel carrier to furnish tank cars as part of its equipment. *United States* v. *Pennsylvania R. R* 208

7. Neglect or refusal to furnish tank cars not a "practice" within meaning of § 15, as amended June 18, 1910. *Id.*

8. In action to enforce award of damages, Commission's finding may be combatted before jury by documentary evidence which was before the Commission but which tends to prove that finding was based on erroneous theory of law. *Pennsylvania R. R.* v. *Jacoby & Co* 89

9. In such case fact that evidence before Commission is not all before court may not justify controlling presumption that award was properly made on competent proofs. *Id.*

10. Power of Commission, under § 4, as amended June 18, 1910, not limited to granting or denying *in toto* relief applied for by carrier; but whenever, following such an application, Commission has considered special circumstances affecting the carrier in its relations to that section, it may exercise broad administrative discretion in determining from time to time the relief which such carrier should receive. *United States* v. *Merchants &c. Assn* 178

11. *Quære:* Whether application by carrier is a prerequisite to granting of relief under § 4 as amended? *Id.*

12. In a proceeding under § 4, as amended, Commission represents public and carrier is only necessary party; interested communities and shippers, though customarily heard, need not be notified, and, at least in the absence of participation, are not bound. *Id.*

13. Shippers or communities injured by discrimination or unreasonable rates in tariffs filed pursuant to orders made under amended § 4 have remedy, not in applying for rehearing of proceedings, but by direct applications to Commission for relief under §§ 13 and 15. *Id.*

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14. That part of amended § 4 providing that rates reduced in competition with water routes shall not be increased unless Commission finds reason in changes of conditions other than elimination of water competition, has no application to case in which complaint is based on difference of rates; in which elimination of water competition is denied by parties complaining; and in which change complained of was part of general readjustment of transcontinental rates made necessary by increase of water competition and authorized by Commission after prolonged hearings. *Id.*

See 16, 17, *infra.*

II. **Duties, Rights and Liabilities of Carriers.**

15. Every shipper charged with notice of terms of interstate tariffs. *Western Transit Co.* v. *Leslie & Co* 448

16. When a carrier in published tariffs denies obligation to furnish tank cars, fact that it publishes rates for commodities so carried may not be construed as an offer, constituting a duty, to furnish such cars; and finding by Commission to contrary is reviewable as conclusion of law. *United States* v. *Pennsylvania R. R.* 208

17. In computing damages resulting from discrimination in car allotments, error to assume that shipper should have received cars in same ratio to shipping requirements as was allowed favored competitor. Award should be based on damages actually resulting from discrimination. *Pennsylvania R. R.* v. *Jacoby & Co* 89

18. Duty of carrier to furnish cars for coal to be loaded at mine and forwarded promptly for delivery to purchasers in other States is duty in interstate commerce, notwithstanding sale of coal is f. o. b. at mine. *Pennsylvania R. R.* v. *Sonman Coal Co.* 120

19. When conditions are normal, carrier upon reasonable demand must furnish sufficient cars to satisfy actual needs of shipper's business. The duty exists under the common law and Hepburn Act. *Id.*

20. Right to sue in state or federal courts for damages arising from breach of carrier's duty to supply cars is preserved by § 22; the remedy provided by §§ 8 and 9 not being exclusive. *Id. Pennsylvania R. R.* v. *Stineman Coal Co* 298

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21. When passenger claims damages from carrier for loss of baggage accepted by carrier for transportation between States, rights and liabilities of parties depend upon acts of Congress, agreement of parties and common-law principles accepted and enforced by federal courts. *New York Central &c. R. R.* v. *Beaham* 148

22. As bearing on baggage liability, interstate carrier has right to put in evidence applicable tariff schedules on file with Commission, and to have them duly considered by court. *Id.*

23. Upon question whether law in respect of filing schedules to correspond with ticket stipulations has been complied with, carrier is entitled to presumption that its business is being rightly conducted. *Id.*

24. Damages against carrier for loss of goods can not exceed valuation stated in bill of lading upon which freight charge is based. *Western Transit Co.* v. *Leslie & Co* 448

For construction of contract respecting damages, see **Carriers,** 8.

25. A carrier which holds goods stored while *in transitu*, under tariff allowing shipper privilege of storage and diversion, liable as carrier and not as warehouseman. *Id.*

26. Under § 6 separate tariff must be filed when privileges of storage and diversion are offered which are not specified in general tariff. *Id.*

27. When damages have been awarded by Commission under §§ 8, 9 and 16, and satisfied, further damages may not be recovered in court. *Louis. & Nash. R. R.* v. *Ohio Valley Tie Co.* 288

28. Where carrier's rule is found discriminatory by Commission, shipper though not party before Commission, cannot recover from carrier for its failures to obey rule before finding was made. *Pennsylvania R. R.* v. *Stineman Coal Co* 298

29. Carriers owning terminal facilities jointly not obliged by § 3 to allow use of them to another. *Louis. & Nash. R. R.* v. *United States* 60

30. Refusal of joint owners of terminals to switch for another carrier not unlawful discrimination against latter. *Id.*

31. Such joint owners may employ joint agency for their own switching exclusively. *Id.*

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32. Carriers owning terminal jointly who switch noncompetitive goods but refuse to switch competitive thereby discriminate against the latter. *Id.*

33. Failure of carrier to report instances of service by employees exceeding periods allowed by Hours of Service Act, *held* not to incur the penalties of § 20 of Interstate Commerce Act, where failure due to honest mistake. *United States* v. *Northern Pacific Ry* 190

34. States may regulate headlights on locomotives used in interstate commerce consistently with Act of Feb. 17, 1911. *Vandalia R. R.* v. *Public Service Comm* 255

35. Order of state commission fixing rate for transportation in purely intrastate commerce will not be disturbed upon grounds that it produces discrimination against interstate commerce, interferes with administrative provisions of Interstate Commerce Act, and intrudes upon jurisdiction of Interstate Commerce Commission, where relations of rate fixed to interstate commerce have not been determined by Interstate Commerce Commission and are not established by evidence, and where certainty that it will operate to injury of those engaged in such commerce is not made to appear. *Chicago, Mil. & St. P. Ry.* v. *Public Utilities Comm* 333

INTOXICATING LIQUORS:

1. West Virginia Prohibition Law and Webb-Kenyon Act construed and upheld. *Clark Distilling Co.* v. *Western Maryland Ry.* 311

2. Power of state and federal governments to regulate. *Id.*

JEOPARDY. See **Constitutional Law,** 48–51.

JUDGMENTS. See **Jurisdiction.**

Full faith and credit to. See **Constitutional Law,** VIII.

1. Orders of state court in lunacy proceedings, finding insanity and appointing committee are not open to collateral attack because respondent is committed at the time to private asylum and does not appear, if he is served with notice, is physically able to come, and makes no effort to appear in person or through another. *Chaloner* v. *Sherman* 455

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2. Such orders are not assailable collaterally by proof that respondent was and remained citizen of another State, or was served in proceedings through being corruptly lured into first State and there illegally committed to private hospital, or that adjudication of insanity was made on perjured evidence while he was actually sane, or that sanity and competency have been established by later adjudication of court of his domicile and have since continued. *Id.*

JUDICIAL NOTICE:

1. The court judicially notices coincidence in time with Civil War of certain acts of Congress; lack of bridges over the Ohio at Cincinnati, Louisville, and points west; natural difficulties of crossing the stream; urgent need of bridge to transfer troops and supplies south; and fact that financial disturbances made it difficult to secure capital for large undertakings. *Louisville Bridge Co.* v. *United States*..... 409

2. That the Pottawatomie Tribe of Indians long ago abandoned any occupation of lands in Lake Michigan. *Williams* v. *Chicago*..... 434

JURISDICTION. See **Cause of Action; Constitutional Law; Interstate Commerce Acts; Judgment.**
For effect of administrative findings. See **Indians,** 7, 10–12; **Interstate Commerce Acts,** 1, 2, 4, 8, 9, 27, 28.
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I. **Generally.**

1. Federal judiciary has no power to refuse imposition of criminal penalties. *Ex parte United States*..... 27

2. Federal courts decide questions of commercial and general law independently but tend to adoption of state court decision in case of doubt. *Sim* v. *Edenborn*..... 131

3. An interstate carrier's liability for loss of passengers' baggage depends on agreement of parties; acts of Congress and common-law principles accepted by federal courts. *New York Central &c. R. R.* v. *Beaham*..... 148

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4. *Quære:* In determining whether royalties under mining leases are income subject to Federal Corporation Tax Act, must federal court follow court of State where property is situate holding such royalties rents and profits? *Von Baumbach* v. *Sargent Land Co* 503

5. Courts have no jurisdiction to award further damages after award of Interstate Commerce Commission is made and satisfied. *Louis. & Nash. R. R.* v. *Ohio Valley Tie Co* 288

6. Right to sue in state or federal courts for failure of carrier to supply coal cars. *Pennsylvania R. R.* v. *Sonman Coal Co* .. 120

7. Also for discriminatory departures from rule of car distribution. *Pennsylvania R. R.* v. *Stineman Coal Co* 298

8. When a carrier's rule of car distribution has been held invalid by the Interstate Commerce Commission, the question can not be revived in a court for the purpose of ousting its jurisdiction. *Id.*

9. A finding made by the Interstate Commerce Commission without basis in fact is reviewable as a conclusion of law. *United States* v. *Pennsylvania R. R* 208

II. **Jurisdiction of this court.**

(1) *Generally.*

10. May mandamus District Judge to impose criminal sentence. *Ex parte United States* 27

11. Will dismiss writ of error based on frivolous constitutional propositions. *Gasquet* v. *Lapeyre* 367

12. May not pass upon expediency or adequacy of legislation. *Merrick* v. *Halsey & Co* 568

(2) *Over Circuit Courts of Appeals.*

13. None by writ of error to judgment of Circuit Court of Appeals in case presenting neither diversity of citizenship nor federal question, taken to that court upon basis of pecuniary amount from Supreme Court of Hawaii, pursuant to Jud. Code, § 246, as amended Jan. 28, 1915. *Inter-Island Steam Nav. Co* v. *Ward* 1

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(3) *Over District Courts.*

14. May compel execution of criminal sentence by mandamus. *Ex parte United States*..... 27

15. A direct writ of error lies, under Jud. Code, § 238, to test jurisdiction of District Court over person of the defendant. *Stewart* v. *Ramsay*..... 128

16. Under Criminal Appeals Act, the right to review a judgment sustaining special plea in bar is not limited to cases in which decision is based on the invalidity or construction of statutes upon which indictment is founded. *United States* v. *Oppenheimer*..... 85

(4) *Over Supreme Court of District of Columbia.*

17. A decree of the Supreme Court of the District of Columbia refusing to adjudicate defendant a bankrupt is not directly reviewable in this court. *Swift & Co.* v. *Hoover*..... 107

18. Under § 24 of Bankruptcy Act and § 252 of Jud. Code, only controversies arising in bankruptcy proceedings, and not steps taken in the proceedings themselves, afford basis for direct appeal to this court from Supreme Court of District of Columbia. *Id.*

19. *Quære:* Whether Congress has omitted to provide for appellate review of bankruptcy adjudications of Supreme Court of District of Columbia? *Id.*

(5) *Over Judgments of State Courts.*

20. Claim that State may not subject private detectives and detective agencies to police supervision, require bond, etc., not frivolous. *Lehon* v. *Atlanta*..... 53

21. To confer jurisdiction under Jud. Code, § 237, a claim of federal right must be set up in apt time and way under state procedure. *Atlantic Coast Line R. R.* v. *Mims*..... 532

22. On whether this was done, state court's decision is binding, if it is not evasive. *Id.*
See also *O'Neil* v. *Irrigation Co*..... 20

23. Whether proceedings to forfeit a land contract for default are governed by law of the *situs* or law of the place of making and performance is question of local common law with which

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this court is not concerned in a case coming from a state tribunal. *Kryger* v. *Wilson* 171

24. When state law is said to impair a contract, this court determines, upon its independent judgment, the existence of contract, the obligations under it, and whether the latter are impaired by operation of subsequent law. *Detroit United Railway* v. *Michigan* 238
See *Long Sault Development Co.* v. *Call* 272
Seton Hall College v. *South Orange* 100

25. When highest state court has refused to exercise discretion to review judgment of intermediate appellate tribunal, it is to the latter that writ of error under Jud. Code, § 237, should be directed. *Second National Bank* v. *First National Bank* .. 600

26. Ohio Court of Appeals affirmed judgment of Superior Court of Cincinnati, upon record coming from latter, and ordered that court " to carry this judgment into effect," without directing it to enter any judgment of its own. *Held*, that writ of error under § 237 should have been directed to Court of Appeals and not to Superior Court. *Id.*

27. In criminal case tried in District Court of Territory and coming here by way of Supreme Court of State into which Territory was afterwards converted, defenses based on Fifth and Sixth Amendments (in part not raised until case reached the latter court) are within this court's jurisdiction to consider. *Lovato* v. *New Mexico* 199

(6) *Over Judgment of Territorial Courts.* See 13 and 27, *supra.*

III. **Jurisdiction of District Court.**

28. None to refuse to impose sentence on proper verdict of guilty. *Ex parte United States* 27

29. Has discretionary power over sentences consistent with due enforcement of penal laws as enacted by Congress. *Id.*

30. Sitting in one State cannot acquire personal jurisdiction over citizen and resident of another through process served upon him while in attendance as plaintiff and witness. *Stewart* v. *Ramsay* 128

31. Suits to enforce claims on assets of bankrupt estate may be brought in the court of administration only. *Knauth, Nachod & Kuhne* v. *Latham & Co* 426

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IV. **Jurisdiction of Court of Private Land Claims.**

32. Derived wholly from Act of Mar. 3, 1891, which created it. *La Joya Grant* v. *Belen Land Grant* 595

33. The court has no jurisdiction even by consent of parties to extend survey and decree over grant previously confirmed by Congress and patented. *Id.*

JURY. See **Instructions to Jury; Constitutional Law,** 49–52.

1. Whether a car movement is for a purpose of interstate commerce may be question for jury, and party may waive benefits of Federal Employers' Liability Act by neglecting to have it so determined. *Louis. & Nash. R. R.* v. *Parker* ... 13

2. Whether safety appliances comply with act of Congress may be question for jury. *Atlantic City R. R.* v. *Parker* 56

LAND CLAIMS, Private.

See **Jurisdiction,** IV.

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LEASE:

Mining leases on royalty basis considered. *Von Baumbach* v. *Sargent Land Co* 503

LICENSE. See **Constitutional Law,** 28, 32, 37, 66, 71, 75–80, 87–91; **Franchise.**

LIEN. See **Bankruptcy Act,** 5–7; **Contracts,** 3; **Garnishment.**

LIMITATIONS. See **Criminal Law,** 6–8.

On action to establish water priority in Colorado. *O'Neil* v. *Irrigation Co.* 20

LIVE STOCK:

Uniform contract conditioning carrier's liability for loss. See **Carriers,** 4.

LUNACY PROCEEDINGS:

Due process in and collateral attack upon. *Chaloner* v. *Sherman* 455

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1. Proper remedy to enforce imposition of sentence by District Judge. *Ex parte United States*..... 27

2. Should be directed to judge, not clerk. *Id.*

MEDICINE:

Regulation of practice. See *Crane* v. *Johnson*..... 339
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MINES. See **Corporation Tax Act.**

On nature of "mining leases." *Von Baumbach* v. *Sargent Land Co*..... 503

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In report by carrier. See **Interstate Commerce Acts,** 33.

MOOT CASES. See **Practice and Procedure,** VI.

MORTGAGE. Fraudulent. See **Bankruptcy Act,** 5–7.

MOTION TO QUASH. See **Criminal Law,** 6.

MUNICIPALITIES. See **City Ordinances.**

Ordinances regulating street car fares. *Detroit United Ry.* v. *Michigan*..... 238
Granting license for railway spur. *Seaboard Air Line Ry.* v. *Raleigh*..... 15
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NATIONAL BANKS:

1. Are shares "interest bearing securities"? *Williams* v. *Cobb*..... 307

2. Shares non-assessable against decedent's estate when executor, though without authority, has transferred them to himself as trustee. *Id.*

NATURALIZATION ACT:

Clerk may not charge fees against United States for making copies of declarations of intention and attaching seals at direction of Bureau. *Cross* v. *United States*..... 4

NEGLIGENCE. See **Employers' Liability Act,** 7, 12. PAGE

NONRESIDENTS. See **Constitutional Law,** 78, 79, 82, 85, 91; **Service of Process.**

NOTICE. See **Constitutional Law,** XI; **Judicial Notice.**
Of interstate tariffs. See **Interstate Commerce Acts,** 15.

" OPTOMETRISTS."
State regulation of. See *McNaughton* v. *Johnson* 344

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OWNERSHIP.
Joint, of terminal facilities. *Louis. & Nash. R. R.* v. *United States* 60

PAIN AND SUFFERING. See **Employers' Liability Act,** 13.

PARDONING POWER. See **Constitutional Law,** 16.

PAROL LAWS:
Congress may adopt. *Ex parte United States* 27

PARTNERS:
Individually responsible for torts committed by firm while acting within general scope of business, whether they personally participate therein or not. *McIntyre* v. *Kavanaugh* .. 138

PASSENGERS. See **Constitutional Law,** 30.

PATENTS FOR INDIAN ALLOTMENTS. See **Indians,** 10.

PATENTS FOR INVENTIONS:
1. The rule giving conclusive effect to finding by judge who saw the witnesses where finding depends on conflicting testimony or credibility, is peculiarly applicable in case wherein patent is assailed by oral evidence of alleged unpatented anticipation. *Adamson* v. *Gilliland* 350

2. One who opposes patent by oral evidence of prior discovery must prove his case beyond reasonable doubt. *Id.*

3. When defendant retains junior patent under which he has infringed, denies plaintiff's rights under senior patent and

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otherwise manifests hostility, fact that he has suspended business before suit does not debar relief by injunction and accounting against him. *Goshen Mfg. Co.* v. *Myers Mfg. Co* .. 202

4. Patent sustained over prior art for process extracting mineral by admixture of oil and water with ore pulp and special agitation, causing air bubbles which attach to metallic particles and buoy them to surface. *Minerals Separation* v. *Hyde*..... 261

5. Persuasive evidence of invention that process came immediately into general use and largely replaced all earlier like processes without aid of puffing or business exploitation. *Id.*

6. Those who plan experiments and direct and control investigation are not to be denied benefit of resulting discovery because made immediately by employee. *Id.*

7. Particularity and certainty of disclosure required is not greater than reasonable, having regard to the subject-matter. *Id.*

8. Any variation from process disclosed in patent must come within claims to constitute infringement. *Id.*

PERSONAL INJURIES. See **Employers' Liability Act; Safety Appliance Act.**

PLEA IN BAR. See **Criminal Law,** 6–8.

PLEADING. See **Criminal Law,** 6.

1. Where there is enough in pleadings to present issue of fraud, and issue is fully tried and variance only claimed on appeal, decree based on fraud will not be disturbed. *Dean* v. *Davis*..... 438

2. To fix trust on specific personal property on ground that it represents money procured by fraud, bill must trace money into property by apt, specific averments. *Knauth, Nachod & Kuhne* v. *Latham & Co*..... 426

PLEDGOR AND PLEDGEE. See **Bankruptcy Act,** 4.

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PRACTICE AND PROCEDURE. See **Cause of Action; Constitutional Law; Jurisdiction.**

I. **Affirmance by State Court.**

1. Judgment of trial court should not be affirmed on new ground in such manner as to deprive party of opportunity to introduce evidence supporting claim of federal right. *New York Central &c. R. R.* v. *Beaham* 148

II. **Saving Points in Trial Court.**

2. On conflicting evidence, the purpose of a car movement is for jury, and benefits of Federal Employers' Liability Act may be waived if party does not ask to have it so determined. *Louis. & Nash. R. R.* v. *Parker* 13

3. To gain benefits of that act, party must claim them in proper time and way under state procedure. *Atlantic Coast Line R. R.* v. *Mims* 532

4. A party who insists on application of Federal Employers' Liability Act in state court can not urge the ruling in his favor as ground for reversal by this court. *Minneapolis & St. Louis R. R.* v. *Winters* 353

5. A decree avoiding mortgage as fraudulent will not be disturbed upon ground that it exceeds pleadings where bill, though attacking the transfer mainly as unlawful preference, contains enough with answer to present issue of fraud, where that issue was fully tried, and question of variance is first raised in this court. *Dean* v. *Davis* 438

III. **Scope of Review.**

6. Although an error not challenged in state court may not be relied on here as a ground of reversal, it is proper for this court to point it out in anticipation of a possible new trial. *Great Northern Ry.* v. *Capital Trust Co* 144

7. Where state court erroneously assumes Federal Employers' Liability Act applicable to case this court will not pass on questions of negligence and assumption of risk. *Minneapolis & St. Louis R. R.* v. *Winters* 353

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8. In such case it will simply affirm judgment if party complaining induced state court to apply federal act. *Id.*

9. In passing on validity of state statute, this court looks to its application to the particular case and will not anticipate construction which may never be given by highest court of State. *Chicago &c. Ry.* v. *Anderson* 283

IV. **Following State Construction.**

10. Although on a question of commercial law or general jurisprudence federal courts exercise their own judgment, they nevertheless lean toward agreement with state courts where question is balanced with doubt. *Sim* v. *Edenborn* 131

11. In determining whether there is a contract impaired by subsequent legislation, this court, though exercising right of independent examination, accords much consideration and respect to decision of state court construing state statutes involved. *Seton Hall College* v. *South Orange* 100
Long Sault Development Co. v. *Call* 272
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State construction accepted in testing constitutionality of state laws, and harmful constructions not anticipated. See **Constitutional Law**, II, III; **Jurisdiction**, II, (5).

V. **Findings of Fact.**

12. Conclusive effect of finding by judge who heard witnesses. *Adamson* v. *Gilliland*. 350

13. In absence of clear error, this court will not disturb concurrent findings of state courts upon mere sufficiency of evidence concerning negligence and assumption of risk in case under Employers' Liability Act. *Balt. & Ohio R. R.* v. *Whitacre* 169

14. So as to finding that evidence of employment in interstate commerce was insufficient to go to jury. *Erie R. R.* v. *Welsh*. 303

15. Finding of District Court and Circuit Court of Appeals that parties to mortgage intended to defraud creditors in sense of Bankruptcy Act—followed. *Dean* v. *Davis* 438

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VI. **Disposition of Moot Cases.**

16. Where agreements of domestic and foreign ship-owners, assailed under Anti-trust Act, were made moot by European War after suit begun, this court reversed, with direction to dismiss without prejudice. *United States* v. *American-Asiatic S. S. Co.* 537

17. Where a suit to enjoin action under a state law became moot because of later state legislation, decree of injunction was reversed, with direction to dismiss. *Berry* v. *Davis* 468

VII. **Certiorari.**

18. Writs of certiorari are subject to dismissal whenever court discovers they were granted under misapprehension. *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn* 430

19. Duty of counsel on both sides to make plain the real situation. *Id.*

20. Petitions should be accurate, brief, clear, with proper references to record. *Id.*

VIII. **Mandamus.**

21. Mandamus, out of this court, is proper remedy for enforcing criminal sentence where District Court has defeated its execution by *ultra vires* order of suspension. *Ex parte United States* 27

22. The proceeding should be directed to District Judge, with view to annulment of order of suspension; not to clerk with view to issuance of commitment in spite of it. *Id.*

23. To meet ends of justice writ may be withheld till end of term. *Id.*

IX. **Prohibition.**

24. In prohibition to prevent enforcement of order of District Court alleged to be void, District Judge is respondent and parties interested in enforcing order can not be substituted. *Ex parte Indiana Transportation Co* 281

X. **Advancing and Postponing Causes.**

25. Where decision in suit between State and individual would result practically in disposing of boundary suit between that

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State and another State, the court reassigned former case for hearing with latter and made provision for advancing both or taking them on submission. *Cissna* v. *Tennessee* 195

26. Under Rule 19, after case has been called and continued at previous term, consent of counsel will not suffice as ground for second continuance. *Hart Steel Co.* v. *Railroad Supply Co.* 609

PREFERENCE. See **Bankruptcy Act, 5.**

PRESUMPTION:

1. That interstate carrier is transacting its business rightfully. *New York Central &c. R. R.* v. *Beaham* 148

2. Shippers presumed to know provisions of tariffs filed with Interstate Commerce Commission governing their shipments. *Western Transit Co.* v. *Leslie & Co* 448

3. In deciding constitutionality of state statute reposing in executive officer supervision over private business, presumed the officer will act not arbitrarily but according to duty. *Hall* v. *Geiger-Jones Co* 539

4. Contract under which gas company purchased its gas may be presumed in absence of other proof to measure company's expense for gas, in testing whether consumers' rate fixed by ordinance is reasonable, although the contract expired during trial. *Newark Natural Gas Co.* v. *Newark*..... 405

5. In action on award of Interstate Commerce Commission, fact that evidence before Commission is not all before court will not necessarily justify presumption that award was justified by facts. *Pennsylvania R. R.* v. *Jacoby & Co* 89

PRINCIPAL AND AGENT. See **Partners; Indians, 8; Trusts, 3.**

PRIVATE LAND CLAIMS. See **Jurisdiction, IV.**

PRIVILEGE:

Of nonresident party to action from service of summons while in jurisdiction. *Stewart* v. *Ramsay* 128

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RATES:
Gas rates, fixed by ordinance. See **Constitutional Law,** 69; **Presumption,** 4.
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RETROACTIVE LAWS:
By judicial construction. See **Constitutional Law,** 62.

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Effect of unexpected construction of state statute. See **Constitutional Law,** 63.

SAFETY APPLIANCE ACT:
1. When couplers fail to couple automatically on straight track because of lateral play of drawheads, jury may properly infer such a degree of play unnecessary and violative of Safety Appliance Act, in absence of satisfactory explanation. *Atlantic City R. R.* v. *Parker* 57

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2. The case is not different where failure to couple occurs on a curve if effect of curvature may have been negligible. *Id.*

3. Section 2 of supplementary Act of Apr. 14, 1910, requiring carriers to equip cars with secure running-boards, ladders, and hand-holds or grab-irons, became effective July 1, 1911. *Illinois Central R. R.* v. *Williams* 462

4. Purpose of § 3 is to standardize appliances required by § 2, and purpose of the proviso is to confer authority on Interstate Commerce Commission to extend time within which carriers may conform to established standards, but it does not authorize Commission to change date upon which § 2 became effective. *Id.*

SAVINGS BANKS:

Garnishment of deposits holds subsequently accruing dividends. *Savings Bank of Danbury* v. *Loewe* 357

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On power of federal courts over. *Ex parte United States* 27

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Privilege of nonresident party to action from service while in jurisdiction attending trial. *Stewart* v. *Ramsay* 128
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STATUTES:

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Commerce Acts; Naturalization Act; Safety Appliance Act; White Slave Traffic Act.

Enjoining execution. See **Injunction**, 2, 3.

I. **Principles of Construction.**

1. When the language is plain and does not lead to absurd results no construction allowable and courts must enforce. *Caminetti* v. *United States*..... 470

2. Common meaning of statutory words accepted unless contrary reason appears. *Id.*

3. Plain meaning of statute not to be overriden by a name by which, it provides, it shall be known. *Id.*

4. In construing a penal provision, the court will be slow to attribute to Congress intention to exact punishment which the Government itself has conceded would be greatly disproportionate to offense. *United States* v. *Northern Pacific Ry*.. 190

5. Statutes should be construed, if possible, so that their requirements shall be apparent in their own terms rather than dependent upon discretion of executive officers. *Id.*

6. A grantee of a franchise can not be compelled to suffer the ills of a strict construction in one aspect without being allowed the benefits necessarily flowing from strict construction in other aspects. *Detroit United Ry.* v. *Michigan*..... 238

7. Rule of strict construction applies peculiarly where franchises are set up as limitation on federal power over commerce. *Louisville Bridge Co.* v. *United States*..... 409

8. In construing federal grants of bridge franchises, Congress will be presumed to have intended to preserve its power to make future adjustments to fit commercial development. *Id.*

9. Statutory tax exemptions strictly construed. *Seton Hall College* v. *South Orange*..... 100

10. The meaning which this court had attributed to the words "any other immoral purpose" as used in the act concerning importation of alien women, Feb. 20, 1907, Congress must be presumed to have known when it employed the same words in a similar association in the White Slave Traffic Act. *Caminetti* v. *United States*..... 470

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11. The reports of congressional committees may be resorted to by courts when legislation to which they relate is doubtful and requires interpretation. *Id.*

12. In construing Interstate Commerce Acts, much weight attached to construction early placed by Commission on Act of 1887 and to explanation made to Congress by Commission concerning occasion and scope of Act of 1906, which, in part, it drafted. *United States* v. *Pennsylvania R. R* 208

13. The Commission having in part drafted and recommended the Interstate Commerce Act of 1906, the court feels justified in presuming that Congress by those parts did not intend to exceed the recommendation. *Id.*

14. The absence of express reservation of right to alter or repeal has not the same significance in acts of Congress as in state legislation. *Louisville Bridge Co.* v. *United States*..... 409

15. State laws may be tested constitutionally on the constructions placed upon them by the state court. *Chaloner* v. *Sherman*. 455

See **Constitutional Law, III.**

II. **Particular Statutes and Ordinances.**

16. The general bridge act of Mar. 3, 1899, repealed or modified Acts of 1862 and 1865 under which the Louisville Bridge was constructed. *Louisville Bridge Co.* v. *United States*..... 409

17. The franchises granted Louisville Bridge Company by Acts of 1862 and 1865 held subject to changes requiring alterations of bridge without compensation. *Id.*

18. The " Webb-Kenyon Act " of Mar. 1, 1913, was intended to give effect to state laws prohibiting introduction of intoxicating liquors for personal use and forbids interstate shipments violating such prohibitions. *Clark Distilling Co.* v. *Western Maryland Ry*..... 311

19. Ordinances of Detroit requiring street railway to carry passengers at reduced rates " over any of its lines in said city " and " over the entire route of said company," *held*, not intended to include prospectively lines which company might afterwards own within subsequent additions to city. *Detroit United Ry.* v. *Michigan*..... 238

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20. A special act of New Jersey granting tax exemption to a college, *held*, subject to power of repeal reserved by legislature in prior general act. *Seton Hall College* v. *South Orange* 100

21. West Virginia prohibition law of February, 1913, as amended, prohibits bringing into State by carriers of intoxicating liquors intended for personal use and receipt and possession of such liquors, so introduced, for personal use. *Clark Distilling Co.* v. *Western Maryland Ry* 311

22. West Virginia Act of 1881, in declaring that " railroads " shall be public highways " free to all persons for the transportation of their persons and property," embraces branch line constructed and operated under it, and imposes on carrier with respect to such line continuing franchise obligation to transport passengers as well as freight. *Ches. & Ohio Ry.* v. *Public Service Comm* 603

23. Section 3 of Michigan " Blue Sky " Law, which exempts securities " listed in any standard manual of information " approved by the securities commission, *held*, not to render the act unduly discriminatory or involve unlawful delegation of power. *Merrick* v. *Halsey & Co.* 568

24. The act complies with the requirement of the Michigan constitution that no law shall embrace more than one object, which shall be expressed in its title. *Id.*

25. Its purpose is to protect investors in securities not from financial loss generally but from fraud. *Id.*

26. By Indiana Railway Law of May 11, 1852, railroads constructed under it are under continuing obligation, at their own expense, to accommodate their roads and bridges to drainage canals, etc., made under the Drainage Law of Mar. 11, 1907. *Lake Shore &c. Ry.* v. *Clough* 375

STOCKS:

Right of State to regulate floating of and dealing in securities. See **Constitutional Law**, 32, 33, 64–66.

STREET RAILROADS:

Protection of franchise right to fares against impairment by later law. *Detroit United Ry.* v. *Michigan* 238

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Court of Private Land Claims without jurisdiction to extend survey over claim previously confirmed by Congress and surveyed and patented. *La Joya Grant* v. *Belen Land Grant*.. 595

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Burdening interstate commerce. See **Constitutional Law,** 29.

1. Power of State to impose fees for maintenance of roads used by resident and nonresident automobile owners. *Kane* v. *New Jersey*..... 160

2. State may tax foreign corporations for privilege of doing business at different rate than that which she applies to her own corporations in taxing franchises by which she creates them. *Kansas City &c. R. R.* v. *Stiles*..... 111

3. While State may not tax property beyond her borders, she may measure a franchise tax within her authority by capital stock which stands in part for property beyond her taxing power. *Id.*

4. Exemption from taxation must be shown in language not otherwise reasonably construed, and all doubts must be resolved in favor of State. *Seton Hall College* v. *South Orange*.. 100

TERMINAL FACILITIES:

Of railroads. What amounts to joint ownership of. *Louis. & Nash. R. R.* v. *United States*..... 60

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TRUSTS:

1. Section 2091, Wisconsin Stats., 1913, providing that conveyances made by trustees in contravention of express trusts

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shall be absolutely void, does not apply to personal property. *Williams* v. *Cobb*..... 307

See **Executors and Administrators.**

2. A bill seeking to impress trust upon personal property of bankrupt's estate, claimed to represent moneys procured by fraud, must trace such moneys by adequate averments into specific property sought to be affected. *Knauth, Nachod & Kuhne* v. *Latham & Co*..... 426

3. It is constructive fraud for member of "syndicate," formed to buy up shares of a corporation, when acting for other members in the purchase, secretly to turn in shares of his own, applying them on his subscription to the "syndicate." *Sim* v. *Edenborn*..... 131

UNIFORMITY:

A regulation is uniform which applies uniformly to the conditions which call it into play. *Clark Distilling Co.* v. *Western Maryland Ry*..... 311

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Nature of statutory proceedings conditioning right to terminate contract on default. *Kryger* v. *Wilson*..... 171

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WATER RIGHTS:

Under laws of Colorado a suit by a claimant of water right in one water district to contest priority defined by general adjudication in another, is barred if not brought within four years from rendition of decree. *O'Neil* v. *Irrigation Co.* 20

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