STATES

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UNITED STATES REPORTS

VOLUME 247

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1917

FROM MAY 6, 1918, TO JUNE 10, 1918

ERNEST KNAEBEL

REPORTER

THE BANKS LAW PUBLISHING CO.
NEW YORK
1918

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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.

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.

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 241 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1917.

SHEPARD ET AL. *v.* BARKLEY, MODERATOR OF THE GENERAL ASSEMBLY AND CHAIRMAN OF THE EXECUTIVE COMMISSION OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, ET AL.

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

No. 257. Argued April 23, 1918.—Decided May 6, 1918.

Decided on the authority of *Watson* v. *Jones*, 13 Wall. 679.
222 Fed. Rep. 669, affirmed.

Mr. Charles E. Morrow, with whom *Mr. Max D. Aber* was on the briefs, for appellants.

Mr. Frank Hagerman for appellees.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

The court is of the opinion that the following propositions are well founded, although some members of the

court differ concerning them: (a) That the appeal in this case brings up for review both the causes which were decided by the court below at the same time and both therefore will be controlled by the decree here to be rendered. (b) That the order allowing an amendment as to the form of the appeal and the parties which was previously made without prejudice to the right of the appellees to object to the same at the hearing on the merits was rightfully granted and the objection which was at the hearing on the merits made by the appellees is without merit. (c) That under the case as made by the pleadings there is authority to review.

The approach to the merits being thus cleared, without any difference on the subject the court is of opinion that the doctrines by which the case is controlled have been so affirmatively and conclusively settled by a prior decision of this court as to cause it to be unnecessary as a matter of original consideration to restate them. *Watson* v. *Jones*, 13 Wall. 679. And the want of any possible reason for removing this case from the control of the doctrines of the *Watson Case* is, if needs be, conclusively shown by the many cases referred to by the court below in its opinion (222 Fed. Rep. 669) in which the *Watson Case* was made controlling and decisive as to controversies not in substance differing from the one here presented. *Sherard* v. *Walton*, 206 Fed. Rep. 562; *Helm* v. *Zarecor*, 213 Fed. Rep. 648; *Sharp* v. *Bonham*, 213 Fed. Rep. 660; *Harris* v. *Cosby*, 173 Alabama, 81; *Sanders* v. *Baggerly*, 96 Arkansas, 117; *Permanent Committee of Missions* v. *Pacific Synod*, 157 California, 105; *Mack* v. *Kime*, 129 Georgia, 1; *First Presbyterian Church of Lincoln* v. *First Cumberland Presbyterian Church of Lincoln*, 245 Illinois, 74; *Fussell* v. *Hail*, 233 Illinois, 73; *Fancy Prairie Church* v. *King*, 245 Illinois, 120; *Pleasant Grove Congregation* v. *Riley*, 248 Illinois, 604; *Ramsey* v. *Hicks*, 174 Indiana, 428; *Bentle* v. *Ulay*, 175 Indiana, 494; *Wallace* v. *Hughes*,

131 Kentucky, 445; *Carothers* v. *Mosely*, 99 Mississippi, 671; *Hayes* v. *Manning*, 263 Missouri, 1; *Missouri Valley College* v. *Guthrie*, 263 Missouri, 52; *First Presbyterian Church* v. *Cumberland Presbyterian Church*, 34 Oklahoma, 503; *Brown* v. *Clark*, 102 Texas, 323.

Affirmed.

COX *v.* WOOD, COMMANDANT OF CAMP FUNSTON, IN THE STATE OF KANSAS.

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

No. 833. Argued April 17, 18, 1918.—Decided May 6, 1918.

Congress may conscript for military duty in a foreign country; the militia clause is not a limitation upon the war power. *Selective Draft Law Cases*, 245 U. S. 366, followed.

Passages in appellant's brief are found scandalous and impertinent, but it is deemed unnecessary to strike them from the files.

Affirmed.

THE case is stated in the opinion.

Mr. Hannis Taylor, with whom *Mr. Joseph E. Black* was on the briefs, for appellant.

The Solicitor General for appellee.

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

The appellant, conformably to the Selective Draft Law of May 18, 1917, c. 15, 40 Stat. 76, was called to compulsory military duty and in December, 1917, was en-

gaged in performing it at Camp Funston, Kansas. On the third of that month he petitioned for a writ of habeas corpus to be directed to the general commanding the camp to discharge him from further service. The ground of the petition was that, although Congress had the power to call the citizens of the United States, the national militia, to compulsory service in virtue of the militia clause of the Constitution (Article I, § 8), that power was limited to the character of services specified in the militia clause, viz: "To execute the laws of the Union, suppress insurrections and repel invasions." Further alleging that it had been officially declared that the call to service for which the draft had been made under the act was avowedly for the purpose of military duty in a foreign country, it was charged that the call was illegal and the right to the writ existed. Before the allowance of a rule on the petition, through the United States district attorney, the general who was named as respondent in the petition moved to dismiss because the facts alleged constituted no ground for the relief which was prayed and hence, as a return stating such facts would require a discharge of the rule for habeas corpus if issued, none should be ordered. On the 20th of December the matter was submitted by consent of the United States district attorney and the petitioner to the court for its action upon the petition and the motion to dismiss. On the 4th of January, 1918, the court sustained the motion of the district attorney and dismissed the petition. In the opinion by which this conclusion was sustained it was pointed out, conformably to the statement which we have made concerning the petition, that the "petitioner, after affirming the validity of said Conscription Act of May 18, 1917, pleads what he calls his constitutional immunity from military service beyond the territorial limits of the United States. Such claim of constitutional immunity rests upon the contention that no conscription act can be

passed except under that part of § 8, Art. I, of the Constitution, which provides that 'The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions'. . . ." On the day the judgment was rendered, January 4th, an appeal to this court was prayed and allowed, the assignments of error then made for that purpose reasserting the want of power in Congress to require a citizen to render compulsory military service beyond the territorial limits of the United States.

When on December 3rd the petition was filed in the lower court, various cases calling in question the constitutionality of the Selective Draft Law of May 18, 1917, were on the docket of this court and approaching hearing; and they were argued here on December 13th and 14th, before the decision below was rendered, January 4th, sustaining the motion to dismiss. Before that argument, however, at the request of counsel for the present appellant, permission was given to file a brief in those cases as a friend of the court and such brief was filed and considered in passing upon the cases which were decided on January 7th, 1918. *Selective Draft Law Cases*, 245 U. S. 366.

Coming to consider the elaborate contentions and arguments supporting them made in the present case, it is indisputable that they all rest upon the assumption as to the exclusive character of the delegation made to Congress by the militia clause (Article I, § 8) and the restriction, as to the use of the military force raised under such delegation, resulting from the provisions in the clause relied upon, that is, the prohibition of compulsory service beyond the territorial limits of the United States. But we are of opinion that we are not now called upon to consider these contentions as a matter of original inquiry, because the fundamental mistake upon which all the

arguments rest, and the error in the conclusion which they are advanced to sustain, were pointed out and conclusively established by the decision sustaining the Selective Draft Law recently announced in the *Selective Draft Law Cases*, 245 U. S. 366. This result is apparent since on the face of the opinion delivered in those cases the constitutional power of Congress to compel the military service which the assailed law commanded was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution. Our duty to affirm is therefore made clear.

But before so ordering, we must notice a suggestion made by the Government that, because of impertinent and scandalous passages contained in the brief of the appellant, the brief should be stricken from the files. Considering the passages referred to and making every allowance for intensity of zeal and an extreme of earnestness on the part of counsel, we are nevertheless constrained to the conclusion that the passages justify the terms of censure by which they are characterized in the

suggestion made by the Government. But despite this conclusion, which we regretfully reach, we see no useful purpose to be subserved by granting the motion to strike. On the contrary, we think the passages on their face are so obviously intemperate and so patently unwarranted that if, as a result of permitting the passages to remain on the files, they should come under future observation, they would but serve to indicate to what intemperance of statement an absence of self-restraint or forgetfulness of decorum will lead, and would therefore admonish of the duty to be sedulous to obey and respect the limitations which an adhesion to them must exact.

Affirmed.

PERLMAN *v.* UNITED STATES.

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

No. 752. Argued April 18, 1918.—Decided May 6, 1918.

An order of the District Court allowing the District Attorney's application for the custody of documentary and other exhibits, to be used in criminal proceedings against a witness in a private suit in which they were used and impounded, and overruling the witness' objection based on grounds of constitutional privilege and his prayer to have them restored to him as his property, is a final order, and the right of the objecting party to appeal therefrom is unaffected by his lack of interest in the suit in which the exhibits were impounded.

One who voluntarily and to subserve his own interest has produced papers, models, etc., owned by him, as part of his testimony in an equity suit, in which they are impounded as exhibits, is not subjected to an unreasonable seizure, or made to bear witness against himself, within the meaning of the Fourth and Fifth Amendments, by the delivery of such exhibits to the District Attorney and their use as

evidence in a prosecution of such owner for perjury alleged to have been committed in his testimony.

244 Fed. Rep. 304, affirmed.

APPEAL and error to review an order denying petition of Perlman to restrain and enjoin the United States attorney for the Southern District of New York from taking into his possession or custody certain exhibits which had been impounded and deposited by order of the district court for that district with the clerk of the court.

In support of the relief prayed Perlman alleges the following facts, which we state narratively: He is the inventor of a device known in the market as a demountable rim, its purpose being to mount and carry an inflated pneumatic tire upon a metallic rim, which contains locking devices for attachment to the wheels of automobiles and other vehicles.

He brought suit for infringement against the Standard Welding Company, and, issue being joined, there was a judgment for him against the company, which was affirmed by the Court of Appeals. 231 Fed. Rep. 453; *Id.* 734. At the trial of the cause certain exhibits hereinafter referred to were offered by him which were and are his personal property and have been continuously in his possession or in the possession of those who represent him.

Subsequently he, with others, formed a corporation known as the Perlman Rim Corporation, which, among other things, undertook to market the patented device.

In March, 1916, he assigned the letters patent to the corporation, but not the exhibits above mentioned.

In February, 1917, the corporation, being advised that the Firestone Tire & Rubber Company was infringing the device, brought suit against the company for infringement, which came up for trial before Judge Hand. After final submission of the case, the plaintiff, the Perlman Rim Corporation, through its counsel, asked leave to discontinue the action and for its dismissal without prejudice.

The motion was granted, but the condition was imposed that the evidence be perpetuated and the exhibits impounded in the custody of the clerk, to be kept under seal subject to the order of the court.[1] The exhibits were part of those heretofore referred to and used on the trial before Judge Hunt.

July 17, 1917, Perlman ascertained from the attorney for the corporation that the attorney had been served with a copy of an order signed by Judge Hand directing him, the attorney for the corporation, and the attorney for the Firestone Company to appear and show cause why the United States attorney should not have and be given possession of the exhibits, as the United States attorney had instituted proceedings against Perlman which involved the question whether he had committed an offense against the United States. The attorney for the corporation also told Perlman that he had not opposed the motion and that the attorney for the Firestone Company had not appeared; that, therefore, the order would be entered as a matter of course.

The application of the United States attorney was based

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[1] "This cause having come on to be heard and testimony having been taken by both parties, now, on plantiff's motion, and after hearing defendant's counsel in opposition thereto, it is

"Ordered, that the bill of complaint herein be and it hereby is dismissed without prejudice with costs to defendant to be taxed; and as a condition of such dismissal and in accordance with plaintiff's stipulation made in open court, it is

"Further ordered, that the minutes of the trial be filed and that all the exhibits offered by either party be impounded and deposited with the clerk of this court under seal to be opened only by order of court on notice to each of the parties hereto; and

"That, all testimony taken up to the present time in this cause (as well as the exhibits) shall stand as testimony which may be read and used in any cause between the parties hereto or between any other parties who would be privies if judgment were entered herein, including cases in which the vendees and users of the rims made or sold by the defendant or such other parties are sued."

on an affidavit of one Harold Harper, an assistant to the United States attorney, which charged, among other things, that the exhibits were material and necessary in an investigation pending before the grand jury and for preparation for trial in case an indictment should be found.

The exhibits are his, Perlman's, personal property and the use of them by the grand jury and the United States attorney as contemplated would be in violation of his rights and unwarranted in law; they were impounded in a suit to which he was not a party, but a witness, and he had not consented thereto or been heard by counsel.

He prayed for an order upon all the parties concerned to show cause why an order should not be made directing the clerk to deliver to him, Perlman, the exhibits and that the United States attorney be restrained from using them, averring that, unless such stay were granted, his rights would be seriously invaded and he would be compelled to furnish evidence against himself in a criminal proceeding, all without due process of law.

A schedule of the exhibits is attached to the petition and shows them to be not only matters in writing, such as bills, letters and checks, but models of wheels, rim-carrying tires, and of other implements and tools, and the patent upon which the suit was brought.

Before the filing of the petition an order had been granted upon motion of the United States attorney directing the clerk to produce the exhibits before the grand jury. The order further directed that the United States attorney have access to the exhibits at all reasonable times and that if an indictment should be found against Perlman the United States attorney might have such temporary custody of the exhibits or any part thereof as might be necessary for the purpose, under such regulations as the clerk might make.

Upon the filing of Perlman's petition an order was granted restraining the use of the exhibits until the hear-

ing of the petition. Subsequently, upon the hearing, and Perlman having withdrawn so much of his application as related to the return of the exhibits to him, the court, Judge Manton sitting, denied the relief prayed for against the use of the exhibits by the United States attorney or their presentation to the United States grand jury.

The order recited that it was made upon the order of Judge Hand, the petition of Perlman and the affidavit of Harper.

The affidavit gives some details that Perlman's petition does not. It states that Perlman testified that he had been president of the Perlman Rim Corporation since its formation, and, further, that he gave testimony in respect to the alleged invention which was the subject of the patent, and that, in the course of his testimony, he produced and offered in evidence on the part of the corporation the exhibits. And the affidavit states that the impounding of the exhibits was part of the decree in the suit against the Firestone Company and that Perlman was present at the time and during practically all of the proceedings of the trial and that the minutes of the court show no protest by him.

It further states that certain of the alleged perjuries committed by Perlman referred directly to the exhibits, as to the time and manner of their production or alteration; and that certain other statements alleged to have been perjured were made by him and supported by the exhibits. And further that in the course of his cross-examination Perlman gave certain evidence with regard to events in England in the year 1895 which did not directly concern the matter of invention but went to the credibility of the witness as such, and in respect to those statements an indictment had been found against Perlman by the grand jury attending the court for the July, 1917, term.

The sources of information of Harper as to the above

matters not within his own knowledge were stated to be the official stenographic report of the trial, the records of the clerk's office, and statements made to him by persons who had been present in the court room during the trial and were cognizant of the proceedings.

Mr. Louis Marshall, with whom *Mr. A. A. Silberberg* was on the briefs, for appellant and plaintiff in error.

Mr. Assistant Attorney General Fitts for the United States.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

The United States makes a motion to dismiss on the following grounds:

"1. Appellant has no interest in the subject matter of and is not a party to the equity suit out of which the appeal arises;

"2. The order of the District Court if considered as a part of the criminal proceeding is not final, but merely interlocutory, and therefore not reviewable by this court."

We think the motion should be overruled. Referring to the impounding order it will be seen that the Government was not one of those for whom the use of the exhibits was reserved. It, therefore, had no rights under the order. Its rights—or, it is more accurate to say, its powers—were of different origin, were governmental, and would affect Perlman by their exercise. We think, therefore, that he could intervene to oppose and urge in opposition property and constitutional rights and their sanctions. His petition was in effect independent and did not lose its character by being entitled in the equity suit.

The second contention of the Government is somewhat

strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

On the merits the case is rather unique. Perlman contends that the proposed use by the United States before the grand jury of the exhibits as a basis for an indictment against him constitutes an unreasonable seizure and makes of him a compulsory witness against himself, in violation of the Fourth and Fifth Amendments. In other words, he claims the same sanctuary for the exhibits in the hands of the court as though they were in his hands and had never been published or delivered to the world. For this he invokes certain principles and cases. The principles are well established. They are paraphrases of the Constitution, giving it in cases a more precise specialization. They preclude, of course, compulsion, either upon the individual or, under some circumstances, his property; nor is it a condition or part of compulsion that there be an actual entry upon premises, an actual search and seizure. The principles preclude as well the extortion of testimony or detrimental inferences from silence or refusals to testify.

The incidences of the cases in which the principles were declared do not help Perlman. In all of them there was force or threats or trespass upon property, some invasion of privacy or governmental extortion. In *Boyd* v. *United States*, 116 U. S. 616, there was an order of the court requiring the production of private books, invoices and papers, the alternative of refusal being that their character as asserted by counsel should be taken as confessed. In *Counselman* v. *Hitchcock*, 142 U. S. 547, there was an effort to compel a witness to disclose circumstances which might be

evidence against him of the commission of an offense or might connect him with it. *Hale* v. *Henkel*, 201 U. S. 43, is of like illustration. In *United States* v. *Wong Quong Wong*, 94 Fed. Rep. 832, private letters were opened. In *United States* v. *Mills*, 185 Fed. Rep. 318, there was a general seizure of all of the defendant's business records by the United States marshal when executing a warrant of arrest. In *United States* v. *Abrams*, 230 Fed. Rep. 313, business papers were delivered to an officer under threats or promises of benefit. In *Weeks* v. *United States*, 232 U. S. 383, there was an invasion of premises without a search warrant and the carrying away of certain letters and envelopes. The latter case is especially relied on by counsel, and it is definite as to principles and as to seizures the Constitution forbids and those it permits. The distinctions are made clear and the discussion leaves nothing to be added of either principles or their illustration. But it is not like the case at bar. In it there was an invasion of the defendant's privacy, a taking from his immediate and personal possession. In the case at bar there was a voluntary exposition of the articles, for use as evidence in the District Court and in the Circuit Court of Appeals (231 Fed. Rep. 453 and 734), that judicial action should be based upon them, action prayed for by him against another. And they served his purpose; they prevailed as proof and secured a judgment for him.

There was again exposition of them and use as evidence in *Perlman Rim Co.* v. *Firestone Tire & Rubber Co.* In that case, it is true, Perlman was not nominally a party, but he was interested in the suit and its success. His patent depended upon it. They were part of his evidence, necessary supports and illustrations of it, as much, therefore, a part of his testimony as his spoken word, as much a part of the records of the court as the stenographer's notes. Their tangibility did not change their character as evidence. Indeed, it gave emphasis to the notes and

a more pertinent strength, and was deemed necessary to their completeness and understanding. As is usual in a patent case, there was exposition and illustration by exhibits. And their production was voluntary, no form of constraint or compulsion or extortion was put upon him, and that some one of them must exist is the test of immunity. *Holt* v. *United States*, 218 U. S. 245, 252. Therefore, as said by counsel for the Government, "Having let go the exhibits, so that they have become a part of the judicial records, he is not now in position to suppress the story they tell."

But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosesoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

As we have seen, Perlman delivered the exhibits to publicity, made them the means of advantage. They, for the purposes of justice, were taken from his possession and volition into the control and custody of the court. Upon formal motion they were released for the use of the Government, a use as meritorious in consideration as that which determined the ruling in *Ex parte Uppercu*, 239 U. S. 435.

Order affirmed.

GASQUET *v.* FENNER, TESTAMENTARY EXECUTOR, ET AL.

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

No. 261. Argued April 24, 1918.—Decided May 6, 1918.

When the laws of a State provide that final settlement of an estate in the probate court on behalf of a person under interdiction can only be had upon proceedings there setting aside the interdiction or appointing a curator, a decree of a court of another State purporting to establish his sanity notwithstanding such interdiction will not, by virtue of the full faith and credit clause of the Constitution, operate upon the interdiction directly but, at most, would be conclusive in such probate proceedings.

In such case the District Court, sitting in the State where the estate is being administered, can not dispense with such proceedings in the local probate court and require a settlement from the executors.

235 Fed. Rep. 997, affirmed.

THE case is stated in the opinion.

Mr. William Winans Wall and *Mr. G. T. Fitzhugh*, with whom *Mr. J. C. Gilmore* and *Mr. Thos. Gilmore* were on the briefs, for appellant.

Mr. George Denegre, with whom *Mr. Victor Leovy* and *Mr. Henry H. Chaffe* were on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellant, alleging himself to be a citizen of Tennessee, to require the principal appellee, the executor under his mother's will, appointed and qualified in Louisiana, to pay over to him one-third of his mother's estate—that being the proportion to which

he is admitted to be ultimately entitled. The defendants allege that the appellant is a citizen of Louisiana and pronounced incapable of taking care of his person and administering his estate, by a judgment of interdiction of the Louisiana Courts. They say that the estate has not yet been fully administered as no final account has been filed and that until the interdiction is set aside an account can be rendered and possession of the appellant's share delivered only to a curator; but that appointment of a curator has been delayed by the appellant's having taken a writ of error from this Court to the Supreme Court of the State in respect of its interdiction decree. 136 Louisiana, 957. Dismissed, 242 U. S. 367.

Pending an application to the Supreme Court of the State for a rehearing, Gasquet, who was in custody, obtained his release on habeas corpus from a lower court, afterwards declared by the Supreme Court to have been without jurisdiction, and on July 28, 1914, established himself in Tennessee. On February 20, 1915, he filed a petition in the Probate Court of Shelby County, Tennessee, for an inquiry whether he was a lunatic, upon the same day obtained a verdict declaring him of sound mind and on February 23 a decree to this same effect, which also declared him entitled to settlement from all persons having control of any part of his estate "any disability . . . by reason of the proceedings against him hereinbefore mentioned [i. e. the Louisiana interdict] being hereby removed." Armed with this Gasquet brought the bill in the present case and contends that due faith and credit were denied to the Tennessee decree when the bill was dismissed, as it was. 235 Fed. Rep. 997.

Ordinarily, at least, a decree *in rem* is conclusive as to the facts that it establishes only as against parties entitled to be heard. *The Mary*, 9 Cranch, 126, 146. *Tilt* v. *Kelsey*, 207 U. S. 43, 52. *Manson* v. *Williams*, 213 U. S. 453. It may be argued that if the defendant was entitled to be

heard he was entitled to notice of some kind, which of course he did not receive in a proceeding that was tried on the day when it was begun, and that if he was not entitled to be heard he is not bound outside the limits of Tennessee. But we are not called upon to consider whether this and other arguments are sound that would need consideration before the plaintiff could prevail in this case, because in our opinion the decree was right for the reason given by the district judge. It may be called a matter of form rather than of substance; upon that we are not curious to inquire. It is enough that the reason seems to us sufficient. Article 420 of the Civil Code of Louisiana provides that a "person interdicted cannot resume the exercise of his rights, until after the definitive judgment by which the repeal of the interdiction is pronounced;" and article 421, that "interdiction can only be revoked by the same solemnities which were observed in pronouncing it." Whatever may be the conclusiveness of the Tennessee decree it cannot operate upon the interdiction directly. At most it can only furnish ground for a conclusive right to have the interdiction removed. When the state laws, as a condition for the final settlement of a probate decree require either the revocation of the interdict or the appointment of a curator one or the other thing must be done. It is not enough for the party to show that he has a right to have one of them done.

It is said that the appellant may have his right determined by the Court of the United States, under the decision in *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33. But the short answer is that all that could be determined in the District Court is admitted and never has been in dispute. The only obstacle in the way of giving the plaintiff his share is the obstacle in the way of a final account and settlement, which must take place in the Probate Court. By the law of Louisiana they cannot be had until either a curator is appointed or the in-

terdiction removed. Assuming that the plaintiff has every other right that he says, he cannot pursue his rights across country but must proceed along the road that Louisiana law provides.

Decree affirmed.

THE CHIEF JUSTICE took no part in the decision of this case.

EX PARTE SOUTHWESTERN SURETY INSURANCE COMPANY, PETITIONER.

PETITION FOR WRIT OF PROHIBITION.

No. 28, Original. Submitted April 22, 1918.—Rule discharged May 20, 1918.

In an action against a contractor and surety under the Act of August 13, 1894, 28 Stat. 278, as amended, the District Court has jurisdiction to decide whether claims of materialmen were filed within the year limited by the act, and upon the effect of filing them later.

Prohibition will not issue to control the District Court upon questions which that court is competent to decide or questions dependent on facts not presented to this court.

Rule discharged.

UPON petition, a rule was made upon the Judge of the District Court for the Western District of North Carolina, to show cause why a writ of prohibition should not issue to prevent further proceedings in an action brought against a contractor and the petitioner as its surety, under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended. The decision was made upon the petition and respondent's answer thereto.

Mr. Hayden Johnson and *Mr. Thomas M. Fields* for petitioner.

Mr. R. Randolph Hicks for respondent.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

The statute (c. 280, 28 Stat. 278; c. 778, 33 Stat. 811) makes the district court of the district in which work contracted to be done for the United States is to be performed the forum for the assertion by supply creditors or material men of their claims against the contractor and the surety on the bond. It moreover authorizes one suit by all for the purpose of enforcing the liability of the surety. In the light of these provisions and their settled interpretation all the contentions of the petitioner but one which we shall hereafter separately notice are so completely foreclosed by previous authorities as to require only reference to them. *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376. Indeed so certain is this the case that as to the principal one of the questions, the power of the court, when raised at this term it was treated as not open to controversy and was hence disposed of by a *per curiam* opinion. *Hopkins* v. *Ellington & Guy*, 246 U. S. 655.

The one subject which we postponed considering is the contention that rights of some of the claimants were asserted after the one-year period of limitation which the statute fixes. But this depends upon facts which are not before us, and besides involves a question within the competency of the court to decide concerning which therefore there is no basis for granting the writ of prohibition or sanctioning a resort to any other extraordinary legal remedy. See *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523; *Ex parte Oklahoma*, 220 U. S. 191.

It follows therefore that the rule must be and it is discharged.

Rule discharged.

YORK MANUFACTURING COMPANY *v.* COLLEY ET AL.

ERROR TO THE COURT OF CIVIL APPEALS, FOURTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 200. Argued March 18, 1918.—Decided May 20, 1918.

In an interstate contract for sale of a complicated ice-making plant, it was stipulated that the parts should be shipped into the purchasers' State and the plant there assembled and tested under the supervision of an expert to be sent by the seller. The purchasers agreed to pay him a per diem while so engaged and to furnish mechanics for his assistance, and their obligation to accept the plant was made dependent on the test. The erection took three weeks and the test a week more. *Held*, that these provisions as to the services of the expert were germane to the transaction as an interstate contract and did not involve the doing of local business subjecting the seller to regulations of Texas concerning foreign corporations. *Browning* v. *Waycross*, 233 U. S. 16, and *General Railway Signal Co.* v. *Virginia*, 246 U. S. 500, distinguished.

172 S. W. Rep. 206, reversed.

THE case is stated in the opinion.

Mr. N. C. Abbott for plaintiff in error.

No appearance for defendants in error.

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

The York Manufacturing Company, a Pennsylvania corporation, sued for the amount due upon a contract for the purchase of ice manufacturing machinery and to foreclose a lien upon the same. By answer the defendants alleged that the plaintiff was a foreign corporation, that

it maintained an office and transacted business in Texas without having obtained a permit therefor and was hence under Texas statutes not authorized to prosecute the suit in the courts of the State, and a dismissal was prayed. In reply the plaintiff averred that the contract sued on was interstate commerce and that the state statute if held to apply was repugnant to the commerce clause of the Constitution of the United States. At the trial it was shown without dispute that the contract covered an ice plant guaranteed to produce three tons of ice a day, consisting of gas compression pumps, a compressor, ammonia condensers, freezing tank and cans, evaporating coils, a brine agitator and other machinery and accessories including apparatus for utilizing exhaust steam for making distilled water for filling the ice cans. These parts of machinery, it was provided, were to be shipped from Pennsylvania to the point of delivery in Texas and were there to be erected and connected. This work, it was stipulated, was to be done under the supervision of an engineer to be sent by the York Manufacturing Company for whose services a fixed per diem charge of $6.00 was to be paid by the purchasers and who should have the assistance of mechanics furnished by the purchasers, the supervision to include not only the erection but the submitting of the machinery to a practical test in operation before the obligation to finally receive it would arise. It was moreover undisputed that these provisions were carried out, that about three weeks were consumed in erecting the machinery and about a week in practically testing it, when after a demonstration of its successful operation it was accepted by the purchasers.

The trial court, not doubting that the contract of sale was interstate commerce, nevertheless concluding that the stipulation as to supervision by an engineer to be sent by the seller was intrastate commerce and wholly separable from the interstate transaction, held that the seller by car-

rying out that provision had engaged in local business in the State and as the permit required by the state statutes had not been secured, gave effect to the statutes and dismissed the suit. The case is here to review the action of the court below sustaining such conclusion, its judgment being that of the court of last resort of the State in consequence of the refusal of the Supreme Court of the State to allow a writ of error.

Referring to a previous ruling (*Leschen & Sons Rope Co.* v. *Moser*, 159 S. W. Rep. 1018) in which it had held that the performance by a contractor of the duty of supervising the construction of a complex system of tramways did not constitute a doing of business within the State because it was relevant to and a part of the main contract for the material from which the road was to be constructed which was interstate commerce, the court below concluded that that case had been by it mistakenly decided and therefore should be overruled and not applied in this. The conclusion as to previous error committed, the court said, was persuasively the result of the ruling in *Browning* v. *Waycross*, 233 U. S. 16, which it treated as here conclusively determining that the performance of the contract for the supervision by the engineer was purely intrastate commerce and subject to be treated as such although it formed a part of the stipulations of the principal contract of sale conceded to be interstate commerce.

But we are of opinion this decision was erroneous whether it be examined from the point of view of what was assumed to be the controlling effect of the ruling in the *Waycross Case* or whether it be tested by the elementary doctrines as to what constitutes interstate commerce. In the first place the *Waycross Case* concerned merely the right of the City of Waycross to collect a charge against a person who was carrying on a business of erecting lightning rods as the agent of one who had sold the rods in another State and shipped them to Waycross under an

agreement after their arrival to erect them. The case turned exclusively upon the nature and character of the business of erecting lightning rods and the relevant or appropriate relation to interstate commerce of a stipulation in an interstate contract of sale of such rods providing for their erection when delivery under the sale was made. As it was determined that the business of erecting lightning rods bore no relevant or appropriate relation to the contract made for the sale of such rods, it was decided that the contract for the erection of the rods did not lose its local character simply because it was made a part of an interstate commerce contract for the sale of the rods any more than would a contract for materials with which to build a house cause the building of the house to be a transaction of interstate commerce and not local business. But the broad distinction which is established by the statement just made between what was decided in the *Waycross Case* and the question here presented does not rest alone upon the implication resulting from what was under consideration in that case but moreover expressly results from the fact that in the *Waycross Case* through abundance of precaution attention was directed to the fact that the ruling there made was not controlling as to a case where the service to be done in a State as the result of an interstate commerce sale was essentially connected with the subject-matter of the sale, that is, might be made to appropriately inhere in the duty of performance. 233 U. S. p. 23.

As, in the second place, since the ruling in *McCulloch* v. *Maryland*, 4 Wheat. 316, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the con-

tract made. The only possible question open therefore is, was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer. Generically this must be unless it can be said that an agreement to direct the assembling and supervision of machinery whose intrinsic value largely depends upon its being united and made operative as a whole is not appropriate to its sale. The consequence of such a ruling if made in this case would be particularly emphasized by a consideration of the functions of the machinery composing the plant which was sold, of its complexity, of the necessity of its aggregation and unison with mechanical skill and precision in order that the result of the contract of sale—the ice plant purchased—might come into existence. In its essential principle therefore the case is governed by *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507; and *Dozier* v. *Alabama*, 218 U. S. 124. In fact those cases were relied upon in the *Waycross Case* as supporting the contention that a mere agreement for the erection of lightning rods in a contract made concerning the shipment of such rods in interstate commerce caused the act of erection to be itself interstate commerce. But the basis upon which the cases were held to be not apposite, that is the local characteristic of the work of putting up lightning rods, not only demonstrates beyond doubt the mistake concerning the ruling as to the *Waycross Case* which was below committed, but serves unerringly to establish the soundness of the distinction by which the particular question before us is brought within the reach of interstate commerce.

Of course we are concerned only with the case before

us, that is, with a contract inherently relating to and intrinsically dealing with the thing sold, the machinery and all its parts constituting the ice plant. This view must be borne in mind in order to make it clear that what is here said does not concern the subject passed on in *General Railway Signal Co.* v. *Virginia*, 246 U. S. 500, since in that case the work required to be done by the contract over and above its inherent and intrinsic relation to the subject-matter of the interstate commerce contract involved the performance of duties over which the State had a right to exercise control because of their inherent intrastate character. In fact the case last referred to when looked at from a broad point of view is but an illustration of the principle applied in the *Waycross Case* to the effect that that which was inherently intrastate did not lose its essential nature because it formed part of an interstate commerce contract to which it had no necessary relation. And this truth by a negative pregnant states the obverse view that that which is intrinsically interstate and immediately and inherently connected with interstate commerce is entitled to the protection of the Constitution of the United States resulting from that relation.

It follows therefore that the judgment must be and it is reversed and the case remanded to the court below for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE PITNEY dissents.

EX PARTE ABDU ET AL., PETITIONERS.

PETITION FOR WRIT OF MANDAMUS.

No. 31, Original. Argued April 29, 1918.—Rule discharged May 20, 1918.

In a case ultimately within its reviewing power, this court has jurisdiction to require by mandamus the filing of the record in the Circuit Court of Appeals.

Where the refusal to file was in accordance with orders of the Court of Appeals, relied on in the clerk's answer, *held* that, while properly the relief should have been directed to the court, under the peculiar circumstances the irregularity might be treated as formal and the authority to make the orders be determined with the clerk alone as technical respondent.

The provision in the Act of June 12, 1917, c. 27, 40 Stat. 157, that "courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit," etc., does not apply to appellate proceedings.

Rule discharged.

THE case is stated in the opinion.

Mr. Silas B. Axtell, with whom *Mr. Vernon S. Jones* was on the brief, for petitioners.

Mr. Robert S. Erskine, with whom *Mr. John M. Woolsey* was on the brief, for respondent.

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

In the trial court the petitioners, six in number, Arabian seamen and members of the crew of a British ship, as libellants sought to enforce the payment of one-half their wages in reliance upon the provisions of § 4530, Rev. Stats., as amended by § 4 of the Act of March 4, 1915, c. 153,

38 Stat. 1165. In granting an appeal from a decree dismissing their claim the court, in view either of the provisions of the Act of Congress of July 1, 1916, c. 209, 39 Stat. 313, or those of the Act of June 12, 1917, c. 27, 40 Stat. 157, or both, directed that the appellants be permitted to perfect their appeal without cost.

In the Circuit Court of Appeals the clerk declined to file the record without the deposit to secure costs required by the rules. The court was asked to direct the clerk to do otherwise, but for reasons stated in a brief memorandum it refused to do so. Assuming that this action was based solely on the view that the Act of 1916 had ceased to be operative by limitation of time, relying upon the Act of 1917, the request for direction to the clerk to file the record without costs or security for the same was again made to the court and refused upon the ground of want of merit in the application, that is, upon the conclusion that the act of Congress relied upon did not relieve seamen from costs in appellate courts. Leave to present a petition for mandamus against the clerk to compel him to file the record without costs was then here granted and the matter is before us on the submission of the rule to show cause consequent upon such permission and the answer of the clerk to the rule setting out the action of the court, in which answer reliance is placed upon the orders of the court which are appended and the two opinions expressed by the court on the subject.

The existence of ultimate discretionary power here to review the cause on its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power in a case properly made gives the authority to consider the subject which the rule presents.[1] But that does not without more dispel the seeming con-

[1] *Ex parte Crane*, 5 Peters, 190, 193–194; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544; *Hollon Parker, Petitioner*, 131 U. S. 221, 225–226; *In re Hohorst*, 150 U. S. 653; *In re Grossmayer*, 177 U. S. 48, 49–50.

fusion resulting from the fact that the remedy prayed is directed not to the court below but to its clerk and hence in form the relief sought is a mandamus to direct the clerk to disobey the order of the court, leaving the order unreviewed and unreversed. The incongruity is obvious and we cannot as a general rule sanction it. Looking, however, through form to the essence of things, as no mere independent action of the clerk as clerk is involved, but the authority exerted by the court in directing the action of the clerk complained of is the subject-matter at issue and is the only justification relied upon by the clerk in the answer to the rule, we are of the opinion that in the exercise of a sound discretion we may treat the case from that point of view, that is to say, under the circumstances consider the authority to have made the order with the clerk alone as a technical party to the proceeding.

The contention that the court mistakenly refused to permit the appellate proceedings to be conducted without payment of costs is based upon a provision in the Appropriation Act of June 12, 1917, as follows:

"*Provided,* That courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety."

The provision does not in express words relate to appellate proceedings and the whole argument advanced to sustain the theory that it includes such proceedings rests upon the conception that because the provision was intended to benefit seamen by giving them access to the courts without cost, therefore by necessary implication the statute should be construed as all-embracing, that is, as giving the right to carry on appellate proceedings free from costs. But this simply assumes the proposition contended for and after all comes but to the contention

that, because the statute gives the right which is asserted, therefore the statute should be construed as conferring it and its enjoyment consequently sustained. The error results from disregarding the broad distinction which exists between the right to be heard in courts of justice on the one hand and the necessity for the grant of authority on the other to review the results of such hearing by proceedings in error or appeal. *Reetz* v. *Michigan*, 188 U. S. 505, 507–508; *United States* v. *Heinze*, 218 U. S. 532, 545–546; *Lott* v. *Pittman*, 243 U. S. 588, 591. This obvious distinction between the two we are of opinion, in the absence of a clear and express legislative direction to the contrary, excludes the possibility of giving the statute the all-embracing construction sought to be applied to it. And the correctness of this opinion is we think conclusively illustrated by a consideration of prior statutes dealing with a somewhat cognate subject and the decisions concerning the same. Act of July 20, 1892, c. 209, 27 Stat. 252; Act of June 25, 1910, c. 435, 36 Stat. 866; *Bradford* v. *Southern Ry. Co.*, 195 U. S. 243; *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43. In other words, under the Act of 1892 conferring a right to prosecute *in forma pauperis* suits in courts of the United States, which was certainly as broad in its language as the one now under consideration, it was decided in the *Bradford Case* that the right did not embrace appellate proceedings. And when following that decision the statute was amended by the Act of 1910 so as to cause it in express terms to be applicable to appellate proceedings, the right was subjected to accompanying restrictions and safeguards which as held in the *Kinney Case* made the new right not absolute, but dependent not only upon the limitations which were otherwise put in the statute but also upon the exercise of a sound discretion by the appellate court. The statute before us, as we have seen, which was enacted in 1917 after the decision in the *Bradford Case*, contains none of the ex-

press provisions as to appellate proceedings inserted in the Act of 1910. Thus if resort is to be had to legislative history and the implication of legislative intent as a means of reading into the statute that which it does not contain, a contrary result must necessarily follow, since the conclusion from considering that subject must be that the Act of 1917 enacted after the *Bradford Case* in not expressing the right to be exempt from costs in appellate proceedings was intended to conform and give effect to the rule announced in the *Bradford Case.*

Rule discharged.

MR. JUSTICE BRANDEIS, dissenting.

I am unable to concur in the decision of the court. Congress declared without qualification: "That courts of the United States shall be open to seamen . . . for the purpose of entering and prosecuting suit" . . . "without . . . making deposit to secure fees or costs." There being no qualification, the words "courts of the United States" mean *all* the courts in which seamen may have occasion to enter and prosecute suits. Seamen have occasion to enter and prosecute such suits in appellate courts. Consequently they should be permitted to do so "without . . . making deposit to secure fees or costs."

MR. JUSTICE CLARKE joins in this dissent.

UNITED STATES *v.* UNITED SHOE MACHINERY COMPANY OF NEW JERSEY ET AL.

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

No. 207. Argued March 16, 19, 20, 21, 1917; restored to docket for reargument May 21, 1917; reargued January 11, 14, 15, 1918.—Decided May 20, 1918.

Where the evidence is strongly conflicting, especial weight attaches to the findings of a trial court whose judges saw and heard the witnesses.

Applying this principle, the court holds, with the court below, that the evidence does not sustain the charges of unlawful restraint of interstate commerce in shoe machinery, and monoply thereof, in the formation and conduct of the United Shoe Machinery Company.

In determining whether a combination restrains interstate commerce injuriously to the public, the foremost inquiry is whether the interests brought together were competitive.

Where machines were patented and, though used collectively in the making of a single product, were so far distinct in their functions that they were practically noncompetitive, a common control over their manufacture and use, *held* not obnoxious to the Anti-Trust Act.

Statements in notices to shareholders and in an agency contract, made by participants in a combination, explaining its object, *held* not to establish unlawful intent, in view of the evidence of what was done, publicity of the statements when made, lapse of time and inaction of the Government.

Lapse of time, changes of condition due to it and to the progress of the art, the development of high industrial efficiency, difficulty or impossibility of restoring antecedent conditions and injurious effects that would follow the attempt to grant the relief prayed, are matters to be considered in determining from conflicting evidence whether a combination should be dissolved.

Unconnected purchases of certain businesses with patent rights, made by the Company after its formation, are *held*, on conflicting evidence, not to have been intended, nor to have had the effect, of restraining competition illegally or to have brought it obnoxious power. Generally, one has the right to purchase patents for the protection

or improvement of his own inventions and business, and for the prevention of patent litigation, and such purchases should not be adjudged to have stifled competition unduly upon speculative estimates of the potential competitive power of new and untried inventions.

Upon similar considerations, certain contracts for assignment of future inventions are also held legitimate.

The charge that the Shoe Machinery Company's power has been oppressively used is not sustained.

The patent law gives the patentee the right to exclude others from the use of his invention, absolutely or upon terms. The exertion of this right within the field of the patent law is not an offense against the Anti-Trust Act.

The principle, announced in recent cases, that when a patented article is sold it passes beyond the patent monopoly, has no application where there is no conveyance of title but a *bona fide* lease of the article.

In a suit to set aside leases of patented machines upon the ground that they exceed the rights of the lessor as patent owner and operate to produce results obnoxious to the Anti-Trust Act, *semble*, that the lessees may be necessary parties.

Defendant supplied its sets of patented machines to shoe manufacturers on a royalty basis under a system of leases, of a uniform term of 17 years, with conditions for use of each machine to full capacity; for leasing others of lessor as more work became available; for use to exclusion of, and forbidding use on work coming from, machines not so leased; requiring lessee to obtain certain supplies from lessor only; permitting lessor, for breach of condition in any lease, to forfeit it and all others, and requiring lessee thereupon to return machines and pay a charge. *Held:* (1) Upon the evidence, that the leases were entered into by the lessees voluntarily and without coercion, and that their legality must be determined apart from a general charge of illegal dominancy by the corporation which the evidence failed to sustain. (2) Upon the evidence, that the purpose of the system was to make the sets of machinery available to customers on easy terms and promote their efficient and productive operation, in connection with an accessory service furnished by the company, and insure adequate royalty returns. (3) That the conditions were within the lessor's patent rights, and not violative of the Anti-Trust Act.

222 Fed. Rep. 349, affirmed.

SUIT to dissolve an asserted combination and conspiracy between certain companies, makers or dealers in boot and

shoe machinery, and the officers of the companies; also to have declared illegal and canceled certain leases and agreements, charged to be the means of the combination and conspiracy whereby, through control over the manufacturers of boots and shoes, competition has been prevented, inventive genius subjected to the designs of the combiners and conspirators, and auxiliary machines and accessories controlled and made subsidiary.

The charges are met with denials, with justification that the conduct which is asserted to be illegal was in promotion of trade, in natural development of business and in strict compliance with modern trade progress; indeed, that there was simply the fusion of independent and non-competing businesses, each differing from the other, and the combination of various elements of machinery covered by United States patents and all of it relating to the same art and the same school of manufactures. And that the leases and agreements were but the exercise of patent rights, wholly legal and indeed necessary.

These contentions are displayed in a bill which occupies 46 pages of the record and an answer of equal volume.

The statute of limitations is also pleaded in defense, the greater part of the acts charged being alleged to have taken place more than 6 years before the filing of the petition.

Three judges sat in the case, who heard the testimony in open court. Upon its completion and consideration a decree was entered dismissing the bill. Each judge rendered an opinion exhibiting the case from a different angle, and the opinions, taken together, display all the phases of the case and the considerations and issues involved. 222 Fed. Rep. 349.

Mr. H. La Rue Brown, Special Assistant to the Attorney General, with whom *The Attorney General, The Solicitor General, Mr. Assistant to the Attorney General*

Todd, and *Mr. Leo A. Rogers*, Special Assistant to the Attorney General, were on the briefs, for the United States.[1]

Mr. Charles F. Choate, Jr., and *Mr. Frederick P. Fish*, with whom *Mr. Malcolm Donald* was on the briefs, for appellees.

Mr. Frank Y. Gladney, by leave of court, filed a brief on behalf of General Shoe Machinery Co., successor to Boylston Manufacturing Co., as *amicus curiæ*.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The charge of the bill is that defendants, not being satisfied with the monopoly of their patents and determined to extend it, conceived the idea of acquiring the ownership or control of all concerns engaged in the manufacture of all kinds of shoe machinery. This purpose was achieved, it is charged, and a monopoly acquired, and commerce, interstate and foreign, restrained by the union of competing companies and the acquisition of others. And that leases were exacted which completed and assured the control and monopoly thus acquired.

But this charge of comprehensive trade dominance was modified in the course of the trial. The Government disclaimed the assertion of such extensive culpability and confined its contention to machinery adapted to the bottoming of shoes (attaching soles to uppers), machines called clicking machines (cutting-out machines), and eyeletting machines (sufficiently indicated by name), and

[1] *Mr. H. La Rue Brown* and *Mr. Constantine J. Smyth*, Special Assistants to the Attorney General, argued the case for the United States at the first hearing. The briefs of counsel deal largely with the facts, and are too extensive for proper representation here.

declared that if the bill did not so limit the actual monopoly counsel would agree so to limit it.

Of course, we agree with the Government that defendants cannot be discharged from all guilt merely because they leave open some branches of the business to the enterprise of others, or, as the Government puts it, "that a limited field is as yet open to competition." But in view of the large design attributed to the defendants and the illustration of what it is contended they accomplished, it would be interesting if not instructive to be told when their large scheme was abandoned or broke down, even though it may now be said to be an unimportant detail, since the trial court has decided that neither the greater nor lesser scheme was established by the evidence.

The conclusion, however, is contested, and in description of what is now contended, the Government says that "the end which avowedly was sought by the organizers of the United Company was 'the control in one corporation, both in the United States and in foreign countries, of the efficient types of shoe machinery.'" And, further, after stating the business of defendants to be that "of supplying machines used in the manufacture of shoes," and the restraint of interstate and foreign commerce in certain of the machines, it is said: "The subject matter of the action, therefore, is the effect of the things done by the defendants upon the trade between manufacturers of machines used in the manufacture of shoes and the manufacturers of shoes." And in further display of the interest which attaches to the issues, it is said: "Shoes are made in every section of the Union" and "it is obvious that supplying important machines for such an industry must be an exceedingly important part of the interstate trade and commerce of the United States."

And there are contentions as to the dominance achieved. Indeed, it is asserted somewhat fervidly that the United Company "is absolute monarch of the industry" and

that "no competitor can exist unless for its own pleasure or policy it withholds its destroying hand."

There are opposing contentions no less fervidly urged. There is denial of the purpose attributed to the defendants or the possession or exercise of baleful power, and the insistence that the United Company is a union of non-competing businesses conducted under letters patent, effecting through the resources thus acquired greater economies in manufacture and greater efficiency of machinery and "in other ways perfecting the shoe-maker's art"—advantages not engrossed by the company but inuring to its patrons and through them to the wearers of their product, a finished shoe.

In final answer to the charge of the Government the comprehensive declaration is that the shoe machinery industry is not one open to everybody on equal terms. It is one of patents. And the company's power, if it have power, is not that of combination but the power of the superiority of its inventions—the effect and demonstrated supremacy of its mechanical instrumentalities.

The contentions could not well be more antagonistic, upon each of which there was conflicting testimony, and the important fact is to be borne in mind that it was given in open court (except as to certain contentions about patents, their scope and validity).[1] The fact justifies defer-

[1] During the trial a discussion came up about patents. The presiding judge intimated that the court did not desire to take up the patents themselves but would send them to an examiner. It was stated by counsel in the case that the matter was important. But the court made a distinction between a "patent question" and a "patent controversy"—good faith being an element of the latter—and stated that the latter would not be included in the hearing before the examiner, but would be heard in open court. The court then ordered the taking of testimony of both parties before the examiner as to that section of the bill which charged an unlawful extension of the patents to perpetutate their monopoly at the expense of boot and shoe manufacturers and to use them to acquire a complete monopoly of all kinds

ence to the findings of the trial court. *Adamson v. Gilliland*, 242 U. S. 350, 353.

There are two accusations against the defendants. One is that at the very outset they combined competing companies and subsequently acquired others, § 1 of the Act of 1890 [1] being thereby offended. The other is a monopolization of the trade in violation of § 2 of that act. And it is charged, as we have said, that certain leases and license agreements are the instruments which consummate both offenses.

The offense of combination was committed, it is contended, February 7, 1899, at which time seven shoe machinery companies were consolidated into the United Shoe Machinery Company of New Jersey, a corporation organized for that purpose. The companies were: Goodyear Shoe Machinery Company, International Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Davey Pegging Machine Company, Eppler Welt Machine

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of shoe machinery. The examination took place and it was the usual battle of experts, and the conflicts are recorded in a volume of more than eight hundred pages. Their ultimate test, however, and the effect of the patents is the testimony delivered in open court.

[1] "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person, or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Company and the International Eppler Welt Machine Company. The last two companies were acquired by the new company after its formation, but they may be regarded as constituent companies. The businesses of these companies were conveyed to the new company, the businesses being those of manufacturing, selling and leasing and dealing in shoe machinery, including patents of the United States and other countries.[1] A more

[1] There is apparent confusion in the brief of the Government. In one place it is stated that the United Company was the consolidation of the businesses and properties of seven companies which were taken over as going concerns, to-wit: Goodyear Shoe Machinery Company, International Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Davey Pegging Machine Company, Eppler Welt Machine Company, and International Eppler Welt Machine Company.

In another place the organization of the United Company is stated to be the merger of four companies—Goodyear Company, Consolidated & McKay Company, Eppler Company and the McKay Shoe Machinery Company—and resulted in the immediate suppression of competition between those companies and dominating "to the point of practical exclusion the important field of supplying the principal and essential machines necessary in the manufacture of shoes."

However, in the conclusion of the Government's brief it contends that it has established "that there existed vigorous competition between three of the companies merged in the organization of the United Company, and that the fourth company, which at any moment might have become a competitor, was taken in for the purpose and with the effect of furthering the unlawful scheme of the combination thus brought into being." The fourth company referred to is no doubt the McKay Shoe Machinery Company.

The immediate results were, it is contended—

"(1) The suppression of the actual and of the potential competition in lasting machines theretofore existing between the Consolidated & McKay Company and the Goodyear Shoe Machinery Company. It created a monopoly in lasting machines.

"(2) The suppression of the actual and of the potential competition between the Goodyear Shoe Machinery Company and the Eppler Welt Machine Company. It created a monopoly of welting and outsole stitching machinery.

particular distinction we do not deem it necessary to make.

The first question is, Were the companies in competition? It confronts us at the outset; all other considerations are dependent upon it. As an element in the answer to it we must revert to the admission that the charge of combination is only as to machinery for bottoming shoes—that is, the uniting of the sole to the upper—an operation which might be called "simple" if the complexity of this record did not contradict it and if we were not told that the letters patent covering the machinery for the operation are too great in number for explanation or enumeration. It is said that on certain classes of shoes over 100 different operations are performed by different machines. And the Government has taken pains to tell us how far "the mysteries of the shoemaker's art and the variations between different methods of making shoes" are outside of the understanding of the purchaser of them. To him, it is said, "shoes are shoes, except as they differ in appearance, comfort, wearing qualities and price." But to the manufacturer distinctions multiply and to the production of a shoe a complete line of machinery is necessary. Indeed, the Government makes the mystery of the art and the necessity of the instrumentalities, in part, the basis of its argument.

"(3) The absolute prevention of future competition between the McKay Shoe Machinery Company, the Goodyear Shoe Machinery Company, the Eppler Welt Machine Company, and the Consolidated & McKay Company.

"(4) The creation of an absolute and complete monopoly in lasting, pegging, welting, outsole stitching, heeling and metallic fastening machines.

"(5) The creation of an organization with vast resources whose control of many different types of machines necessary to the shoe manufacturing industry gave it a power to extend and intrench its monopoly which none of its constituent companies, however successful, could approach."

We are therefore admonished at once of the complexity of the case and the maze of mechanical technicalities into which we should be plunged in estimating the evidence if we had not the guidance of the opinions of the judges of the trial court. The court found, as we have said, that the companies were not in competition at the time of their union in the United Company, and based the finding not only upon the testimony of witnesses but the uses of the machines of the respective companies and their methods of operation. The testimony was conflicting, it is true, and different judgments might be formed upon it, but from an examination of the record we cannot pronounce that of the trial court to be wrong. Indeed, it seems to us to be supported by the better reason. We should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it and judge of witnesses from their reported words as against their living presence, the advantage which the trial court had.

The Government, however, urges two circumstances which it contends corroborate its oral testimony and against which it asserts that "literal denials of specific intent to restrain trade are of no significance." But there was more than literal denials. There were detailed representation of the condition of the trade and explanation of the machines convincing, as we have seen, in its strength and the confirmation it received. Let us, however, consider the instances upon which the Government relies. The most important of them is a circular letter,[1] sent by

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[1] "Plaintiff's Exhibit 152.

"*To the Stockholders of Goodyear Shoe Machinery Company:*

"BOSTON, MASS., *Feb. 8, 1899.*

"The great advantages to be secured by the control in one corporation, both in the United States and in foreign countries, of the efficient types of shoe machinery, have been for several years recognized by the officers of the principal shoe-machinery companies.

the directors of the Goodyear Company to its stockholders, which set forth that great advantages were to be secured by the control in one corporation of the most efficient types of shoe machinery and that the directors and large stockholders had been in negotiation to accomplish that end; and further that the United Company would from time to time acquire other shoe machinery properties either by direct ownership or by purchase of shares of their stock. Also a like declaration [1] in a contract with its agent in Australia.

For more than a year your directors and large shareholders have been in negotiation to accomplish this end.

"After a thorough investigation of the financial condition and the business of the shoe-machinery companies named below, the organization of a corporation has been effected under the laws of the State of New Jersey, to be known as United Shoe Machinery Company.

"The United Shoe Machinery Company has already contracted for more than a majority of the capital stock of Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Goodyear Shoe Machinery Company of Canada, International Goodyear Shoe Machinery Company, Eppler Welt Machine Company, International Welt Machine Company, Davey Pegging Machine Company, besides stocks in other shoe-machinery companies, letters patent, and other property.

"The United Company will also from time to time acquire other shoe-machinery properties, either by direct ownership or by purchase of shares of their stock."

[1] "Plaintiff's Exhibit 189.

"Whereas the United Company has acquired control of the boot and shoe and leather working machinery made by the following named corporations doing business in said Boston, namely:

"Goodyear Shoe Machinery Company, Consolidated & McKay Lasting Machine Company, McKay Shoe Machinery Company, Eppler Welt Machine Company, Goddu Metal Fastening Company, Gordon Staple Lasting and Tacking Company, Davey Pegging Machine Company, Gem Flexible Insole Company, Boot & Shoe Sole Laying Company, and contemplates acquiring the control of other lines of boot and shoe and leather working machinery and boot and shoe findings, except leather, linings, lasts and finished boots and shoes. . . ."

The circular and agreement could not, of themselves, give character to the constituent companies. It is evident, therefore, that both of them need comment to give them sinister significance, and the innuendo of the Government is that they meant not only that great competing companies had been united, but that other companies—competitors, it may be—would be acquired. It would be a stout credulity that could accept this explanation against the counter considerations. We cannot put out of mind that according to the Government, in repeated assertions, the United Company in 1899, twelve years before the suit was brought, jumped into the field full-panoplied in monopolistic power and started immediately on its career of dominance and restraint of trade. But to preclude the denial of the assertions it is now said that, in stock circulars and trade agreements, the company trumpeted its might and illegal enterprise to two continents. Deliberate guilt—we say deliberate guilt, for it is not a question of ignorance or imbecility—is usually not so bold. It masks its purpose to hide it from prevention and penalty. If it may be asserted that the trade agreement was in secret, certainly the circular letter to the stockholders committed the scheme to publicity.

We cannot, therefore, accept the explanation of the Government. Its implications discredit it. It implies that there was governmental supineness for a long time or an extraordinary oversight of conspicuous, indeed vaunted, criminality. Neither can be accepted. And we are persuaded that the circular and agreement were not intended nor regarded to be the avowal, as contended by the Government, of monopoly, achieved or to be achieved, but simply the business expression and foresight of the advantages which would result from the concentration in one management of instrumentalities which, however different, supplement one another in the creation of a shoe.

We have given the explanation of the Government im-

portance because the Government has done so. And we have only answered in estimation of what the circular and agreement are worth as avowals of intention. Of course, if the Government is right, they are unimportant circumstances; the demonstration of the United Company's purpose is complete without them; for the Government contends that the constituent companies were in open competition and that their union resulted in the "immediate suppression of the actual and potential competition" in shoe machinery and the "creation of an organization with vast resources" which "gave it a power to extend and intrench its monopoly which none of its constituent companies, however successful, could approach." If this were a fact it would not need the confirmation of words.

The second circumstance cited by the Government is that before the union of the companies their machines had a flexibility in use that the testimony of defendants does not now ascribe to them, and that this was declared in advertisements. We are not disposed to give much importance to the circumstance. It may be that there was a certain interchangeability in the described machines, but, in the opinion of the trial court, there was, notwithstanding, no practical competition between them. We can add nothing to what determined its judgment or to the detailed comparison and explanation of the machines made in its opinions. Indeed, we might rest this branch of the case on those opinions. They were considerate of all the elements of the Government's contentions and the opposing contentions and tested the machines, their sameness and difference and respective efficiency, by the purposes for which they were designed by the inventors and employed in the trade and by the explanations made of them.

In considering the competition of the machines and in estimating the defendants' acts in uniting the companies,

it is to be observed that the machines were all made "under letters patent of the United States and other countries," were owned by the companies, and covered improvements made by the companies from time to time and embodied in the machines, which were so far developed that they were in 1899 principally in use by shoe manufacturers in the kinds of work to which they were respectively adapted. The patents and the businesses passed to the new company, but necessarily were the same in its hand as before. In other words, the patents did not lose their distinction, nor the machines their difference; and to dwell upon the percentages of manufacture is misleading. Of a like situation we said in *United States* v. *Winslow*, 227 U. S. 202, 217, and said of it in answer to the charge against the combination here involved, that we could "see no greater objection to one corporation manufacturing seventy per cent. of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute [Act of 1890] does not extend to reducing all manufacture to isolated units of the lowest degree." Or, as expressed by one of the judges in the court below, "The combination was not unlawful so far as it did no more than put the different groups of noncompeting patented machines into one control. . . . It was not unlawful unless, to an extent injurious to the public interest, it destroyed competition."

And it was held that competition was not destroyed to the designated extent. Indeed, the court was repelled, as it might well have been, by the consquences of so holding on account of the change of conditions, the union of the companies not having been questioned by the Government for twelve years and large investments having been made not only by the company but by the public.

The lapse of time, indeed, may not condone the offense

if offense there was. It, however, may call offense in question and be an element in the refutation of accusations long deferred, or determine against particular remedies. It is to be remembered that a dissolution of the offending companies is prayed and that each of them be "separated into such parts that no one of them will constitute a monopoly . . . of the shoe machinery business," or that receivers be appointed to take possession of them and their assets, business and affairs and wind them up and "bring about conditions in trade and commerce among the States and with foreign nations in harmony with law." If there be need for this the difficulties of achievement should not deter; but the difficulties may admonish against the need and demonstrate that the situation may be remediless or to be redressed at a cost too great. Therefore, considering the remedy prayed, which is extreme, even in its mildest demands, we may ask, what of the investments that have been made during these years of extension and development of the new company's business? What of the machines that have become obsolete and the new ones that have been developed? What of the patents that have expired and the new ones that have not yet run out, and how distribute them? And what of their effect when distributed? Will their monopoly cease, or be regarded as an instrument of illegal purpose and forfeited as a deodand? How pick out from the new conditions the conditions of 1899 and restore them and the art of that time and rehabilitate the businesses that are alleged to have ceased to exist or to have become merged in the United Company? How from the complexity only thus suggested, not displayed, "bring about conditions in trade and commerce" in shoe machinery "among the States and with foreign nations in harmony with law," which is the ultimate resource of the Government for this part of the case? How radical should the disintegration be? Or should there be a sale in en-

tirety and not in parts? And, if in entirety, will the purchaser get an immunity that the companies did not have? A sale in entirety would seem to be absolutely necessary to preserve the works at Beverly. And yet how can that be done if there be a dissolution of the company and a distribution of machines? On the other hand, the idea is repellent that so complete an instrumentality should be dismantled and its concentration and efficiency lost. It has been testified that the purpose of the organization was the consolidating of all the machines in one modern factory and the standardizing of them. This purpose has been attained. The company employs there 4,000 men.

There are, however, certain instances of acquisition which may be said to give confirmation to the charges of the Government and justify the demand for redress, at whatever cost or disaster to the offenders; in other words, demonstrate the purpose of the original union of the companies, the persistence of that purpose and the extension of its dominion having the evil consequences depicted by the Government. Upon these instances it would seem unnecessary to dwell, the companies not being competitive at the time of their union in the United Company. However, they are made so much of by the Government and are so strongly urged that attention must be given to them. The most important of them and the one that was given most prominence in the testimony was that of the plant and machinery of the Thomas G. Plant Company, a New Jersey corporation, a manufacturer of shoes, not of machinery, and of the shoe machinery interest of Thomas G. Plant.

Plant was an inventor of machines of the shoe-bottoming variety and had taken out a number of letters patent in the United States and foreign countries covering the same. There was in the testimony and is in the argument of counsel dispute as to the efficiency of the machines of themselves. We say "of themselves" to distinguish

them from the inventions embodied in them, a necessary distinction to meet some of the phases of the case. A set was installed in the Plant Company's factory, of which Plant owned a majority of the stock. Two other concerns to which they were offered under inducements refused to accept them. It may be admitted, as the trial court found, that they had experimental promise, and it was testified that a number of shoe manufacturers had concerted to buy them. There were charges of infringements of the United Company's machines and Plant was loath to permit an inspection; indeed for a time refused it. And, besides, for their completion into a set for combined operation important machines were necessary which were not yet developed. As they stood they were undoubtedly inferior to the machines of the United Company, and in the state, therefore, in which the United Company took them they were not found capable of use. Nothing was in them which affords reasonable support for the Government's contention that they were "right at the threshold of extensive competition with the United Company." But, suppose they were. It would only be conjecture to say that they would cross it or that their strength would be formidable if they did.. It is in the testimony that they broke down upon trial and were supplanted in the Plant factory where Plant had installed them by the United Company's machines. And the substitution was not at the dictation of the latter company. The vice president of the Plant Company and the general manager of its factory testified that satisfactory work could not be done with them on men's shoes; they broke down even in the manufacture of women's shoes to which they were adapted.

It appeared that some of the machines infringed the United Company's and in some details the latter infringed the Plant machines, and the complexity of rights hence resulting, to which we shall presently refer, had led to and threatened litigation; to compose which, it was

testified, and the trial court found, was a contributory inducement of the United Company's purchase from Plant.

The Government resists the finding. Its conception is, and to this all of its contentions are addressed, that the United Company combined and was intended to combine great competing companies and to acquire other competing companies. "The United Company acquired," counsel say, "every company then [when the company was organized] actively putting out or planning to put out" machinery adapted to bottoming shoes, and that "in the twelve years before the bringing of this action no substantial change took place, but rather the monopoly so acquired was in some respects extended and in many respects strengthened and intrenched." In the light of this conception and contention the Government sees and colors all that the United Company has done, all of the acquisitions it has made, and upon whatever motive made, including the prevention of patent troubles or the composition of litigation. And it directly says of the purchase from Plant that it was made at an overvaluation and by it Plant was tempted to the bargain and the United Company satisfied by getting rid of a competitor.

We get no solution of the purpose of the parties by the price the United Company paid.[1] We must consider what it was paid for. It is to be remembered that we are dealing with a transaction which took place eleven years after the formation of that company and is to be judged of by its own circumstances, the incentives of that time. Plant was eager to sell and the overtures came from him—indeed, he engaged two intermediaries, to one of whom he paid a large commission. There was necessarily negotiation before the final meeting of minds. To estimate the bargain to it the United Company insisted upon an

[1] The price was $3,000,000 in cash and $1,500,000 in common stock of the United Company at par, the market value of which was $3,000,000.

inspection of the machines, that is, to estimate their value, as it was testified, "to the advancing of the art of shoemaking." [1] Plant refused at first, as we have said, but later yielded, and after inspection the purchase was consummated. Indeed, there were two inspections. The report on the first was adverse to the purchase. Mr. Winslow, president of the United Company, took part in the second and we may quote his testimony, for it is the standpoint of that company we are now considering. His testimony, besides, had confirmation. He believed, he testified, that he had a broader knowledge of shoe machinery than any one else and he therefore studied the Plant machines "personally as an expert." He considered them, he said, from the standpoint of their capacity, the value of the inventions and the improvements embodied in them, the comparison of their work with the work of the United Company's machines and the mechanical construction of the latter. He further testified that "Plant had used the Goodyear machines [the United Company's machines] as a basis for his machines and had made important improvements and developments." He indicated one of the improvements in particular, which he regarded as of the very greatest practical importance, especially when combined

[1] Mr. Winslow gave the following explanation of his purpose in the Plant purchase as stated in conversations with Mr. Plant:

"I always declined to have anything to do not only with buying but considering his propositions without a full and complete right to examine his machinery, determine the value of the inventions—the patents that he had—and Mr. Plant knew that my position all the time, at every interview was that I was not interested in what it cost him to get them up, whether much or little. My entire and only interest was whether those patents could be made of benefit to our customers and the trade. If they could be of benefit, if they were of large benefit, and the trade ought to have them, I should be very glad to buy them and embody them in our machines for what I thought they were worth, irrespective of what they had cost him—but I would not pay a cent more for them."

with a device that the United Company had just developed and placed in its factories. In a "broad way," he said, the value was almost incalculable.

But there was an interdependency of values. While the Plant device had value over that of the United Company's, it was controlled by the latter, or, as the witness expressed the situation, "in a broad way it was a perfect deadlock." In other words, the United Company had the underlying invention and Plant a patent for a particular form of operation which was necessarily subordinate to the other—a situation familar in patent law and contests.

It will be seen, therefore, that there was no other way out of the deadlock, if the inventions were to be used together—that is, embodied in one machine, without infringement—than by ownership in one hand of all the patents. That plan was adopted and was the inducement of the purchase of the Plant inventions by the United Company. But there was litigation to be composed as well, and it was composed.

Another witness testified as to the relation of the Plant patents and those of the United Company and stated that the result, if Plant had insisted upon his patent rights and the company had insisted upon its patent rights, would have been "a stop in the development of shoe machinery in these lines." And continuing, he said: "We should hardly have dared to go ahead with the improvements in our machines for fear of not succeeding in our patent litigation, or of conflicting with such improvements as Plant had patented. On the other hand, Plant, or any company which he might form, would have hardly dared to go ahead with the possibility of these infringement suits. These infringement suits, or a good many of them, were then pending, and certainly he would have found very few customers, I think, for his machines."

This, in outline, was the situation that confronted the

parties and induced their transaction, the incentives of each being as indicated. And they were justifiable incentives, and we may accept them as an alternative to the contention made by the Government that a violation of law was the impelling motive of the parties. And we may say that after the United Company had made the Plant acquisition it proceeded to make improvements on the Plant patents and developed many of them, giving them an efficiency they did not have before.

There are other acquisitions that are emphasized, among them, that of the stock of the Goddu Sons Metal Company. It was acquired March, 1899, a month after the United Company was formed and eleven years before this suit was brought; and the inducement to the acquisition was to settle the patent troubles that came to the United Company through one of its constituent companies. The value obtained was in patents. These were for the metallic variety of machines, and, according to a witness for defendants, "at that time the United Company was putting out commercial machines for doing the work for which the Goddu Company machines were intended." And, according to another witness, though not then in a condition to be placed in the hands of manufacturers, "they were in a state of development where some of them could have been, without extensive changes, made operative."

By this testimony the defendants justify the purchase; the Government condemns it. The defendants say that it was in composition of an inherited litigation and that patents of value were obtained by it. To this the Government replies in condemnation that the cost of the settlement of the disputes was excessive, being $150,000, and the purpose of getting the patents was to forestall the competition they threatened and could have accomplished by their development.

The value of a settlement of a dispute about rights which has reached litigation or threatens it cannot be

easily or accurately estimated. It depends upon too many considerations which are not reflected in the price paid. The other ground of condemnation has strength. As the Government says, quoting Circuit Judge Putnam in another case, neither the letter of the law nor its purpose "distinguishes between strangling of commerce which has been born and preventing the birth of a commerce which does not exist." But there is another view. No one can tell the strength of the competition that may be in a patent. It may be more than competition; it may be destruction, and the Anti-Trust Act surely does not require the acceptance of that or forbid effort to prevent it. But even if such extreme does not impend, certainly improvement of business and its efficiency can be striven for without offense to the law. *United States* v. *Winslow, supra.*

We may say here of the contention of the Government as to the acquisitions—and the same comment may be made of most of its contentions—that they cast us into speculation for their estimate and urge us to decide between well-sustained conflicting opinions and adjudge the defendants guilty of a violation of law. And this, too, against the considered judgment of the trial court.

We see no illegality in the contract with Goddu for assignment of other inventions he might make, or in like agreement with others. We content ourselves with this general declaration. An analysis of the contracts is not feasible, nor are the covenants measurable. That they are attempts to subject the inventive genius of the country to the designs of the defendants is too extreme. They can be seen to have more particular use and to be justified in the circumstances of the transaction with which they were connected. Those whom one employs one gives opportunity to (this was Goddu's case) and may exact that it be used for the employer. Those who have conveyed to him special machines may be presumed to have been compensated by their price, and that in either case

there will be such development and use as to make them competitive is too speculative to justify a judgment.

It is to be noted that the acquisitions in this case were not coincident in time nor parts of the same transaction. They were scattered through a period of years and varied each from the other, had no dependency, were different and unrelated steps in the development of the business of defendants. They must hence be judged separately, not in accumulation.

The above comment is applicable to other acquisitions, said to be fifty-six in number. It is impossible to review them. A description of them and wherein the machines acquired were competitive with the machines of the United Company the Government sets forth in many pages of its brief, and the defendants reply as circumstantially with opposing delineation and justification. Their effect is hard to estimate. The removal in some degree of competition may be charged against some of them and yet, on the other hand, the acquisitions may be said to be justified by the exigencies or conveniences of the situation. Some of them were merely of accessorial machines; some in composition of patent troubles; some not connected with the special charge of monopoly to which the Government has limited itself; some the transfer to defendants of kinds of machines not possessed by them; some of patented improvements and inventions, aiding or completing the defendants' machines, tributary therefore to their efficiency. They give a false impression by their number. They added nothing of obnoxious power to the United Company nor in any practical or large sense removed competition.

Defendants charge that the Government not only puts an exaggerated computation upon the acquisitions by defendants but gives no credit for or account to their resistance of applications to buy other and, it is asserted, more important concerns. Their number is given as 75, all of great use and importance. The trial court found that the

offers refused were more numerous and several of them were of concerns more important to the scheme of monopoly charged against defendants than any of the specified acquisitions. The comment is justified by the evidence.

We pass by the charge of the Government that the United Company through its president threatened destruction to opponents and the use of his influence in the business world to enforce transfers of competing concerns and the patents they controlled. The charge and its denial or explanation were estimated by the trial judges and the charge was held not to be established, or of no serious importance. The court said that if the declarations could be called "threats" in view of all the surrounding circumstances shown, it was not established that any competitor lost a customer or that anybody was prevented from attempting competition. Besides, they were isolated instances, separated in time, without relation, not coördinated acts in a scheme of oppression.

We cannot go into further detail without unduly extending this opinion. It would be repetition, besides, of what was done carefully and thoroughly in the opinions of the trial judges. We sum up with a generalization that the United Company took by its organization "established businesses already of great value, possessing great possibilities of development," as said by the trial court. It was discerned that there was advantage in their concentration, and the expansion that has hence resulted has been as much in necessary evolution as by design. At its foundation there were certain basic patents and many auxiliary ones. Inventors—those connected with and those independent of it—were devising and experimenting, and of this the company had to keep informed. It had to keep up with the mechanical march; to fall back would have been its destruction. There was growth not only in its business proper but in the accessories to it. When it was formed in 1899 it had no facilities for furnishing findings

and supplies. It was business enterprise or, it may be, necessity, to acquire them, and their acquisition became what is called in the case the United Company's "general department," which handles, it is said, between 150 and 200 different kinds of machines. The expansion to this and in this was like the expansion of the department store—an accumulation not only of necessary things, but of incidental, supplemental things, auxiliary to the completion and finish of a boot or shoe. There is a service force as well, estimated at 6,000 men, to repair immediately breaks or deterioration without extra charge. And these men are kept at convenient places to repair machines and replace worn-out parts, and depots of supplies are maintained. There are also instructors of operators as well as furnishing of men in emergency. It is in the testimony that a total of 8,889 operatives were taught in the year 1911 alone.

The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained. Patrons are given the benefits of the improvements made by the company and new machines are substituted for the old ones without disproportionate charge. There has been saving as well in the cost of manufacture of shoes. These are some of the results of the organization of the United Company. Others are testified to and the means of their accomplishment; but time will not permit their statement, and we pass to the leases.

There was complaint of them and the Government attacks them. Complaints, however, may be interested lament; but, on the other hand, they may be the expression of real grievance and demand redress. And which they are should be considered. To the attacks of the Government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them it is the monopoly of the right. It

must, indeed, be said that it is the experience of the world that the utility of an invention entices to its infringement, but it would be a perversion of things to facilitate the wrong by a sacrifice of the right in revulsion from the restraint which the right authorizes. But, on the other hand, we must not over-estimate the right or give it a sinister effect—permit it to be a means, to use the words of the Government, "to the building up and intrenchment" of an "illegal monopoly." We cannot consider the contentions with the detail that counsel have. We think that their answer is in the statement of certain general propositions.

Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act. In other circumstances it may be, as in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, to which case that at bar has no resemblance.

The question, then, is, Was the patent right lawfully exerted in the leases? Were they anything more than the exercise of the patent monopoly? The word is descriptive and must be used, but it does not imply oppression. The old instrumentalities exist for all who are content with them and who care not for the better ones which inventive genius creates.

The charge of oppression puts out of view many essential things. We must keep in mind the quality of the right we are considering and that the inventor gets nothing from the law that he did not have before and that the only effect of his patent is to restrain others from dealing with or using its device. *United States* v. *Bell Telephone Co.*, 167 U. S. 224, 239; *Paper Bag Patent Case*,

210 U. S. 405, 424; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 510. Or to put it another way, the inventor does not get from the law a right to a use that he did not have before but he gets the right to an *exclusive* use. Take this from him and you take all that the law gives him and to secure which the public faith is pledged. Chief Justice Marshall in *Grant* v. *Raymond*, 6 Pet. 218, 242.

Indeed, we said in the *Paper Bag Patent Case* that he may keep his invention out of use. Therefore, he necessarily has the power of granting it to some and withholding it from others, a right of selection of persons and terms. There is, however, a limitation upon him; he cannot grant the title and retain the incidents of it. *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490; *Bauer* v. *O'Donnell*, 229 U. S. 1; *Motion Picture Co.* v. *Universal Film Co.*, *supra*.

These cases have received review and application in *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U. S. 8. The principle of them was expressed to be that where an article has been sold it passes beyond the monopoly given by the patent and conditions cannot be imposed upon it. Leases are not of this character; they do not convey the title. It is not contended, nor could it be, that in this case they are a disguise for something else, artifices to convey the machinery and yet keep it subject to the patent right and its exercise. It therefore follows that conditions may be imposed by them.

It is not certain that the Government denies this or means to assert anything more than that the patent right is exercised in oppression, assisting, indeed consummating, a scheme of monopoly, begun by the formation of the United Company, prosecuted in the various ways to which we have referred, and completed by the leases and their clauses.

It is difficult to represent the contentions of the Gov-

ernment without under-coloring them or over-coloring them. There is one that the leases are invalid in and of themselves; there is another that "ultimately, of course, it is upon the lease forms themselves and their apparent and necessary effect upon competition that the United States relies." The first contention the Government leaves very much to assertion, and defendants charge that it was not made in the trial court; the second contention is necessary to assign to the leases an obnoxious quality in the hands of the United Company which they did not have in the hands of the constituent companies. The distinction would seem to be not material of itself, and the important consideration is not what the leases were in some other relation but what they are in their present relation and to what purpose are they being rightfully or wrongfully, or can they be rightfully or wrongfully, used or enforced? To this inquiry we shall now address ourselves.

The first objection made to the leases is that they are unchangeable by the lessee—he "has no right," it is urged, to demand either the cancellation or modification of an existing one. The objection is not definite or measurable. It is probably but a representation of what is deemed the severity of the leases, for, of course, a contract is a restraint upon option and can be enforced. This power is its efficacy and indicates its obligation. And further it is of no consequence that the leases cover all of the machines of the United Company if they are an exercise of the patent rights. Whether they are is the broad question in the case and its disposition will dispose of all minor and dependent ones.

What, then, do the leases accomplish? They have clauses called "tying" clauses, so called because, it is said, they tie the use of the machine leased to the use of machines not covered by the particular lease. Their result is, the Government asserts, "to make it in effect a

condition of the lease that the lessee shall not use the machines of competitors either to supply a need for additional machines of the kind leased or for machines of other important though wholly different types."

And it is urged: "In addition to those clauses there are certain other clauses which have a similar effect upon the freedom of the lessee's choice of machines. They give to the tying clauses their maximum effect as destroyers of the possibility of competition with the defendants." It is charged that "the objectionable clauses are inter-related and operate together with cumulative effect"; that "they are unlawful both as integral and effective parts of an unlawful whole, and, for the most part, in and of themselves." And it is further charged that "it is, however, in their combined effect as a system of leasing, used and insisted upon by a corporation dominant in its field that the full extent of their illegality is to be perceived." This, however, is assertion and relies for its foundation upon the assumption of an illegal dominance by the United Company that has been found not to exist. This element, therefore, must be put to one side and the leases regarded in and of themselves and by the incentives that induced their execution; and to a suit seeking their dissolution it may well be contended that the lessees are necessary parties, certainly so far as existing leases are concerned. But the contention of the Government goes farther and asserts that its purpose and object justify the absence of the lessees from the case. Indeed the Government takes merit to itself in relieving them of a thraldom. "The rights of the lessees," it is said, "are not touched except to preserve them." But a lessee may like his situation, may have deliberately chosen it and may not care for any interposition, benevolent or otherwise.

Finally the Government, in possible opposition to both lessor and lessee, asserts that "no one has the right to

say that the unlawful conduct of another shall be permitted to continue because he has an interest in it." Perhaps not. But there may be dispute as to the character of the conduct, and its illegality cannot be conceded to mere assertion and the consequent assumption of a destroying power.

However, let us consider the clauses from the standpoint of the Government's contentions and determine if they transcend the rights given to patentees. The clauses are: (1) One that prescribes a uniform term of 17 years. The result of this is, the Government says, "that during that long period no replacement of a machine so leased by a better machine of defendants or others and no change in the form of the lease or avoidance of any of its requirements is open to the lessee except with the defendants' consent and upon their terms." To this it is replied that the leases of the constituent companies ran for indefinite periods and, besides, new patents were constantly taken out, and to these the criticism of the Government does not apply. And again, the term was assurance to the lessee as well as lessor, and, as defendants' counsel suggest, there is analogy in the term to that of a building lease which may under the hazard of circumstances turn out to be or not to be advantageous Of this there are two recent examples in this court. *Filene's Sons Co.* v. *Weed*, 245 U. S. 597, and *Gardiner* v. *Butler & Co.*, 245 U. S. 603. Indeed, we may say of all the clauses, without a minute analysis and discussion of them, that they were simply bargains, based on patent rights and the conditions upon which those rights were granted.

(2) The "additional-machines" clause, which provides that in case the lessee has more work than can be performed by the machine leased, he will lease additional machinery to perform the work and that if the lessee does not do so the lessor may cancel the lease if he so elect, and any other lease of machinery of the same kind then in

force between them. This clause, we shall presently see, was discontinued in 1907 and was not in use when this suit was brought. (3) An "exclusive use" clause requiring the lessee of particular machinery to use it exclusively and the auxiliary machines which aid or supplement it, and for failure to do so, lessor may at his option terminate forthwith in writing any or all leases or licenses of the particular machines and accessorial machines and they shall become revested in the lessor. This clause only requires an election of use between the United Company's machines and those of other makers. If the election be of the latter, the lessor may terminate the lease and resume his machines. (4) A prohibitive clause. This clause provides that the particular machine leased shall not be used in the preparation or manufacture of shoes, etc., upon which work is done by any machine not held by the lessee under lease from the lessor. (5) The right to terminate all leases clause. This clause does not need much explanation. Its name expresses its purpose. It gives the lessor the right, in default of the performance of the conditions of the particular lease, not only to cancel that lease but all other leases and requires a delivery of the leased machinery to the lessor at Beverly, Mass., complete and in good order, reasonable wear and tear alone excepted. (6) The full-capacity clause. Its name expresses its purpose. It requires the leased machinery to be used to its full capacity upon the work to which it is applicable. This clause was in the lease of the Consolidated Company prior to the formation of the United Company. Its purpose is to secure the royalty which is based on the amount of use of the machine. It does not require the use of any particular machine or the use of other machines. It merely requires that the particular machine that is installed shall be used if the lessee have work for it. Without it defendants say that, as lessors, they would have no assurance of compensation for their machine. (7) A

charge upon the return of the machinery leased is required. This needs no comment or further notice. (8) The leases of metallic machinery provide for the purchase from the lessor of certain fastening material. This clause and the next, which provides for the payment of royalties, are mere make-weights and not of special materiality.

The evil potency ascribed to the leases (we use the word as inclusive of the clauses and we do not think it necessary to distinguish them according to their application to particular machines) by the Government is their asserted coercion of shoe makers and machinery makers. They limit the freedom of the first, it is contended, and by that limitation preclude the competition of the second with the defendants. In other words, the use of the machines of the United Company is compelled as against the use of machines of other manufacturers, resulting in the restraint of the trade of the latter. To this charge all other charges are subsidiary, and the restraint is said to have been the initial conception of the company and the purpose of its organization. The evidence disproves this. As we have seen, the leasing of their respective machines was the practice of the constituent companies before their union and they were substantially the same after union as before—in instances better. There was a difference as to the prohibitive clause. After the union it related to machines of all of the companies. And the testimony also shows that the advantage of the leases was and is that manufacturers of not large means were able to obtain machinery which they were without capital to buy. They helped, indeed, the big and the little. One manufacturer, whose output was 5,000 pairs of shoes a day, testified that if his company had been compelled to buy outright the machinery necessary to equip its factory, it could not have developed as it had.

And sets of machines are necessary to the equipment of a factory, and their best results are obtained when used in proper relation. This relation, indeed, the necessary coördination of the machines, was shown pictorially by a number of views in the court below, as well as testified to by witnesses. And there is great economic advantage, it was testified, in the accessory service furnished by the United Company for the reason that "the regularity and continuous operation of the machines is dependent upon what may be termed instantaneous service. . . . This factor of service is at the very base of the successful operation of a shoe factory. The work is planned to travel from one room to another in fixed quantities. So many pair go in in the morning—so many pair come out at night. The operatives are dependent upon that work traveling along regularly to them. The breaking down of some of these machines will in many of the factories block the entire flow of the work." This was the testimony of the president of the United Company, and it received corroboration from a witness for the United States, who said: "The margin of profit in making shoes is such that it is very essential that our machinery should work smoothly and regularly and with continuity, and economies in the manufacture of shoes often make the difference between a successful manufacturer and one who is not successful. One of the most important economies is to have our machinery work with continuity and with the highest efficiency and turn out our product with the utmost regularity day after day, just as we want to get it so that there won't be any hitch anywhere in the flow of our product through our factory." The witness gave praise to the excellence of the machines of the United Company. This excellence and the described service the leases secured to the lessees and secured at the same time rights to the lessors. And the leases are strictly a reservation of the use of the machines, a right

recognized in *Bauer* v. *O'Donnell; Straus* v. *Victor Talking Machine Co.*, and *Motion Picture Co.* v. *Universal Film Co., supra.* We must assume they were entered into by the lessees upon a calculation of their value—the efficiency of the machines balanced against the restrictions upon and conditions of their use. The lessees had the alternative of the choice of other machines for other machines were sold side by side with those the leases covered. This, we think, is put out of view.

Let us guard against confusion and not confound things which must be kept in distinction. A patentee is given rights to his device, but he is given no power to force it on the world. If the world buy it or use it the world will do so upon a voluntary judgment of its utility, demonstrated, it may be, at great cost to the patentee. If its price be too high, whether in dollars or conditions, the world will refuse it; if it be worth the price, whether of dollars or conditions, the world will seek it. To say that the world is not recompensed for the price it pays is to attack the policy of the law, is to defy experience and to declare that the objects of inventive genius all around us have contributed nothing to the advancement of mankind. This comment is applicable here. We cannot accept, therefore, the contention of the Government. We see nothing else in the circumstances of the parties than that which moves and may move the transactions of men.

We may say further, in answer to the criticism of the leases, that relaxations of them were granted by "riders" and that forms other than the restrictive were open to the shoe manufacturers, distinguished in the testimony by the term "independent." They do not contain the prohibitive clause but do contain the other clauses and require an initial payment. Comparison is made of the independent form and the other forms by witnesses and various judgments are expressed. The Government sees nothing in any of them but the restraints upon the freedom

of business, and regards the independent form as only slightly relaxing what counsel implies is the slavery of the others. The defendants contend that they are the simple exercise of a property right, the mutuality of agreement based on definite and valuable considerations. And it was testified that the machines in the United Company's general department have always been open to sale or lease. It is further said that the additional-machine clauses were removed from all leases of the company as early as 1907 and they were not in use and did not represent its policy at the time of bringing this suit. But leases with that clause are outstanding, the Government replies.

However, we need not dwell further upon the leases. It approaches declamation to say that the lessees were coerced to their making. And, as we have said, there was benefit to the lessee. It is easy to say that the leases are against the policy of the law. But when one tries to be definite one comes back to the rights and obligations of the parties. There is no question in the case of the use of circumstances to compel or restrain; the leases are simply bargains, not different from others, moved upon calculated considerations, and, whether provident or improvident, are entitled nevertheless to the sanctions of the law. We have said this, indeed, with iteration, but sometimes propositions which have become postulates have to be justified to meet objections, which, if they do not deny their existence, tend to bring them into question.

Besides, it is impossible to believe, and the court below refused to find, that the great business of the United Shoe Machinery Company has been built up by the coercion of its customers and that its machinery has been installed in most of the large factories of the country by the exercise of power, even that of patents. The installations could have had no other incentive than the excellence of the machines and the advantage of their use, the con-

ditions imposed having adequate compensation and not being offensive to the letter or the policy of the law.

Decree affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS took no part in the consideration and decision of the case.

MR. JUSTICE DAY, dissenting.

I concur with the opinion of MR. JUSTICE CLARKE [*post*, 75] as to the character of the combination here involved.

There are provisions in the so-called leases attacked in this case which in my view are so clearly within the condemnation of the Sherman Anti-Trust Act, that the further enforcement of them and the making of new leases of like character, should be enjoined. The far-reaching character of a decision sustaining a leasing system such as the defendant has developed and uses justifies a statement of the reasons which impel me to this conclusion.

As to the suggestion that the lessees are not parties to this proceeding, and, therefore, no decree can be had as to them, it seems to me this is not a case of want of indispensable or even necessary parties because of their interest such as should prevent the court from proceeding to a decree to enjoin the United Shoe Machinery Company from the further enforcement of these features of the leases and the making of similar contracts hereafter. If these leases are in violation of the Sherman Anti-Trust Act the makers of them may be proceeded against, and a decree rendered which shall effectually preclude them from further contracts of this sort, without the presence of the lessees, if it could be assumed that any of them should desire to be heard in advocacy of the retention of these prohibitive and restrictive features.

The object of this proceeding is to enjoin in equity fur-

ther violation of a criminal statute, not to determine title or property rights of the defendant. It is sufficient as to the doctrine of indispensable parties to refer to *Shields* v. *Barrow*, 17 How. 130, and the cases collected in the discussion of the subject in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 48. There is no reason in this case why the court may not so shape its relief as to reserve the rights of persons not before it, if that should be necessary.

The questions involved in the aspect of the case now under consideration are two-fold. First: Are certain provisions of these lease agreements of themselves considered within the terms of the Sherman Anti-Trust Act? Second: Are such agreements to be held immune from the requirements of the act because of the fact that much, perhaps all, of the machinery of the United Shoe Machinery Company is made and leased under letters patent issued by the United States? Of these questions in their order.

1. It clearly appears from the record that the United Shoe Machinery Company dominates the trade in certain kinds of shoe machinery furnished to manufacturers all over the country; which machinery is essential to the successful prosecution of the business of manufacturing shoes. It has many customers to whom it supplies these machines under leases, and such customers are required to accept the terms of these instruments or go without the machines. The leases are made for a uniform term of seventeen years, and not now considering the conditions of payment for the use of the machines and other terms usual and legal in their nature, they contain certain other features which may be summarized in the requirements: (1) The lessee shall not use the machinery, or any part thereof, in the manufacture or preparation of welted boots, shoes or other footwear which has not had certain operations performed upon it by other machines leased from the lessor. This is called the prohibitive clause. (2)

If at any time the lessee shall fail or cease to use exclusively lasting machinery held by him under lease from the lessor, or fail or cease to use exclusively tacking mechanisms and appliances held by him under lease from the lessor, etc., the lessor may at its option terminate any or all leases or licenses of lasting machines, etc., then existing between the lessor and the lessee, and the right of possession shall thereupon vest in the lessor. This is called the exclusive use clause. (3) In case the lessee has work of the kind which can be performed by the machines belonging to the metallic department of the lessor in excess of the capacity of the metallic machinery which he has under lease from the lessor, then the lessee shall either take from the lessor sufficient additional machinery to perform the work, or failing so to do the lessor may cancel the lease forthwith, or any other lease of metallic machinery then in force between the parties. This is called the additional machines clause. (4) The lessee shall obtain from the lessor exclusively, at such prices as it may establish, all the fastening material needed in operating the leased machines. (6) The lessee shall, at the election of the lessor, suffer a termination of all leases which he may have, and the removal of all machines leased by him from the defendant, in the event of any violation of any term of any one of the leases.

From familiar decisions of this court it may be said to be now well settled that the Sherman Anti-Trust Act condemns all combinations and contracts the effect of which is to unduly restrain the free and natural flow of interstate commerce, or which monopolize or tend to monopolize such trade or commerce in whole or in part. While the act does not reach normal contracts sanctioned by law and sustained by usage, it does reach any and all means and devices by which the purposes of the act to protect the freedom of interstate commerce may be thwarted and monopolies promoted and created. *United States* v. *Ameri-*

can Tobacco Co., 221 U. S. 106, 179; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *United States* v. *Reading Co.*, 226 U. S. 324; *United States* v. *Patten*, 226 U. S. 525; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600. That these lease restrictions tend to prevent the free flow of interstate commerce, and the natural course of its activities, and at least tend to monopolize an important trade in interstate commerce seems apparent from a mere statement of their terms, having in mind their natural and necessary effect.

For the seventeen years term for which all the leases are drawn, the lessees upon failure to use exclusively the defendant's machines for lasting shoes, or upon failure to purchase needed additional machines from the lessor, or to buy certain supplies from the lessor at prices to be fixed by it, are subject to the right of the lessor to terminate all the leases held by the offending lessee and to take possession of the machines to the utter destruction of the lessee's business. The necessary effect of these prohibitive provisions, in view of the dominating control of the business by the lessor, is to prevent the lessee from using other similar machines, however advantageous to him it may be to do so, unless he is willing to incur the peril of losing machinery essential to his business. It likewise so curtails the field of free customers as to keep others from manufacturing such machinery.[1] Whenever a new ma-

[1] The Judiciary Committee of the House of Representatives, when considering the Clayton Bill (38 Stat. 730), said of such provisions:

"Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Company, . . . the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors not only from trade in which they are already engaged but from the opportunities to build up trade in any community where these great and powerful conditions are appearing under this system and practice. By this method and practice the Shoe Machinery Company has built up

chine is acquired by the lessee for the period of seventeen years (the full life of a patent under the statutes of the United States) the chain is forged anew which binds him to the use of the lessor's machines, to the practical exclusion of all others.

Nor is the situation changed by the fact that so-called independent leases are offered to manufacturers. These leases require the payment of considerable additional charges and embrace terms which lead the shoe manufacturers to choose the prohibitive and restrictive forms of leases rather than to accept others. Moreover, the questions in this case are to be tried upon the effect of the leases actually made, and for years to remain in force. When it is considered that these results may be obtained in the conduct of a great business industry by this system of "tying" contracts, the necessary effect to restrain the freedom of commerce, and the attempt to effect monopolization, seem to me to be established.

2. The stress of the argument on behalf of the company is rested upon the fact that it is the owner of letters patent issued by the United States, and that within the monopoly created by such patents it has the right to make and enforce such contracts as are herein involved. At an

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a monopoly that owns and controls the entire machinery now being used by all great manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If the manufacturer who is using machines of the Shoe Machinery Company were to purchase and place a machine manufactured by an independent company in his establishment, the Shoe Machinery Company could, under its contracts, withdraw all their machinery from the establishment and thereby wreck the business of the manufacturer." (Report of Committee, p. 13.)

A statute of Massachusetts forbidding patentees from making leases in effect like those here involved was sustained as constitutional by the Supreme Judicial Court of Massachusetts in 193 Massachusetts, 605.

early day this court, speaking by its Chief Justice, declared: "The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent." *Bloomer* v. *McQuewan*, 14 How. 539. The extent and nature of rights secured by letters patent have been the subject of recent consideration in this court, and the definition, just quoted, has been approved and applied. *Bauer* v. *O'Donnell*, 229 U. S. 1; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502; *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U. S. 8.

When this case was tried in the District Court *Henry* v. *Dick*, 224 U. S. 1, was the law of this court. In that case a mimeograph, made under letters patent, was sold for less than its full value, with a license agreement limiting its use to certain unpatented articles belonging to the patentee. Such use was held to be within the exclusive right secured by the lessor's patent. In *Motion Picture Co.* v. *Universal Film Co.*, *supra*, it was sought to extend the doctrine of that case so as to protect a license agreement evidenced by notice attached to the machine so as to limit the purchaser to the use of certain films, and to restrict the purchaser to other terms to be fixed by the owner of the patent at his discretion. But such extended scope of patent rights was denied and it was again held that the patentee received from the law no more than the exclusive right to make, use, and sell his invention.

It is said, however, that the series of cases begining with *Bauer* v. *O'Donnell*, *supra*, and ending with *Boston Store of Chicago* v. *American Graphophone Co.*, *supra*, decided at this term, hold no more than that a patentee may not sell an article covered by his letters patent, receive his price therefor, and then undertake to impose a restriction upon the price at which resales of the patented article may

be made. A reading of those cases shows that the nature and extent of the right to grant to others the use of an invention was fully discussed, and its limitations defined.

In the *Motion Picture Case* the right of a patentee to place restrictions upon the use of a patented machine, and to limit its use by a purchaser, or purchaser's lessee, to terms stated in the license agreement, was considered. This court held that such limitations as were there involved upon the use of patented machines were not within the scope of the patent. It was upon the expanded right to use an invention that the *Button Fastener Case,* 77 Fed. Rep. 288, and *Henry* v. *Dick,* were rested; both cases were overruled in the *Motion Picture Case.* In the latter case it was specifically held that while the patentee might withhold his invention from public use, yet if he consented to its use by himself or others, he was limited to the use described in the claims of his patent, and that there was nothing in the statute which extended his right to control the patented invention by prescribing the use of machines, materials and supplies not covered by the patent. In view of the full discussion of the question in the series of cases already referred to, it is unnecessary to pursue it further.

Under the system of leasing, now before us, the patentee not only undertakes to grant the use of the machines covered by the letters patent, but to dictate the supplies with which they shall be used; to compel their surrender if the machine of another is used; to prevent their use except with other machinery furnished by the patentee; to extend the monopoly of the invention beyond the 17 years allowed by the statute; to lease the use of the invention only upon terms which permit the lessor to forfeit the patent license, and to terminate, if he chooses, all similar leases to use the machines of the lessor. And these extraordinary claims of right are made under the grant of the patent which gives to the inventor the exclusive

right to make, use, and sell his invention, and nothing more. In my opinion such extended power and authority are not consistent with the act as the same has been construed in every case dealing with the subject beginning with the decision in *Bauer* v. *O'Donnell*. To sustain such provisions it seems to me amounts to an authority to holders of patented inventions, under the guise of leasing the use of patented machinery, to exercise the right to make combinations necessarily and unduly restraining the freedom of trade, and by virtue of the patent grant to build up monopolies in direct violation of the Sherman Act.

True it is that there is embraced in the patent grant the right or privilege to make licenses and agreements covering the use of the machines patented so long as such agreements are not in themselves unlawful. But the right to make restrictions is controlled by the general principles of law, and because he is at liberty to make them, the patentee may not make contracts in themselves illegal and certainly is not authorized to make contracts in violation of other statutes of the United States. That rights granted under a patent do not authorize the making of contracts in restraint of trade, or monopolizing or tending to monopolize trade and commerce in violation of the Sherman Act, was held by this court in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20.

In *Straus* v. *American Publishers' Assn.*, 231 U. S. 222, contracts, otherwise clearly within the terms of the Sherman Act, were claimed to be justified because of rights secured under the copyright laws of the United States. Quoting and following the decision in the *Standard Sanitary Mfg. Co. Case*, this court said: "So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended

to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman Law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies. . . ."

The patent statute and the Sherman Act are each valid laws of the United States. While a patentee should be protected in the exercise of rights secured to the inventor under the patent system enacted into the laws of the United States, there is nothing in the act which gives the patentee a license to violate other statutes of the United States, and certainly not the one now under consideration. In my opinion the restrictive and prohibitive clauses of these leases are within the Sherman Act, as they are clearly in restraint of interstate trade and tend to monopolize in the sense that those terms have been defined in the decisions of this court. That some of the leases were in existence when the United Shoe Machinery Company was formed affords no protection as against the exercise of the power of Congress in the passage of the Sherman Act. *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 480. I think that a decree should be entered as prayed for, and I therefore dissent from the opinion and judgment of the court.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in this dissent.

MR. JUSTICE CLARKE, dissenting.

A plain history of just what the parties did at and after the time the United Shoe Machinery Company was organized in February, 1899, compiled, almost exclusively, from the testimony of the two leaders in the organization and from documentary evidence, will be the best state-

ment I can make of the reasons other than those stated in the dissenting opinion by Mr. Justice Day, which render it impossible for me to concur in the opinion and judgment of the court in this case.

I fully agree with the customary practice of giving great weight to the conclusions of trial judges as to questions of fact involved when the value of the testimony depends upon the appearance and manner of the witnesses when testifying, but the reason for this rule ceases when the evidence is in writing or consists, chiefly, as it does in this case, of purchases of property, the significance of which lies in the fact of the purchase rather than in the manner of making it.

Obviously, the attaching of the sole of a shoe to the upper is the difficult and dominating operation in the manufacture of shoes by machinery, and early in the trial the charge of the Government in the case, by stipulation in open court, became, that the consolidation was formed for the purpose of monopolizing interstate trade or commerce in machinery adapted to that purpose, the "bottoming of shoes," in violation of both the first and second sections of the Anti-Trust Act of 1890.

Before the merger the Goodyear Shoe Machinery Company (hereinafter designated the Goodyear Company) was engaged in manufacturing and leasing to shoe manufacturers two principal and sixteen auxiliary machines, the latter being used in preparing the materials for the operation of the former. The two principal machines were used for sewing the sole to the upper and were known as the Goodyear welt and turn shoe machine and the Goodyear outsole rapid lock stitch machine. With these machines, the Goodyear Welt, a popular and largely used shoe, was manufactured. This company also manufactured a specially designed lasting machine used in making Goodyear Welt Shoes.

The Consolidated and McKay Lasting Machine Com-

pany (hereinafter designated as the Consolidated Company) was engaged in manufacturing and leasing lasting machines of three types.

As the name of the one implies, and as otherwise appears in the record, each of these two companies had resulted from prior consolidations of shoe machine manufacturing companies and they were the largest organizations of their kind in the country.

The controlling spirit of the Consolidated Company was S. W. Winslow, and of the Goodyear Company E. P. Howe, who, the record shows, were keen and masterful men, and they both testifiy that in July, 1898, they began the negotiations looking to a uniting of the interests of the two companies, which culminated in the organization of the United Shoe Machinery Company in February, 1899. A "harmonious arrangement" or "working agreement" was at first proposed, but Howe, being a lawyer, would not agree to this, "because," he says, "I had a sort of indefinite idea that it might be deemed to be a combination in restraint of trade. . . . I had an indefinite fear that if the two companies remained separate but, for instance, had a joint factory and joint branch offices, there might be something in the way of restraint of trade. I insisted for that reason that there should be a complete merger and consolidation."

This idea that the "harmonious arrangement" was unlawful was doubtless inspired in the mind of Howe by the decision in the *Trans-Missouri Freight Assn. Case*, 166 U. S. 290, rendered in 1897, and he probably shared a then not uncommon notion that the holding company and the merger were devices lawfully available for evading the congressional purpose expressed in the Anti-Trust Act. But in the *Northern Securities Case*, 193 U. S. 197, this court decided in 1904 that the holding company was a futile device, and in the *American Tobacco Co. Case*, 221 U. S. 106, it was decided in 1911 that the merger was also

a mere "subterfuge of form" which the courts would not permit to shield those who violated the act.

Thus rejecting the "harmonious agreement" or "understanding" as unlawful, for the purpose of accomplishing the same end, in what they thought a not illegal way, the defendants resorted to the merger (later on, as we shall see, using also the holding company) and organized the United Shoe Machinery Company, under the laws of New Jersey, with a capital stock of $25,000,000.

The scope of the declaration of the purposes for which this corporation was formed, as stated in its articles of incorporation, is of much significance in determining what the real objective was at which the persons interested were aiming. It is therein declared that the company is formed not only "to manufacture, lease and sell shoe machinery," but also, "to manufacture . . . boots, shoes, and footwear and *all articles* . . . of every description that may be produced or manufactured, in whole or in part, from leather, rubber or any other materials or fabrics; . . . to purchase, lease or otherwise acquire . . . trade-marks, trade-names, . . . copyrights and patent rights, . . . and, with a view to the working and development of the same, to carry on any legal business whatsoever, whether manufacturing or otherwise, which the corporation may deem calculated, directly or indirectly, to accomplish these objects, or any of them. . . . To hold, purchase, or otherwise acquire . . . shares of the capital stock . . . of any other corporation or corporations; . . . to do all or any of the above things . . . in any part of the world."

As impressive proof of the objects of the incorporators, we print in the margin some extracts from the certificate of incorporation of the holding company, the "United Shoe Machinery Corporation," organized in 1905, by the

men controlling the United Shoe Machinery Company, of 1899.[1]

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[1] The following are excerpts from the articles of incorporation of the "United Shoe Machinery Corporation," with a capital stock of $50,000,000.00, filed May 2nd, 1905:

"Third. The objects for which the corporation is formed are:

"To manufacture, buy, sell, lease, operate and deal in and with all kinds of machinery, tools, and implements, and mechanical devices and contrivances of every name and nature whatsoever, and especially to manufacture, buy, sell, lease, operate and deal in and with all sorts of boot and shoe machinery, lasts, trees, forms, and every kind of mechanism, contrivance, implement, tool, material, or thing in any way whatsoever connected with, or useful in connection with the manufacture of boots, shoes and footwear, or the manufacture of leather and rubber goods, or goods made from materials and fabrics of any description whatsoever, or useful in connection with the manufacture or operation of any of the machinery, mechanical devices or contrivances hereinbefore mentioned; to produce, prepare and manufacture, buy, sell and deal in and with leather and rubber, and materials and fabrics of all sorts, and the raw materials from which said leather, rubber materials or fabrics are produced; to manufacture, buy, sell and deal in and with boots, shoes and footwear and all articles and things of every description that may be produced or manufactured, in whole or in part, from leather, rubber or any other materials or fabrics; and in general to produce, prepare, manufacture and deal in and with goods, wares, merchandise, property, materials and things of every class and description.

"To carry on the business of manufacturers of and dealers in all kinds of eyelets, hooks, buttons, studs, nails, wires, rivets, tacks, metallic and other plates, metallic, wood and other fastenings, laces, cloth, linen, tape and other fabrics, brushes, abrasive materials, cements, dressings, stains, blackings and other requisites for the improvement and treatment of boots and shoes, threads, elastic material, buttons and inner soles, and other articles or substances for protecting feet from damp or heat, and other articles or substances used in connection with the manufacture of boots and shoes, corsets, stationery, sails, tents, clothing and for analogous purposes, and to carry on the business of manufacturers of and dealers in all kinds of appliances, devices, findings, tools, mechanisms, accessories, processes and things which may be used or useful in connection with the manufacture or treatment of any of the above named articles or substances. . . .

And now thus equipped with apparent legal authority, amply sufficient if successfully used, to restrain and monopolize among the several States the branch of trade and commerce involved, let us see what the defendants did.

First of all, $4,918,000 of the stock of the new company was exchanged for all of the capital stock of the Goodyear and International Goodyear Companies, and $4,432,000 of stock plus $432,000 in cash was exchanged for all of the capital stock of the Consolidated Company. By this merger, with fifteen millions of the capital stock

"To apply for, obtain, register, purchase, lease or otherwise acquire, and to hold, own, use, operate, introduce, sell, assign or otherwise dispose of any and all trade-marks, trade-names and distinctive marks, copyrights, patents and patent rights, and all inventions, improvements and processes used in connection with or secured under Letters Patent of the United States or elsewhere, or otherwise, and to use, exercise, develop, grant licenses, in respect of, or otherwise turn to account any such trade-marks, patents, licenses, concessions, processes and the like, or any such property, rights and information so acquired, and, with a view to the working and development of the same, to carry on any legal business whatsoever, whether manufacturing or otherwise, which the corporation may deem calculated, directly or indirectly, to accomplish these objects or any of them. . . .

"To purchase, acquire by subscription or otherwise, and to hold for investment or otherwise, use, sell, assign, transfer, mortagage, pledge, or otherwise dispose of and to guarantee any shares of stock, bonds, securities, or other obligations of any other corporation or association carrying on any business which this corporation is authorized to carry on. . . .

"To enter into partnership or into any arrangement for sharing profits, union of interest, joint adventure or co-operation with any person, partnership, association or corporation carrying on or engaged in any business which this corporation is authorized to carry on or engage in. . . .

"To do all and everything necessary or convenient for the accomplishment of the purposes, objects and powers above-mentioned, or incidental thereto, and to conduct its business, or do anything which it is authorized to do, in every State and in the Territories and Colonies of the United States of America and in foreign countries . . ."

of the new company still available for other uses, the two largest manufacturers of lasting machines in the country were combined and Winslow testifies that, "After the formation of the United Company it was manufacturing *every single lasting machine* that was being put out in the United States except the Seaver machine; and in 1900 we acquired the Seaver Company."

Next, and immediately, although Winslow testifies that "no word had been spoken to either the McKay people or the Eppler people when the charter for the United Company was obtained," the Company purchased the entire capital stock of the McKay Shoe Machinery Company for five and one-half million dollars of stock of the United Company. This company, Winslow testifies, was engaged in manufacturing metallic fastening machines and heeling machines, "was doing a very large business," and through controlled subsidiaries was "putting out nearly all the metallic fastening machines and nearly all the heeling machines that were being made in the United States."

Thus, confessedly, by this union of these three companies there were consolidated substantially all of the manufacturers of lasting machines and of machines for attaching the soles of boots and shoes to uppers with metallic fastenings and with thread, and in addition to this the Davey Pegging Machine Company was owned by the Consolidated Company.

There yet remained only one strong competitor doing business in this country, the Eppler Welt Machine Company, with an international subsidiary. Besides the Eppler there was only one other welt machine company engaged in business, the Globe, an unimportant concern which, however, was acquired by the United Company a little later, in 1901.

Although Winslow and Howe could remember within a small fraction of a cent just what royalties were paid at any time for the use of their machines, neither of them

could remember what was paid for the Eppler stock, and both testified that the records of the company did not show the amount. But other testimony shows that payment for it, of between $350,000 and $400,000 in cash, was made within a few weeks after the organization of the United Company, and it was admitted, significantly, that no inventory was taken at the time of the purchase of either the McKay or Eppler stock.

That the Goodyear and Eppler machines were sharply competitive is shown by the testimony of both Winslow and Howe. Winslow testifies that just before the consolidation the Eppler Company was "manufacturing a welting machine, an outsole stitching machine and two auxiliary machines" and that the Goodyear Company was making "a welting machine, an outsole stitching machine and auxiliary machines that performed the same functions that the auxiliary machines of the Eppler Company did, and a number in addition." "Both machines," continues Winslow, "were being used in the manufacture of men's welt shoes," and "the two welting machines that were being specially pressed on the market at that time were the Goodyear machine and the Eppler machine." And Howe testifies, "Those two types of shoes were well known in the trade. There was the Goodyear welt, made by the Goodyear welt machines; the Eppler welt, which was a recognized class of shoe. We didn't know whether the manufacturers would prefer . . . Eppler welts or whether they would prefer Goodyear welts."

What these two dominating spirits of the enterprise thought of their work at the stage of its development which we have thus far described, is interesting and illuminating as to their purpose. Thus, Winslow:

"Immediately after the organization of the company our welting, outsole stitching and lasting machines were doing about all the welting, outsole stitching and lasting that was being done in the United States.

"Q. And so with your heeling and metallic fastening machines?

"A. Not so much the heeling."

And this from Howe, "When the United was formed I don't remember that any outside concerns were putting out lasting machines," and he elsewhere says, on cross-examination, that lasting machines of the Goodyear and Consolidated Companies overlapped in the work which was done with them and, if this was true, obviously they must have been competitors in the market.

To this must be added the statements made in circulars sent at this time to the smaller stockholders of the companies to induce them to join in the combination. Thus, to stockholders of the Goodyear Company: "The great advantages to be secured by the control in one corporation, both in the United States and in foreign countries, of the efficient types of shoe machinery, have been for several years recognized by the officers of the principal shoe-machinery companies. For more than a year your directors and large shareholders have been in negotiation to accomplish this end. After a thorough investigation of the financial condition and the business of the shoe-machinery companies named below, the organization of a corporation has been effected under the laws of the State of New Jersey, to be known as the United Shoe Machinery Company. . . . The United Shoe Machinery Company has already contracted for more than a majority of the capital stock of [the companies named other than the Eppler Company and the Davey Pegging Machine Company] besides stocks in other shoe-machinery companies, letters patent and other property.

"The United Company will also from time to time acquire other shoe-machinery and properties, either by direct ownership or purchase of shares of their stock."

I cannot share in estimating this circular as simply a naïve expression of unusual business foresight. It was a

confidential circular, boldly phrased, perhaps because its authors thought that their combination had been given a character of merger which could withstand Government attack, but which this court has since repeatedly held is a mere subterfuge of form. The circular is an accurate descripton of what had been accomplished and of what, as we shall see, the evidence in the record shows, was intended to be done in the future.

It would seem that men who were not bent upon complete monopoly and control would have been satisfied with the advantages which, we have thus seen, those in this enterprise clearly held over any competitors who might remain or who might appear in the future. But that the men connected with the United Company were not satisfied, and were determined to make their control as perfect and permanent as possible, is shown by their further conduct during the first year of the existence of that company, as follows:

Within a month of the organization of the United Company, on March 1, 1899, for the sum of $74,800 worth of its capital stock it purchased the control of the Goddu Company, which was manufacturing metallic fastening machines, which competed with those of the absorbed McKay Company, and the six inventors who owned the stock were bound by the contract of purchase to transfer to the United Company all inventions relating to shoe machinery, which they *jointly or severally might make or have any interest in for a period of ten years;* and they were also bound not to become interested "directly or indirectly" for a like term "in the business of making and selling any inventions or improvements relating in any way to shoe machinery," or relating in any way to the manufacture of boots and shoes or useful in connection therewith "without the consent in writing of the United Company."

On the 16th day of March, 1900, the Company purchased from Winkley and Phillips the exclusive license

to use the inventions and improvements in sole leveling machines, described in ten letters patent of the United States and in patents of Great Britain, France and Germany, and bound the inventors to communicate to the United Company all inventions "which they or either of them *shall hereafter make*" in sole leveling machines or sole pressing machines. Howe testifies that at the time of this purchase the United Company was making machines of the kind, but of a different type.

On August 26, 1899, for the sum of $72,000 the Company purchased the business of Timothy Bresnahan, together with the entire capital stock of the Boston Shoe Tool Company. It employed Bresnahan as manager for two years and bound him by contract not to thereafter engage in "the manufacture of heel trimming, edge trimming or edge setting machines and tools . . . or of any . . . machines, tools and products now [then] made by him or by said Boston Shoe Tool Company," and that he would not "directly or indirectly aid, assist or encourage *any competition* with said Boston Shoe Tool Company or its business," but would do "everything in his power to promote the interests of the United Shoe Machinery Company."

On October 11th of the same year, the Company purchased from one Brewer, for $250 and $5 royalty on each machine which should be manufactured, *his application for letters patent* for an improvement in heel breasting machines, the one machine he had manufactured and the tools with which he had made it, and it took an assignment from Brewer "of any and all inventions *he may hereafter make* relating to machines for breasting heels 'on the last.'"

The attempt made in argument to justify as familiar business practice such contracts as these, binding inventors from whom patents and other property were purchased to surrender to the United Company all of the

fruits of their inventive genius for many years after the purchase and often for many years after their employment had ceased, is disingenuous in the extreme. In a single, terse sentence this court has made conclusive answer to such contention, saying, "Even if separate elements of such a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful." *Swift & Co.* v. *United States*, 196 U. S. 375; *United States* v. *Reading Co.*, 226 U. S. 324.

On January 13, 1900, the Company purchased, for the sum of $38,000, the business and assets, including twenty United States and foreign patents and 138 lasting machines, of the Seaver Process Lasting Company. This was the only independent company putting lasting machines on the market after the combination was formed, and it removed the last vestige of competition in the lasting machine business.

These will suffice. They are typical of fifty-seven purchases proved to have been made by the United Company prior to the commencement of this suit; of shoe machinery manufacturing companies; of boot and shoe manufacturing companies; of patent rights or applications for such rights; and of the property and businesses of partnerships and corporations engaged in manufacturing appliances "calculated," in the language of the charter of the company, "directly or indirectly, to accomplish the objects, or any of them, of the corporation," and varying from sewing machine needles and awls, to tacking machines, to buttons, brushes and sandpaper. Brewer's $250 application for a patent was not too small to be overlooked, and we shall see a six million dollar purchase was not too great to be made in order to continue, to extend, and to make secure, the complete control over the business involved, which was first attained by the consolidation of the Goodyear and Consolidated Com-

panies and the purchase of the McKay and Eppler Companies in 1899.

The history of the first year of this company would not be complete without reference to the fact that the combinations and purchases made during that year resulted in collecting under one control many hundreds of patents covering every "shadow of a shade" of variation in the parts of the many machines used in the manufacture of shoes, and, it must be noticed, that in the month of December, 1900, the first of the forms of leases were developed and brought into use, which came to be known in the trade as "iron clad," and which have been discussed by Mr. Justice Day in a dissenting opinion in which I cordially concur.

The boot and shoe trade of the country was so restless under what was regarded and unhesitatingly denounced as a monopoly, strongly entrenched, that although the men engaged in that trade were now utterly dependent upon the United Company for the terms on which they might continue to do business, at least two groups of important manufacturers were formed before the commencement of this suit for the purpose of devising, if possible, some means of freeing themselves from conditions which they regarded, as the record abundantly shows, as oppressive and intolerable.

Under the spur of this incentive it came to pass that a large manufacturer of shoes, one Plant, of Boston, developed a line of shoe manufacturing machinery so complete in character that on May 1, 1910, he canceled the leases which he held on many machines owned by the United Company and removed them from his factory, and advertised his readiness to supply manufacturers with adequate, and what was termed, "wonder working shoe machinery."

By Winslow's own story, negotiations for the purchase of Plant's shoe machinery manufacturing business by the United Company were entered upon on June 16th,

within two months of the time that he removed their machines from his factory. These negotiations were interrupted on July 5th, and on the 28th of the same month four suits were commenced by the United Company against Plant, two more were commenced on August 11th, two more on August 13th, and two more on September 3rd. These suits were in part to recover royalties claimed for the use of the United machines before they were taken out of Plant's factory and the rest were to enjoin him from using his own machines, on the ground that they infringed patents of the United Company.

Whether as a result of this familiar resort to coercive measures need not be determined, but on September 22nd, at four o'clock in the morning, possibly to anticipate negotiations which were in progress for the purchase of Plant's property by a group of wealthy shoe manufacturers, the United Company purchased Plant's shoe machinery manufacturing business and patents, and also the control which he owned of the capital stock of a shoe manufacturing company. The United Company paid for these two properties six millions of dollars, plus $122,000 for the Stambon property, which Plant insisted must be purchased as a part of the transaction. This large sum of money, larger than was paid for either of the original constituent companies of the consolidation, was not divided in the contract of sale, but Winslow allots three and one-half millions to the purchase of the shoe manufacturing company stock and two and one-half millions to the purchase of the shoe machinery manufacturing company and patents. Even this division, it will be observed, allows two and one-half millions of dollars to be paid for the Plant machinery company property and patents, which it is now argued were of little value and at best were infringements of patents owned by the United Company. Mr. Winslow, however, thought better of them, for he says they were "almost invaluable" to his company.

It is impossible for me to understand how the transaction, thus described in Winslow's own words, can fail to convince any one who reads or hears the description, that the Plant Company was a formidable competitor, actual and potential, of the United Company, and that the great sum of money paid to control it was paid to stifle and restrict competition. Standing alone it shows the defendant to be an unmistakable offender against the Anti-Trust Law, but when taken together with the origin of the company and with the history of the conduct of it, a small but typical part of which we have described, it seems to me a flagrant and an all but confessed offender against that law, as it has been repeatedly interpreted by this court, *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179; *United States* v. *Reading Co.*, 226 U. S. 324; *United States* v. *Patten*, 226 U. S. 525; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600, and against the policy of the law as expressed in the act of Congress.

I shall add only the convincing statement as to the complete ascendancy which the combination has attained over the important branch of the industry of the country selected for its control, which is shown in the following results tabulated in the brief of the Government from the testimony, and from which all elements seriously disputed by counsel for defendants have been excluded:

Machines in use in this country.	Manf'd by defendants.	Manf'd by all others.
Lasting machines	7,496	7
Standard screw machines	409	None.
Pegging machines	146	None.
Tacking machines	3,488	6
Welt sewing machines	2,527	142
Outsole stitching machines	2,676	758
Loose-nailing machines	1,835	24
Heeling machines	2,019	17

Further details could not add to the effect of the large outline we have thus presented. This is not a case to be decided upon the detailed statements of individuals as to their intentions or upon refined distinctions as to the application of the patent law. The design was a large one, comprehensively conceived and boldly executed. The dominating spirits of the enterprise, with the advantage of knowing precisely what they wished to accomplish, rejected a "harmonious arrangement" of their interests as unlawful, but to accomplish the same end they adopted the scheme of merger, since condemned by this court as a mere "subterfuge of form."

The trade recognized the combination as a monopoly from the beginning, and for years struggled in vain to free itself by organizing competing interests; the Judiciary Committee of the House of Representatives, when the Clayton Bill was under consideration, reported as the result of its investigations that the company appeared to be "a monopoly that owns and controls the entire machinery now being used by all great manufacturing houses of the United States" and with a record before me such as in outline I have detailed, it is impossible for me to agree that this now securely entrenched monopoly is an innocent result of normal business development.

The difficulties of bringing the defendants within the restraints of the law, which are regarded by the court as all but insurmountable, seem unimpressive in the presence of the resolute manner with which this court dealt with difficulties quite as complex and interests vastly greater in the *Northern Securities*, *Standard Oil* [221 U. S. 1] and *American Tobacco Co. Cases*, *supra*. In the last named of these cases it was found unnecessary "in order to give effect to the requirements of the statute" to apply the remedy of restraining the movement of the products of the combination in interstate commerce, or that of appointing a receiver for the property of the offender, for

the simple declaration by the court of its readiness to resort to either or both of these effective remedies, if the conduct of the parties or the exigencies of the situation should require it, served in that case, as it would in this, to open the way for bringing the powerful interests involved into obedience to the law.

Convinced as I am, by a most careful study of this record, that the United Shoe Machinery Company is a combination in restraint of interstate trade and commerce; that it was designed to and actually does monopolize a large part of that trade and commerce, and that it therefore is a continuing violation of both §§ 1 and 2 of the Anti-Trust Act of July 2, 1890, I am obliged to dissent from the opinion and judgment of the court.

I am authorized to say that MR. JUSTICE DAY and MR. JUSTICE PITNEY concur in this dissent.

McGINIS ET AL. *v.* PEOPLE OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPERIOR COURT OF IMPERIAL COUNTY, STATE OF CALIFORNIA.

No. 133. Argued April 26, 1918.—Decided May 20, 1918.

Upon the question whether opium was in transit through California to Mexico, or was in possession of defendants in violation of the state law, evidence that the purpose of a customs officer in weighing it at the boundary with the assistance of one of the defendants was to make out papers necessary for the exportation, and that defendants had authority from the Treasury Department to export, was competent in a prosecution for unlawful possession, and its exclusion by the state court denied a federal right of the defendants arising under the commerce clause.

Reversed.

THE case is stated in the opinion.

Mr. William Sea, Jr., with whom *Mr. Frederick S. Tyler* was on the brief, for plaintiffs in error.

Mr. James M. Oliver, with whom *Mr. Thomas E. Haven* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case is here to review a judgment of the Superior Court modifying and affirming as modified a judgment pronounced against plaintiffs in error (whom we shall call defendants) after a verdict of a jury finding them guilty of violating a law of the State entitled "An Act to regulate the sale and use of poisons in the State of California and providing a penalty for the violation thereof." [Stats. 1913, c. 342, p. 692.]

The action was commenced by filing a verified complaint in a justice's court of the county charging them with having in their possession at Calexico in that county a preparation of opium containing more than two grains of opium to the fluid ounce, they, the defendants, not being within any of the exceptions of the statute.

Their trial was by jury which returned a verdict of guilty against them, and, after motion for new trial made upon the rulings hereinafter stated and denied, judgment was entered fining each of them in the sum of $300, the imprisonment to be suspended during good behavior if the fine be paid. It was further adjudged that until the fine be paid each should be imprisoned in the county jail one day for each dollar of the fine not exceeding 180 days.

On appeal to the Superior Court of the county the judgment was reversed as to imprisonment until the fine

be paid; in all else affirmed. This writ of error was then allowed by the presiding judge.

The case is in narrow compass. The charge was, as we have seen, that the defendants had opium in their possession in violation of the statute of the State. The defense was, among others, that the opium was in transit from St. Louis, Missouri, to Mexicali, Mexico. The latter town and Calexico are really but one, having, however, different names and being in different countries—the international boundary being a street.

Necessarily the United States custom house is in Calexico, and to the practical singleness of the towns is added the fact that Wells, Fargo & Company, the carrier of the drug from St. Louis, has its terminal in Calexico and has the same office that the custom house broker has, whose relations with defendants were the subject of testimony and contention.

It is clear, however, that the drug was shipped from St. Louis and could have been carried by Wells, Fargo & Company no farther than Calexico and that the consignees could have paid—indeed, had to pay, and did pay—the express charges at that place, and could have received the drug upon payment. It is in dispute whether they did or whether one McCoy, the custom house broker, received it and weighed it, assisted by Young. The weighing, it was testified, was made necessary by the requirement of the law of Mexico. It was therefore a dispute of fact or inference in the case whether Young received the drug or McCoy did as a customs officer and that Young did no more than assist in the preparation of the shipment to Mexico, not participating in the possession.

In explanation of the situation Young testified that he did not remove the box (it was quite large and weighed, with contents, 72 pounds and, we may say in passing, was valued at $960.00) or take possession of it, arrange-

ments having been made with McCoy to have the box taken to Mexicali, he, McCoy, being a common carrier. And he testified that McCoy weighed its contents. He was then asked the question if he knew why McCoy weighed the contents. The question was objected to as immaterial on the ground that it made no difference what the purpose of weighing the contents was. The objection was sustained and counsel for Young replied, "We want to show that Mr. McCoy was to make out the American and Mexican papers for the exportation of the box to McGinis and Young at Mexicali." The question was then put whether McGinis and Young had authority to export the opium that was seized. Again the attorney for the State objected, saying, "It can have no bearing in this case. It is only a question of possession." The objection was sustained, to which it was replied by defendants' attorney, "If the court will not permit us to put in our defense as to having permission and authority to export the opium, cocaine and morphine mentioned in interstate and foreign commerce under the regulations of the Treasury Department of the United States, the defendants will rest."

A series of instructions were asked by defendants to be given which expressed the supremacy of Congress over interstate and foreign commerce and that therefore, even if defendants had control of the opium, if it was in transit or being transported from the United States to Mexico through a chain of carriers, then the defendants did not have possession of the opium in violation of the law of the State, and that it was the duty of the jury to acquit them. The instructions were refused.

It is clear, therefore, that defendants asserted rights under the commerce clause of the Constitution and that the evidence ruled out as immaterial was offered to sustain them. It was certainly pertinent and the circumstances of the case and the evidence made it competent. In other words, there was a dispute as to whether defendants had

taken possession of the opium—of which the jury were to be the judges, not the court—and whether the drug was in transit; and the conditions of transit were elements to be considered.

The judgment of the Superior Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

McGINIS ET AL. *v.* PEOPLE OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPERIOR COURT OF IMPERIAL COUNTY, STATE OF CALIFORNIA.

No. 134. Argued April 26, 1918.—Decided May 20, 1918.

In a prosecution for having cocaine in possession in violation of a state law, it is a defense that the drug was in transit through the State to an adjacent foreign country; and defendants are entitled to prove such fact in the state court and therein to explain their relations to the shipment at the international boundary where they are charged with having taken the unlawful possession. *McGinis* v. *California*, *ante*, 91.

Error in excluding such evidence *held*, in the circumstances of this case, not to have been made harmless by proof that more of the drug was added at the international boundary, where the whole prosecution was based upon the original shipment and such proof involved only one of the defendants, and cross-examination upon it was not allowed, and the source of the added drug was not shown.

Reversed.

THE case is stated in the opinion.

Mr. William Sea, Jr., with whom *Mr. Frederick S. Tyler* was on the brief, for plaintiffs in error.

Mr. James M. Oliver, with whom *Mr. Thomas E. Haven* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted with No. 133, *ante*, 91.

As in the latter case plaintiffs in error, whom we shall call defendants, were charged in a justice's court of Imperial County with having cocaine in their possession in a quantity forbidden by the statute of the State regulating the sale and use of poisons. After trial and verdict of guilty, there was judgment exactly the same as in No. 133, which judgment, after motion for new trial made and denied, and upon appeal to the Superior Court of the county, was modified, and as modified affirmed as in that case.

The drug was shipped from St. Louis in the same box as the opium in case No. 133. The testimony in this case, however, as to its being in transit to Mexico is somewhat fuller. In addition to the exclusion of such testimony the defendants were prevented from showing permission from the Treasury Department to export a quantity of cocaine to Mexico. Such permission and the purpose of weighing the contents of the box were decided to be immaterial, possession alone being determinative of guilt.

We think the rulings were error. But it is said that the error was without detriment to defendants; that the testimony showed that there were only 100 ounces of cocaine in the original package from St. Louis and that 85 ounces were added in the repacking. However, it is not shown from whence it came, and the trial of the case and the submission of it were based on the shipment from St. Louis. The judgment of the Superior Court was rendered in both actions and made no distinction between them. And, besides, McGinis was not shown to have had any connection with the 85 ounces, and we may remark that cross-examination as to the fact was, on the objection of the

prosecution, prevented. We think, therefore, the error in excluding the testimony cannot be said to have been without detriment to defendants.

The court was asked to instruct the jury as in No. 133 and refused. It gave, however, a number of instructions requested by the prosecution, some abstract, as to the extent of the police power of the State, and others directed to the effect of possession of the drug, if found by the jury, and its determination of defendants' guilt. We do not consider it necessary to comment upon them further than to say that they give emphasis to the rulings upon the testimony offered by the defendants.

The judgment of the Superior Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

ERIE RAILROAD COMPANY *v.* HILT, AN INFANT, BY HIS NEXT FRIEND, ET AL.

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

No. 846. Argued May 3, 1918.—Decided May 20, 1918.

The New Jersey law providing that any person injured by engine or car while walking, standing or playing on any railroad shall be deemed to have contributed and shall not recover from the company (Comp. Stats., 1911, p. 4245), applies to a boy less than seven years old.

In the absence of a decision of the state supreme court, this court inclines to follow an intermediate appellate tribunal in construing a state statute.

When the injured child's object in reaching under a car was to recover a plaything, *held* there was no basis for implying an invitation on the part of the railroad company.

246 Fed. Rep. 800, reversed.

THE case is stated in the opinion.

Mr. George S. Hobart, with whom *Mr. Gilbert Collins* was on the brief, for petitioner.

Mr. Raymond Dawson, with whom *Mr. James J. Murphy*, *Mr. Edwin F. Smith* and *Mr. Samuel Greenstone* were on the brief, for respondents:

The statute does not apply to infants of tender years. In *Barcolini* v. *Atlantic City & Shore R. R. Co.*, 82 N. J. L. 107, the New Jersey Supreme Court held that the statute applied to an infant of the age of 21 months. The Court of Errors and Appeals (the highest court of that State) has never passed upon the question, and the decision of the Supreme Court is not binding upon the federal courts.

While it may be true that the statute was passed to prevent accidents on railroads, and to discourage the walking, standing or playing on railroad tracks of persons who have arrived at such an age as to fully appreciate the dangers of so doing, yet to apply the terms thereof to infants of such tender years as to be incapable of caring for their own safety seems harsh and inhumane, and not in accordance with the true intent of the legislature. It has always been the policy of the State to safeguard the life and limb of its citizens, and particularly those too young to take care of themselves.

While there are decisions by the courts of New Jersey holding that one going upon the lands of another as a trespasser or mere licensee can recover from the owner only in case of injury wilfully or wantonly inflicted, there is no such settled rule of law established by the decisions of the New Jersey tribunal of last resort as would be binding upon the federal courts under the circumstances of this case. *Snare & Triest Co.* v. *Friedman*, 169 Fed. Rep. 1, 15.

The federal courts, realizing the inability of children of tender years to care for themselves, and the dangers which their impulsiveness and thoughtlessness leads them

into, have refused to hold that when attracted and enticed into a place of danger for the purpose of play, they cannot recover for injuries received due to the owner's negligence, where the owner knew, or had reason to know, of the custom of such children to be at such place. *Railroad Co.* v. *Stout*, 17 Wall. 657.

The wording of the statute plainly indicates that there must be a voluntary action upon the part of the person injured, accompanied by an understanding of the action taken. Surely an idiot or insane person straying on to a railroad track and injured by a train could not be "deemed to have contributed to the injury sustained" by him. See *State* v. *Brown*, 38 Kansas, 390.

This court has held that an infant of tender years cannot be guilty of contributory negligence. How, then, could such a one, injured while on a railroad track, be "deemed to have contributed to the injury sustained?" Had the legislature intended the statute to be applicable to such infants, it would have said so. *Erie R. R. Co.* v. *Swiderski*, 197 Fed. Rep. 521.

For years prior to the accident such infants had been accustomed to play in and upon the tracks at this point, and in, upon and between railroad cars standing thereon. Of these facts the defendant had actual knowledge; all of its servants working nearby knew of it, and the crew of the train which backed into the cars where the plaintiff was, knew of it. By permitting children of tender years so to play upon said railroad tracks, and in, about and between said cars, the defendant impliedly invited them so to do. *Kaffe* v. *Milwaukee & St. Paul R. R. Co.*, 21 Minnesota, 207, 211; *Union Pacific R. R. Co.* v. *McDonald*, 152 U. S. 262; Cooley on Torts, c. 10, p. 303. The defendant could not invite the plaintiff upon its premises and then interpose the statute as a defense to an action to recover damages for injuries inflicted upon him by reason of its negligence.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries caused by the plaintiff being run over on a siding of the defendant's railroad at Garfield, New Jersey. The plaintiff was a boy less than seven years old and had been playing marbles near the siding when a marble rolled under a car. The boy tried to reach the marble with his foot and while he was doing so the car was backed and his left leg was so badly hurt that it had to be cut off. A statute of New Jersey provides that "if any person shall be injured by an engine or car while walking, standing or playing on any railroad, . . . such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad," with a proviso that the section shall not apply to the crossing of a railroad at a lawful crossing. General Railroad Law, § 55; Compiled Stats., 1911, p. 4245, citing P. L. 1903, p. 673. The trial court, notwithstanding this statute, allowed the plaintiff to go to the jury and to obtain and keep a verdict, following such precedents in the circuit as *Erie R. R. Co.* v. *Swiderski*, 197 Fed. Rep. 521, and the judgment was affirmed by the Circuit Court of Appeals. 246 Fed. Rep. 800.

The ground of the decision seemingly is that the statute does not appear beyond doubt to apply to very young infants, although the word "playing" sufficiently indicates that it had minors in view, even if the absoluteness of the opening phrase "any person" were not enough to exclude the reading in of exceptions by the Court. The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the State in the case of an infant younger than the plaintiff. *Barcolini* v. *Atlantic City & Shore R. R. Co.*, 82 N. J. L. 107. In view of the importance of that tribunal in New

Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do.

There is no ground for the argument that the plaintiff was invited upon the tracks. Temptation is not always invitation. *Delaware, Lackawanna & Western R. R. Co.* v. *Reich*, 61 N. J. L. 635. *Holbrook* v. *Aldrich*, 168 Massachusetts, 15, 16. *Romana* v. *Boston Elevated Ry. Co.*, 218 Massachusetts, 76. In this case too the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble. Therefore it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away. The statute seemingly adopts in an unqualified form the policy of the common law as understood we believe in New Jersey, Massachusetts, and some other States, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there. *Turess* v. *New York, Susquehanna & Western R. R. Co.*, 61 N. J. L. 314. *Delaware, Lackawanna & Western R. R. Co.* v. *Reich; Holbrook* v. *Aldrich; Romana* v. *Boston Elevated Ry. Co.*, *supra.*

Judgment reversed.

In the absence of a decision of the highest Court of New Jersey holding otherwise, MR. JUSTICE DAY and MR. JUSTICE CLARKE are of opinion that the Circuit Court of Appeals was right in holding the statute inapplicable to a child of seven, and therefore dissent.

CARNEY *v.* CHAPMAN ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 281. Argued May 1, 1918.—Decided May 20, 1918.

The construction of an act of Congress may be involved by implication so as to present a federal question.

Evidence that, notwithstanding a tribal law of 1876 directing that marriages be solemnized by judge or preacher, it was customary among the Chickasaws to disregard such ceremonies, with evidence that two Indians held themselves out as man and wife and were reputed married, *held* enough to warrant a finding of marriage contracted under the tribal customs, within the meaning of the Act of Congress of May 2, 1890, ratifying marriages theretofore contracted under the laws or tribal customs of Indian nations of the Indian Territory.

158 Pac. Rep. 1125, affirmed.

THE case is stated in the opinion.

Mr. Kirby Fitzpatrick for plaintiff in error.

Mr. W. C. Duncan for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the defendant in error J. C. Chapman to recover possession of certain land and to have his title quieted against the claims of Lottie Carney, the plaintiff in error, and of the Albersons, the other defendants in error. The right of possession is immaterial now, but there was a judgment quieting the title of the plaintiff against the above named parties which was affirmed by the Supreme Court of the State and in which error is alleged by Lottie Carney. The land was allotted to John Alberson, a Chickasaw Indian, who was averred by the plaintiff to

be the lawful son of Charles Puller, a Chickasaw, and Louisa James, an Indian woman. She died and later Alberson died leaving Puller his sole heir, if Puller was married as alleged. Puller conveyed to the plaintiff. The defendants denied the marriage and if they were right Lottie Carney is Alberson's heir.

If any federal question is presented in the case it arises under the Act of Congress of May 2, 1890, c. 182, § 38, 26 Stat. 81, 98, by which all marriages theretofore "contracted under the laws or tribal customs of any Indian nation" located in the Indian Territory are declared valid. The date of the supposed marriage was in 1887 and therefore if it complied with the terms of the act it was validated if not valid before. The plaintiff in error, after asking instructions as to what constituted a common law marriage that were given in substance, asked for another that a common law marriage was not recognized by the Chickasaws and that a marriage of Chickasaws without a compliance with their laws was void. Taking all the requests for rulings and the rulings together we are inclined to agree with the Court below that common law marriage and marriage under the customs of the tribe were used as equivalent phrases and to assume in favor of the plaintiff in error that the request means that a marriage of Chickasaws although in accord with their customs was invalid under a Chickasaw Act of October 12, 1876, unless solemnized by a judge or ordained preacher of the Gospel. This assumption would seem to carry with it the implication that the act of Congress did not validate a marriage in accordance with still prevailing custom if no judge or preacher added his sanction, and so to ask a construction of that act that, again by implication, was refused.

In this somewhat remote way a federal question is opened, but it cannot profit the plaintiff in error. There was some evidence that Charles Puller and Louisa James held themselves out as man and wife and were reputed

married. There was evidence also that it was customary to disregard solemnization before a judge or preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized. The act of Congress made valid marriages under either custom or law. Whatever may be the requisites to satisfy that act the above mentioned evidence warranted a finding that they had been complied with, as is expressly provided by statute for the case of a marriage of a white man with an Indian woman. Act of August 9, 1888, c. 818, § 3, 25 Stat. 392. The reason for the rule is stronger here.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY ET AL. *v.* FOSTER AND MACLEOD ET AL., MEMBERS OF THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS.

WESTERN UNION TELEGRAPH COMPANY ET AL. *v.* MACLEOD ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

NOBLE, AS PRESIDENT OF THE NEW YORK STOCK EXCHANGE, *v.* WESTERN UNION TELEGRAPH COMPANY ET AL.

NOBLE, AS PRESIDENT OF THE NEW YORK STOCK EXCHANGE, *v.* UNITED TELEGRAM COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 274, 275, 419, 420. Argued April 29, 30, 1918.—Decided May 20, 1918.

The New York Stock Exchange, for lump sums, contracted with telegraph companies to furnish them continuous stock quotations, to be furnished by them in turn to their subscribers by ticker service; each subscriber's application must be subject in terms to his being approved by the Exchange before it became effective, and must authorize the company to discontinue his service whenever so directed by the Exchange, the contract declaring that the Exchange reserved these rights to prevent improper use of the facts. Under this arrangement, the quotations, as received from the Exchange in New York, were wired in Morse code to Boston where they were

decoded and wired to the tickers, the wires of other companies being in part used in the process. *Held*, that the transmission of the quotations remained interstate commerce until completed in the subscribers' offices, and that an order of a Massachusetts commission, requiring the companies to cease discriminating against a would-be subscriber whom the Exchange disapproved, was a direct interference with such commerce, not sanctioned under the police power of the State or its power over streets crossed by the telegraph, which infringed the constitutional rights of the companies and those of the Exchange.

224 Massachusetts, 365, reversed.

THE cases are stated in the opinion.

Mr. Rush Taggart and *Mr. John G. Milburn*, with whom *Mr. Arthur Lord* was on the briefs, for plaintiffs in error in Nos. 274 and 275.

Mr. Henry S. Robbins, with whom *Mr. Walter F. Taylor* was on the briefs, for appellant in Nos. 419 and 420.

Mr. Patrick Henry Kelley for Foster, defendant in error and appellee.

Mr. H. Ware Barnum, Assistant Attorney General of the State of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the State of Massachusetts, was on the briefs, for Public Service Commission of Massachusetts:

If an individual had compiled this information in New York, taken train to Massachusetts, and after arrival there disclosed his knowledge either by lecture or publication in print, it would hardly be contended that the lecture or publication was not subject to state control, on the ground that the information had been acquired in one State and was being distributed in another. It would be plain that the interstate journey had ended. The essential features of this business cannot be altered by

reason of the fact that corporations rather than individuals are concerned, or that modern inventions have made greater speed possible. The interstate transaction, to wit, the communication from the agent in New York to the agent in Boston, is in no way affected by the requirement that all persons in Massachusetts must be treated alike. The case of *International Textbook Co.* v. *Pigg*, 217 U. S. 91, is not in point, since there the communication was direct, by mail, from the company in Pennsylvania to the pupil in Kansas (see at p. 100).

The information received by the companies in Boston is distributed to divers customers there. If the companies' agents, after receipt of the information, had proceeded to set it up in type, strike off a hundred copies and send one by messenger to each of a hundred customers, it would seem clear that the interstate transaction was completed when the agent in Boston received the information, and that the business of printing the copies and distributing them should be regarded as entirely intrastate matter. Can it make any difference that the printing machine is set up in the customer's office and operated simultaneously with ninety-nine like machines in other offices? The interstate transmission ceased before the retailing operation began, just as when the owner of goods begins retailing them out to different customers within the State the interstate transit has ceased. *Commonwealth* v. *Peoples Express Co.*, 201 Massachusetts, 564; *Kirmeyer* v. *Kansas*, 236 U. S. 568.

The present case cannot correctly be regarded as an interstate transportation of property by the owner, the telegraph company, from New York to Boston, and a sale by the company in Boston of the property transported. So far as a property right exists it is a right to keep to oneself or to publish or communicate to others the matter collected. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236; *Dodge Co.* v. *Construction Informa-*

tion Co., 183 Massachusetts, 62. In furnishing the quotations to the brokers the telegraph companies are exercising the property right derived by them from the Stock Exchange, under contract, but in no sense are they selling or transferring it.

However, even if the transaction is regarded as a transfer of property, the retailing out of property to a hundred different customers in Boston which has been received by one interstate shipment would be subject to the police regulations of the State. So far as the communication of this information is spoken of as a sale of "news" it is applying an analogy to a sale of goods, and the principle of breaking bulk seems properly to be applied to such analogy, and would bar any claim to exemption from state regulation.

Even the doctrine of special immunities inherent in an "original package" does not nullify police regulation by a State as to retail trade. *Austin* v. *Tennessee*, 179 U. S. 343; *Cook* v. *Marshall County*, 196 U. S. 261; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 360.

There must be some time when a subject-matter, although moving in interstate commerce, becomes subject to state control. *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 240.

The fact that it is physically impossible to operate ticker instruments in Boston by means of a transmitter located in New York, and that, accordingly, it is necessary to use the Morse telegraph system for the transmission from New York to Boston, would seem to strengthen the claim that the interstate character of the transmission ceased when that transmission ended.

Even if matter affected is held to constitute interstate commerce, the subject is open to state regulation until acted upon by Congress.

The power of a State to regulate common carriers, even though interstate commerce is incidentally affected,

is well established, and such regulations remain effective until such time as Congress may act upon the matter. *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364; *Minnesota Rate Cases*, 230 U. S. 352; *Vermilye* v. *Western Union Telegraph Co.*, 207 Massachusetts, 401.

Such statutes are not regulations of interstate commerce but proper police regulations for the enforcement of the rules and policies of the common law. *Western Union Telegraph Co.* v. *James*, 162 U. S. 650; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 634; *Western Union Telegraph Co.* v. *Wilson*, 213 U. S. 52, 55.

The requirement of the Massachusetts statute that the telegraph companies shall serve all citizens without unfair or unreasonable discrimination is but an enforcement of a common law duty. *Primrose* v. *Western Union Telegraph Co.*, 154 U. S. 1; *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92, and other cases.

Surely, if it is lawful for a State to enforce the common-law duty by means of a penalty, as was done in the *Crovo Case, supra*, it may provide a more perfect means of enforcement by specific order of a commission, and equitable relief. *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills*, 211 U. S. 612.

Congress has not legislated with reference to any matters affected by the order of the Public Service Commission.

Assuming that an agreement of the telegraph company to furnish service only to persons approved by the Stock Exchange is wholly valid, the order of the commission and decree of the court in no way attacked or injured this property right, either with or without due process of law. The order is simply for the telegraph companies to remove the discrimination. They can do this either by furnishing the quotations to Mr. Foster in the exercise of the rights which they now have or may acquire from the Exchange,

or by ceasing to give to others in Massachusetts the service which is denied to him.

The Exchange was not an indispensable party to the proceedings before the Commission and in the court proceedings to enforce the order.

The clause of the contract by which the telegraph company agrees to furnish its service only to persons approved by the Stock Exchange is void so far as it prevents the telegraph company from serving the public without discrimination. *Commercial Union Telegraph Co.* v. *New England Tel. & Tel. Co.*, 61 Vermont, 241; *Chesapeake & Potomac Telephone Co.* v. *B. & O. Telegraph Co.*, 66 Maryland, 399, 416; *Bell Tel. Co. of Philadelphia* v. *Commonwealth ex rel. B. & O. Tel. Co.*, 3 Atl. Rep. 825; *Heaton Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. Rep. 288, 293.

The Stock Exchange has granted to the telegraph company, with knowledge of the public character of the business in which it is engaged, the right to distribute this information by ticker or otherwise. Having so parted with it, the property becomes subject to all obligations which the law, from reasons of public policy, attaches to property devoted to a public use. *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 19.

Mr. Justice Holmes delivered the opinion of the court.

Four cases were argued together in this Court. The first two were suits in the Supreme Judicial Court of Massachusetts, one a statutory petition by the telegraph companies to have an order of the Public Service Commission annulled, the other a bill by the Commission to have the same order enforced. The cases were consolidated and reserved on the pleadings for determination by the full Court, which decreed that the petition of the plaintiffs in error should be dismissed and the order of

the Commission obeyed. 224 Massachusetts, 365. The order recited that the Gold and Stock Telegraph Company by the Western Union Telegraph Company lessee and the United Telegram Company had without just cause refused to supply to Calvin H. Foster the continuous quotations of the New York Stock Exchange by means of ticker service then supplied to others, declared the refusal an unlawful discrimination and required the two companies to remove the discrimination forthwith.

The material facts may be abridged as follows: The New York Stock Exchange, having a monopoly of the information collected by it on the floor of the Exchange concerning the prices quoted in transactions there, made contracts with the plaintiffs in error of the same general character as those before the Court in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 246, and *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322. By these contracts for specified lump sums the Exchange agreed to furnish to the Telegraph Companies simultaneously full and continuous quotations of prices made in transactions upon the Exchange. The Telegraph Companies "may" in their turn furnish quotations to their "patrons" at intervals of more than fifteen minutes subject to discontinuance upon objection of the Exchange, and may furnish continuous service by ticker to subscribers, provided the latter sign applications in duplicate, one of which is to go to the Exchange, the application not to be effectual until the subscriber is approved by the Exchange, agreeing that the Telegraph Company may discontinue the service "whenever directed so to do by said New York Stock Exchange." The application recognizes that the quotations are furnished under contract with the Exchange and agrees not to furnish the quotations to branch offices or correspondents unless first approved by the Exchange and also signing agreements, one of which is to be delivered to the Exchange. The contract states

that the intent of the Exchange in reserving the right to disapprove, etc., is only to prevent improper and unlawful use of the facts.

The Gold and Stock Telegraph Company's business is carried on by the Western Union Telegraph Company in the name of the former. The quotations are furnished to the latter in New York, telegraphed by it to the office of the Gold and Stock Company in Boston, translated from the Morse code into English, and thence transmitted by an operator to the tickers in the offices of the brokers who have subscribed and have been approved. The United Telegram Company, a New Jersey corporation, receives quotations for Boston alone, where is its principal office outside of New Jersey. They are furnished by the Exchange in New York, telegraphed to the Boston office over a wire of the Postal Telegraph Cable Company, and thence transmitted as in the other case. On these facts the plaintiffs in error say that the order is an unwarranted interference with commerce among the States and takes property without due process of law, setting up the Constitution of the United States.

We shall not discuss the bearing of the Fourteenth Amendment nor yet how far an order simply to remove a discrimination could be effectual when, if Mr. Foster were let in on the same terms as those now accepted as subscribers, he would agree that the Telegraph Company might discontinue its service without notice whenever directed so to do by the New York Stock Exchange. It is enough that in our opinion the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices and that the interference with it was of a kind not permitted to the States. The supposed analogy that has prevailed is that of a receiver of a package breaking bulk and selling at will in retail trade. But it appears to us misleading. We also think it unimportant that the contracts between the Ex-

change and the Telegraph Companies emphasize the element of quasi-sale for a lump sum and leave it to the interest of the Telegraph Companies to find subscribers. Neither that nor the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the Exchange. It does not matter if they have no contract with the Exchange, directly. It does not matter that if the Telegraph Companies did not deliver to any given one the Exchange could not complain. If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office it does not matter what are the stages or how little they are secured by covenant or bond.

Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. *Texas & New Orleans R.R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 126. Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character, and other cases to the same effect were cited. The principle was reaffirmed in *Railroad Commission of Louisiana* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336; and is too well settled to need to be further sustained. *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 349. See *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399. It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so it continued such until it reached "the point where the parties originally intended that the movement should finally end." *Illinois Central R. R. Co.* v. *Louisiana R. R. Commission*, 236 U. S. 157, 163.

If the transmission of the quotations is interstate commerce the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control—to change the criteria by which customers are to be determined and so to change the business. It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.*, 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. *Pullman Co.* v. *Kansas*, 216 U. S. 56. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 203. The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified "under that somewhat ambiguous term of police powers." *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 359. *Leisy* v. *Hardin*, 135 U. S. 100. *Savage* v. *Jones*, 225 U. S. 501, 520. *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, 547. Without going into further reasons we are of opinion that the decrees of the Supreme Judicial Court must be reversed.

The other two cases were suits brought by the New York Stock Exchange against the Telegraph Companies severally and Foster. The bills set forth the respective contracts with the companies, allege that Foster made applications to them in the prescribed form, was given a full hearing before a committee of the Exchange, and that as a result the Exchange reached the conclusion that

Foster had been conducting bucket shops and wanted the quotations in aid of such shops, and therefore disapproved the applications. They set forth the order of the State Commission, the decree of the State Court and the intent of the Telegraph Companies to comply with the order, and allege that it is void as beyond the jurisdiction of the State Commission under the Constitution and acts of Congress and also as depriving the plaintiff of its property without due process of law. Injunctions are prayed against delivery of continuous quotations to Foster or receipt of them by him unless and until he shall have acquired the right by contract with the approval of the Exchange. Subsequently the members of the Public Service Commission were made parties, and then upon their motion the bills were dismissed by the District Court, the judge accepting the reasoning of the Supreme Court of the State. The decision seems to have been upon the merits, but the question is certified whether the bill presents a controversy which arises under the Constitution or laws of the United States within the meaning of § 24 of the Judicial Code. In view of the decision in the state cases probably it will not be necessary to prosecute these suits farther. But it follows from what we have said that the decision of the District Court was wrong and that the decrees in these cases also must be reversed. It is suggested, to be sure, that the Exchange would be barred by the state decree against the Telegraph Companies if it stood, because the Exchange by its contracts reserved the right to intervene in such suits. It did not intervene and therefore would not have been bound.

Decrees reversed.

UNITED STATES *v.* BIWABIK MINING COMPANY.

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

No. 594. Argued March 4, 5, 6, 1918.—Decided May 20, 1918.

In computing the excise, under the Corporation Tax Act of August 5, 1909, of a mining company operating under a lease terminable at its option in any year and which grants it the privilege of entering, and of exploring for, mining and removing ores, in return for a royalty of so much per ton removed, but which does not convey the ore *in situ*, that part of the value of the ore disposed of during the tax year which represents its value as ore in place when the law took effect should not be deducted as depreciation of capital assets. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503.

The lease here involved is not to be construed as a conveyance of the ore in place, although the latter could be measured with substantial accuracy.

242 Fed. Rep. 9, reversed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for the United States.

Mr. A. C. Dustin for respondent, besides dealing with the distinction to be drawn between income and a mere conversion of capital assets existent before the law took effect, presented the following on the nature of the company's interest:

It is said the Biwabik Mining Company's interest in this property was obtained under a lease and that as such lessee it was not the *owner* of the *ore*, and was not, therefore, when it sold the ore converting its capital assets into money. Whether these contracts of lease effected an *absolute* sale of the ore or not is wholly immaterial. It is

settled that they do create an interest in real estate of a permanent character which cannot be divested so long as the contract provisions are complied with. Such a lease is recognized as property and is frequently sold and dealt in in the same way as other property. In 1898 the defendant paid $612,000 for this lease, which was on January 1, 1909, of the agreed value of $3,351,413.81. That a lessee of a mine has a vested estate is well settled.

The position of the Government is in effect that the interest is a mere license to take the ore on payment of the 30 cents per ton. The distinction between such an estate as we have here and a mere license is well recognized. Snyder on Mines, vol. II, §§ 1143, 1390, 1394, 1397; *Wheeler* v. *West*, 71 California, 126, 129; *Boone* v. *Stover*, 66 Missouri, 430, 434; *Barnsdall* v. *Gas Company*, 225 Pa. St. 338; *Coltness Iron Co.* v. *Black*, 6 App. Cas. 315, 335; *Stoughton's Appeal*, 88 Pa. St. 198, 201, 202; *Scranton* v. *Phillips*, 94 Pa. St. 15, 22; *Eley's Appeal*, 103 Pa. St. 300; *Delaware, Lackawanna & Western R. R. Co.* v. *Sanderson*, 109 Pa. St. 583.

The court below distinguishes this case from the *Sargent Land Company Case* in this court, pointing out that royalties could very properly be treated as simply rentals so far as the lessor is concerned; the use of the land for mining purposes being only one of the many uses to which such land could be put, the land itself being the chief thing. But these reasons do not apply to the case of a lessee whose interest is in the ore, which is susceptible of definite measurement and valuation. This interest is wholly exhausted and consumed as the ore is extracted.

It should not be overlooked that after giving the Biwabik Company full credit for the value of its capital assets thus converted into money there was left a large net income in 1910 upon which it paid the taxes assessed by the Government. The construction adopted by the court simply places the company on a parity with other

corporations. It gives it the benefit of the realization of its capital assets as they existed on January 1, 1909.

The action of Congress in allowing first five per cent. and later in full for the depletion of ores, when it came to replace the original corporation tax by the Acts of 1913 and 1916, successively, was an acceptance in principle of the interpretation placed upon the Act of 1909 by the Treasury Department, and reflexly shows what that act itself intended. All the income tax laws are part of a system and cast light one upon another.

The *Sargent Land Company Case*, and *Stratton's Independence* v. *Howbert*, 231 U. S. 399, and *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, are not in point.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

Mr. Justice Day delivered the opinion of the court.

This case is here upon a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. It was instituted by the United States in the District Court of the United States for the Northern District of Ohio to recover the sum of $2,653.72 being 1% upon $265,372.08 which, it was claimed, the mining company had wrongfully omitted from the return of its net income for the year 1910 under the Corporation Tax Act of 1909.

The case was tried upon an agreed statement of facts which, omitting unnecessary details, were epitomized by the District Court as follows:

"In the year 1898 the defendant, by assignment of a lease, acquired a leasehold estate in certain ore producing properties in the State of Minnesota, from which it mined ore from that date to and including the year 1910. For the year 1910 the defendant made a return to the collector

of internal revenue of its gross income, and from this amount it deducted, 'to cover realization of unearned increment,' the sum of $265,372.08. The amount of this deduction was arrived at by multiplying the number of tons of ore mined during the year by 48¾c., which was the market value of the ore in place on the premises on the first day of January, 1909, as estimated by the defendant, this being the date upon which the returns for taxation were to commence. It is stipulated that this deduction was made in good faith upon the claim that it was 'a reasonable allowance for depreciation' of the property of the defendant for that year.

"In June, 1911, payment was made in accordance with this return, but the Treasury Department about the month of October, 1914, after investigating the books and records of the defendant, made the claim that because the defendant was not the owner in fee of the premises from which it was mining ore, but was lessee of the same and was paying a royalty to the fee owners, it was not entitled to deduct anything for depletion of the ore body on the premises. Thereupon the defendant was requested to amend its return for the year 1910 so as to include in its gross income the amount of said deduction, which it declined to do, and thereupon this suit was instituted to recover the tax upon the amount of this deduction, amounting to $2,653.72.

"Some time prior to the making of the return for the year 1910 the defendant estimated the tonnage and the market value of the ore in place upon the premises upon which it held its lease, which estimate gave to the ore in place a value of 48¾c. per ton, exclusive of royalty.

"The rights of the defendant in the iron ore mined in the year 1910 were derived from the assignment to it of a written lease dated April 4, 1898, by the Biwabik Bessemer Company, lessor. By the terms of that lease the defendant acquired the right for the term of fifty years

and three months from the first day of May, 1898, to explore for, mine out, and remove the merchantable shipping iron ore which might be found upon the lands described in the lease upon the payment of a royalty of 30c. for each ton mined. The expression 'merchantable ore' is defined as including 'all ores which grade 55% and above in metallic iron regardless of other ingredients.'

"The lessee contracted to mine and remove at least 300,000 tons of ore annually, or to pay to the lessor 30c. per ton on that amount if it should not be mined, but payments made in any year in excess of royalty on ore actually mined could be credited upon the excess which might be mined over the minimum requirement in subsequent years. Any failure to keep or perform any of the covenants or conditions of the lease gave to the lessor the option to take immediate possession of the premises.

"The lessor in the lease reserved a lien upon any ore mined and upon all improvements for any unpaid balance of royalty, and it was also provided in the lease that the lessee should have the right to terminate the lease on any first day of January during its term by giving ninety days' notice of the purpose and desire so to do.

"The defendant, at the time it acquired this lease, paid to the prior lessee the sum of $612,000, in addition to contracting to pay the 30c. per ton royalty upon the ore mined, as has been stated.

"It is stipulated in the agreed statement of facts that the deposit of ore on the leased premises is of such character that its quality and quantity were capable of determination 'with extraordinary accuracy' by drilling and shafts, and that the defendant 'by drilling and by standard recognized methods' had calculated the tonnage remaining on the land on January 1, 1909, as 6,874,695 tons, all of which could be easily removed within the term of the lease."

Upon these facts the District Court reached the con-

clusion that the leases in question were not conveyances of ore in place, but were grants of the privilege of entering upon the premises and mining and removing the ore, and, consequently, that the deduction claimed as being one from capital investment could not be allowed. In reaching this conclusion the court cited the opinion of this court in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, and the judgment of the Circuit Court of Appeals for the Eighth Circuit (211 Fed. Rep. 1023) affirming the judgment of the District Court (207 Fed. Rep. 419), which decision of the Circuit Court of Appeals was made after the return of the answer to the questions propounded by that court to this court in the *Stratton's Independence Case.*

Coming to the question as to what allowance should be made to the mining company by way of deduction from its income in making return the district judge said:

"The defendant paid $612,000 for the lease under consideration and in addition assumed the payment of the royalties stipulated for therein. This may properly and justly be considered a payment in advance of an increased royalty on ore to be mined, and that is precisely the character which the defendant gave to the payment when dealing with it in its private accounts, in which the stipulation shows, 'Ex. H,' that it carried one account, entitled 'Rate of general ledger or capitalized value .03885 per ton,' and another account entitled 'Rate of increment value, January 1, 1909, .44865 per ton.' These two values added make the 48¾c. per ton which the defendant deducted in making its return.

"Thus in its own bookkeeping the defendant gives its private opinion as to the requisite reimbursement necessary to maintain its capital investment, and thereby is made applicable that long-standing rule for the construction of contracts, viz., 'Show me what men have done under a contract and I will tell you what it means.' The defendant should not complain if it be held to that

construction of this lease and its investment under it which it adopted for purposes of its own accounting before the question of taxation had arisen to call forth ingenuity of interpretation.

"It results that a decree will be entered allowing instead of the deduction computed on the basis of 48.75 cents per ton of ore mined, the sum of .03885 cents per ton, and there being no question of bad faith in the case, the ends of justice will be served by the payment of interest at the rate of 6% per annum from the date when the additional payment found due should have been made."

The District Court thereupon entered judgment:

"And the court finds as conclusions of law from said facts that the defendant was entitled to deduct for and on account of the 544,353 tons of iron ore mined by it under its lease in the year 1910, the sum of .03885 cents per ton (which amount the parties agree hereby is the cost to defendant of said ore at the time it acquired the property in the year 1898, interest, taxes, surveys, and other carrying charges on the said ore up to the time of its removal from the said mine having been charged annually including the year 1910 into operating expenses), and defendant is not entitled to deduct the 48.75 cents per ton deducted by it in its return, and there is due from the defendant to the plaintiff the sum of $2,442.23, with interest thereon at 6% from the 30th day of June, 1911, the date when said sum should have been paid, and the court assesses the plaintiff's damages herein at $3,140.70, and judgment is hereby rendered against the defendant in favor of the plaintiff of the sum of $3,140.70, with interest from the first day of this term of court."

The company took the case to the Circuit Court of Appeals upon writ of error, that court reversed the judgment of the District Court, holding that the company was entitled to the deduction of 48.75 cents per ton upon each ton of ore mined, as so much depletion of capital assets.

(242 Fed. Rep. 9.) This conclusion was reached upon a construction of the lease in view of the character of the mining property involved, and largely because of the fact that the quantity of the ore in place could be estimated with substantial accuracy. The court held that the selling price of the ore in any one year so far as it represented the actual value to the mining company of the ore in the ground on January 1, 1909, was not income within the meaning of the Corporation Tax Act of 1909. In the course of its opinion the Circuit Court of Appeals announced the decisive question of law to be: "So far as the selling price of the ore in 1910 represented its actual value to the company in the ground on January 1, 1909, was it income or was it the sale price of capital assets?" And after dealing with the character of this lease and the property covered by it, said:

"We think that the lessee of such property and under such a lease is as much entitled as is the owner of the fee to treat the value of his interest in the ore in the ground at the beginning of the tax period as his capital—indeed, the lessee's right to do so, is, in some respects, the stronger of the two, as hereafter pointed out. Such a lease, as applied to this situation, is in every substantial way *pro tanto* a purchase."

This view of the character of these instruments and their legal effect differs from that taken by this court in the *Sargent Land Co. Case*, 242 U. S. 503, wherein precisely similar iron ore leases were under consideration. In that case this court reached the conclusion that such leases were not conveyances of the ore in place, but were grants of the privilege of entering upon, discovering, and developing and removing the minerals from the land, and that the lessor's income from such operations was obtained by a corporation shown to be carrying on business, and upon principles laid down in previous cases in this court (*Stratton's Independence* v. *Howbert*, *supra; Stanton*

v. *Baltic Mining Co.*, 240 U. S. 103) that such income was subject to taxation under the Corporation Tax Act of 1909.

In the *Sargent Land Co. Case* it was pointed out that the courts of Minnesota, certainly familiar with the physical characteristics of the ore deposits involved, had in a series of cases held these instruments to be leases, and that the royalties agreed to be paid were rentals in compensation for the privileges granted the lessee. We held the conclusion of the Minnesota courts to be warranted by reason and authority. (242 U. S. 503, and cases cited in margin, p. 518.)

The Circuit Court of Appeals distinguished the *Sargent Land Co. Case*, and of it said:

"Finally, it is urged that this case is controlled by the decision of the Supreme Court in the *Sargent Land Company Case*. The mining leases involved in that case and in this one seem to be identical in substance, and it is now said with great plausibility that the ore in the ground and affected by such a lease belongs partly to the lessor and partly to the lessee, and that if the interest of the lessor is not capital assets no more is the interest of the lessee, and that if the receipts of the former are income so must those of the latter be. We are convinced that the analogy between the two cases is superficial and not substantial. In that case the Supreme Court had to determine whether the royalties received by the lessor were income or were a depletion of capital. Many considerations led to the conclusion that they must be treated as income. The contract was a 'lease,' the receipts were 'royalties,' and royalties being rentals are inherently income and have been commonly so considered. All these things seem to have affected the conclusion of the court, but after all the dominating thought appears to be that when land is devoted to mining it is put to only one of those productive uses of which it is capable, and that the product of

the use should be called income. The land itself is the chief thing. After the mining is finished the land remains suitable for other uses; and the fact, if it is a fact, that the minerals are the greater part of its value can not operate to make the incidental overshadow the principal. These reasons do not apply at all to the case of the lessee, whose existing interest, at the beginning of the taxing period, over and above the royalty which he must pay, amounted to $3,000,000; his entire interest was each year, as far as he went, consumed and exhausted forever; he did not have remaining the principal thing, the land, which he could put to some other use; the receipt in 1910 of his January 1st, 1909, interest in the ore was not the offshoot and income of his property; it was the transformation and eating up of the very property and of the whole of it. We therefore think that applying the principle of the *Sargent Case* results in holding that these receipts were from the sale of capital assets and not from income."

We are unable to concur in this view expressed in the opinion of the Circuit Court of Appeals as to the effect of the *Sargent Land Co. Case*. Certainly this court had not in mind the distinction suggested. In the *Sargent Land Co. Case* the Circuit Court of Appeals for the Eighth Circuit found that the land including the ore in it was worth hundreds of thousands of dollars, and without the right to the ore the land was worth practically nothing. (219 Fed. Rep. 38.) This finding, as well as facts of general knowledge, leaves little room to suppose that this court made its decision concerning the rights of the lessor influenced by the fact that the land itself was the chief thing, and the ownership of it after the exhaustion of the minerals one of the controlling reasons in reaching the conclusion announced in that case. The lessee takes from the property the ore mined, paying for the privilege so much per ton for each ton removed. He has this right or privilege under the form of lease here involved so long as

he sees fit to hold the same without exercising the privilege of cancellation therein contained. He is, as we held in the *Sargent Land Co. Case*, in no legal sense a purchaser of ore in place.

In this case the Government took no writ of error as to the partial deduction allowed by the District Court; it follows that the correctness of that ruling is not open here. The Circuit Court of Appeals erred in making the additional allowance for capital depletion. It follows that the judgment of the Circuit Court of Appeals must be reversed, and that of the District Court affirmed, and it is so ordered.

Reversed.

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

GOLDFIELD CONSOLIDATED MINES COMPANY *v.* SCOTT, AS COLLECTOR OF U. S. INTERNAL REVENUE, FOURTH CALIFORNIA DISTRICT.

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

No. 334. Argued March 4, 5, 6, 1918.—Decided May 20, 1918.

In computing its excise under the Corporation Tax Act of August 5, 1909, a mining corporation is not entitled to deduct from its gross income any amount whatever on account of depletion or exhaustion of ore bodies, caused by its operations for the year for which the tax is assessed.

It cannot deduct the cost value of the ore in the ground before it was mined, ascertained in compliance with the Treasury Regulations of February 14, 1911.

THE case is stated in the opinion.

Mr. Henry M. Hoyt, 2d, for Goldfield Consolidated Mines Company, submitted.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for Scott, Collector.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ.*

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon certificate from the United States Circuit Court of Appeals for the Ninth Circuit, from which it appears that the Goldfield Consolidated Mines Company brought an action against Scott, United States Collector of Internal Revenue, Fourth California District, to recover certain taxes levied for the years 1909 and 1910 under the Corporation Tax Act of 1909. The District Court sustained a demurrer to the complaint, and entered judgment against the present plaintiff in error.

In the certificate the Circuit Court of Appeals sets out the allegations of the complaint as to the first cause of action, stating that the second cause of action need not be repeated as the facts are of the same character as those set out in the first. Omitting formal and unnecessary matters the Circuit Court of Appeals certifies as the allegations of the complaint, to which the demurrer was sustained, the following:

"The plaintiff below, and plaintiff in error herein, The Goldfield Consolidated Mines Company, is and was a corporation engaged in mining in the State of Nevada, which State is within the jurisdiction of the Fourth Internal Revenue District of California.

"An assessment of an excise tax under section 38 of the Act of Congress approved August 5th, 1909, entitled: 'An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for other purposes,' was levied upon the plaintiff in error by the then Collector of Internal Revenue for the said District amounting to $41,890.91, upon an assessment of $4,189,091.61, which tax was paid under protest of the levy and assessment. The plaintiff in error had made a return of annual net income for that year, 1909, claiming a deduction for the value of the ore in the ground before it was mined, of 230,463 tons of ore, of the value in the ground before it was mined, of $5,646,940.46, upon the ground that such ore constituted exhaustion of the capital value of the property owned by it, and its protest against the assessment and levy was based thereon. Thereafter, the plaintiff in error made application for refund of said tax pursuant to sections 3220 and 3226 of the Revised Statutes, and based its claim to such refund upon the propriety of the deduction so claimed, and stated in said application that such exhaustion of capital assets constituted a depreciation within the meaning of the Act in question, and that the same would have more than offset the total net income of the plaintiff in error.

"Thereafter, during the pendency before the Commissioner of Internal Revenue of said application for refund, the plaintiff in error, by its duly authorized officials, made full explanation before the Commissioner of Internal Revenue, and offered full proof of the correctness in all respects of its said return of annual net income for the year 1909 and of all statements of fact contained therein, and while the Commissioner of Internal Revenue was holding said application under consideration, the plaintiff in error was duly and regularly granted by said Commissioner, leave to comply fully with the then rules and regulations of the Treasury Department embodied in

Treasury Decision 1675 promulgated February 14th, 1911, and particularly sections 80 to 89 thereof relating to depreciation of property of corporations whose business involved wasting assets, and like leave was so given to present to the Commissioner of Internal Revenue, an amended statement and return of annual net income for said year with explanations of fact in support thereof, and to ascertain the unit cost per ton of the estimated ore bodies belonging to the plaintiff in its various mining properties as of January 1st, 1909, and the estimated value of the ore in the ground before it was mined for the year 1909, by multiplying the said unit cost per ton by the total number of tons mined in said year, all of which was done, and the same was filed by the plaintiff in error during the time so provided." The rules and regulations are then set out.

* * * * * * * * *

"In addition to the rules and regulations as above set out, the plaintiff in error was further required by the Commissioner of Internal Revenue to make a calculation for the year 1909 and of previous years of operation, to ascertain the total exhaustion of ore which had taken place in the operation of its mining properties, and to enter such amount of tonnage exhaustion, multiplied by the unit cost per ton, in its official corporate books of account, and also cause the same to be included in its printed annual report of that current year to its stockholders and the public with appropriate explanation thereof, all of which requirements were performed by the plaintiff in error in obedience to said orders of the Commissioner of Internal Revenue, and within the time granted therefor.

"The complaint alleged that the resulting figures so rendered in said return were and are in all respects true and correct, and resulted in a showing of net income measuring the excise tax under the rules and regulations

amounting to $765,380.02 upon which the tax would have been $7,653.80; it also appeared from said complaint that this compliance with the requirements of the Commissioner of Internal Revenue was made by the plaintiff in error without waiving its claim to the full deduction originally claimed.

"It further appears from the complaint, that in disobedience and disregard of the law and of the rules and regulations of the Treasury Department, the Commissioner of Internal Revenue disallowed the application for refund of the plaintiff in error in toto, which disallowance was communicated to the plaintiff in error December 29th, 1913, by the defendant in error, Collector of Internal Revenue, the then collector having succeeded to the office of the Collector of Internal Revenue who had originally levied the tax in question. The complaint alleges that no part of the said tax has been refunded or paid back, and that the same is still due and unpaid."

The questions propounded are:

"1. Under the provisions of paragraph 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 5th, 1909, (36 Statutes at Large, p. 11, at p. 112), is a mining corporation, for the purpose of determining its net income for the basis of taxation, entitled to deduct from its gross income any amount whatever on account of depletion or exhaustion of ore bodies caused by its operations for the year for which the tax is assessed?

"2. Is such a corporation under said Act, entitled in the ascertainment of its net income, to a deduction against gross proceeds from the mining and treatment of ores to the extent of the cost value of the ore in the ground before it was mined, ascertained in strict compliance with the rules and regulations of the Treasury Department of February 14th, 1911 (Tr. Dec. 1675)?

"3. Where such a corporation claimed originally in its return of net income under said Act a deduction for depreciation from exhaustion of ore for the year equal to the actual value of the ore in the ground before it was mined, and having been denied any deduction whatever for exhaustion of ore, and having been assessed accordingly and having paid the resulting tax, made application pursuant to sections 3220 and 3226 Revised Statutes for refund, during the pendency of which application said corporation was granted leave to amend and did amend its return of net income in strict accordance with the rules and regulations promulgated February 14th, 1911, sections 80 to 89 T. D. 1675, resulting in an amended return based upon cost as provided in said regulations and showing claimed deductions therefrom less than the corporation's net realizations for the year from the ore actually mined, is such corporation entitled to an allowance of deductions and refund of taxes accordingly?

"4. In what, if any, way is the right to such claimed deductions affected by the fact that such corporation, in obedience to requirements imposed by the Commissioner of Internal Revenue at the time of filing its amended returns showing the cost value as of January 1st, 1909, of the ores mined during the year, caused to be entered in its official books of account and printed in its annual report of that current year to all of its stockholders and to the public, a statement of the total amount of ore exhaustions, multiplied by the unit cost per ton on its mining properties for that and all previous years?"

In the brief submitted for the Goldfield Consolidated Mines Company counsel frankly admit that if this court is to adhere to the principles laid down in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, and *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, those cases are conclusive against the contentions of the Mines Company in this proceeding. In view of the discussion of the nature

of mining property in *Stratton's Independence* v. *Howbert*, *supra*, and the application of the principles therein laid down in the subsequent cases of *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, and *Von Baumbach* v. *Sargent Land Co.*, *supra*, it is unnecessary to enter upon further consideration of the matters disposed of in those cases. We find no occasion to depart from the principles therein announced, or the rulings therein made. They have been reaffirmed in the case of *United States* v. *Biwabik Mining Co.*, *ante*, 116. In this view it follows that the first and second questions must be answered in the negative, and that it is unnecessary to answer the third and fourth questions.

So ordered.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY *v.* STATE OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 240. Argued March 22, 1918.—Decided May 20, 1918

The "license fee," laid by Wisconsin on domestic "level-premium" life insurance companies doing business in the State, of 3% of the gross income from all sources during the year, except rents from real estate and premiums collected outside Wisconsin on policies of non-residents, as construed by the Supreme Court of the State, is a commutation tax in lieu of all other taxes on the personal property of the companies taxable in Wisconsin.

Assuming, but not deciding, that the foreign investment business of such a company, involving shipments of securities, correspondence, etc., beyond the State, amounts to interstate commerce, such a tax casts no burden upon such commerce, where the gross receipts are in effect used as a fair measure of the value of the property and franchise taxable, but not otherwise taxed, within the State.

A tax on life insurance business is not a tax on interstate commerce.

It is not an arbitrary discrimination against domestic life insurance corporations, amounting to a denial of the equal protection of the laws, for a State to tax them by taking a percentage of their gross receipts, while exacting a fixed and comparatively slight fee from similar foreign corporations for the privilege of doing local business of the same kind. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, distinguished.

Neither is such arbitrary discrimination involved in imposing a license or privilege tax upon domestic old-line, level-premium companies, while exempting fraternal societies, having lodge organizations and insuring only the lives of their own members.

163 Wisconsin, 484, affirmed.

THE case is stated in the opinion.

Mr. Harry L. Butler, with whom *Mr. John M. Olin*, *Mr. Byron H. Stebbins* and *Mr. Ray M. Stroud* were on the briefs, for plaintiff in error.

Mr. Walter Drew, with whom *Mr. Spencer Haven*, Attorney General of the State of Wisconsin, was on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought to recover certain taxes or license fees paid by the Northwestern Mutual Life Insurance Company to the State of Wisconsin; the same were paid under protest, and this action was to recover $482,193.23 paid in 1912, and $505,643.22 in 1913. The case was decided in the Supreme Court of Wisconsin, upon demurrer to the original and amended complaints, and judgment was rendered in favor of the State. 163 Wisconsin, 484.

The taxes in question were collected under the statutes of Wisconsin. (§ 1220, Wis. Stats. of 1911, being § 51.32 of the later Stats.; § 1221, now § 51.33, being the so-called retaliatory law; § 1222, subsec. 5 of § 1947, and § 1948.)

The substance of the statute immediately involved is thus stated by the plaintiff in error:

"'Every company . . . transacting the business of life insurance within this state,' (excepting only such fraternal societies as have lodge organizations and insure only the lives of their own members) shall annually, on or before March 1, pay 'in lieu of all taxes for any purpose authorized by the laws of this state' (except taxes on real estate), certain prescribed license fees 'for transacting such business.'"

It appears that fraternal societies with lodge organizations insuring only the lives of their own members are not subject to this tax, and foreign level premium companies, similar to the plaintiff in error, are subject to an annual tax of but $300.00 liable to increase under the so-called retaliatory law according as other States impose like taxes on similar companies of Wisconsin. Assessment and stipulated premium companies, domestic and foreign, are taxed $300.00, or as to foreign companies such larger amounts as may be imposed under the retaliatory law. The license when granted authorizes the company to transact business until the first of March of the ensuing year unless sooner revoked or forfeited.

The contentions of a federal nature, raised by the plaintiff in error, are that this license tax imposes an unlawful burden upon interstate commerce in contravention of § 8, Article 1 of the Federal Constitution; that it violates the Fourteenth Amendment in denying the equal protection of the laws to the Northwestern Company by arbitrarily discriminating against it and in favor of foreign insurance companies, and between it and fraternal associations, both domestic and foreign; that it violates the Fourteenth Amendment in imposing an arbitrary, discriminatory, and confiscatory burden upon the Northwestern Company.

As to the annual license fee, it is made up as follows:

"Domestic companies. (1) If such company, corporation or association is organized under the laws of this

state, and is not purely an assessment or stipulated premium plan company under chapter 270, laws of 1899 (sec. 1955—1), three per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March, excepting therefrom income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected outside of the state of Wisconsin on policies held by nonresidents of the state of Wisconsin. In ascertaining the income upon which such license fee shall be computed as aforesaid, no deduction shall be made from premiums, whether paid in cash or premium notes, on account of dividends allowed or paid to the insured." [Wis. Stats. 1913, § 51.32.]

The statute also provides that such license fee shall be in lieu of all taxes for any purpose authorized by the laws of the State except taxes on real estate. The Northwestern Company was thus obliged to pay 3% of its gross income less income from rents of real estate, and less premium receipts from outside of the State.

Before entering upon a consideration of the errors assigned the nature and effect of this system of taxation must be borne in mind. The Northwestern Mutual Life Insurance Company is a corporation of the State of Wisconsin, having large reserves in that State, having a taxable situs therein. Of this statute the Supreme Court of Wisconsin said:

"It covers all the contributions which the state demands from the company or its business except real-estate taxes, which are relatively small in amount. It is common knowledge that all of the great level-premium insurance companies of the present day have vast reserve funds, to protect their liabilities on policies, running up into the hundreds of millions of dollars, and that these reserves are invested in interest-bearing securities, of

which real-estate loans secured by mortgage generally form the largest part. In the complaint in the present case it appears that on December 31, 1911, the plaintiff had outstanding loans secured by real-estate mortgages amounting to $153,562,654.39, of which only $5,654,369.10 covered real estate in Wisconsin. It also appears that the plaintiff's income from real-estate mortgages for the year ending on said last named date amounted to $7,446,393.10 and its income from bonds to $3,172,489.58. These securities are all credits, i. e., personal property of an intangible character, the situs of which for the purposes of taxation is in this state at the residence of the corporation."

And in the opinion on the filing of the amended complaint, added:

"In this connection it is argued that if a personal property tax had been levied on the plaintiff's reserve, consisting of securities and credits, there would have been deducted from the amount thereof, under the existing policy of the state with regard to the taxation of such property, its liabilities to policyholders, i. e., the present value of its outstanding policies valued as required by law, which is about ninety per cent. of the reserve. It is also argued that if the plaintiff had been subjected to income taxation under the state law it would have paid much less than under the three per cent. license fee requirement.

"We do not regard either contention as well founded. Our statutes governing the taxation of securities and credits for many years provided that there should be exempted from taxation so much thereof as 'shall equal the amount of bona fide and unconditional debts by him owing.' This provision was repealed by the Income Tax Law, which marked the abandonment of the attempt to levy personal property taxes upon that species of property. Ch. 658, Laws 1911.

"It seems entirely clear that the liability to policy-

holders which the plaintiff refers to is not in any sense an 'unconditional debt,' and as the policy of the state has never extended the exemption to any liability short of an unconditional debt we are unable to see any sound basis for the argument made.

"As to the contention that if the plaintiff were taxed under the income tax system its burden would be far less than under the present license system, we shall not attempt to go into the arguments and figures presented in detail. It is sufficient to say that we do not think it appears from the allegations of the amended complaint that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system.

"At all events there does not affirmatively appear to be any such disparity as would condemn the law as arbitrarily discriminatory."

While these views of the nature and effect of the law are not conclusive upon us, they are accepted unless they appear to be ill-founded, and we find no reason to reject them. The tax in question is, therefore, not only one for the privilege of doing life insurance business within the State, but is in effect a commutation tax, levied by the State in place of all other taxation upon the personal property of the company in the State of Wisconsin.

It is insisted that because of the foreign investment business of the company, large in amount, and involving shipments of securities, correspondence, etc., beyond the State, this law burdens interstate commerce. We need not reiterate the reasoning upon which this court has repeatedly held that a State may not by its system of taxation impose burdens upon interstate commerce, the cases have been recently reviewed and the doctrine reaffirmed. *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135; *Cheney Brothers Co.* v. *Massachusetts*, 246 U. S. 147.

The construction of the act by the state court brings the case within the decisions of this court in *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450. In the former case a commutation tax upon gross receipts of the express company from state and interstate business was sustained as casting no burden upon interstate commerce. In the *Cudahy Packing Co. Case* a tax of like character was held not a burden upon interstate commerce, although much of the gross receipts, which measured the property tax, was derived from such commerce. In both of these cases, following the previous decisions of this court, the tax was held to be within the authority of the State, and the inclusion in the measure of taxation of the receipts partly derived from interstate commerce was held not to invalidate the tax, its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value.

We have said thus much as to the alleged invalidity of this license tax as a burden upon interstate commerce, without deciding, as we do not find it necessary to decide, whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce. If it amounts to commerce of that character no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the State.

That the tax upon the life insurance business, which is the subject-matter of the license tax here involved, is not a tax upon interstate commerce is established by a reference to the recent full consideration of the subject by this court. *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495.

This brings us to the question whether the statute denies to the company the equal protection of the laws. That

the State is not because of the Fourteenth Amendment required to tax all property alike, and may classify the subjects selected for taxation, is too well established to require citation of the many cases in this court which have so held. The classification may not be arbitrary and must rest upon real differences—subject to these qualifications the State has a wide discretion. In this connection the Northwestern Company contends that the tax upon it is so different from that imposed upon foreign level-premium companies doing a like business within the State that an arbitrary discrimination, amounting to a denial of equal protection, is exercised as against it and in favor of the foreign company. As we have already said, the foreign companies of like character pay a privilege or occupation tax in the sum of $300.00 per annum. The state court held, and we think properly so, that foreign insurance companies occupy a relation to the State which is different from that of a domestic company. The latter has within the borders and taxing jurisdiction of the State a large amount of personal property, receiving protection, and subject to taxation. The foreign company has its reserves in the State of its domicile, and there subject to local taxation, which is of itself a substantial difference. Moreover, we have held that it is no denial of equal protection for a State to impose a different rate upon one of its own corporations than that imposed upon a foreign corporation, for the privilege of doing business within its borders. *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, 118. In the case of *Cheney Brothers Co.* v. *Massachusetts*, *supra*, this court said:

" . . . a State does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and, second, that '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.' *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, 118."

But, it is said that these decisions are opposed to the decision of this court in *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. In that case the railway corporation of another State came into the State of Alabama in compliance with its laws, paid the license and property tax imposed upon other corporations doing business within the State, under sanction of the laws of the State acquired a large amount of railroad property therein, when it was attempted to subject it to a further tax for the privilege of doing business as a foreign corporation, which tax was not imposed upon domestic corporations doing the same kind of business in the same manner, and it was held that such classification was arbitrary and void under the Fourteenth Amendment. In that case we laid stress upon the fact that the tax related to railroad property not susceptible of other uses, which placed in the State had to remain there permanently, and could not be withdrawn at the pleasure of its owners. Under such circumstances, and dealing with that character of property, we held that the particular tax constituted such discrimination as to deny to the company the equal protection of the laws. That case was distinguished in the decision in *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, *supra*, and also in disposing of the case of the White Company involved in *Cheney Brothers Co.* v. *Massachusetts*, *supra*. The difference between the *Southern Ry. Co. Case* and the one under consideration is quite obvious.

As to the alleged discrimination between old-line level-premium companies and beneficial associations, which are exempted from taxation under this statute, we think the differences are plain. The fraternal and beneficial

features are wanting in organizations like that of the Northwestern Company. The ascertainment and collection of premiums and payments for insurance are upon wholly different plans. As to the alleged discrimination in favor of stipulated premium companies and assessment companies, the plaintiff in error in its brief says that no domestic company of these classes and but one foreign company existed in Wisconsin in 1912, and that as to this its argument as to discrimination in favor of foreign level-premium companies applies. What we have already said disposes of that contention. We find no reason to disagree with the Supreme Court of Wisconsin in the conclusion that differences upon which classification rests in this statute are not fanciful, but real and substantial, and that the dissimilarities in treatment fall short of that arbitrary classification which amounts to a denial of the equal protection of the laws.

We find no error in the judgment of the Supreme Court of Wisconsin.

Affirmed.

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

MARIN, AS RECEIVER OF THE AMERICAN BISCUIT COMPANY OF CROOKSTON, *v.* AUGEDAHL.

ERROR TO THE DISTRICT COURT OF CASS COUNTY, STATE OF NORTH DAKOTA.

No. 227. Submitted March 18, 1918.—Decided May 20, 1918.

Refusal of a state court to respect a sister state judgment upon the ground that the court rendering it exceeded its jurisdiction under its own constitution and laws, presents a federal question based on the full faith and credit clause and the supplementary legislation of Congress.

The Minnesota constitution, Art. 10, § 3, in providing for stockholders' liability, excepts corporations organized for carrying on manufacturing business. *Held:*

(1) That the exception goes not to the jurisdiction but only to the merits in proceedings to sequester the assets of a local corporation and assess stockholders to pay its debts, under Rev. Laws, 1905, §§ 3173, 3184–3187; and that an order of assessment, made in such proceedings by the proper Minnesota court, of general jurisdiction, which in other respects has acquired jurisdiction over the corporation, and through it over the shareholders, necessarily involves a determination that the corporation is not of the excepted class, and in that respect is in Minnesota conclusive against collateral attack by a shareholder, whether or not he was personally a party to the proceedings.

(2) That like force must be given such order in an action brought by the receiver, appointed in such proceedings, to enforce the assessment against a shareholder in the courts of another State, and that a refusal of those courts to be bound by it, upon the ground that the corporation was of the class excepted by the Minnesota constitution, and erroneously treating this exception as jurisdictional, fails to accord the due faith and credit to which the order is entitled under the Federal Constitution and laws.

32 N. Dak. 536, reversed.

THE case is stated in the opinion.

142. Argument for Defendant in Error.

Mr. Edward Engerud and *Mr. A. A. Miller* for plaintiff in error.

Mr. Emerson H. Smith, Mr. A. W. Fowler and *Mr. L. L. Twichell* for defendant in error:

The decision of the court below, based purely on the construction of the constitution and statutes of Minnesota, in the absence of any settled construction by the courts of that State duly pleaded, raises no federal question. *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36.

In holding that the company was in the manufacturing business, in the sense of the Minnesota constitution, the court below but decided a question of local law, not reviewable here (*Stone* v. *Southern Illinois Bridge Co.*, 206 U. S. 267; *New Orleans Debenture Redemption Co.* v. *Louisiana*, 180 U. S. 320; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329), and decided it correctly. [Citing Minnesota cases.]

The full faith and credit clause and supplementary act of Congress do not bar inquiry into the jurisdiction behind the Minnesota judgment. *Thompson* v. *Whitman*, 18 Wall. 457; *Andrews* v. *Andrews*, 188 U. S. 14; *National Exchange Bank* v. *Wiley*, 195 U. S. 257; *Ward* v. *Joslin*, 186 U. S. 142.

By the express terms of the Minnesota law the district court can only proceed when the corporation is one whose stockholders have a liability. And this would be true even in the absence of the express provision, for the reason that the object is to enforce stockholders' liability. Concededly in the case at bar the only liability sought to be enforced is the alleged superadded liability of defendant. Since the Biscuit Company's is a manufacturing business, no superadded liability existed; the defendant and other stockholders were not liable to assessment because there was no liability to assess; there was no subject-matter in

existence upon which the jurisdiction of the Minnesota court could operate; and therefore the order of assessment was rendered wholly without jurisdiction of any subject-matter and is null and void.

We concede that, given a corporation in which there is superadded liability, the jurisdiction of the corporation gives jurisdiction of the stockholders to the extent of making the order of assessment conclusive as to the necessity for and the amount of the assessment, even though no service of any kind was made on nonresident stockholders. But there must first exist a superadded liability upon which to base the assessment. The order of assessment has the conclusive effect provided by the act only when the court has jurisdiction to order an assessment. In all of the cases cited by plaintiff in error, the corporation in question was one in which there was a superadded liability and hence the court clearly had jurisdiction to enter the order of assessment.

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

This was an action at law in North Dakota by a receiver of an insolvent Minnesota corporation to enforce against one of its stockholders an order of a Minnesota court laying an assessment on the stockholders generally. The defendant prevailed because the North Dakota court was of opinion that the order laying the assessment was made in the absence of such jurisdiction as was essential to bind him, 32 N. Dak. 536; and the question for decision here is whether that court gave to the laws and proceedings in Minnesota the full faith and credit to which they are entitled under the Constitution and laws of the United States. See *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329; *Tilt* v. *Kelsey*, 207 U. S. 43, 51.

Under the law of Minnesota, where an execution on a

judgment against a corporation of that State is returned unsatisfied, the court, in a suit by the judgment creditor, may sequestrate the property of the corporation, appoint a receiver of the same, cause the property to be sold and apply the proceeds to the payment of the receivership expenses and the corporate debts. And where in such a suit the receiver presents a petition asserting that "any constitutional, statutory or other liability of stockholders" exists, and that resort thereto is necessary, the court must appoint a time for a hearing on the petition and cause such notice thereof as it deems proper to be given by publication or otherwise. If from the evidence presented at the hearing, including such as may be produced by any creditor or stockholder appearing in person or by attorney, it appears that there is a liability of stockholders and that the available assets are not sufficient to pay the expenses and debts, the court is required to make an order ratably assessing the stockholders on account of such liability and to direct that the assessment be paid to the receiver. If payment be not made, the duty is laid on the receiver of enforcing the same by actions against the defaulting stockholders, "whether resident or non-resident, and wherever found." The court's order is expressly made "conclusive as to all matters relating to the amount, propriety, and necessity of the assessment." Rev. Laws, 1905, §§ 3173, 3184–3187.

According to a settled line of local decisions the proceeding on the receiver's petition for an assessment on the stockholders is not an independent suit, but simply a step in the original sequestration suit, *Ueland* v. *Haugan*, 70 Minnesota, 349; and the conclusive effect of the court's order is not dependent on the personal presence of the stockholders, because they are so far in privity with the corporation as to be represented by it, and a judgment against it is in effect a judgment against them. *Hanson* v. *Davison*, 73 Minnesota, 454, 462; *Town of Hinckley* v.

Kettle River R. R. Co., 80 Minnesota, 32, 39. But while the order is conclusive "as to all matters relating to the amount, propriety, and necessity of the assessment"—*matters which concern all stockholders alike*—, it leaves open the questions whether a particular person is a stockholder or holds the number of shares attributed to him, whether he has discharged his liability or has a claim which may be set off against the assessment, and whether he has any other defense which is "*personal to himself.*" *Straw & Ellsworth Co.* v. *Kilbourne Co.*, 80 Minnesota, 125, 136.

As so applied, the Minnesota law has been sustained by this court against various claims that as to stockholders it infringes the due process clause of the Fourteenth Amendment; and we have also recognized and enforced the duty of courts of other States, under the due faith and credit clause of the Constitution and the legislation of Congress on that subject, to give effect to orders of Minnesota courts making assessments under that law, although the stockholders were not personally made parties to the suits wherein the orders were made. *Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243; *Selig* v. *Hamilton*, 234 U. S. 652. And see *Royal Arcanum* v. *Green*, 237 U. S. 531, 543–545.

The order with which we here are concerned was made by a Minnesota court in a sequestration suit against a Minnesota corporation. Besides being a court of general jurisdiction, both at law and in equity, the court making the order had full jurisdiction of that suit. The suit was begun by a judgment creditor after an execution on his judgment was returned unsatisfied. The defendant corporation had its principal place of business in the county where the suit was begun, and was brought into the suit by due service of process. Thus much is not questioned. Nor is it questioned that a receiver was appointed, or that by a petition in the suit he sought an

assessment on the stockholders, or that public notice of the hearing on the petition was given as the court directed, or that there was a hearing as contemplated. But it is insisted that the court was without jurisdiction to make the assessment and that in consequence the order is open to collateral attack. In support of this contention it is said that in making the assessment the court evidently proceeded on the mistaken assumption that the corporation was one on whose stockholders a liability was imposed by § 3 of article 10 of the state constitution,[1] whereas in truth the corporation was one of a class whose stockholders were excepted from the operation of that provision. But is this anything other than saying that the court erred in ruling on a matter of substantive law regularly presented to it for decision in a pending suit? The constitutional provision does no more than to declare a general rule of liability and to except therefrom stockholders of a certain class of corporations. It does not purport to deal with the jurisdiction of courts—their power to hear and determine—, but only to prescribe in a general way the relative rights of stockholders and creditors. It therefore must be taken as going to the merits rather than to the jurisdiction. The Minnesota courts evidently so regard it; and they also treat the question whether a particular corporation belongs to one class or another as a matter the decision of which in a suit against the corporation is binding on the stockholders in subsequent litigation with the latter. *Merchants National Bank* v. *Minnesota Thresher Manufacturing Co.*, 90 Minnesota, 144, 149.

Four Minnesota cases are cited as making against these views, but we do not so understand them. In *Dwinnell* v. *Kramer*, 87 Minnesota, 392, a policyholder in an in-

[1] "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

solvent mutual fire insurance company, against whom a general assessment on the policyholders was sought to be enforced, successfully defended on the ground that his policy did not conform to the mutual plan, but was an "ordinary contract of insurance" issued on receipt of a cash premium. The defense plainly was personal to him. *Swing* v. *Humbird*, 94 Minnesota, 1, arose under an Ohio law and not the law of Minnesota. An assessment made in Ohio on the policyholders of an insolvent fire insurance company was sought to be enforced in Minnesota, and the defendant prevailed because his policy had been fully paid for and had terminated prior to the assessment. That also was a personal defense. In *Swing* v. *Red River Lumber Co.*, 105 Minnesota, 336, an attempt was made to enforce a similar Ohio assessment, but it failed for the reason, among others, that when the defendant's policy was issued the insurance company was doing business in Minnesota in violation of the laws of that State,—a matter which was personal to him and to other Minnesota policyholders if there were such. In *Finch, Van Slyck & McConville* v. *Vanasek*, 132 Minnesota, 9, there was a direct appeal from an order levying an assessment on stockholders in a sequestration suit. The character of the corporation was not in controversy, and the "only controverted question before the [trial] court was the amount to be levied." There also was a question in the appellate court as to whether the trial should have been to a jury. With this in mind, it seems plain that what was said can have no particular bearing here.

Had the Minnesota court in this instance held that the corporation was in the excepted class and then denied the receiver's petition, is it not certain that the order, if neither vacated nor reversed, would have settled conclusively the non-existence of the asserted liability? And if in a subsequent suit the receiver or the creditors represented by him had again asserted such a liability on the part of

the stockholders, is there any doubt that the latter could have relied safely on the order as a prior adjudication in their favor? The answers seem obvious. Charged with the duty, as the court was, of ascertaining whether there was any liability to be enforced, it was its province to consider and decide every question which was an element in that problem, including the one of whether the corporation was in the excepted class. That question required solution and the power to solve it was lodged in the court. The court did solve it, for, as is said in *Neff* v. *Lamm*, 99 Minnesota, 115, 117, the order making the assessment is "necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the excepted class." Whether the decision was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack. *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 510, 512; *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 172–174; *Dowell* v. *Applegate*, 152 U. S. 327, 340; *In re First National Bank*, 152 Fed. Rep. 64, 68–70. Of course, it was the duty of the court to have due regard for the exception in the constitutional provision because of its bearing on the merits; and if proper effect was not given to it an error of law was committed, but nothing more. The true view of the subject is indicated in the following excerpts from our opinion in *Fauntleroy* v. *Lum*, 210 U. S. 230, 234, 237:

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeacha-

ble, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction of the court dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide."

"A judgment is conclusive as to all the *media concludendi*, *United States* v. *California & Oregon Land Co.*, 192 U. S. 355; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law."

Whether the stockholder against whom the order is here sought to be enforced was personally a party to the suit in which it was made does not appear; nor is it material. Under the rule in Minnesota, as also the general rule, he was sufficiently represented by the corporation to be bound by the order in so far as it determined the character and insolvency of the corporation and other matters affecting the propriety of a general assessment such as was made. This court frequently has recognized and applied that rule. In *Hawkins* v. *Glenn*, 131 U. S. 319, an assessment ordered by a Virginia court having the corporation before it was sustained as against stockholders residing in another State and not personally brought into the suit, the ground of decision being that "a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member." Of similar import are *Sanger* v. *Upton*, 91 U. S. 56; *Glenn* v. *Liggett*, 135 U. S. 533; *Great Western Telegraph Co.* v. *Purdy*, 162

U. S. 329, 336; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Bernheimer* v. *Converse*, 206 U. S. 516, 532; *Royal Arcanum* v. *Green*, 237 U. S. 531, 544.

No doubt the order might be attacked collaterally by showing an absence of jurisdiction of person or subject-matter. The cases of *Thompson* v. *Whitman*, 18 Wall. 457, and *National Exchange Bank* v. *Wiley*, 195 U. S. 257, hold nothing more. Neither gives any warrant for saying that the order may be attacked collaterally by showing that error was committed in deciding the merits. One dealt with a judgment by a court having no jurisdiction whatever over the subject-matter, and the other dealt with a personal judgment rendered without service of process or personal appearance, but confessed under a warrant of attorney which did not cover it—in other words, a judgment rendered without jurisdiction of the person through a representative or otherwise. Both are inapposite here. By the law of its organization the Minnesota court was empowered to take cognizance of, hear and determine, the suit to sequestrate and the receiver's petition for an assessment. Thus it had jurisdiction of the subject-matter. *Cooper* v. *Reynolds*, 10 Wall. 308, 316. The corporation was before it in virtue of process duly served, and the stockholders, as has been said, were represented by the corporation. Thus there was jurisdiction of the person.

Under these circumstances, the order is entitled, under the Constitution and laws of the United States, to the same faith and credit in the courts of North Dakota as by law or usage are given to such an order in the courts of Minnesota. *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *Converse* v. *Hamilton*, 224 U. S. 243. In Minnesota, as before said, it is conclusive of all matters relating to the propriety of the assessment, including the questions of the character and insolvency of the corporation, and therefore it should have been held similarly

conclusive in North Dakota. The court of that State declined to regard it as determining the character of the corporation, and so failed to give it the faith and credit to which it is entitled.

Judgment reversed.

MR. JUSTICE CLARKE, dissenting.

The importance of the question involved in this case leads me to state somewhat fully my reasons for dissenting from the decision of the court.

The plaintiff in error, as receiver of the American Biscuit Company of Crookston, an insolvent corporation, organized under the laws of the State of Minnesota, instituted suit in a district court of North Dakota against the defendant in error, a stockholder in the company, to recover upon an order, treated in the record as a judgment, entered by an inferior, a district court of the State of Minnesota, which is described in the amended complaint as follows:

"The said court . . . made an order in said proceedings ordering and assessing against each and every share of the capital stock of said American Biscuit Company of Crookston the sum of one hundred dollars ($100) and against the persons and parties liable as such stockholders . . . and further ordering that each and every party or person liable as such stockholder pay to this plaintiff as Receiver of said insolvent corporation the sum of one hundred dollars ($100) for each and every share of stock on which he should be liable," etc.

It is further alleged that the defendant is the owner of one share of stock of the said company of the par value of $100 and that he has not paid to the court the assessment made.

The complaint sets out in detail the statutes under which the Minnesota court proceeded and alleges that the Biscuit Company

"By its Articles of Incorporation . . . was empowered to manufacture and sell biscuits, crackers, candies, confections, cereals, and other kindred products, or supplies (necessary) or component parts thereof, and ["to purchase or own," probably omitted] the machinery, fixtures, equipment and supplies necessary for the manufacturing and dealing in the same . . . and to maintain and operate stores and depots for the sale and disposal of its products and the purchase of its supplies, and in general to do and perform all matters and things necessary and proper in the successful conducting of its said business."

The District Court of North Dakota sustained a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and its judgment was affirmed by the Supreme Court of the State.

The constitution of Minnesota in effect at the time of the transactions involved in the case contains the following provision:

Article 10, § 3. "Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

It is admitted that this is the only warrant for the Minnesota order, which was for the amount of the personal or double liability of stockholders.

The theory on which the North Dakota courts proceeded was that the complaint showed that the Biscuit Company was a manufacturing corporation such that no double liability could attach to its stockholders, and that therefore the Minnesota court did not have jurisdiction, under the constitution and laws of that State, to enter an order which precluded the defendant from showing that he was not, and could not be, liable to a valid double liability assessment.

The distinction between provisions of law which are

jurisdictional and those which are not, has not been, perhaps cannot be, made the subject of hard and fast definition. A much quoted statement is that the distinction, while difficult of application, is between "A rule of law for the guidance of the court and a limit set to its power." *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544; *Fauntleroy* v. *Lum*, 210 U. S. 230, 235.

In the opinion of the court it is said that the district court which entered the order sued on is a court of general jurisdiction. As a general statement this may be accepted, but when that court entered the order we are here considering it was not acting as a court of general jurisdiction, but,—as we shall see, from the decisions of the Supreme Court of Minnesota,—as a statutory court of narrowly limited powers, authorized to enter orders "conclusive" in specifically defined respects. As a court of general jurisdiction, and independent of the statute under which the court was acting, its receiver could not have maintained this action in North Dakota. *Hale* v. *Allinson*, 188 U. S. 56.

In the case at bar we are dealing with a constitutional provision, obviously intended for the encouragement of manufactures in the State of Minnesota, which places it beyond the power of the legislature to attach double liability to holders of stock in any manufacturing corporation organized under the laws of that State.

Shall it be said that this, clearly a limitation on the power of the legislature, is not also a limitation on the power of the Minnesota courts? That it is a jurisdictional limitation upon the legislature but was only a rule for the guidance of the court, the jurisdiction of which, when entering the order involved, was determined by the act of the legislature? It is not merely a rule to guide courts in determining whether stockholders in manufacturing corportations are subject to double liability, for it prohibits both the legislature and the courts from imposing such

liability upon stockholders in such corporations under any circumstances and is therefore a limitation upon the power of courts as certainly as it is a limitation on legislative power.

The validity, in a proper case, of such an order as was entered by the Minnesota court, and the right of such a receiver to maintain a suit upon it in a foreign State to collect from stockholders resident therein, have both been sustained by this court (*Bernheimer* v. *Converse*, 206 U. S. 516; *Converse* v. *Hamilton*, 224 U. S. 243). But in each of these cases it was expressly found that the insolvent company was within the general terms of § 3, Art. 10, of the Minnesota constitution, and that therefore personal liability attached to its stockholders.

Notwithstanding this fact, the defendant in error contends that the Minnesota court was without jurisdiction to render the order sued upon, and argues in substance as follows:

(1) That the Minnesota court had authority to render such a "judgment" only as against stockholders in other than corporations organized for manufacturing or mechanical business.

This is not contested by the plaintiff in error in argument, but the answer to it, relied upon, is that the first question confronting the Minnesota court hearing the petition of creditors for the assessment was whether the Biscuit Company was a corporation whose stockholders were subject to double liability; that the order making the assessment could have been rendered only upon a holding that it was such a corporation; and that such an order, not appealed from, is conclusive as to this question, upon all stockholders.

(2) That the character of the corporation as pleaded shows it to have been a manufacturing company, that therefore no personal liability attached to its stockholders and that thereby the Minnesota court is shown to have

been without jurisdiction to render the "judgment" sued upon.

This contention also is not contested by the plaintiff in error, who contents himself, again, with relying upon the implication springing from the rendering of the Minnesota order.

It seems clear enough that a corporation "empowered to manufacture and sell biscuits, crackers, candies," etc., and to own and use "the machinery, fixtures, equipment and supplies necessary for the manufacturing and dealing in the same" must be classed as one "organized for the purpose of carrying on" a "manufacturing business."

But the Supreme Court of Minnesota has placed this conclusion beyond discussion.

In *Senour Mfg. Co.* v. *Church Paint & Mfg. Co.*, 81 Minnesota, 294, it is held:

"In proceedings to enforce the individual liability of stockholders of a corporation [for the debts of the corporation], the Articles of Incorporation are the sole criterion as to the purposes for which the corporation was formed." And corporations organized for purposes stated as follows have been held by that court to be manufacturing corporations such that they came within the constitutional exception, so that personal liability did not attach to holders of stock in them, viz., companies organized for:

"The manufacture of painters' materials and supplies," *Senour Case, supra;* "For the manufacturing or brewing of lager beer, and selling and disposing of same," *Hastings Malting Co.* v. *Iron Range Brewing Co.*, 65 Minnesota, 28; "For the manufacture of cloth of every description and the sale of cloth so manufactured," *Nicollet National Bank* v. *Frisk-Turner Co.*, 71 Minnesota, 413; "To produce and create water, steam and other motive power for transmission and use as may be desirable for any legitmate purpose," *Cuyler* v. *City Power Co.*, 74 Minnesota, 22; "For the purpose of generating electricity for distribution

to the public," *Vencedor Investment Co.* v. *Highland Canal & Power Co.*, 125 Minnesota, 20.

The test prescribed by the Supreme Court of Minnesota is, Whether the entire business which the corporation is authorized to engage in is manufacturing and disposing of its products and such incidental business as may reasonably be necessary for the purposes of its organization. *Hastings Malting Co.* v. *Iron Range Brewing Co.*, 65 Minnesota, 28, 31. Again, and obviously, in *Nicollet National Bank* v. *Frisk-Turner Co.*, 71 Minnesota, 413, it was held that the buying of raw materials and the selling of manufactured products are within the scope of the incidental powers of a manufacturing corporation, and do not constitute doing business other than the manufacturing business authorized. Clearly the Biscuit Company meets the constitutional requirement thus interpreted.

The difference between the case at bar and the *Bernheimer* and *Converse Cases*, *supra*, is manifest and fundamental. These two cases were concerned with the affairs of the same corporation, and the Supreme Court of Minnesota held that on their face the articles of incorporation of the company provided for the purchase of the capital stock, evidences of indebtedness and assets of another corporation and also for a manufacturing purpose; that the former business was not incidental to the latter and that, therefore, the company not being organized exclusively for a manufacturing purpose, did not come within the constitutional exception and that the personal liability attached to the stockholders. With this conclusion this court expressed itself satisfied in both cases.

The question remains whether, in the proceeding in which the order relied upon was entered, the Minnesota court had jurisdiction to render and actually did render an order such that a stockholder when sued upon it, either in Minnesota or in another State, would not have open to him the defense that the insolvent corporation was of

such character that double liability did not attach to the owners of its stock.

That the court did not have such jurisdiction and did not enter such an order in this case seems to me clear for the reasons following, viz.:

In *Thompson* v. *Whitman*, 18 Wall. 457, a decision obviously "rendered on great consideration," prior decisions dealing with the full faith and credit clause of the Constitution were carefully reviewed, and it was there decided that when the question of jurisdiction is appropriately presented the record of a judgment rendered may, constitutionally, be assailed in a collateral proceeding to enforce it in another State, even as to facts therein stated to have been passed upon by the court. This decision has been repeatedly affirmed and followed, and in *National Exchange Bank* v. *Wiley*, 195 U. S. 257, it was accepted as authority sufficient for holding that a judgment by confession under warrant of attorney could be collaterally attacked in a foreign State by showing that the plaintiff in whose favor it was rendered in an Ohio court of general jurisdiction was not the owner of the note in suit at the time, and that the court entering it was, therefore, without jurisdiction, although the rendering of the judgment involved, or implied, the finding that the plaintiff was then the owner of the note.

These authorities will suffice to illustrate the scope of the established rule that a judgment sued on in a foreign State may be shown in defense to have been entered by the court rendering it without jurisdiction, regardless of the form which such judgment may take on.

With this rule in mind let us examine the character and scope of the "order" sued upon in this case.

The order was entered in a special statutory proceeding of a character such that the Supreme Court of Minnesota has declared that it is intended to be "*summary and without formal pleadings*, and not controlled by all the forms

usually incident to judicial procedure." 132 Minnesota, 9, 12; the hearing in such cases is upon "such notice as it [the court] deems proper, by publication or otherwise, to be given;" upon the hearing the court "shall receive and consider such evidence *by affidavit or otherwise* as may be presented by the receiver, or by any creditor, officer, or stockholder, appearing in person or by attorney," and the statute expressly provides that:

"Such order shall be conclusive as to all matters relating to the *amount, propriety, and necessity* of the assessment, against all parties therein adjudged liable upon, or on account of, any stock or shares of such corporation, whether appearing or being represented at the hearing or not, or having notice thereof or not." Rev. Laws, 1905, § 3186.

That the conclusive character of the order entered in such a proceeding has been strictly confined by the Minnesota Supreme Court to the respects in which the statute just quoted declares it shall be conclusive, leaving all other defenses open to the stockholder, is shown by the following decisions:

The act in force when the order now under discussion was entered was passed in 1899 [Laws 1899, c. 272], and in the following year the Supreme Court of Minnesota sustained its constitutionality in *Straw & Ellsworth Co.* v. *Kilbourne Co.*, 80 Minnesota, 125, a case cited with approval by this court in both the *Bernheimer* and *Converse Cases, supra.* It was there held as follows:

"Although the court inquires into the amount of the liabilities as well as to what will probably be realized out of the assets, *its sole determination is* that it is necessary and proper that an assessment of a given amount shall be levied against each share of stock. *That, and that only, is the ultimate issuable fact to be found by the court.*

"The plain purport of sections 3 and 5 is that after an

order of assessment has been duly made, and the receiver has sued an alleged stockholder to recover upon the assessment, the order cannot be attacked in that action upon the ground that the assessment was unnecessary or excessive, or upon the ground that the defendant was not actually a party to, or personally notified of, the hearing upon which the assessment was made. . . .

"But, as we have heretofore intimated, the stockholders are not concluded in all respects by the determination of the court, nor is that the fair meaning of chapter 272, § 5. A person sued as *a shareholder may show*, if he can, *that he is not a shareholder at all, or that he is not the holder of so large an amount of stock as is alleged*, or that he has discharged his liability, or that he has a claim against the corporation which he may, in law or equity, set off against the claim or judgment in assessment, *or he may make any other defense which is personal to himself.*"

Again, in its latest construction of the act, in 1916, in *Finch, Van Slyck & McConville* v. *Vanasek*, 132 Minnesota, 9, 12, the court uses this language:

"It was intended by the statute that the proceeding should be summary and without formal pleadings, and it is not controlled by all of the forms usually incident to judicial procedure. *The court* under the statute deals in the main with probabilities, and *is not authorized to determine any fact, other than that of insolvency and the amount of the assessment to be made*, which in any way precludes the stockholders in a subsequent action brought to enforce the assessment. *The assessment is but preliminary to such an action and therein the stockholders may present all matters that may be available to them in defense. Straw & Ellsworth Mnfg. Co.* v. *L. D. Kilbourne Boot & Shoe Co.," supra.*

Thus is the expression in the earlier case "He [the stockholder] may make any other defense which is personal to himself," interpreted in this later case as meaning

"All matters that may be available to them [the stockholders] in defense."

During the sixteen years between these two decisions that court had under consideration the scope of several such "orders" [following the language of the act, the court habitually refers to them as "orders" not "judgments"] and it has expressed its conclusions as follows:

In *Dwinnell* v. *Kramer*, 87 Minnesota, 392 (1902), in a suit upon an assessment order, made under the act we are considering, against the holder of a policy in a mutual insurance company, [There is no "difference, in principle, in respect to the question now under consideration, between an action to recover on premium notes, when insolvency of the company has made an assessment on members necessary, and an action to enforce a stockholder's liability, constitutional or statutory," 80 Minnesota, 134] the defense was made on demurrer that the policy issued to the defendants "shows upon its face that the defendants were not insured on the mutual plan, and that the extent of their liability by the terms of the policy was the amount of the premium named therein, which has been paid." This defense was entertained and held valid by the court against precisely such a "judgment" as this court now holds conclusive against a defense in principle precisely similar,—that under the contract relation of the defendant to the corporation he was not liable for any double liability assessment.

Again, in *Swing* v. *Humbird*, 94 Minnesota, 1 (1904), in an action on an assessment made by the Supreme Court of Ohio in a suit on a mutual insurance company policy, under a statute similar to that of Minnesota, the court holds in the syllabus, paragraph 1:

"Such assessment is not conclusive upon any policyholder as to the question whether his relation to the company was such as to subject him to liability for an assessment. The judgment making the assessment is, how-

ever, conclusive as to matters relating to the necessity for, and the amount of, the assessment."

In the opinion the court says:

"The plaintiff contends, in effect, that the ex parte decree in question is conclusive upon the defendants upon the question of their liability to assessment for the losses of the company, and that they are barred from urging the defense pleaded in this case. *The question of the conclusiveness of an assessment upon stockholders* and members of a corporation for the payment of its liabilities made by a court having jurisdiction to wind up its affairs *is too well settled in this State to justify any extended discussion of it.* Where the court has such jurisdiction of a corporation, its order or decree making an assessment upon its stockholders or members without personal notice to them is conclusive as to all matters relating to the necessity for making the assessment, and the amount thereof. *But it does not conclude any stockholder or member as to the question whether his relation to the corporation was such as to subject him to liability for an assessment,* or as to any other defense personal to himself," citing cases. . . . "The assessment in the case last cited (*Dwinnell* v. *Kramer*, *supra*) was made by one of the courts of our own state, yet effect was given to the claim of the defendant that by virtue of his policy contract he was not liable to assessment."

Here again the same character of defense urged in the instant case was entertained and sustained, viz: That, notwithstanding the order or judgment, the policies on which the assessment was entered were "of a class which imposed no liability upon the holders thereof beyond the amount of the cash deposit required." In the case at bar the character of the corporation is such that no double liability can constitutionally be imposed on any of its stockholders.

Again, in *Swing* v. *Red River Lumber Co.*, 105 Minne-

sota, 336 (1908), the court had under consideration an assessment upon the policyholders of a mutual insurance company, entered by the Ohio Supreme Court, under a statute similar to that of Minnesota, and the court said:

"The last contention of the plaintiff to be considered is to the effect that the decree of the supreme court of Ohio making the assessment is conclusive upon the defendant upon the question of its liability to be assessed for the losses of the company, and that the trial court in this case, by refusing to give such conclusive effect to the decree, refused to give full faith and credit to the judicial proceedings of the state of Ohio, as required by section 1, art. 4, of the federal constitution. The decree was ex parte as respects the defendant, it having been made without notice to the defendant. The decree, then, the court having jurisdiction of the corporation, was conclusive as to all matters relating to the necessity for and the amount of the assessment; *but it is not conclusive as to the question whether the contract relations of an alleged member to the company were such as to subject him to liability for the assessment.* It did not, nor could it, deprive a member of the company of any defense going to show that he was not liable to be assessed for the losses of the company. *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329; *Swing* v. *Western Lumber Co.*, 205 U. S. 275."

These cases, made complete by *Finch, Van Slyck & McConville* v. *Vanasek*, *supra*, decided in 1916, give us a line of decision, not only general in terms but specific in application, consistently maintained for sixteen years, which, it seems to me, makes it very clear that if the suit commenced in North Dakota, which we are considering, had been instituted in a Minnesota court it would have been open to the defendent stockholder to show, in defense, that his relations to the company were such as not to subject him to liability (94 and 105 Minnesota, *supra*) and that, therefore, the opinion of the court gives to the

"order" of an inferior court of Minnesota a faith and credit in North Dakota which it would not have had in the State of its origin, a result which I venture to think is unsound in principle, anomalous in our judicial history and likely to lead to most unfortunate results.

The opinion of the court concedes that, notwithstanding this "judgment," it was open to the defendant stockholder, in the North Dakota case, to show, if such were the fact, that he was not a stockholder at all; that he owned but half as many shares as was alleged; that he had paid the amount assessed against him in whole or in part, or that he had a set-off to apply on the amount of the assessment. But, nevertheless, the court concludes that he cannot be permitted to show, as was true, that he was not, and could never have been, indebted to the receiver on the liability relied upon,—and this, notwithstanding that the latest decision of the Supreme Court of Minnesota, construing the statute of its own State, holds, as quoted above, that in such a suit the stockholders "may present all matters that may be available to them in defense," and notwithstanding the fact that the earlier cases also held that such an order is not conclusive as to "whether the contract relations of an alleged member to the company were such as to subject him to liability for the assessment," (94 and 105 Minnesota, *supra*). When we add that the holding of this court in the *Bernheimer Case*, repeated in the *Converse Case*, *supra*, was that "It may be regarded as settled that upon acquiring stock the stockholder [in a Minnesota corporation] incurred an obligation arising from the constitutional provision, *contractual in its nature*," we are seemingly confronted with the conclusion that the decisions of a Supreme Court of a State, construing its own statutes, of the character such as we have here (*Flash* v. *Conn*, 109 U. S. 371, 378) are no longer of controlling influence on this court but may be ignored in its discretion.

Believing, as I do, that upon the discussion in this opinion and upon the authorities cited, the insolvent corporation involved was one within the exception of the Minnesota constitution and that, therefore, no double liability attached to the defendant in error; that under the Minnesota decisions cited this defense could have been successfully made against the order if it had been sued on in a Minnesota court; that the implied finding that the corporation was not within the exception is necessarily jurisdictional, and that therefore it was open to the stockholders to assail it when sued in North Dakota, as it would have been in Minnesota; and that facts sufficient appeared on the face of the complaint to show that in this case the defense was a valid one, I think the judgment of the Dakota courts should be affirmed and therefore dissent from the decision of the court.

MR. JUSTICE PITNEY and MR. JUSTICE BRANDEIS concur in this dissent.

WILLIAM E. PECK & COMPANY, INCORPORATED, *v.* LOWE, COLLECTOR OF INTERNAL REVENUE, SECOND DISTRICT OF NEW YORK.

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

No. 234. Argued December 10, 11, 1917.—Decided May 20, 1918.

The Sixteenth Amendment does not extend the power of taxation to new or excepted subjects, but merely removes occasion for apportioning taxes on income among the States.

Net income of a corporation derived from exporting goods from the States and selling them abroad is subject to be taxed under § II of the Income Tax Law of October 3, 1913, c. 16, 38 Stat. 166, 172,

as part of the "entire net income arising or accruing from all sources."

Such a tax, general and in no way discriminating against exports and affecting the export business at most only indirectly, is not contrary to the constitutional provision that "no tax or duty shall be laid on articles exported from any State." Art. I, § 9, cl. 5.

234 Fed. Rep. 125, affirmed.

THE case is stated in the opinion.

Mr. Charles P. Spooner and *Mr. Richard V. Lindabury*, with whom *Mr. John C. Spooner* and *Mr. Ralph T. Keyser* were on the briefs, for plaintiff in error:

A tax upon income derived from exports, by whatever name it is called, is a tax upon exports, and is therefore unconstitutional. Congress may no more burden exports and exportation by indirection than by a tax directly upon the article exported; the substance and effect and not the form of a tax controls. The principle here involved has found repeated examples in cases of state taxes, in various forms, burdening interstate and foreign commerce. *Brown* v. *Maryland*, 12 Wheat. 419, 445; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Welton* v. *Missouri*, 91 U. S. 275; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645. In *Fairbank* v. *United States*, 181 U. S. 283, 295, the court, citing *Brown* v. *Maryland*, held that "the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance." To the same effect: *United States* v. *New York & Cuba Mail S. S. Co.*, 200 U. S. 488; *United States* v. *Hvoslef*, 237 U. S. 1; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 18; *State* v. *Allgeyer*, 110 Louisiana, 839. See further (as to state taxes): *Welton* v. *Missouri*, *supra*, 278; *Low* v. *Austin*, 13 Wall. 29, 34; *Cook* v. *Pennsylvania*, *supra*, 570; *Webber* v. *Virginia*, 103 U. S. 344, 350.

165. Argument for Plaintiff in Error.

It is well settled by the decisions that a tax on income is a tax on the source from which the income is derived, and that if the source be not subject to tax the income cannot be. This principle is clearly stated in the final decision of the *Pollock Case*, 158 U. S. 630.

On the first hearing of that case the Attorney General sought to justify the assessment of the tax on the income from state and municipal securities "as part of the total income of the respective owners under a law assessing incomes generally and not discriminating between those securities and others of like character." But this court, in its first as well as in its final decision, unanimously overthrew this contention. In the decision upon the first hearing (157 U. S. 429), the majority and the dissenting opinions agreed on this point. In the same opinion the court held that an annual tax upon the income from real estate is the same in substance as an annual tax on the real estate; also that a tax on income from personal property is a tax on that property. 158 U. S. 618.

The *Pollock Case* shows clearly that there is no possible distinction between taxing an income and taxing the source from which it is derived. In the case at bar, the plaintiff is in just the same position, as to federal income taxation, as a state official receiving a salary from his State or a recipient of income from state or municipal bonds. See *Collector* v. *Day*, 11 Wall. 113; *Dobbins* v. *Erie County Commrs.*, 16 Pet. 435.

Upon the foregoing principles and decisions, this tax is unconstitutional. The income consists almost wholly of commissions or profits on sales of goods exported. The income from a group of such sales is a collection of the incomes from single sales. In considering either single export sales or transactions, or groups of them, and the profit or income therefrom, it is clear that no distinction can be established between the taxation of such sale or transaction and the taxation of the income or profit there-

from. The profit is the net yield or proceeds of the transaction, and the most essential and necessary factor in it, in fact, its very object and purpose, for the sake of which the transaction is made and except for which in sufficient amount the transaction would not be made.

No distinction has been drawn, in the courts or in commercial life, between the taxation of a transaction and the taxation of the proceeds of it. There is no difference in substance and effect between a tax on the goods in course of exportation, or on the bill of lading, or on the bill of exchange (*Fairbank* v. *United States*, *supra*), or on the commission or profit of the sale. All are alike burdens on the export transaction, and this is the essential matter. Differences in rate or method of application are of no significance.

If it were held that a tax on income from exports is not a tax on exports, the result would be to open the way to serious injury or destruction of export trade by taxation, which would in effect overthrow the constitutional prohibition against taxing exports. For if it be not taxing exports to tax the income at the rate of one per cent., any higher rate would be equally permissible. Congress has power to and does discriminate in the income tax between different kinds of occupations and conditions, exempting some and varying the taxes imposed on others. The requirement of uniformity is held by the court to be sufficiently met when all the members of any designated class are treated alike throughout the United States. Likewise, Congress has power to and does discriminate between commodities. And so, if a tax on income from exports were not a tax on exports, Congress could at any time impose higher than the normal or ordinary rates on incomes of exporters, or certain classes of exporters, as in the *Fairbank Case*. Thus, by resorting to discriminatory and excessive taxes, Congress could suppress given classes of export business and lines of exportation to suit its views

of economic policy. And the principle thus accredited would logically lead to the taxation of the income of state securities by the United States and of United States securities by the States; the virtual state taxation of interstate and foreign commerce, and of the salaries of federal judges and other officers, to which Congress might reciprocate by like taxes on state officials. The results would be evil in the extreme.

It is not denied that income from exportation after it has been received and become commingled with the general property of the taxpayer is liable to the imposition of a general property tax, either federal or state, or both. So also is the income from state and federal bonds, the salary of state and federal officials and the receipts from interstate commerce.

It is one thing, however, to tax property which, although derived as income from a non-taxable source, has become an indistinguishable part of the taxpayer's general funds, and quite a different thing to tax a person on account of his receipt of an income from such source.

The difference between the two classes of taxes was pointed out by Mr. Justice Bradley in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 341. It will be observed that in *Weston* v. *Charleston*, 2 Pet. 449; *Collector* v. *Day*, 11 Wall. 113; and the *Pollock Case*, *supra*, the tax was imposed under general income tax acts, two of which were similar in their provisions to the act under which the present tax was imposed, and in all of them the income had been received and had become as much a part of the general property of the taxpayer as the income taxed in the present case.

If the income from state and federal securities and from state and federal offices cannot be taxed, how can the income from exports be taxed? And, conversely, if the income from exports can be taxed, how can the income from state and federal securities and offices escape?

In answer to the argument that the constitutional prohibition against the taxation of exports was designed to give immunity only to property in the actual course of exportation, see *United States* v. *Hvoslef*, 237 U. S. 1, 13; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 338; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648.

As to the cases of *Cornell* v. *Coyne*, 102 U. S. 418; *Brown* v. *Houston*, 114 U. S. 622; *Turpin* v. *Burgess*, 117 U. S. 504; and *State Tax on Railway Gross Receipts*, 15 Wall. 284, cited by the Government, it is enough to say: (1) That the last named was unanimously overruled in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania, supra.* (2) That in the other three the tax was a general property tax and was levied upon manufactured goods before they became the subject of exportation. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, decides nothing more than that "when the sovereign authority has exercised the right to tax a legitimate subject of taxation, as an exercise of a franchise or privilege, it is no objection that a measure of taxation is found in the income produced in part from property which itself considered is nontaxable." But here the franchise or privilege involved is clearly not a "legitimate subject of taxation," as the authorities already cited establish.

Neither can the tax be sustained as a tax on the person, measured by income. Such a tax would be by nature a capitation rather than an excise, and, in any event, would be a mere evasion for reaching exports indirectly. See *Brown* v. *Maryland, supra; Dobbins* v. *Erie County Commrs., supra; Cook* v. *Pennsylvania, supra; Leloup* v. *Port of Mobile, supra; State* v. *Allgeyer, supra.*

The various opinions in the *Pollock Case* show that the court divided only on the question as to whether the tax levied under the Income Tax Act of 1894 was direct or indirect in so far as it was imposed upon income from real and

personal property, and that the court was unanimous in holding that the tax was unconstitutional in so far as it rested upon income from municipal securities for the reason that Congress was without power to impose any tax whatever upon such securities and, therefore, the question as to whether the tax, as applied to them, was direct or indirect, was altogether negligible.

Mr. Assistant Attorney General Fitts for defendant in error:

A general tax laid upon all persons with respect to their income does not become a tax upon "articles exported" because the income is derived from an export business. Citing and discussing: *Brady* v. *Anderson*, 240 Fed. Rep. 665; *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517; *Cooley* v. *Port Wardens*, 12 How. 299; *Cornell* v. *Coyne*, 192 U. S. 418; *Fairbank* v. *United States*, 181 U. S. 283; *Pace* v. *Burgess*, 92 U. S. 372; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19; *Turpin* v. *Burgess*, 117 U. S. 504; *United States* v. *Hvoslef*, 237 U. S. 1.

The case is completely governed by the decisions of this court in the corporation tax and income tax cases. Citing and discussing: *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103; *Stratton's Independence* v. *Howbert*, 231 U. S. 399.

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

This was an action to recover a tax paid under protest and alleged to have been imposed contrary to the con-

stitutional provision (Art. 1, § 9, cl. 5) that "No tax or duty shall be laid on articles exported from any State." The judgment below was for the defendant. 234 Fed. Rep. 125.

The plaintiff is a domestic corporation chiefly engaged in buying goods in the several States, shipping them to foreign countries and there selling them. In 1914 its net income from this business was $30,173.66, and from other sources $12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them.

The tax was levied under the Act of October 3, 1913, c. 16, § II, 38 Stat. 166, 172, which provided for annually subjecting every domestic corporation to the payment of a tax of a specified per centum of its "entire net income arising or accruing from all sources during the preceding calendar year." Certain fraternal and other corporations, as also income from certain enumerated sources, were specifically excepted, but none of the exceptions included the plaintiff or any part of its income. So, tested merely by the terms of the act, the tax collected from the plaintiff was rightly computed on its total net income. But as the act obviously could not impose a tax forbidden by the Constitution, we proceed to consider whether the tax, or rather the part in question, was forbidden by the constitutional provision on which the plaintiff relies.

The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removes all occasion, which otherwise might exist, for an apportionment among the States of taxes

laid on income, whether it be derived from one source or another. *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 17–19; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 112–113.

The Constitution broadly empowers Congress not only "to lay and collect taxes, duties, imposts and excises," but also "to regulate commerce with foreign nations." So, if the prohibitory clause invoked by the plaintiff be not in the way, Congress undoubtedly has power to lay and collect such a tax as is here in question. That clause says "No tax or duty shall be laid on articles exported from any State." Of course it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power articles in course of exportation, *Turpin* v. *Burgess*, 117 U. S. 504, 507; the act or occupation of exporting, *Brown* v. *Maryland*, 12 Wheat. 419, 445; bills of lading for articles being exported, *Fairbank* v. *United States*, 181 U. S. 283; charter parties for the carriage of cargoes from state to foreign ports, *United States* v. *Hvoslef*, 237 U. S. 1; and policies of marine insurance on articles being exported,—such insurance being uniformly regarded as "an integral part of the exportation" and the policy as "one of the ordinary shipping documents," *Thames and Mersey Insurance Co.* v. *United States*, 237 U. S. 19. In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which *directly* burdens the exportation." *Fairbank* v. *United States, supra*, pp. 292–293. And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it "so directly and closely" bears on the "process of exporting" as to be in substance a tax on the exportation. *Thames and Mersey Insurance*

Co. v. *United States*, *supra*, p. 25. In this view it has been held that the clause does not condemn or invalidate charges or taxes, not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in *Pace* v. *Burgess*, 92 U. S. 372, and *Turpin* v. *Burgess*, 117 U. S. 504; and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in *Cornell* v. *Coyne*, 192 U. S. 418. In that case it was said, p. 427: "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

While fully assenting and adhering to the interpretation which has been put on the clause in giving effect to its spirit as well as its letter, we are of opinion that to broaden that interpretation would be to depart from both the spirit and letter.

The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton* v. *Baltic Mining Co.*, *supra*, p. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing

from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

For these reasons we hold that the objection urged against the tax is not well grounded.

Judgment affirmed.

UNITED STATES *v.* FERGUSON ET AL.

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

No. 238. Submitted May 1, 1918.—Decided May 20, 1918.

For the purpose of determining the quantum of Indian blood possessed by members of the Five Civilized Tribes, and therein their capacity to alienate allotted lands, the rolls of citizenship approved by the Secretary of the Interior are conclusive. Acts of April 26, 1906, c. 1876, 34 Stat. 137; May 27, 1908, c. 199, 35 Stat. 312.

In this case the Indian was enrolled as a Seminole, "blood ½;" his

father was enrolled as a full-blood Creek. *Held*, that oral testimony to prove that his mother, not enrolled, was a full-blood Seminole was properly excluded.
225 Fed. Rep. 974, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States.

Mr. Harry H. Rogers, Mr. Joseph L. Hull and *Mr. Nathan A. Gibson* for appellees.

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

This is a suit to cancel certain conveyances of allotted Indian lands made by the heir of the deceased allottee. In the District Court there was a decree for the defendants, which was affirmed by the Circuit Court of Appeals. 225 Fed. Rep. 974.

The lands formerly belonged to the Creek tribe and were allotted and patented to Kochokney, an enrolled member of that tribe, as his part or share of the tribal domain. He died and Yekcha, as sole heir, succeeded to the title. A considerable time thereafter Yekcha made the conveyances sought to be canceled. Under the Act of April 26, 1906, c. 1876, § 22, 34 Stat. 137, 145, dealing with restrictions on the alienation of Creek and other allotments, he was free to make the conveyances if he was not a full-blood Indian. But if he was a full-blood the conveyances were void because made in violation of applicable restrictions. How the question whether he was or was not a full-blood should be determined—whether by reference to the rolls of citizenship or otherwise—is the matter in controversy.

The legislation providing for the allotment of the lands

of the Five Civilized Tribes, of which the Creek tribe was one, required the commission in charge of that work to make rolls of the citizens or members of each tribe, such rolls to be "descriptive of the persons thereon," and declared that the rolls, when approved by the Secretary of the Interior, should be "the final rolls of citizenship." Acts June 28, 1898, c. 517, § 21, 30 Stat. 495, 503; June 2, 1900, c. 610, 31 Stat. 250; March 1, 1901, c. 676, §§ 28 and 29, 31 Stat. 861, 870; June 30, 1902, c. 1323, §§ 7–9, 32 Stat. 500, 501. The rolls were made and approved by the Secretary, a statement of the age, sex, and quantum of Indian blood of each member being included in the descriptive matter thereon. The Act of April 26, 1906, *supra*, besides making the presence or absence of restrictions on the alienation of allotments dependent on the quantum of Indian blood possessed by the allottee or heir, declared that "the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior." The Act of June 21, 1906, c. 3504, 34 Stat. 325, 340, directed that a printed and bound copy of the approved rolls be deposited "in the office of the recorder in each of the recording districts for public inspection." Printed copies were so deposited.

While Kochokney, the father, was a member of the Creek tribe, Yekcha, the son, was a member of the Seminole tribe. Yekcha's enrollment as shown on the approved roll was as follows:

Seminole Roll. Indians by Blood.

"No. 1278: Name, Yekcha, Marche; age 30; sex M.; blood ½. Tribal enrollment: Year, 1897; band, Echo Emarthoge; No. 1; census card No. 380."

At the trial counsel for the plaintiff, after calling attention to the fact, which was admitted, that the father was enrolled as a full-blood Creek, sought to show by

oral testimony that the mother, whose name did not appear on any of the approved rolls, was a full-blood Seminole; but the court was of opinion that the quantum of Indian blood possessed by Yekcha must be determined by the approved roll, and so rejected the testimony. Then, interpreting the roll as meaning that he was an Indian of the half-blood, the court held that under the Act of April 26, 1906, he was free to make the conveyances.

We think the court rightly excluded the oral testimony and gave controlling effect to the approved roll. When Congress came to make a difference between full-blood and mixed-blood Indians, by subjecting the former to restrictions not applied to the latter, it evidently deemed it better for the Indians and all concerned that there be some fixed, easily accessible and reasonably reliable evidential standard by which to determine, for the purpose of the matter then in hand, who were of the full-blood and who of the mixed-blood. Congress had power to deal with the subject, and from among the standards which might have been prescribed it selected the rolls made at its direction by the commission charged with making the allotments. Not improbably it was thought that the rolls, even if not altogether free from mistake and error, would be quite as reliable as oral testimony and would have the advantage of being both easily accessible and enduring. But, passing the reason for it, Congress directed that the quantum of Indian blood "be determined" by the approved rolls, and it did this in a connection which leaves no doubt of its purpose to give controlling effect to the rolls. Emphasis was given to this purpose in the Act of May 27, 1908, c. 199, 35 Stat. 312, where, in again dealing with restrictions on the alienation of allotments, it was provided that the approved rolls "shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act."

Both the federal and state courts in Oklahoma have for several years applied the view here expressed. *Bell* v. *Cook*, 192 Fed. Rep. 597, 604–605; *Yarbrough* v. *Spalding*, 31 Oklahoma, 806; *Lawless* v. *Raddis*, 36 Oklahoma, 616.

It hardly requires statement that the court rightly interpreted the entry of Yekcha's enrollment, before quoted. It neither names nor says anything about either parent, but does state very plainly that he is an Indian of the half-blood.

Decree affirmed.

DOYLE, COLLECTOR OF INTERNAL REVENUE, *v.* MITCHELL BROTHERS COMPANY.

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

No. 492. Argued March 4, 5, 6, 1918.—Decided May 20, 1918.

The purpose of the Corporation Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 112, § 38, is not to tax property as such, or the mere conversion of property, but to tax the conduct of the business of corporations organized for profit by a measure based upon the gainful returns from their business operations and property from the time the act took effect.

The act employs the term "income" in its natural and obvious sense, as importing something distinct from principal or capital, and conveying the idea of gain or increase arising from corporate activities.

While a conversion of capital may result in income, in the sense of the act, where the proceeds include an increment of value, such is not the case where the increment existed when the act took effect.

In distinguishing preëxisting capital from income subject to the act, it is a mere question of method whether a deduction be made from gross receipts in ascertaining gross income, or from gross income, by way of depreciation, in ascertaining net income.

Before the Corporation Tax Act, a lumber company bought timber land

to supply its mills, and after the act it manufactured part of the timber into lumber, which it sold. *Held*, that the amount by which the timber so used had increased in value between the date of purchase and the effective date of the act was not an element of income to be considered in computing the tax.

The principle upon which the removal of minerals by mining companies has been held not to produce a depreciation within the meaning of the act is inapplicable to the case of a company engaged in the business of manufacturing and selling lumber from timber supplied by its own timber lands, and which sells the lands incidentally after the timber is removed.

The income is to be determined from the actual facts, as to which the corporate books are only evidential.

235 Fed. Rep. 686, affirmed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for petitioner.

Mr. Mark Norris, with whom *Mr. Oscar E. Waer* was on the brief, for respondent.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action to recover from the Collector additional taxes assessed against the respondent under the Corporation Excise Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 112, § 38, and paid under protest. The District Court gave judgment for the plaintiff, which was affirmed by the Circuit Court of Appeals (225 Fed. Rep. 437; 235 Fed. Rep. 686), and the case comes here on certiorari.

It was submitted at the same time with several other cases decided this day, arising under the same act.

The facts are as follows: Plaintiff is a lumber manufacturing corporation which operates its own mills, manufactures into lumber therein its own stumpage, sells the lumber in the market, and from these sales and sales of various by-products makes its profits, declares its dividends, and creates its surplus. It sells its stumpage lands, so-called, after the timber is cut and removed. Its sole business is as described; it is not a real estate trading corporation. Plaintiff acquired certain timber lands at its organization in 1903 and paid for them at a valuation approximately equivalent to $20 per acre. Owing to increases in the market price of stumpage the market value of the timber land, on December 31, 1908, had become approximately $40 per acre.[1] The company made no entry upon its books representing this increase, but each year entered as a profit the difference between the original cost of the timber cut and the sums received for the manufactured product, less the cost of manufacture. After the passage of the Excise Tax Act, and preparatory to making a return of income for the year 1909, the company revalued its timber stumpage as of December 31, 1908, at approximately $40 per acre. The good faith and accuracy of this valuation are not in question, but the figures representing it never were entered in the corporate books.

Under the act the company made a return for each of the years 1909, 1910, 1911, 1912, and in each instance deducted from its gross receipts the market value, as of December 31, 1908, of the stumpage cut and converted during the year covered by the tax. There appears to have been no change in its market value during these years.

The Commissioner of Internal Revenue having al-

[1] The valuations were based upon the quantity of standing timber, at certain prices per thousand feet for the different varieties. The approximate acreage equivalent is employed for convenience.

lowed a deduction of the cost of the timber in 1903 and refused to allow the difference between that cost and the fair market value of the timber on December 31, 1908, the question is whether this difference (made the basis of the additional taxes) was income for the years in which it was converted into money, within the meaning of the act.

Other items are involved in the case, arising from the sale of certain stump lands, certain by-products, and a parcel of real estate, but they raise no different question from that which arises upon the valuation of the stumpage, and need not be further mentioned.

The act became effective January 1, 1909, and provided for the annual payment by every domestic corporation "organized for profit and having a capital stock represented by shares" of an excise tax "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," with exceptions not now material. It declared that such net income should be ascertained by deducting from the gross income received within the year from all sources the expenses paid within the year out of income in the maintenance and operation of business and property, including rentals and the like; losses sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property; interest paid within the year to a limited extent; taxes; and amounts received within the year as dividends upon stock of other corporations subject to the same tax. In the case of a corporation organized under the laws of a foreign country, the net income was to be ascertained by taking into account the gross income received within the year "from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia," with deductions for expenses of maintenance and operation,

business losses, interest, and taxes, all referable to that portion of its business transacted and capital invested within the United States, etc.

An examination of these and other provisions of the act makes it plain that the legislative purpose was not to tax property as such, or the mere conversion of property, but to tax the conduct of the business of corporations organized for profit by a measure based upon the gainful returns from their business operations and property from the time the act took effect. As was pointed out in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145, the tax was imposed "not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof;" an exposition that has been consistently adhered to. *McCoach* v. *Minehill & Schuylkill Haven Railway Co.*, 228 U. S. 295, 300; *United States* v. *Whitridge*, 231 U. S. 144, 147; *Anderson* v. *Forty-two Broadway Co.*, 239 U. S. 69, 72.

When we come to apply the act to gains acquired through an increase in the value of capital assets acquired before and converted into money after the taking effect of the act, questions of difficulty are encountered. The suggestion that the entire proceeds of the conversion should be still treated as the same capital, changed only in form and containing no element of income although including an increment of value, we reject at once as inconsistent with the general purpose of the act. Selling for profit is too familiar a business transaction to permit us to suppose that it was intended to be omitted from consideration in an act for taxing the doing of business in corporate form upon the basis of the income received "from all sources."

Starting from this point, the learned Solicitor General has submitted an elaborate argument in behalf of the

Government, based in part upon theoretical definitions of "capital," "income," "profits," etc., and in part upon expressions quoted from our opinions in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147, and *Anderson* v. *Forty-two Broadway Co.*, 239 U. S. 69, 72, with the object of showing that a conversion of capital into money always produces income, and that for the purposes of the present case the words "gross income" are equivalent to "gross receipts"; the insistence being that the entire proceeds of a conversion of capital assets should be treated as gross income, and that by deducting the mere cost of such assets we arrive at net income. The cases referred to throw little light upon the present matter, and the expressions quoted from the opinions were employed by us with reference to questions wholly remote from any that is here presented.

The formula that the entire receipts derived from a conversion of capital assets after deducting cost value must be treated as net income, so far as it is applied to a conversion of assets acquired before the act took effect and so as to tax as income any increased value that accrued before that date, finds no support in either the letter or the spirit of the act, and brings the former into incongruity with the latter. If the gross receipts upon such a conversion are to be treated as gross income, what authority have we for deducting either the cost or the previous market value of the assets converted in order to arrive at net income? The deductions specifically authorized are only such as expenses of maintenance and operation of the business and property, rentals, uncompensated losses, depreciation, interest, and taxes. There is no express provision that even allows a merchant to deduct the cost of the goods that he sells.

Yet it is plain, we think, that by the true intent and meaning of the act the entire proceeds of a mere conversion of capital assets were not to be treated as income.

Whatever difficulty there may be about a precise and scientific definition of "income," it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415: "Income may be defined as the gain derived from capital, from labor, or from both combined."

Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a gain that properly may be accounted as a part of the "gross income" received "from all sources"; and by applying to this the authorized deductions we arrive at "net income." In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.

This has been recognized from the beginning by the administrative officers of the Government. Shortly after the passage of the act, and before the time (March 1, 1910) for making the first returns of income, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Regulations No. 31, under date December 3, 1909, for the guidance of collectors and other subordinate officers in the performance of their duties under the act. These prescribed, with respect to manufacturing companies, that gross income should consist of the difference between the price received for the goods as sold and the cost of such goods as manufactured; cost to be "ascertained by an addition of a charge to the account of the cost of goods as

manufactured during the year of the sum of the inventory at beginning of the year and a credit to the account of the sum of the inventory at the end of the year." In the case of mercantile companies, gross income was to be the "amount ascertained through inventory, or its equivalent, which shows the difference between the price received for goods sold and the cost of goods purchased during the year, with an addition of a charge to the account of the sum of the inventory at beginning of the year and a credit to the account of the sum of the inventory at the end of the year." And as to miscellaneous corporations, gross income was to be "the gross revenue derived from the operation and management of the business and property of the corporation," with all income derived from other sources. The matter of income arising from a profitable sale of capital assets was dealt with specifically in such a way as to limit the tax to income arising after the effective date of the act. This was done by adopting the rule that an advance in value arising during a period of years should be so adjusted that only so much as properly was attributable to the time subsequent to January 1, 1909, (December 31, 1908, would have been more precise), should be subjected to the tax.[1] Subsequent treasury regulations, promulgated from time to time (T. D. 1606, March 29, 1910,

[1] Extract from Treasury Regulations No. 31, issued December 3, 1909.

Sale of capital assets.—In ascertaining income derived from the sale of capital assets, if the assets were acquired subsequent to January 1, 1909, the difference between the selling price and the buying price shall constitute an item of gross income to be added to or subtracted from gross income according to whether the selling price was greater or less than the buying price. If the capital assets were acquired prior to January 1, 1909, the amount of increment or depreciation representing the difference between the selling and buying price is to be adjusted so as to fairly determine the proportion of the loss or gain arising subsequent to January 1, 1909, and which proportion shall be deducted from or added to the gross income for the year in which the sale was made.

paragraphs 40, 71, 76; T. D. 1675, February 14, 1911, paragraphs 37, 55, 75; T. D. 1742, December 15, 1911, paragraphs 43, 62, 86, 91,) adhered to the same rule with respect to lands bought prior to January 1, 1909, and sold during a subsequent year, prescribing, however, that the profits, when not otherwise accurately determinable, should be prorated according to the time elapsed before and after the act took effect; and gave to it an application especially pertinent here, one of the regulations reading: "The mere removal of timber by cutting from timber lands, unless the timber is otherwise disposed of through sales or plant operations, is considered simply a change in form of assets. If said timber is disposed of through sales or otherwise it is to be accounted for in accordance with regulations governing disposition of capital and other assets."

In our opinion these regulations correctly interpret the act in its application to the facts of the present case. When the act took effect, plaintiff's timber lands, with whatever value they then possessed, were a part of its capital assets, and subsequent change of form by conversion into money did not change the essence. Their increased value since purchase, as that value stood on December 31, 1908, was not in any proper sense the result of the operation and management of the business or property of the corporation while the act was in force. Nor is the result altered by the mere fact that the increment of value had not been entered upon plaintiff's books of account. Such books are no more than evidential, being neither indispensable nor conclusive. The decision must rest upon the actual facts, which in the present case are not in dispute.

The plaintiff, in making up its income tax returns for the years 1909, 1910, 1911, and 1912, deducted from its gross receipts the admittedly accurate valuation as of December 31, 1908, of the stumpage cut and converted dur-

ing the year covered by the tax. There having been no change in market values during these years, the deduction did but restore to the capital in money that which had been withdrawn in stumpage cut, leaving the aggregate of capital neither increased nor decreased, and leaving the residue of the gross receipts to represent the gain realized by the conversion, so far as that gain arose while the act was in effect. This was in accordance with the true intent and meaning of the act.

It may be observed that it is a mere question of methods, not affecting the result, whether the amount necessary to be withdrawn in order to preserve capital intact should be deducted from gross receipts in the process of ascertaining gross income, or should be deducted from gross income in the form of a depreciation account in the process of determining net income. In either case the object is to distinguish capital previously existing from income taxable under the act.

There is only a superficial analogy between this case and the case of an allowance claimed for depreciation of a mining property through the removal of minerals, since we have held that owing to the peculiar nature of mining property its partial exhaustion attributable to the removal of ores cannot be regarded as depreciation within the meaning of the act. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 520, 524; *United States* v. *Biwabik Mining Co.*, *ante*, 116; *Goldfield Consolidated Mines Co.* v. *Scott*, *ante*, 126.

It should be added that in this case no question is raised as to whether, in apportioning the profits derived from a disposition of capital assets acquired before and converted after the act took effect, the division should be *pro rata*, according to the time elapsed, or should be based upon an inventory taken as of December 31, 1908. Plaintiff, in accordance with Treasury Regulations No. 31, T. D. 1578, January 4, 1910, and T. D. 1588, January

24, 1910, adopted the latter method, and the Government makes no contention as to the accuracy of the result thereby reached, under the stipulated facts, if our construction of the act be correct.

Judgment affirmed.

HAYS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WEST VIRGINIA, *v.* GAULEY MOUNTAIN COAL COMPANY.

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

No. 327. Argued March 4, 5, 6, 1918.—Decided May 20, 1918

The Corporation Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 112, § 38, measures the tax by income received during the tax year without reference to when it accrued, provided it accrued after the act became effective. *Gray* v. *Darlington*, 15 Wall. 63, distinguished.

A coal company bought shares of another coal company before, and sold them at an advance after, the Corporation Tax Act became effective. *Held:* (1) That interest should not be added to the investment as a part of the cost; (2) that so much, and only so much, of the advance as could be deemed to have accrued since December 31, 1908, was part of the company's "gross income," within the act. *Doyle* v. *Mitchell Brothers Co.*, *ante*, 179.

230 Fed. Rep. 110, reversed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for petitioner.

Mr. Henry B. Closson, for respondent, submitted.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

Mr. Justice Pitney delivered the opinion of the court.

Suit by the Gauley Mountain Coal Company against the Collector to recover taxes alleged to have been unlawfully collected under Corporation Excise Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 112, § 38. The District Court gave judgment in favor of defendant, which was reversed by the Circuit Court of Appeals (230 Fed. Rep. 110), whereupon a writ of certiorari was allowed. The case was submitted together with several other cases decided this day, arising under the same act.

The agreed facts are in substance as follows: The Company is a mining corporation organized under the laws of the State of West Virginia. The business of trading in stocks is not included among its corporate powers, nor does it appear that, with a single exception, it ever bought or sold any. On December 9, 1902, it purchased certain shares of another mining corporation for $800,000, and sold them October 16, 1911, for $1,010,000, this sum being less by $214,933.33 than the purchase price plus interest at 6 per cent., but greater by $210,000 than cost ignoring interest. The Commissioner of Internal Revenue held that a proportion of the $210,000 represented by the ratio of the 1,019 days that elapsed between January 1, 1909, when the Corporation Excise Tax Act became effective, and October 16, 1911, the date of the sale, to the 3,233 days that elapsed between the date of purchase and the date of sale, constituted income of the corporation for the year 1911 within the meaning of the act. The apportioned sum, $66,189.30, reduced to $52,506 by certain deductions not now in question, was made the basis of an additional assessment at 1 per cent. upon the latter sum;

and this assessment, having been collected by duress, formed the subject of the present suit.

The decision of the Circuit Court of Appeals, and the principal contentions made by respondent in support of it, are based upon the decision of this court in *Gray* v. *Darlington*, 15 Wall. 63. That case arose under the Act of Congress of March 2, 1867, c. 169, § 13, 14 Stat. 477, which provided that a certain tax should be levied, collected, and paid annually upon the amount over $1,000 of the gains, profits, and income of every person, declaring that "the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax." There was this further provision: "That, in estimating the gains, profits, and income of any person, there shall be included all income derived from interest upon notes, bonds, and other securities of the United States; profits realized within the year from sales of real estate purchased within the year or within two years previous to the year for which income is estimated . . . and all other gains, profits, and income derived from any sources whatever," with an exception that need not be stated. It appeared that plaintiff acquired certain United States bonds in the year 1865 and sold them in 1869 at an advance of $20,000 over their cost, and was taxed upon this amount as gains, profits, and income for the latter year. This court held that by the true construction of the act, except as to gains and profits from trade and commerce and sales of real property, the statute only applied to such gains, profits, and income as were strictly acquisitions made during the year preceding that in which the assessment was levied and collected. We do not regard the decision as controlling, because the language of the act now under consideration is different in material particulars. As pointed out in *Doyle* v. *Mitchell Brothers Co.*, *ante*, 179,

it imposes annually a special excise tax with respect to the carrying on or doing business by the corporation "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," to be ascertained by taking gross income and applying certain exceptions and deductions. "Gains, profits, and income *for* the year ending the thirty-first day of December next preceding" (Act of 1867) conveys a different meaning from "the entire net income . . . *received by it* . . . *during* such year" (Act of 1909). The former expression, as this court held (15 Wall. 65), denoted "such gains or profits as may be realized from a business transaction begun and completed during the preceding year," with the exceptions already mentioned. The expression "income *received during* such year," employed in the Act of 1909, looks to the time of realization rather than to the period of accruement, except as the taking effect of the act on a specified date (January 1, 1909), excludes income that accrued before that date. There are other differences upon which we need not dwell.

As we construe the latter act, it measured the tax by the income received within the year for which the assessment was levied, whether it accrued within that year or in some preceding year while the act was in effect; but it excluded all income that accrued prior to January 1, 1909, although afterwards received while the act was in effect.

This brings us to consider whether the proceeds of the sale of stock by respondent in October, 1911, included anything, and if so how much, of "income" accruing on or after January 1, 1909, as the term "income" is employed in the act.

That the sale resulted in a gain or profit to the extent of $210,000, the difference between the buying and selling prices, is not to be doubted, for there is no merit in the

contention that interest should be added to the purchase price in order to ascertain its cost. The money that went into the purchase was not loaned at interest; on the contrary, by the very fact of the purchase it was placed where it could not earn interest for the respondent in the ordinary sense, and the gain represented by the increase of selling price over cost price must be regarded as a substitute for whatever return some other form of investment might have yielded.

It results that so much of the $210,000 of profits as may be deemed to have accrued subsequent to December 31, 1908, must be treated as a part of the "gross income" of respondent. For it is the simple case of a conversion of capital assets acquired before and turned into money after the taking effect of the act; and, as we have shown in *Doyle* v. *Mitchell Brothers Co.*, *ante*, 179, since the conversion of capital often results in gain, the general purpose of the Act of 1909 to measure the tax by the increase arising from corporate activities together with the income from invested property leads to the inference that that portion of the gross proceeds which represents gain or increase acquired after the taking effect of the act must be regarded as "gross income"; and to this end it must be distinguished from that portion which represents a return of the capital value existing before. In order to do this, it is necessary to ascertain what was the value of the capital assets on December 31, 1908. Whether this should be done by taking inventory upon the basis of market values then existing, or whether the entire increment accruing between the time of acquiring and the time of disposing of the assets should be prorated as if it had arisen through a series of gradual and imperceptible augmentations, is a matter of detail, to be settled according to the best evidence obtainable, and in accordance with valid departmental regulations. Treasury Regulations No. 31, December 3, 1909, provided

for inventories at the beginning and end of each year with respect to manufacturing and mercantile companies; and with regard to a sale of capital assets acquired prior to January 1, 1909, and sold thereafter, required that the amount of increment or depreciation representing the difference between the selling and buying prices should be adjusted so as fairly to determine the proportion of the loss or gain arising subsequent to the date mentioned; but without prescribing any particular method of doing this. Subsequent rulings required that sales of stocks and bonds should be regarded as sales of capital assets and accounted for accordingly under Regulations No. 31, and, while still requiring inventories, resorted to the prorating method with respect to real estate, apparently on the ground that increases and decreases in the value of this class of property during particular periods could not be accurately determined. (T. D. 1606, March 29, 1910, paragraphs 37, 50, 71; T. D. 1675, February 14, 1911, paragraphs 36, 48, 55, 69; T. D. 1742, December 15, 1911, paragraphs 42, 55, 62, 86.)

The present case was heard upon an agreed statement of facts which contains nothing from which the value of the stock at the time the act took effect may be deduced, otherwise than by the prorating method that was adopted; nor is any objection made by the respondent to the application of that method. Hence there is no lawful ground for overthrowing the tax, and the District Court did not err in rendering judgment in favor of the Collector.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

UNITED STATES *v.* CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

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

No. 593. Argued March 4, 5, 6, 1918.—Decided May 20, 1918.

A railroad company bought shares of another railroad company before, and sold them after, December 31, 1908. *Held*, that only so much of the profit as accrued after that date was "income," within the Corporation Tax Act. *Doyle* v. *Mitchell Brothers Co.*, *ante*, 179; *Hays* v. *Gauley Mountain Coal Co.*, *ante*, 189.
242 Fed. Rep. 18, affirmed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for the United States.

Mr. George Hoadly, with whom *Mr. Judson Harmon*, *Mr. Edward Colston*, *Mr. A. W. Goldsmith* and *Mr. Oscar Stoehr* were on the briefs, for respondent.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

In January, 1900, the respondent purchased 30,000 shares of stock of the Chesapeake & Ohio Railway Company for $981,427.92, and sold them January 28, 1909, for $1,795,719—a profit of over $814,000. It included no portion of this profit in its return for the year 1909 under the Corporation Excise Tax Act of August 5,

1909, c. 6, 36 Stat. 11, 112, § 38, and the United States brought this suit to recover the tax of 1 per cent. thereon. The District Court directed a verdict in favor of plaintiff. Upon review the Circuit Court of Appeals held the proceeds of sale of the stock could not be considered as income under the act except to the extent by which they exceeded the market value of the stock on December 31, 1908, ascertained to be $57 per share. It therefore reversed the judgment, and remanded the case with instruction to enter a new judgment to include a tax on this account only upon the balance of the selling price above $57 per share or $1,710,000 in all. 242 Fed. Rep. 18. A writ of certiorari was then allowed.

For reasons sufficiently stated in *Doyle* v. *Mitchell Brothers Co.*, and *Hays* v. *Gauley Mountain Coal Co.*, *ante*, pp. 179, 189, we concur in the view that defendant was not taxable except with respect to so much of the profit upon the stock as accrued after December 31, 1908. Just how this part is to be separated from that which previously accrued is a matter of some nicety, as we have shown in the *Hays Case*. The Circuit Court of Appeals adopted the theory of an inventory taken as of the time the act went into effect; and although the assets here under consideration were not acquired for the purpose of sale in the manner of merchandise, but were bought for investment, and hence were not inventoried on December 31, 1908, it accepted the stipulated fact that the stock had a regular market value of $57 per share on that date as supplying the lack of an inventory. This result accords with the views we have expressed in the cases referred to.

Judgment affirmed.

Mr. Justice Holmes took no part in the consideration or decision of this case.

CHICAGO & ALTON RAILROAD COMPANY *v.* UNITED STATES.

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

No. 640. Submitted April 18, 1918.—Decided May 20, 1918.

A switch tender on duty in switch shanties, within a railroad yard, which are continuously operated day and night, and where by use of the telephone he receives and delivers orders from the yard master to engine and train crews pertaining to train movements through the yard, is within the class described in proviso of § 2 of the Hours of Service Act, whose service is thereby limited to nine hours in twenty-four.

244 Fed. Rep. 945, affirmed.

THE case is stated in the opinion.

Mr. William L. Patton and *Mr. Silas H. Strawn* for petitioner.

Mr. Assistant Attorney General Frierson for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Following its decisions in *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, and *Chicago & Northwestern Ry. Co.* v. *United States*, 226 Fed. Rep. 27, 30, the Circuit Court of Appeals affirmed a judgment of the District Court against petitioner for one hundred dollars, penalty for violating the Hours of Service Act (c. 2939, 34 Stat. 1415) by permitting a switch tender to remain on duty more than nine hours.

Section 2 of the act declares it unlawful for any interstate carrier by railroad to require or permit an employee "actually engaged in or connected with the movement of any train" to remain on duty longer than sixteen consecutive hours: "*Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week."

The cause was tried upon an agreed statement of facts, a jury being waived.

Petitioner's "Yard" at Bloomington, Illinois, is seven and three fourths miles long. During April, 1915, it maintained therein three switch shanties located upon its double track main line, one five hundred feet, another eleven hundred feet and the third a mile north of its passenger station. Trains operated over this portion of the line are under control of the Yard Master and subject to a rule which provides, "all trains will reduce speed on passing through yard limits and proceed only after the way is seen or known to be clear." Each of these shanties was continuously operated night and day by two men, alternately on duty therein for twelve hours during every twenty-four.

"All of the work regularly and generally required of said employees, as well as that required on the days mentioned in said declaration, was in connection with the

use of certain switches and telephones, which said work pertained to and affected the movements of trains of defendant engaged in interstate commerce. Each of said shanties was equipped with a telephone, all three being on the same circuit, and connected with the Yard Master's Office." At the first shanty eight switches were handled; at the second twelve and two sets of cross-overs; at the third eight switches for south bound trains and a cross-over one. "The work of these employees is to throw switches, relieve yard, train and engine crews of this work, and to avoid delays to trains moving through the yard. The telephones are used to permit the Yard Master, who directs all yard movements, to keep in closer touch with such movements and to issue instructions or orders to yard, train or engine crews as to the handling of cars or trains, or as to any other work that he may desire performed." "The telephones at the three places were installed principally for the purpose of making more convenient communication between the Yard Master's Office and said shanties."

"All instructions or orders received from the Yard Master, as above set forth, were always transmitted by said employees to the engine or trains crews, either verbally or by hand signals, and in no case were said employees required to write out said instructions or orders for transmission to these crews." "None of the service required of any of said employees on the days mentioned in said declaration was necessitated by reason of any emergency. They were the regular assigned hours of said employees, fixed in that manner by defendant's operating department which acted under instructions received from its legal department."

The purpose of the statute is to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task. *Baltimore & Ohio R. R. Co.* v.

Interstate Commerce Commission, 221 U. S. 612, 619. It must be construed and applied in view of that purpose and well known circumstances attending the practical operation of trains.

The individuals within the ambit of the proviso's pertinent provisions are marked by the nature of service performed—an "operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements." And the railroad is forbidden to permit one performing such service in "towers, offices, places, and stations continuously operated night and day" to remain on duty therein longer than nine hours in twenty-four. Both the post of duty and character of work are essential elements. If, in due course of his work, an employee while in any of the locations specified uses the telegraph or telephone for sending or receiving messages concerning train movements, he may not lawfully remain on duty therein exceeding nine hours during any twenty-four-hour period, except in case of emergency.

Here, the facts disclose the switch tender on duty for twelve consecutive hours in a shanty continuously operated night and day where, by the use of the telephone, he received and delivered orders pertaining to train movements—not mere switching movements within the yard; and in such service mental and physical alertness are of great importance. By permitting this the railroad violated both language and purpose of the act.

The judgment below is

Affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* RICE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 574. Submitted April 1, 1918.—Decided May 20, 1918.

Judicial Code, § 24, gives jurisdiction to the District Courts "of all suits and proceedings arising under any law regulating commerce." *Held*, that a suit so arises where the carrier sues the consignee of an interstate shipment of live stock to collect a charge for disinfecting the cars, alleged to be due under tariffs approved and published as required by the Interstate Commerce Act, and where the consignee, admitting the interstate character of the shipment and propriety of the charges under the act, defends on the ground that the carrier by its acts is estopped from holding him responsible.

Reversed.

THE case is stated in the opinion.

Mr. George Denegre, Mr. Henry L. Stone, Mr. Victor Leovy, Mr. Henry H. Chaffe and *Mr. Harry McCall* for plaintiff in error.

Mr. T. M. Miller, Mr. John D. Miller and *Mr. Charles F. Fletchinger* for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Did the District Court rightly decide that it had no jurisdiction, is the only question presented.

Plaintiff in error sued to recover one hundred and forty-five dollars claimed to be due under tariffs approved and published as required by Interstate Commerce Act, for disinfecting fifty-eight cars containing live stock shipped

from points outside the State and delivered to defendant, the consignee, at New Orleans, Louisiana. It alleged presentation of bills covering each shipment and payment by defendant of all charges except those for disinfecting—two dollars and fifty cents per car.

Answering, defendant admitted the shipments were interstate; that he paid all lawful charges, except those sued for; and that these had been properly prescribed under and pursuant to the Interstate Commerce Act. But he denied liability for these reasons: As the carrier well knew, or should have known, he had long been engaged in the business of factor or commission merchant; in due course while acting as representative for their owners and consignors he received the live stock, sold them immediately upon arrival, deducted expenses, etc., and remitted balance of proceeds to his principals; when the cars arrived he paid all charges actually demanded; he was not then advised and remained unaware that any others were contemplated until such balance had been remitted. Having led him to believe the amount asked and paid before he remitted entire net proceeds constituted full settlement, the carrier is now estopped from demanding more of him.

The trial court upon its own initiative dismissed the action for want of jurisdiction.

Section 24 of the Judicial Code provides that regardless of amount involved District Courts shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce." The Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff in respect of every shipment. Their duty and obligation grow out of and depend upon that act.

In support of the trial court it is said: There is no jurisdiction unless the suit in part at least arises out of a controversy in regard to operation or effect of the act of Congress. Here there is no dispute as to legality of rate

or its application to the shipments; and consignee's liability was fully discharged upon payment by him of amount demanded at time of delivery and surrender of the carrier's lien.

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress." *Tennessee* v. *Davis*, 100 U. S. 257, 264. "Whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations." *Central R. R. Co. of New Jersey* v. *Mills*, 113 U. S. 249, 257. "If the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. A suit arises under an act of Congress when "it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U. S. 561, 569. As to interstate shipments "there can be no question that, since the decision in the *Croninger Case* [226 U. S. 491], the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation." *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, 595; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97.

The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved as required by Interstate Commerce Act; result of the action necessarily depended upon construction and effect of that act.

We think the District Court had jurisdiction. Its judgment is accordingly reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

UNION PACIFIC RAILROAD COMPANY *v.* LAUGHLIN.

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

No. 623. Argued April 18, 1918.—Decided May 20, 1918

A state statute giving an attorney a lien on the cause of action or its proceeds for an agreed portion of any recovery, and rendering the actual or proposed defendant directly liable to him for its satisfaction in case of settlement after notice without his consent, does not deprive the party thus made liable of any constitutional right, even where the settlement is made under a judgment recovered upon the cause of action through another attorney in the federal court, and by satisfying such judgment by payment to the clerk of that court.

A contrary contention raises no substantial federal question.

So *held* where the cause of action (for personal injuries) arose in another State.

Writ of error to review 196 Mo. App. 541, dismissed.

THE case is stated in the opinion.

Mr. N. H. Loomis, *Mr. R. W. Blair* and *Mr. I. N. Watson*, for plaintiff in error, submitted.

Mr. Edwin A. Krauthoff for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Xedes, a section hand on the Union Pacific Railroad, was injured, in Kansas, while in the performance of his duties. Laughlin, an attorney at law, was employed by him in Missouri to prosecute and settle his claim against the company; and Xedes agreed that Laughlin should receive as compensation one-half of whatever amount he

might obtain in settlement of the claim. The Revised Statutes of Missouri (1909), §§ 964 and 965, authorizing such agreements, give to the attorney a lien on the cause of action and on the proceeds, if notice of the lien is duly given to the defendant or "proposed defendant"; and, as construed by the Supreme Court of Missouri,[1] they also provide that if, after such notice, the claim is settled in any manner without first procuring the written consent of such attorney, the defendant or "proposed defendant" shall be liable to the attorney in an independent suit to an amount equal to that for which he held the lien.

Laughlin gave to the company this statutory notice. Later and without his consent, Xedes brought, through other counsel, in a state court, suit against the company which was removed to the District Court of the United States for the Western Division of the Western District of Missouri, and judgment was entered therein for $550. The company paid this amount to the clerk of court in satisfaction of the judgment; and it was paid by him to Xedes and his new counsel. When Laughlin learned these facts, he brought suit against the company in Missouri before a justice of the peace, for $275, and recovered a judgment therefor which was affirmed in the state circuit court and again by the Kansas City Court of Appeals. A rehearing applied for in June, 1917, was denied by that court, which also refused to transfer the case to the Supreme Court. The company, contending that the Federal Constitution has been violated, brings the case here under § 237 of the Judicial Code as amended.

It does not appear here, as it did in *Dickinson* v. *Stiles*, 246 U. S. 631, that the suit of the employee against the railroad was brought under the Federal Employers' Liability Act; and no claim is made that the attorney's lien

[1] *O'Connor* v. *St. Louis Transit Co.*, 198 Mo. 622, 645; *Taylor* v. *St. Louis Transit Co.*, 198 Mo. 715, 730; *Wait* v. *Atchison, etc. R. R.*, 204 Mo. 491, 501.

statute of the State is inconsistent with that law or the constitutional provision concerning interstate commerce. The company's contention, as set forth in its assignment of error in this court, is that the decision below takes its property and denies to it equal protection of the law in violation of the Fourteenth Amendment, because the decision imposes a liability not imposed by the judgment recovered by Xedes in the federal court; deprives it of the protection afforded by the acts of Congress to those who pay to the clerks of the United States District Courts money in satisfaction of judgments entered therein; [1] and gives to two attorneys liens for the same service. The defendant in error moves to dismiss on the ground that the case does not present a federal question reviewable under § 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, because there is not drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States; and that if such question is presented, the Kansas City Court of Appeals was not "the highest court of a State in which a decision in the suit could" have been had, since the Supreme Court of Missouri has appellate jurisdiction in cases where "the validity of a treaty or statute of or authority exercised under the United States is drawn in question," and no application was made to nor any action taken by it.

The Missouri statute simply gives a cause of action against one who, with knowledge of the existence of a lien, deforces it. To grant such a remedy against the wrongdoer clearly does not deprive him of any right guaranteed by the Federal Constitution, even if the in-

[1] Rev. Stats., §§ 966, 967, 995, and § 996 as amended by Act of February 19, 1897, c. 265, § 3, 29 Stat. 578, and Act of March 3, 1911, c. 224, 36 Stat. 1083; Act of August 1, 1888, c. 729, § 1 and § 2, 25 Stat. 357.

strument by means of which the wrong is accomplished happens to be the judgment of a federal court. No substantial federal question is involved. We have no occasion, therefore, to consider whether the validity of the Missouri statute was drawn in question (*Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162); nor whether "a decision in the suit" might not have been had in the Supreme Court of Missouri, (*Missouri, Kansas & Texas Ry. Co.* v. *Elliott*, 184 U. S. 530).

Writ of error dismissed.

FRIEDERICHSEN *v.* RENARD, EXECUTOR OF RENARD, ET AL.

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

No. 270. Argued April 25, 26, 1918.—Decided May 20, 1918.

Plaintiff, having been defrauded in an exchange of lands, sued in the District Court to annul his contract and deed and for incidental damages. The court finding that by acts of ownership he had affirmed the contract, by its order, under Equity Rule 22, transferred the case to the law side as an action for damages for the deceit, and the bill was amended accordingly but with no substantial change in the allegations of fraud. Meanwhile, the period of the statute of limitations had expired.

Held: (1) That the amendment did not change the cause of action and did not constitute the beginning of a new case.

(2) That, since the money relief prayed in the amended petition could properly have been sought as alternative relief in the original bill in equity, and since the transfer to the law side was made upon order of the court in the exercise of its discretion, plaintiff could not be held

to have made such an election of inconsistent remedies as would let in the defense of limitations against the amended demand.
231 Fed. Rep. 882, reversed.

THE case is stated in the opinion.

Mr. William V. Allen for petitioner.

Mr. R. E. Evans, with whom *Mr. W. D. Funk* was on the briefs, for respondents.

MR. JUSTICE CLARKE delivered the opinion of the court.

On March 12, 1908, the petitioner, Friederichsen, contracted in writing to exchange land which he owned in Nebraska for land in Virginia owned by the respondent, Mary C. Gilmore, who in the transaction acted through her agent, Edward Renard, the decedent of the respondent G. H. Renard. We shall refer to the parties as they were in the courts below, Friederichsen as plaintiff, and Gilmore and Renard as defendants.

On September 22, 1908, Friederichsen filed a bill in equity in the United States Circuit Court for the District of Nebraska, praying for a decree cancelling the contract and the deed made pursuant thereto and for damages sustained, on the ground of fraud practiced upon him.

Defendants answered denying the fraud charged, and on August 20, 1912, a master, theretofore appointed in the case, reported that Friederichsen at the time of the exchange was "below the average in mental ability;" that he had been induced to enter into the contract by the fraudulent representations of Renard, as alleged; and that he had sustained damage in the sum of $5,880. But the master also reported that Friederichsen, after taking possession of the Virginia lands, after filing his bill in the case, and after having had time to discover the condition

and value of the land, had cut down a considerable amount of timber growing thereon.

On the coming in of this report, the court on September 19, 1913, found that the plaintiff was not entitled to equitable relief because he had ratified the contract of exchange by cutting timber on the Virginia lands, thereby preventing the defendants from being placed in *statu quo*, but that his remedy was at law for damages, and thereupon it was ordered: that the master's report be vacated; that pursuant to Equity Rule 22, the cause be transferred to the law side of the court; and that the parties "file amended pleadings to conform with an action at law."

Complying with this order, on September 25, 1913, the plaintiff filed an "amended petition" on the law side of the court, and, upon the same facts stated in the original bill in equity, prayed for a judgment for damages. The defendants filed answers the same in substance as those filed in the equity suit, but adding the defense that the cause of action stated in the amended petition was barred by the Nebraska four-year statute of limitations.

When the case came on for trial, and after it was stipulated by counsel for the defendants that the plaintiff had introduced sufficient evidence to entitle him to recover a verdict, unless barred by the statute of limitations, it was ruled "that the cause of action stated in the plaintiff's amended petition was barred by the statute of limitations of the State of Nebraska, and that the filing of the amended petition did not relate back to the commencement of the action in such a way as to prevent the bar of the statute," and a verdict was directed for the defendants. The judgment entered on this verdict, affirmed by the Circuit Court of Appeals for the Eighth Circuit, is now before us for review on writ of certiorari.

Thus the case presents for decision the single question, Whether the filing of the "amended petition" on the law

side of the court on September 25, 1913, was the commencement of a new action more than four years after the fraud was discovered, (which must have been prior to the filing of the bill in equity on September 22, 1908), which was therefore barred, or whether the proceeding at law was but pursuing toward a conclusion, in another form, the same cause of action stated in the original bill, so that the suspension of the statute of limitations continued, which began with the date of the service of the subpœna in chancery.

It is argued by the respondents that in the bill in equity the petitioner disaffirmed, while in the amended petition he affirmed the contract of exchange; that the latter for this reason states a new and different cause of action from the former, and that, against this new cause of action, the running of the statute of limitations was not arrested until the amended petition was filed, and that then it had become barred.

But the allegations of fraud in the two papers are the same in substance, and practically the same in form, the only substantial difference between them being that the prayer for relief in the bill is for mutual return of lands, with incidental damages, while, in the amended petition, it is for damages alone. The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement of that wrong in the amended petition cannot in any just sense be considered a new or different cause of action.

It is settled upon reason and authority that the conversion of a suit in equity into an action at law or *vice versa* is not alone sufficient to constitute the beginning of a new action and that with respect to the statute of limitations it is a mere incident in the progress of the original case.

It was so held by the Supreme Court of Nebraska long

prior to the origin of the controversy we have here, when an action in ejectment was converted into a suit to redeem, *McKeighan* v. *Hopkins*, 19 Nebraska, 33, and again, in *Butler* v. *Smith*, 84 Nebraska, 78, in a similar case in 1909, the question was held not to be an open one.

In *Smith* v. *Butler*, 176 Massachusetts, 38, followed with approval in 1917 in *Reynolds* v. *Missouri, Kansas & Texas Ry. Co.*, 228 Massachusetts, 584, the Supreme Judicial Court of Massachusetts declared that it had been the settled practice in that Commonwealth for a period of over fifty years to allow actions at law to be amended into suits in equity, in place of putting the plaintiff to a new suit, and to "allow those amendments on the ground that if a new suit were brought, it would be barred by the statute." It will suffice to add that in *Schurmeier* v. *Connecticut Mutual Life Ins. Co.*, 171 Fed. Rep. 1, the Circuit Court of Appeals, a judgment of which we are here reviewing, held that the amendment of a law action into one in equity, for the express purpose of meeting an anticipated defense of the statute of limitations, did not change the cause of action and that the amendment related to the time of the commencement of the action.

There remains to be considered the ground on which the lower courts chiefly rested their judgment, viz: That, in disaffirming the contract by his suit in equity, the petitioner elected to pursue one of two inconsistent remedies open to him, until the period of the statute of limitations had expired, and that he therefore cannot escape that bar when afterwards, by amendment of his pleadings, he seeks to affirm the contract and recover damages.

No matter what may be thought of the merit of the doctrine of election of remedies, it is a long observed and deeply entrenched rule of procedure. But, for obvious reasons, it has never been a favorite of equity and it has been specifically decided by this court that the two forms of relief pursued, before and after the amendment of the

pleadings in this case, are not so inconsistent but that both may be prayed for in one bill in equity and either granted, as the evidence and the equities of the case may require. Thus, in *Hardin* v. *Boyd*, 113 U. S. 756, in a suit to annul a land contract for fraud, the trial court permitted an amendment to the bill, adding a prayer in the alternative for a decree affirming the contract, granting a lien for the unpaid purchase money and for foreclosure. The decree in the case was entered on the alternative prayer.

This court affirmed that decree on principle and authority holding that:

"Under the liberal rules of chancery practice which now obtain, there is no sound reason why the original bill in this case might not have been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the alternative, for a decree which, without disturbing the contract, would give a lien on the lands for unpaid purchase-money. . . . The amendment had no other effect than to make the bill read just as it might have been originally prepared consistently with the established rules of equity practice. It suggested no change or modification of its allegations, and, in no just sense, made a new case."

In view of the New Equity Rules of 1912, especially Rule 22, and of the Act of Congress of March 3, 1915, 38 Stat. 956, it cannot be said that the power of courts of equity to amend pleadings, or to permit them to be amended, to accomplish the ends of justice, has been curtailed since the *Hardin Case* was decided in 1884.

Thus, in express terms was it decided that a properly framed prayer would have allowed the petitioner the relief in equity which he sought before the amendment or, in the alternative, that for which he now prays, and to this it must be added, that the order which converted his suit in equity into an action at law was made in the ex-

ercise of a chancellor's discretion under warrant of an equity rule.

At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended, as it must be in order to reach the case at bar, for here the "amended petition" was not filed by petitioner's counsel of their own motion, but on the order of the court, entered in its discretion, to promote the ends of justice.

Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the Circuit Court of Appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do.

The questions of procedure being thus cleared away, there is little further difficulty with the case. As we have seen, the "amended petition" was not filed in a new case but was simply a step forward in progress toward settlement of the original controversy; the allegations of fact are precisely the same in substance, and almost the same in form, as they were in the original bill and therefore looking to substance and realities, they cannot be regarded as stating a new cause of action. The case falls clearly within the scope of the principle of the decisions of this court in *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593–604; *Atlantic & Pacific R. R. Co.* v. *Laird*, 164 U. S. 393, 401; *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570; *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290; *Washington Ry. & Elec. Co.* v. *Scala*, 244 U. S. 630, 640.

The decision in *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285, is so clearly distinguished in the *Wulf Case*, *supra*, from the principle of these decisions that additional comment would be superfluous.

It results that the judgments of the Circuit Court of Appeals and of the District Court must be reversed and the cause remanded to the latter for further proceedings in conformity with this opinion.

Reversed.

LOONEY, ATTORNEY GENERAL, ET AL. *v.* EASTERN TEXAS RAILROAD COMPANY ET AL.

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

No. 756. Argued April 16, 17, 1918.—Decided May 20, 1918.

In a suit by carriers to restrain the attorney general of a State from instituting suits against them for damages and penalties for complying with an order of the Interstate Commerce Commission respecting rates, the District Court issued a preliminary injunction (not appealed from) pending further proceedings by the Commission and until final hearing by the court. *Held*, that a further order in the case, restraining the defendant from prosecuting a suit of the character complained of which he subsequently began in a state court was in exercise of the power of the District Court to protect its existing jurisdiction and was not appealable under Jud. Code, § 266.

Appeal dismissed.

THE case is stated in the opinion.

Mr. Luther Nickels, Assistant Attorney General of the State of Texas, with whom *Mr. B. F. Looney*, Attorney General of the State of Texas, was on the briefs, for appellants.

Mr. J. W. Terry, with whom *Mr. Hiram Glass* and *Mr. H. M. Garwood* were on the briefs, for appellees.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case presents for decision a motion by appellees to dismiss the appeal for want of jurisdiction, and it involves the consideration of the latest chapter in a litigation which was commenced in 1911, when the Railroad Commission of Louisiana filed with the Interstate Commerce Commission a complaint charging various railroad companies with maintaining unreasonable rates on traffic from Shreveport, Louisiana, to points in Texas, and with maintaining rates which unjustly discriminated in favor of traffic moving wholly within the State of Texas as against that between Louisiana and Texas.

A hearing resulted in an order by the Commission, which was assailed by the railroad companies as invalid, but which this court sustained in *Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342, in a decision rendered in 1913, which has come to be widely referred to as the "*Shreveport Case*."

After this decision there were further proceedings before the Interstate Commerce Commission, which resulted, on July 7, 1916, in the order out of which this litigation arose, which required many railroad companies, among other things,

"To establish, on or before November 1, 1916, . . . and thereafter to maintain and apply to the transportation of property between Shreveport, Louisiana, and points in the State of Texas, class rates and rates on the above-named [in the order] commodities not in excess of those contemporaneously applied by them for the transportation of like property for like distances between points in the State of Texas, except in those instances in which the rates between Texas points have been depressed

by reason of water competition along the Gulf of Mexico or waters contiguous thereto."

Immediately after this order was entered the Attorney General of Texas declared that it was void and that he would institute suits under the Texas laws for damages and penalties against any carrier which should comply with it. Thereupon the carriers filed a bill in the United States District Court for the Western District of Texas, in which they averred the validity of the order, the necessity for their obeying it, their intention to obey it, the threat of suits by the Attorney General, and, attaching a copy of the tariff they had compiled to comply with the order (designated as Texas Lines Tariff 2-B), they prayed for an injunction restraining the Attorney General from executing the threat which he had made. A temporary restraining order was granted and on November 1st, 1916, the tariffs were duly filed.

Issue was joined on this bill, and elaborate pleadings were filed by both parties, such that there can be no doubt that the Attorney General challenged the validity of the order as arbitrary, unreasonable, unsupported by the evidence and void, and especially as being inapplicable, in terms and for want of power, to the western part of Texas, which, for rate-making purposes, is designated "differential territory."

An application for a temporary injunction, on the issues thus joined, was heard on April 4, 1917, by three judges, and resulted in an order as prayed for. The court, in arriving at its announced conclusion, expressly disclaimed passing on the merits of the controversy, and granted the injunction because, as is variously stated in the opinions rendered, it deemed it necessary to prevent a multiplicity of destructive suits against the carriers; because the order of the Commission could not be held void on a preliminary hearing; and because the Texas rate situation involved was at the time in process of re-

examination by the Interstate Commerce Commission. No appeal was taken from this order.

Between the time of the filing of the bill for the injunction and the hearing on April 4th, the Interstate Commerce Commission had entered two orders in the proceeding in which the order of July 7th, 1916, had been granted, one that the tariff filed by the carriers on November 1st, Texas Lines Tariff 2-B, slightly modified, should be permitted to remain effective until further order; and another re-opening the proceeding to give to the Texas authorities an opportunity to introduce new and material evidence, which they asserted should lead to a modification or vacating of the order and might bring about a just and reasonable settlement of the controversy.

Immediately after the granting of the preliminary injunction the taking of testimony in the re-opened inquiry was commenced by the Interstate Commerce Commission, the Attorney General participating, and went forward until in May, when it was continued to the following October for the filing of briefs and for oral argument.

And now, notwithstanding the temporary injunction and notwithstanding the pendency of the re-opened hearing before the Interstate Commerce Commission, the Attorney General on July 20th, instituted suit in a Texas state court, in which he prayed for an injunction restraining the carriers from giving the effect which they had been giving to the Texas Lines Tariff, 2-B, since November 1st of the preceding year, as applied to intrastate traffic moving less than 351 miles within, to and from "differential territory" in Texas. Before the date set for this application by the Attorney General for an injunction, the carriers filed a second supplemental bill in their suit in the United States court, detailing the facts with respect to the various proceedings and hearings which had been had therein, and with respect to the

injunction, not appealed from, granted in the preceding April, and prayed that the Attorney General be enjoined from prosecuting the suit commenced by him in the state court or any other suit of like character, for the reason, among others, that "It is necessary to protect the jurisdiction of this court already acquired over the subject matter, and in order to afford these plaintiffs [the carriers] full and complete relief."

The Attorney General answered this bill, denying that the rates complained of in the state court were warranted by the order of July 7th, 1916, or by the proper construction of the Texas Lines Tariff 2-B, and then went forward and again assailed the validity of the order of July 7th, 1916, on substantially the same grounds stated in answers filed by him in the case prior to the granting of the injunction in the preceding April, and he prayed that the order be declared to be null and void, in whole or in part.

On this supplemental bill an injunction was granted, to continue until final hearing or until further order of the court, enjoining the Attorney General and his assistants from prosecuting the suit thus commenced by him in the Texas court, and from instituting or prosecuting any similar suits in any court other than the United States District Court for the Western District of Texas and from in any way interfering with the carriers in charging the rates published in Texas Lines Tariff 2-B and supplements thereto.

From this temporary injunction the Attorney General appeals to this court, and the case has been heard on the motion of the appellees to dismiss the appeal for want of jurisdiction. One ground, among others, urged for sustaining this motion is that the Federal District Court having acquired, and having entered upon the exercise of jurisdiction over the parties to and the subject-matter of the suit in that court, prior to the commencement of

the suit in the state court, the injunction issued against the Attorney General was granted in aid of and was necessary to protect that jurisdiction until a conclusion should be reached completely disposing of the case and controversy, and is therefore not an appealable order within § 266 of the Judicial Code.

The theory upon which the Attorney General seeks to sustain his appeal is, that the injunction of September 22nd is one restraining him in his capacity as a state officer from enforcing statutes of the State of Texas and orders by the Railroad Commission of that State entered pursuant thereto, on the ground that the statutes are unconstitutional and that the orders are unlawful, and therefore, it is claimed, an appeal direct to this court is warranted under § 266 of the Judicial Code.

With this contention of the Attorney General we cannot agree. There is no claim in the second supplemental bill, on which this injunction was granted, that any state statute is unconstitutional or that the execution of any order of the Railroad Commission of Texas should be suspended because invalid. The bill is very voluminous, but as we interpret its allegations it simply sets out in detail the history of the suit in which it was filed, for the purpose of showing: that by the pleadings of the parties,—by those of the carriers not more than by those of the Attorney General,—every phase of the controversy, and definitely the aspect of it involved in the petition filed in the state court by the Attorney General on July 20, 1917, had been submitted to and was considered by the court when the application for a temporary injunction was heard in the preceding April, and also what the facts were with respect to the re-opened inquiry before the Interstate Commerce Commission, so that it should appear to the court that the Texas rate situation, again involving the phase of it presented by the Attorney General in the state suit, was pending, undisposed of before the Commis-

sion when his petition was filed. The specific ground of the prayer for the injunction is, "Because the state court is without jurisdiction of the subject matter and because it is necessary to protect the jurisdiction of this court already acquired over the subject matter, and in order to afford these plaintiffs full and complete relief, contemplated and intended by the opinions of such Circuit Judges and order made by them granting the injunction herein."

The opinion of the court in granting the injunction appealed from is a satisfactory and sufficient statement of what this record discloses had been done in the case prior to the application for the injunction and amply justifies the granting of it. This statement is as follows:

"The subject-matter of the State suit is a part of that involved in this case. The jurisdiction of this Court with reference thereto has been invoked by the parties plaintiff and defendant and by interveners; the jurisdiction has been exercised by this Court in granting an injunction at the prayer of plaintiffs, and refusing one asked by defendants, and by considering and determining an application for a continuance, . . . Jurisdiction having been conferred by law, having been invoked by all the parties, and having been exercised by the Court, its protection is a right and duty not limited by § 266, Judicial Code. The injunction prayed for by complainants is granted. . . .

". . . But, waiving all questions as to the legality or propriety of modifying their action [that of the Judges in April preceding], our conclusion is that the present status should be maintained until such time as this Court may consider all of the grave questions of law and all the great mass of facts connected with this complicated and important litigation. The fact that the matters involved are again before the Interstate Commerce Commission, and that their action may affect the rates attacked, fur-

nishes an additional reason for our conclusion. The relief asked by the defendants is refused."

The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject-matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice, *Freeman* v. *Howe*, 24 How. 450; *Harkrader* v. *Wadley*, 172 U. S. 148, 163, 164; in a rate case, *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 543. So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that § 265 of the Judicial Code, Rev. Stats., § 720, Act of March 2, 1793, c. 22, 1 Stat. 334, has repeatedly been held not applicable to such an injunction. *Julian* v. *Central Trust Co.*, 193 U. S. 93, 113; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115.

The motion to dismiss is granted.

Dismissed.

LYNCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA, *v.* TURRISH.

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

No. 421. Argued March 4, 5, 6, 1918.—Decided June 3, 1918.

Due to gradual increase in the market value of timber lands owned by a corporation, the market value of its shares had increased to twice par value by March 1, 1913, when the Income Tax Act of that year took effect. Afterwards the company sold all its property and made

final distribution of the proceeds to the shareholders on surrender of their certificates of stock, the amount received by each being twice the par value of his shares but representing no increase since the effective date of the act. *Held*, that the value thus received in excess of par was not "income, gains, or profits" of a shareholder, subject to the tax, (a) because it represented merely a conversion of his existing investment, (b) because it did not "arise" or "accrue" after the act became effective.

236 Fed. Rep. 653, affirmed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for petitioner.

Mr. A. W. Clapp, with whom *Mr. N. H. Clapp*, *Mr. H. Oldenburg* and *Mr. H. J. Richardson* were on the brief, for respondent.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit to recover an income tax, paid under protest, assessed under the Act of October 3, 1913, 38 Stat. 166.

The facts, as admitted by demurrer, are these: Respondent, Turrish, who was plaintiff in the trial court, made a return of his income for the calendar year 1914 which showed that he had no net income for that year; afterwards the Commissioner of Internal Revenue made a supplemental assessment showing that he had received a net income of $32,712.08, which, because of specific deductions and exemptions, resulted in no normal tax, but as the net income exceeded the sum of $20,000 the Commissioner assessed an additional or super-tax of one per cent. upon the excess, resulting in a tax of $127.12,

which was sought to be recovered. The reassessment was based upon certain sums received by the plaintiff in the year 1914 as distributions from corporations subject to the Income Tax Law and held by the Commissioner to be income derived from dividends received by the plaintiff on stock of domestic corporations; of which the sum of $79,975, received as a distribution from the Payette Lumber & Manufacturing Company, and without which no tax could have been levied against the plaintiff, is here in dispute.

Prior to March 1, 1913, and continuously thereafter until the surrender of his stock as hereinafter mentioned, plaintiff was a stockholder in the Payette Company, which was organized in the year 1903 with power to buy, hold, and sell timber lands, and in fact never engaged in any other business than this except minor business incidental to it. Immediately after its organization this company began to invest in timber lands, and prior to March 1, 1913, had thus invested approximately $1,375,000.

On March 1, 1913, the value of its assets was not less than $3,000,000, of which sum the value of the timber lands was not less than $2,875,000. The increase was due to the gradual rise in the market value of the lands. At that date the value of Turrish's stock was twice its par value, or $159,950.00, and about that time he and all the other stockholders gave an option to sell their stock for twice its par value. The holders of the option formed another company, called the Boise Payette Lumber Company, and transferred the options to it. The options having been extended to December 31, 1913, the new company informed the Payette Company and its stockholders shortly before this date that instead of exercising the option it preferred and proposed to purchase all of the assets of the Payette Company, paying to that company such a purchase price that there would be

available for distribution to its stockholders twice the par value of their stock. The stockholders by resolution authorized this sale, and, pursuant to this and a resolution of the directors, the Payette Company transferred to the new company all of its assets, property, and franchises, and upon the completion of the transaction found itself with no assets or property, except cash to the amount of double the par value of its stock which had been paid to it by the new company, and with no debt, liabilities, or obligations except those which the new company had assumed. The cash was distributed to the stockholders on the surrender of their certificates of stock, and the company went out of business. In this way, upon the surrender of his shares, Turrish received $159,950, being double their par value.

The Commissioner of Internal Revenue considered that of this sum one-half was not taxable, being the liquidation of the par value of Turrish's stock, but that the other half was income for the year 1914 and taxable under the Act of 1913.

The question in the case is thus indicated. The District Court took a different view from that of the Commissioner of Internal Revenue and therefore overruled the demurrer to Turrish's complaint and entered judgment for him for the sum prayed, which judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit. 236 Fed. Rep. 653.

The point in the case seems a short one. It, however, has provoked much discussion on not only the legal but the economic distinction between capital and income and by what processes and at what point of time the former produces or becomes the latter. And this in resolution of a statute which concerns the activities of men and intended, it might be supposed, to be without perplexities and readily solvable by the off-hand conceptions of those to whom it was addressed.

The provisions of the act, so far as material to be noticed, are the following: That there is assessed "upon the entire net income arising or accruing from all sources in the preceding calendar year to every . . . person residing in the United States . . . a tax of 1 per centum per annum upon such income. . ." Par. A, subdiv. 1.

In addition to that tax, which is denominated the normal income tax, it is provided that there shall be levied "upon the net income of every individual an additional tax . . . of 1 per centum per annum upon the amount by which the total net income exceeds" certain amounts, and the person subject to the tax is required to make a personal return of his total net income from all sources under rules and regulations to be prescribed by the Commissioner of Internal Revenue. Subdiv. 2.

By Paragraph B it is provided that, subject to certain exemptions and deductions, "the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service . . . also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

After specifying the exemptions and deductions allowed, the law declares as follows:

"The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first: *Provided, however,* That for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive . . ." Par. D.

It will be observed, therefore, that the statute levies a normal tax and an additional tax upon net incomes,

derived from whatever source, "arising or accruing" each preceding calendar year ending December 31, except that for the year ending December 31, 1913, the tax shall be computed on the net income accruing from March 1, 1913, to December 31, 1913.

And in determining the application of the statute to Turrish we must keep in mind that on the admitted facts the distribution received by him from the Payette Company manifestly was a single and final dividend in liquidation of the entire assets and business of the company, a return to him of the value of his stock upon the surrender of his entire interest in the company, and at a price that represented its intrinsic value at and before March 1, 1913, when the act took effect.

The District Court and the Circuit Court of Appeals decided that the amount so distributed to Turrish was not income within the meaning of the statute, basing the decision on two propositions, as expressed in the opinion of the Circuit Court of Appeals, by Sanborn, Circuit Judge,—(a) The amount was the realization of an investment made some years before, representing its gradual increase during those years, and which reached its height before the effective date of the law, that is, before March 1, 1913, and the mere change of form of the property "as from real to personal property, or from stock to cash" was not income to its holders because the value of the property was the same after as before the change; (b) The timber lands were the property, capital and capital assets of their legal and equitable owner and the enhancement of their value during a series of years "prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such an act."

For proposition "a" the court cited *Collector* v. *Hubbard*, 12 Wall. 1; *Bailey* v. *Railroad Company*, 22 Wall.

604, and the same case in 106 U. S. 109. For proposition "b" *Gray* v. *Darlington*, 15 Wall. 63, was relied on.

The Government opposes both contentions by an elaborate argument containing definitions of capital and income drawn from legal and economic sources and given breadth to cover a number of other cases submitted with this. The argument, in effect, makes any increase of value of property income, emerging as such and taxable at the moment of realization by sale or some act of separation, as by dividend declared or by distribution, as in the instant case.

To sustain the argument these definitions are presented: "1. Capital is anything, material or otherwise, capable of ownership, viewed in its static condition at a moment of time, or the rights of ownership therein. 2. Income is the service or return rendered by capital during a period of time. . . 4. Net income ('profits') is the difference between income and outgo. . . 7. In the actual production and distribution of capital there is a constant conversion of capital into income, and *vice versa*. 8. The attempt to conceal this conversion by treating 'income' as the standard return from intact 'capital' only leads to confusion of the value of capital with capital itself."

From these definitions are deduced the following propositions, which are said to be decisive of the problems in the cases:

"1. Income being derived from the use of capital, the conversion or transfer of capital always produces income. 2. Mere appreciation of capital value does not produce 'income,' nor mere depreciation 'outgo.' 3. Net income is the difference between *actual* 'income' and *actual* 'outgo.' 4. Income is not confined to money income, but includes anything capable of easy valuation in money."

It will be observed that the breadth of definition and

the breadth of application are necessary to the refutation of the reasoning of the Circuit Court of Appeals. There is direct antagonism, the court basing its reliance, it says, upon what it asserts is the common sense and understanding of the words of the law, and the exposition of like laws by the decisions of this court. The Government's resource is the discussion of economists and the fact, concrete and practical, of wealth not only increased but come to actual hand. The instant case is an example. Turrish's stock doubled in value. He paid for it $79,975.00; he received $159,950.00. It requires a struggle to resist the influence of the fact, but we are aided and fortified by our own precedents and saved from much intricate and subtle discussion and an elaborate review of other cases cited in confirmation or opposition.

In *Collector* v. *Hubbard, supra,* the distinction between a corporation and its stockholders was recognized and that the stockholder had no title for certain purposes to the earnings of the corporation, net or other, prior to a dividend being declared, but they might become capital by investment in permanent improvements and thereby increase the market value of the shares, "whether held by the original subscribers or by assignees." In other words, it was held that the investments of the corporation were the investments of the stockholders; that is, its stockholders could have an interest, taxable under the act considered, though not identical with the corporation. This was repeated in *Bailey* v. *Railroad Company,* 22 Wall. 604, 635, 636.

The latter case came here again in 106 U. S. 109, and it was then declared that the purpose of an income tax law was to tax the income for the year that it accrued; in other words, no tax in contemplation of the law accrues upon something except for the year in which that something—earnings, profits, gains or income—accrues. In that case the subject of the tax was a scrip dividend, but

the certificates did not show the year of the earnings and testimony as to the particular year was admitted. The principle applies to the case at bar. If increase in value of the lands was income, it had its particular time and such time must have been within the time of the law to be subject to the law, that is, it must have been after March 1, 1913. But, according to the fact admitted, there was no increase after that date and therefore no increase subject to the law. There was continuity of value, not gain or increase. In the first proposition of the Court of Appeals we, therefore, concur.

In support of its second proposition it adduced, as we have seen, *Gray* v. *Darlington*, 15 Wall. 63. The case arose under the income tax law of 1867, which levied "upon the gains, profits, and income of every person, . . . whether derived from any kind of property . . . or from any other source whatever, a tax of five percentum on the amount so derived over one thousand dollars . . . for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax."

Darlington, in 1865, being the owner of certain United States Treasury notes, exchanged them for United States bonds. In 1869 he sold the bonds at an advance of $20,000 over the cost of the notes and upon this amount was levied a tax of five per centum as gains, profits and income for that year. He paid the tax under protest and sued to recover, and prevailed. This court, by Mr. Justice Field, said: "The question presented is whether the advance in the value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. The answer which should be given to this question does not, in our judgment, admit of any doubt. The advance in the value of property during a series of years can, in no

just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. The statute looks, with some exceptions, for subjects of taxation only to annual gains, profits, and income."

And again, "The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of a tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital." This case has not been since questioned or modified.

The Government feels the impediment of the case and attempts to confine its ruling to the exact letter of the Act of March 2, 1867, and thereby distinguish that act from the Act of 1913 and give to the latter something of retrospective effect. Opposed to this there is a presumption, resistless except against an intention imperatively clear. The Government, however, makes its view depend upon disputable differences between certain words of the two acts. It urges that the Act of 1913 makes the income taxed one "arising or accruing" in the preceding calendar year, while the Act of 1867 makes the income one "derived." Granting that there is a shade of difference between the words, it cannot be granted that Congress made that shade a criterion of intention and committed the construction of its legislation to the disputes of purists. Besides, the contention of the Government does not reach the principle of *Gray* v. *Darlington*, which is that the gradual advance in the value of property during a series of years in no just sense can be ascribed to a particular year, not therefore as "arising or accruing," to meet the challenge of the words, in the last one of the years, as the Government contends, and taxable as income

for that year or when turned into cash. Indeed, the case decides that such advance in value is not income at all, but merely increase of capital and not subject to a tax as income.

We concur, therefore, in the second proposition of the Circuit Court of Appeals as well as in the first and affirm the judgment.

Affirmed.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in the result.

EX PARTE SIMONS, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 26, Original. Argued December 10, 1917.—Rule absolute June 3, 1918.

Plaintiff brought an action for damages in two counts against executors, in the District Court in New York, the first count alleging a promise of the testatrix to bequeath a certain sum in return for plaintiff's services, and the second her promise to pay their reasonable value. On motion the first count was ordered transferred to the equity docket, upon the ground that by the law of New York it could not be entertained at law. *Held*, that this was an error, depriving plaintiff of the right of trial by jury, and properly rectified by mandamus. Rule absolute.

THE case is stated in the opinion.

Mr. Roger Foster for petitioner:

Whenever a constitutional right has been denied, or a judge has acted clearly beyond his jurisdiction, and there is no immediate remedy by a writ of error or appeal,

mandamus will issue to correct an error which if left uncorrected will cause confusion and complications so great that serious inconvenience to the courts, and to the litigants, will result. *Virginia* v. *Rives*, 100 U. S. 313, 323, 329; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 540, 546; *Brown* v. *Circuit Judge of Kalamazoo County*, 75 Michigan, 274.

It is well settled that mandamus is the proper remedy to prevent the enforcement of an order for a change of venue made by a court having exclusive jurisdiction to hear and determine the proceeding, and with no power to send away the case for trial elsewhere; and that an appeal from the final judgment rendered by the court to which the venue is changed does not afford an adequate remedy. *Washington ex rel. Wyman, Partridge & Co.* v. *Spokane County*, 40 Wash. 443; *Ex parte Cox*, 10 Missouri, 742; *State ex rel. Harris* v. *Laughlin*, 75 Missouri, 358; *State ex rel. Schonhoff* v. *O'Bryan*, 102 Missouri, 254

The effect of this order is to grant a perpetual stay of proceedings to enforce the first cause of action at common law and to enjoin the further prosecution thereof at common law. It is well settled that mandamus will issue to compel a court to proceed in a suit which it has improperly stayed. *Livingston* v. *Dorgenois*, 7 Cranch, 577; *Barber Asphalt Pav. Co.* v. *Morris*, 132 Fed. Rep. 945; *McClellan* v. *Carland*, 217 U. S. 268.

It will also issue to compel a court to proceed to judgment. *Life & Fire Ins. Co.* v. *Wilson*, 8 Pet. 291; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 571; *Ex parte Equitable Trust Co.*, 231 Fed. Rep. 571, 585, 594; *In re Watts*, 214 Fed. Rep. 80; to compel a court to enforce its judgment, *Ex parte United States*, 242 U. S. 27; to compel a judge to permit documents on file in the clerk's office under seal to be produced, opened and put in evidence, *Ex parte Uppercu*, 239 U. S. 435; to compel a court to overrule an

objection to a master's summons which required the defendant to render a sworn statement of an account in accordance with Equity Rule 79, *In re Beckwith*, 203 Fed. Rep. 45; 201 Fed. Rep. 518; to set aside an order of a District Court which modified a decree rendered at a previous term, although no appeal or writ of error was then pending or had been previously issued or taken, *Re Dennett*, 215 Fed. Rep. 673; see also *New Liverpool Salt Co.* v. *Wellborn*, 160 Fed. Rep. 923; to set aside an order disbarring an attorney which had been rendered without jurisdiction or after a proceeding in which the court below had acted with flagrant impropriety. *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 506. See also *Ex parte Wisner*, 203 U. S. 449; *In re Winn*, 213 U. S. 458.

If mandamus will not lie, a writ of prohibition should be granted. *United States* v. *Mayer*, 235 U. S. 55; *Ex parte Indiana Transportation Co.*, 244 U. S. 456; *Ex parte Equitable Trust Co.*, 231 Fed. Rep. 571, 594; *Lehman* v. *Gumbel*, 236 U. S. 448.

If neither of the foregoing writs can be obtained, the petitioner has the right to a writ of certiorari—the original writ issuable at common law which under its supervisory jurisdiction is vested in this court by § 262, Jud. Code, formerly Rev. Stats., § 716. *United States* v. *Beatty*, 232 U. S. 463, 467.

A District Court of the United States, when sitting in equity and when sitting at common law, exercises as independent a jurisdiction and in the contemplation of the law constitutes two distinct courts just as much as when it is a court of admiralty and a court of bankruptcy. Jud. Code, § 24.

The petitioner has no less right to one of the extraordinary writs than if she had sued upon a single cause of action, and that had been sent from the common-law court to the court of equity. It is settled that when one of two separate and different causes of action joined together in a

single pleading has been dismissed, such dismissal may be reviewed without awaiting the termination of the issues raised upon the other cause of action. *Scriven* v. *North*, 134 Fed. Rep. 366; *Historical Pub. Co.* v. *Jones Bros. Pub. Co.*, 231 Fed. Rep. 784; *Miocene Ditch Co.* v. *Moore*, 150 Fed. Rep. 483, 493; *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52.

The District Court had no power to make the order. No statutory provision nor any equity or common-law rule gives such authority, although under Equity Rule 22 a motion may be made to send a cause from the equity to the common-law calendar. The object of this rule is to protect the constitutional right. No constitutional right is infringed by the trial of a case before a jury which might have been tried in equity. Section 274a, Jud. Code, merely authorizes amendments; it does not authorize a transfer in any case, *Waldo* v. *Wilson*, 231 Fed. Rep. 654; or a severance; and it was clearly not its intention to warrant a transfer upon compulsion against the wish of the plaintiff. If the plaintiff has selected a wrong side of the court upon which to proceed, the penalty upon him is not to compel him to go to the other side which he does not wish to enter, but to dismiss his suit at the appropriate time in the cause. Moreover, the statute does not purport to justify a transfer of part of a suit.

The Constitution forbids such a transfer of part and of the whole of a cause of action from law to equity, especially when the plaintiff claims the right to a trial by jury.

The first as well as the second cause of action was cognizable at common law. [Citing many cases.]

This is not a question which is to be decided according to the state law. *Lindsay* v. *First National Bank*, 156 U. S. 485, 593; *Whitehead* v. *Shattuck*, 138 U. S. 146, 151; *Wehrman* v. *Conklin*, 155 U. S. 314, 325.

The same rule has been enforced in the State of New York.

231. Argument for Respondents.

By the law of New York every right that is cognizable by the courts is a right at common law, including those which by the former practice could be enforced only by a court of equity.

Mr. Edgar T. Brackett, with whom *Mr. Clarke M. Rosecrantz* was on the brief, for respondents:

The order can clearly be reviewed on writ of error after final judgment in the common-law action. Very likely it has become a part of the record in equity; but it also remains a part of the record in the law action, no less so than would an order dismissing the first count, on demurrer or motion. It puts the plaintiff, on the first count, out of court in her action at law. It was entered by the court sitting as a court of law on a motion made by the defendants in the action at law. There is nothing in the situation of petitioner which entitles her to a speedier review here than there would be if Jud. Code, § 274a, had never been enacted.

She may waive her objection to the order if she amends and proceeds under it, but may elect to abide by her declaration. The law was not made to enable her to try her case both at law and in equity.

The petitioner is possibly entitled to an immediate review of the action of the trial court on writ of error from the Circuit Court of Appeals.

Under Jud. Code, § 274a, the court had the power to transfer the first cause of action from the law to the equity side. It is true the section says nothing about transfer. But it is not an ordinary statute of amendments. Its object is not to allow a pleading at law to be amended as such—a right already existing,—but to protect the plaintiff where he could not amend to state a good cause of action at law, against being put out of court altogether. The court, therefore, shall order that he make the necessary amendments to change his declaration at law into a

bill in equity, and *vice versa*. It follows that an order of transfer from the law to the equity side, or from the equity to the law side, as the case may be, is not only proper but necessary, to get the case instated on the side of the court where it will have to be tried. The order in effect dismisses the cause of action wrongly sued upon at law, and, at the same time, for the plaintiff's benefit, transfers it so that he may proceed on the right side of the court if he sees fit. The section authorizes a severance. It is remedial and should be liberally construed.

So far as petitioner's right at law is concerned, her constitutional right to trial by jury is no more and no less involved than is the right of any other plaintiff to whose declaration at law a general demurrer has been sustained. If the demurrer was improperly sustained, the petitioner will, after reversal and remandment, obtain her jury trial.

Petitioner is not entitled to the writ of mandamus. Under § 274a the subject-matter of which the court is given jurisdiction is precisely the determination of the question whether or not a suit has been instituted on the right side of the court. If a judge decides this question wrongly he is merely committing error, and not exceeding his jurisdiction. His ruling can be reviewed by writ of error. This brings the case squarely within the usual rule that the writ of mandamus cannot be used to serve the purpose of an appeal.

The situation here cannot be distinguished from the attempt to review by mandamus the refusal to remand to a state court, in a case where the question of removability can be determined as a question of law on the record. This was the question elaborately discussed and finally set at rest in *Ex parte Harding*, 219 U. S. 363. The jurisdiction of the court to determine the question of law whether or not the first count of plaintiff's declaration

stated a common-law cause of action is plain. The right of plaintiff to review on writ of error the court's determination of that question is plain. Even if it be that, technically, the court had no jurisdiction of the subject-matter of its order, since the section (274a) empowered it only to authorize or direct amendments in pleadings and not to order the transfer of a case, it by no means follows that mandamus will lie to correct this "jurisdictional" trespass. It is of no consequence to petitioner whether or not the first count of her declaration be "transferred" to the equity side before or after she elects to amend and proceed on that side. She is deprived of no substantial right by the order considered as an order transferring a part of her suit, as distinguished from an order merely allowing her to amend. If she had been able to amend the first count of her declaration so as to make it a good count at law, she would doubtless have been allowed to do so had she made the request. No such request was made. And even if it had been made and had been refused, she would have had precisely the same remedy that she now has, namely, by writ of error after final judgment. The important and only vital question to petitioner is whether or not the first count of her declaration states a common-law cause of action. If respondent decided that question wrongly, he was merely deciding wrongly the very question which § 274a obliges him to decide, and, as already shown, his conduct in this regard can certainly not be reviewed by mandamus.

The right to prohibition or certiorari depends on precisely the same considerations determining the right to mandamus.

An oral contract to make a will is not in New York a valid contract on which an action at law may be maintained, though in certain cases relief may be had in equity. [Citations.]

If the New York law is as above stated, it is a rule

of substantive law and not a rule of procedure, and the federal courts will therefore apply it. *Scudder* v. *Union National Bank*, 91 U. S. 406; *Pritchard* v. *Norton*, 106 U. S. 124. The cases cited by petitioner are all cases relating to remedies and not to substantive rights.

Mr. Justice Holmes delivered the opinion of the court.

This is a petition for mandamus, or, if that is denied, for prohibition or certiorari, to the District Court for the Southern District of New York upon the following facts. The petitioner brought an action in two counts against the executors of a widow named Mrs. Frank Leslie. The first count alleged a promise by Mrs. Leslie that if the plaintiff would perform certain personal services of attendance and care to her, she would bequeath to the plaintiff $50,000. It set forth the performance of the services in great detail, alleged the death of Mrs. Leslie and probate of her will, the bequest to the plaintiff of not more than $10,000, and claimed $40,000 with interest from one year after the death of the testatrix, as damages. The second count repeats by reference the averments of the first count, but alleges a promise to pay the reasonable value of the plaintiff's services, set at $50,000, of which $10,000 have been satisfied by legacy, and claims damages as before. On motion of the defendants the judge sitting to hear motions in the District Court ordered the first cause of action to be transferred to the equity side of the Court and docketed as an equity cause, and to be stricken out of the complaint in the action at law, but only for the purpose of transfer, allowing the plaintiff to amend, &c. The ground disclosed was that by the law of New York the

plaintiff could not sustain the first cause of action at law.

We do not find sufficient ground for the opinion of the judge in the New York decisions. No doubt alleged contracts to make a provision by will must be approached with great caution in the matter of proof, but there is no doubt that if proved they are valid so far as no statute intervenes. So much seems to be assumed by the order of the judge, and is the law we believe of New York as well as of other States and England. But if valid we see no reason why a contract to bequeath a certain sum should not give rise to an action for damages if broken, as certainly as a contract to pay the same sum in the contractor's life, or at the moment of the contractor's death. *Parker* v. *Coburn*, 10 Allen, 82. In cases of contracts to leave all the testator's property, including land, or a proportion of a residue requiring an account to ascertain it, equitable remedies have been thought proper, and in some such cases it has been assumed for the purposes of argument that an action would not lie at common law. See *Winne* v. *Winne*, 166 N. Y. 263. *Phalen* v. *United States Trust Co.*, 186 N. Y. 178. But we have seen nothing that suggests an arbitrary departure by the Courts of New York from the common law in cases like the present. See *Farmers' Loan & Trust Co.* v. *Mortimer*, 219 N. Y. 290, 295. *DeCicco* v. *Schweizer*, 221 N. Y. 431. *Silvester's Case*, Popham, 148, 2 Roll. R. 104. *Fenton* v. *Emblers*, 3 Burr. 1279. *Van Houten* v. *Van Houten*, 89 N. J. L. 301. *Krell* v. *Codman*, 154 Massachusetts, 454.

If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not

matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to produce and to give the plaintiff her right to a trial at common law. See *Brown* v. *Circuit Judge of Kalamazoo County*, 75 Michigan, 274.

Rule absolute.

ALICE STATE BANK ET AL. *v.* HOUSTON PASTURE COMPANY.

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

No. 154. Argued January 24, 1918.—Decided June 3, 1918.

Upon a review by certiorari, the court confines its discussion to the matter relied on in procuring the writ.

An enclosure bounded on three sides by a fence and on the fourth by deep water (Nueces Bay) will sustain a claim of adverse possession under Rev. Stats., Texas, Art. 5674, if the other elements—claim under registered deeds, payment of taxes, pasturing of cattle and exclusion of others—are also present.

227 Fed. Rep. 1015, reversed.

THE case is stated in the opinion.

Mr. Henry W. Taft and *Mr. Walter P. Napier*, with whom *Mr. John G. Boston* was on the brief, for petitioners.

Mr. Joseph W. Bailey, with whom *Mr. William D. Gordon* and *Mr. Thomas J. Baten* were on the briefs, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover 1280 acres of land in San Patricio County, Texas. There was a trial by jury in which the Court directed a verdict for the plaintiff as to all but certain excepted portions not in controversy here. Exceptions were saved by the defendants, the petitioners, to their not being allowed to go to the jury on the question whether they had a good defense under the Texas statutes of limitation, but they were overruled and the judgment was affirmed by the Circuit Court of Appeals. A petition for certiorari was allowed on the suggestion that there was a manifest conflict between the ruling and the decision of the state court.

An Act of July 22, 1870, declared that a land certificate for 1280 acres theretofore issued to General Sam Houston for military services was a "just claim from its original date" and authorized the issue of a "patent on the same, in the name of the heirs of General Sam Houston, deceased." General Houston's will gave discretionary power to his executors to make such disposition of his personal and real estate as might seem to them best for the interests of his family. On July 22, 1871, Houston's surviving executor made an instrument purporting to convey the above mentioned land warrant and the interest of Houston's estate and heirs to Coleman, Mathis and Fulton. On December 30, 1872, the warrant was located on land already occupied by those grantees, and the executor's conveyance to them was recorded on July 17, 1873. The defendants held deeds under the successors of Coleman, Mathis and Fulton. A patent was issued "to the heirs of Sam Houston, deceased," on June

22, 1874. The plaintiff derived its title from these heirs under deeds executed in 1914.

A plausible argument can be made that the working of the Act of 1870 and other pertinent facts and statutes which we do not recite was to give to the land warrant the validity and effect that it would have had if lawfully executed in General Houston's life. But as that is not the ground upon which the writ of certiorari was asked or granted we confine our discussion to the matter relied upon in asking the intervention of this Court. *Hubbard* v. *Tod*, 171 U. S. 474, 494. The defendants alleged that if the deeds did not give them a good title, still they had held peaceable and adverse possession of the land, using and enjoying the same, paying taxes thereon, and claiming under deeds duly registered, for more than five years, and therefore that this suit was too late under Rev. Stats. Texas, Art. 5674. They contended that the fact appeared as matter of law, and also that at least the jury might find for them and sufficiently saved the question as against the view taken by the Court below.

There was evidence that the land in question was part of a large pasture fenced on the north along the Chiltipin Creek and on the east and west by fences running from the creek to deep water in Nueces Bay. There was evidence also that the defendants or their predecessors had paid the taxes, had pastured their cattle there, and excluded those of others, and that they claimed under duly registered deeds. The ground on which the Court ruled as it did and refused requests of the petitioners was stated by it to be that the water front on Nueces Bay was not "such a barrier as would put in motion the statutes of limitation." This ruling was in deference to *Hyde* v. *McFaddin*, 140 Fed. Rep. 433, (442). But that case was decided on peculiar circumstances, and we do not think an extensive citation from the Texas decisions necessary to show that when the other elements of ad-

verse occupation are present, deep water upon one side of a parallelogram is as good a barrier as a fence. Evidently that is the law in Texas as well as elsewhere, and an enclosure by fences and the Nueces River has been said to sustain the defence of the statute as well as fences all around. *Dunn* v. *Taylor*, 107 S. W. Rep. 952, 956; 102 Texas, 80, 87. The arguments of the respondent on this point at the most do no more than offer considerations of fact that possibly it might be entitled to present to the jury when the case next is tried.

Judgment reversed.

STATE OF MINNESOTA *v.* LANE, SECRETARY OF THE INTERIOR, ET AL.

IN EQUITY.

No. 20. Original. Motion to dismiss. Argued April 15, 1918.—Decided June 3, 1918.

An act of Congress granted the "undisposed of" lands in certain sections to a State, saving "vested rights" of others existing at its date. Part of the described tracts, here in question, within the indemnity limits of the Northern Pacific, had previously been selected by that railroad and by it sold to purchasers in good faith. After the date of the act, the selections were canceled as being founded on improper bases, but the Land Department, upon fully hearing the State, allowed an application of the purchasers' assignee, made meanwhile, to purchase the lands in question from the United States, and secure patents therefor, under the Adjustment Act of March 3, 1887. *Held*, that the decision was not arbitrary, and that a suit against the Secretary of the Interior and the Commissioner of the General Land Office, brought by the State before the patents issued, to enjoin their issuance and to quiet its title, would not lie. *Lane* v. *Watts*, 234 U. S. 525, distinguished.

Dismissed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful, for defendants, in support of the motion.

Mr. Charles R. Pierce, with whom *Mr. Lyndon A. Smith*, Attorney General of the State of Minnesota, and *Mr. Clifford L. Hilton*, Deputy Attorney General of the State of Minnesota, were on the brief, for complainant, in opposition to the motion.

MR. JUSTICE DAY delivered the opinion of the court.

This bill of complaint is filed by the State of Minnesota to quiet title to certain lands in that State, and to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from issuing patents for the lands to the Immigration Land Company, a corporation of the State of Minnesota. The defendants filed a motion to dismiss the bill upon the following grounds:

"1. The court is without jurisdiction to entertain this suit because it is in substance and effect against the United States, which has not consented to be sued or waived its immunity from suit.

"2. There is a defect of parties defendant which can not be cured without depriving the court of jurisdiction.

"3. The relief prayed for would be an invasion of the lawful jurisdiction of the defendants as officers of the Land Department.

"4. The bill of complaint does not state facts sufficient to entitle the State of Minnesota to any relief."

From the allegations of the bill it appears that the State claims title to the lands under the Act of August 3, 1892, 27 Stat. 347.[1]

[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all undisposed lands of

The Immigration Land Company claims title under § 5 of the Act of March 3, 1887, 24 Stat. 556,[1] relat-

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the United States situated in the following subdivisions, according to the public surveys thereof, to-wit: Section six of township *one hundred and forty-two;* sections six, seven, eighteen, nineteen, thirty, and thirty-one of township *one hundred and forty-three*, all in *range thirty-five;* sections one, two, three, and four of township *one hundred and forty-two*, and sections one, two, three, four, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, thirty-three, thirty-four, thirty-five, and thirty-six, of township *one hundred and forty-three, all in range thirty-six*, situate in the district of lands subject to sale at Saint Cloud and Crookston, Minnesota, is hereby forever granted to the State of Minnesota, to be perpetually used by said State as and for a public State park: *Provided*, That the land hereby granted shall revert to the United States, together with all improvements thereon, if at any time it shall cease to be exclusively used for a public State park; or if the State shall not pass a law or laws to protect the timber thereon.

Sec. 2. That this act shall not in any manner whatsoever interfere with, supersede, suspend, modify, or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of this act.

[1] That where any said company shall have sold to citizens of the United States, or to any persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section

ing to the adjustment of land grants to railroad companies.

The last-named statute provides that where the railroad company shall have sold to citizens of the United States as a part of its grant, lands not conveyed to or for the use of the company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of the road, and where the lands so sold are for any reason excepted from the operation of the grant, it shall be lawful for a *bona fide* purchaser thereof from said company, to make payment to the United States for the lands at the ordinary government price for like lands, and thereupon patents shall issue to the *bona fide* purchaser, his heirs or assigns.

Under this act, on February 9, 1907, the Land Company made application in the Land Department to purchase the land, claiming to be the assignee of a *bona fide* purchaser of the lands from the railroad company. The State of Minnesota protested against the issuance of a patent to the Immigration Land Company, and claimed the land under the Act of August 3, 1892, under which undisposed-of lands of the United States, situated in certain sections and townships, were granted to the State for a public park. The Act of 1892 also provides that it shall not in any manner interfere with, supersede, suspend, modify or annul the vested right of any person, company, or corporation in respect to any of the land existing at the date of the passage of the act.

A hearing was had before the Commissioner of the General Land Office upon the issue made between the

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shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

State of Minnesota and the Immigration Land Company, wherein the Commissioner held:

"These tracts of land are within the second indemnity limits of the grant to the Northern Pacific Railroad (now Railway) Company, under act of July 2, 1864 (13 Stat., 365), as amended by Joint Resolution of May 31, 1870 (16 Stat., 378). On October 15, 1883, said railway company selected all of the above described tracts of land per list No. 12, Crookston, rearranged list No. 12 filed April 19, 1893. The bases given in support of the selections covered by such rearranged list were lands claimed to have been excepted from the company's grant of July 2, 1864, supra, by reason of the reservation subsisting at the date thereof on account of the grant made by the act of May 5, 1864 (13 Stat., 64), to aid in the construction of the Lake Superior and Mississippi Railroad.

"Said list of selections No. 12 was canceled as to these and other tracts of land by letter 'F' of March 20, 1907, upon authority of the decision of the Supreme Court of the United States in the case of the *Northern Lumber Company* v. *O'Brien* (204 U. S. 190), but the cancellation was suspended by the order of the Secretary of the Interior on April 1, 1907, and remained in that status until October 30, 1909, when said list of selections No. 12 was canceled as to these and other tracts of land.

* * * * * * * *

"The lands above described, with others were sold and conveyed by the Northern Pacific Railway Company by warranty deed for a valuable consideration, January 14, 1891, to Frederick Weyerhauser, Peter Musser and M. G. Norton, whose title was afterwards conveyed by certain mesne conveyances to the applicant Immigration Land Company as set forth in its application to purchase dated February 2, 1907, and filed in your office February 9, 1907."

Of the issues involved the Commissioner said:

"The attorneys on behalf of the State of Minnesota

contend that the lands herein involved, which are situated within the limits of the Itasca State Park, were granted to the State by act of August 3, 1892 (27 Stat., 347), and it is urged on the part of the State that the grant took effect immediately, the lands being 'undisposed of' on that date, and that the claim asserted by the Immigration Land Company does not have the dignity of the 'vested right' protected in Sec. 2 of said act.

"On behalf of the Immigration Land Company it is contended that these lands were segregated from the mass of public lands by Crookston indemnity list of selections No. 12, made October 15, 1883, which was not canceled from the records until October 30, 1909; that the sale of the lands covered by cash entry No. 05008, in the name of the Immigration Land Company, by said railway company on January 14, 1891, was bona fide and for a valuable consideration, and it is urged that the Immigration Land Company should have its purchase of said lands protected under Sec. 5 of the act of March 3, 1887 (24 Stat., 556), and receive patent therefor; the attorneys for the Land Company contending that the lands involved were not 'undisposed of lands' on August 3, 1892, the date of the grant to the State."

After an opinion, in which the issues were considered, the Commissioner reached the conclusion:

"Accordingly, it is held that under Sec. 5 of the act of March 3, 1887, the rights of the Immigration Land Company under the facts and laws above cited are superior to the claim of the State under the act of August 3, 1892, that cash entry 05008 by said Immigration Land Company should remain intact.

"The protest of the State is hereby dismissed subject to the usual right of appeal within thirty days after notice to the Secretary of the Interior."

The decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, and

a rehearing denied. *State of Minnesota* v. *Immigration Land Co.*, 46 L. D. 14.

The purpose of the bill filed in this case is to quiet title to the lands in controversy by a decree in favor of the State of Minnesota notwithstanding the decision of the Secretary of the Interior, and to enjoin that officer from issuing patents for the lands to the Immigration Land Company.

We are of opinion that the State has mistaken its remedy, and if it be true that the Secretary has made a mistake in overruling the contention of the State that the title passed to it under the Act of August 3, 1892, relief must be sought in the courts after the issuance of patent.

The grant to the State of August 3, 1892, was of all undisposed of lands in certain townships, and § 2 specifically provided that it should not interfere with, supersede, suspend, modify or annul the vested rights of any person, company, or corporation in respect to any of said lands existing at the date of the passage of the act. The Act of March 3, 1887, permitting *bona fide* purchasers of certain lands, in the manner which we have stated, to make payment and acquire title to the lands excepted from the operation of the railroad grant, was then in full force. A part of these lands had been purchased before the act granting them to the State, by the predecessors of the Immigration Land Company, and the Secretary of the Interior held that the title thus acquired was superior to that of the State, and, in accordance with the decision of the Secretary, patents were about to be issued to it as a *bona fide* purchaser. This decision is not of an arbitrary character, and was made upon full hearing before the department of the Government entrusted with the administration of the public land laws, and the patents were still unissued when this suit was brought.

This is not a case where the title had passed absolutely in favor of the claimant, as was the fact in *Lane* v. *Watts*,

234 U. S. 525; 235 U. S. 17. It is a case where the grant was in terms of "undisposed-of lands," and subject to the vested rights of others. As against those holding such lands the title was not intended to pass.

The Act of 1887, under which the Immigration Land Company claims title, specifically provides that patents shall be issued for lands to which the purchaser is entitled. The patents not having issued, the lands in controversy were still in course of administration in that department of the Government which, until patent issues, has exclusive control of proceedings to acquire the title.

As we have said, the remedy must be sought in the courts after the issuance of patent. Under such circumstances as are here disclosed this court has uniformly so held. *Litchfield* v. *The Register*, 9 Wall. 575, 577; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 593; *Brown* v. *Hitchcock*, 173 U. S. 473; *Kirwan* v. *Murphy*, 189 U. S. 35; *Lane* v. *Mickadiet*, 241 U. S. 201, 208, 209.

It follows that the bill of the State must be dismissed, and it is so ordered.

Dismissed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

HAMMER, UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF NORTH CAROLINA, *v.* DAGENHART ET AL.

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

No. 704. Argued April 15, 16, 1918.—Decided June 3, 1918.

The Act of September 1, 1916, c. 432, 39 Stat. 675, prohibits transportation in interstate commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under the age of 14 years have been employed or permitted to work, or children between the ages of 14 and 16 years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 P. M. or before the hour of 6 A. M. *Held*, unconstitutional as exceeding the commerce power of Congress and invading the powers reserved to the States.

The power to regulate interstate commerce is the power to prescribe the rule by which the commerce is to be governed; in other words, to control the means by which it is carried on.

The court has never sustained a right to exclude save in cases where the character of the particular things excluded was such as to bring them peculiarly within the governmental authority of the State or Nation and render their exclusion, in effect, but a regulation of interstate transportation, necessary to prevent the accomplishment through that means of the evils inherent in them.

The manufacture of goods is not commerce, nor do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to the control of Congress.

The power to regulate interstate commerce was not intended as a means of enabling Congress to equalize the economic conditions in the States for the prevention of unfair competition among them, by forbidding the interstate transportation of goods made under conditions which Congress deems productive of unfairness.

It was not intended as an authority to Congress to control the States in the exercise of their police power over local trade and manufacture, always existing and expressly reserved to them by the Tenth Amendment.

Affirmed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Assistant Attorney General Frierson* and *Mr. Robert Szold* were on the brief, for appellant.

[The Government supported its argument upon the history and physical and economic effects of child labor by voluminous references to reports and debates in Congress and other public documents, including those bearing direct relation to the act in question.]

Unquestionably the power conferred by the commerce clause embraced all which the States had previously enjoyed over the subject, and "the power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure." *Gibbons* v. *Ogden*, 9 Wheat, 1, 227. While doubt has existed as to how far back Congress may reach prior to the actual start of the interstate journey (*Coe* v. *Errol*, 116 U. S. 517; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Loewe* v. *Lawlor*, 208 U. S. 274), and how far forward after the journey has ceased (*Brown* v. *Maryland*, 12 Wheat. 419; *McDermott* v. *Wisconsin*, 228 U. S. 115), it has never been doubted that when the actual transportation begins the jurisdiction of Congress at once attaches.

The act is upon its face a regulation. To regulate is "to prescribe the rule by which commerce is to be governed" (*Gibbons* v. *Ogden*, 9 Wheat. 1, 196); "to foster, protect, control and restrain" (*Second Employers' Liability Cases*, 223 U. S. 1, 47). One form of such regulation is prohibition. *In re Rahrer*, 140 U. S. 545; *Lottery Case*, 188 U. S. 321; *Hipolite Egg Co.* v. *United States*, 220 U. S. 45; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399; *Hoke* v. *United States*, 227 U. S. 308; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311; *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510. Indeed, the denial of the facilities of interstate

transportation to specified articles in terms precisely like those now in question has become a familiar and a customary method of regulation. [Citing numerous acts of Congress.]

The substantial connection between the regulation and the actual interstate movement (*Adair* v. *United States*, 208 U. S. 161) is not questioned in this case. The statute carefully avoids the difficulties in the first *Employers' Liability Cases*, 207 U. S. 463, by not applying to that commerce which is wholly within one State.

It sharply distinguishes between the manufacture, which lies wholly within one State, and the interstate movement. No prohibitions are extended to manufacturers of goods as such, although they may intend subsequently to ship in interstate commerce. *United States* v. *E. C. Knight Co.*, 156 U. S. 1. A manufacturer may, notwithstanding the act, employ such children as he pleases. The law springs into activity only when actual transportation to another State begins.

It cannot be denied that a change in public opinion regarding child labor has occurred like that in relation to lottery tickets. Neither the ticket nor the labor is inherently bad, but the facts of life have disclosed undeniable evils in the use of both. With the growth of industrial activity in the latter part of the nineteenth century the far-reaching effects of the employment of children in factories became manifest. The dangers to persons of tender years in working about machinery are apparent to everyone. But the evil effects on the child's physical well-being were shown by medical science to be not confined to the so-called dangerous occupations. Night work and excessive hours of labor indoors in factories at a critical stage in the development of the child's body stunt the physique and decrease the resistance to disease. The child worker becomes dwarfed in body and mind, and the State

is deprived of that vigorous citizenship upon which the success of democracy must depend.

The legislation of the States on the subject was not uniform, and many States were without the provisions which came to be regarded as the standard necessary for the public protection. Interstate commerce is not a technical legal conception but a practical one, drawn from the course of business. *Swift* v. *United States*, 196 U. S. 375, 398. In the day of steam and electricity the play of the forces of competition makes the cause operating in one State immediately felt in another. The slightest difference in the cost of production, or what amounts to the same thing, a belief on the part of manufacturers in the existence of such difference, alters the development of an industry. As the conviction grew that the employment of child labor was morally repugnant and socially unwise, it came to be regarded also in the light of unfair competition in trade among the States. The State authorizing the use of such labor in products shipped into other States was thought unfairly to discriminate against the citizens of the latter. Citizens in the States in which child labor products were introduced through interstate commerce were made unwilling parties to practices deemed immoral. The health of children in competing States was injuriously affected by the interstate transportation of child-made goods. Thus, if one State desired to limit the employment of children, it was met with the objection that its manufacturers could not compete with manufacturers of a neighboring State which imposed no such limitation. The shipment of goods in interstate commerce by the latter, therefore, operates to deter the former from enacting laws it would otherwise enact for the protection of its own children.

The manufacturers' argument is based upon the belief that child labor is cheaper. There is much reason for thinking this belief mistaken; but the facts of their com-

mon belief in it, of their insistent arguments before state legislatures, and of the resultant effect in postponing or relaxing state legislation with reference to child labor, can not be denied.

The effect on one community of the importation from another of the products of cheap labor has been recognized by Congress in dealing with foreign commerce. It has prohibited the importation from foreign countries of convict-made goods. This exclusion was not designed to prohibit convict labor in foreign countries, but to prevent the lowering of standards in this country. The theory of much of our tariff legislation and of the Alien Contract Labor Law is the same.

The effect of low child labor standards in one State upon health in competing States is due entirely to the interstate character of the commerce in question. Because this is so a State can not protect itself. A state law forbidding entrance into the State of goods made by children of an age lower than that at which the State itself permits young persons to work would perhaps be valid in the absence of congressional legislation. *Asbell* v. *Kansas*, 209 U. S. 251; *Reid* v. *Colorado*, 187 U. S. 137; but see *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. But such a law would not be adequate, for the effects of the competition would be felt when goods from the competing States met in other States or at the ports for foreign exportation (the present law as enacted, therefore, includes a prohibition against shipment in foreign as well as domestic commerce). The conviction became gradually settled that the situation called for the exercise by Congress of its power to prescribe a uniform rule for the conduct of interstate commerce. Congress had thoroughly investigated the subject.

The act does not contravene the Fifth Amendment. The due process clause in that Amendment limits Congress

precisely as the same clause in the Fourteenth Amendment limits the State. *Lottery Case*, 188 U. S. 321, 356, 357; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320, 332; *Twining* v. *New Jersey*, 211 U. S. 78, 100, 101. If therefore a State, notwithstanding the Fourteenth Amendment, may bar the facilities of intrastate commerce to goods made by children in factories, Congress may do likewise, so far as the Fifth Amendment is concerned, for interstate commerce. Prohibition of all intrastate commerce in child labor by a State clearly does not contravene the due process clause of the Fourteenth Amendment. *Sturges & Burn Mfg. Co.* v. *Beauchamp*, 231 U. S. 320; *People* v. *Ewer*, 141 N. Y. 129; *State* v. *Shorey*, 48 Oregon, 396; *Starnes* v. *Albion Mfg. Co.*, 147 N. Car. 556; *In re Weber*, 149 California, 392; *In re Spencer*, 149 California, 396; *Inland Steel Co.* v. *Yedinak*, 172 Indiana, 423; *State* v. *Rose*, 125 Louisiana, 462. Note also the cases in this court upholding statutes limiting the hours of labor for men and women.

There is no right to use the channels of interstate commerce to affect injuriously the health of the people in competing States; nor to consummate the injury to the producing child; nor in unfair competition.

The act is a legitimate exercise of legislative power for the protection of the public health. It is now settled that regulations of interstate commerce may have the quality of police measures. *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 515; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215. See also *Hoke* v. *United States*, 227 U. S. 308, 323; *Wilson* v. *United States*, 232 U. S. 563, 567; *Caminetti* v. *United States*, 242 U. S. 470, 492.

The act is reasonably calculated to protect the health of children in States competing with the point of origin. The shipment of child-made goods outside of one State directly induces similar employment of children in com-

peting States. It is not enough to answer that each State theoretically may regulate conditions of manufacturing within its own borders. As Congress saw the situation, the States were not entirely free agents. For salutary statutes had been repealed, legislative action on their part had been defeated and postponed time and again, solely by reason of the argument (valid or not) that interstate competition could not be withstood.

The act also protects the health of children in the producing State. The Fifth Amendment imposes no obstacle to the denial by Congress of facilities of interstate transit for the prevention of injury to children in the shipping State. Congress can outlaw such goods to prevent pollution of the interstate stream.

That the articles excluded are themselves innocuous is immaterial. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 132. Discussion of the inherent badness of things is largely futile. How do we judge of goodness or badness except by their effect? Those things which work ill effects when transported across state lines are for that reason evil. The transportation of products of child labor, therefore, can not be classed as innocuous in fact.

As a matter of law, the regulating power is not limited to goods harmful *per se*. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366; *Weeks* v. *United States*, 245 U. S. 618; *Wilson* v. *United States*, 232 U. S. 563; *Athanasaw* v. *United States*, 227 U. S. 326; *Compagnie Francaise* v. *Louisiana Board of Health*, 186 U. S. 380; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510. Liquor, lottery tickets, and misbranded food were legitimate objects until the legislature made them outlaws.

Congress acted reasonably in putting child-made goods in the same class.

A seller's liberty is not unduly restrained by protecting a purchaser from becoming an unwilling party to an im-

moral sale. *Plumley* v. *Massachusetts*, 155 U. S. 461; *United States* v. *Coca Cola Co.*, 241 U. S. 265, 285.

There is no right to use the channels of interstate commerce for unfair competition. Large authority was exercised in removing unfair discrimination as a means of competition in the Act to Regulate Commerce, and the Clayton Anti-Trust and Federal Trade Commission Acts. Industry and business are the controlling considerations. Sales detrimental to a state industry may be prohibited by a State. *Sligh* v. *Kirkwood*, 237 U. S. 52. In interstate commerce discretion is intrusted to Congress to determine which of the various business elements of the Nation is entitled to protection. An example of a prohibition of interstate trade for industrial reasons is in the quarantine of cattle fit enough for food in themselves but likely to damage the cattle industry in the receiving State. *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 623.

Congress believed that it was exercising in this case its power to forbid competition deemed unfair. Senate Report No. 358, 64th Cong., 1st sess.; House Report No. 46, 64th Cong., 1st sess. It was not fanciful to class shipment of child-made goods as unfair competition. Fraud and deceit are recognized acts of unfairness. An advantage derived by drawing on the blood of children is also immoral, according to the consensus of modern thought. Nor is immorality alone the test of unfair competition. An act unreasonably interfering with another's right to pursue trade, such as local price cutting, or hiring away of workmen, constitutes unfairness. Congress may well have thought that child labor deserved a like reprobation.

The extension of the prohibition to all products of the factory in which the child labors is a reasonable provision for the due enforcement of the act.

Assuming that the act does not contravene the Fifth

Amendment, there is no other clause of the Constitution to which it is obnoxious. *The Lottery Case*, 188 U. S. 321, 357.

To urge the reserved powers of the States is to beg the question. The reserved powers of the States do not begin until the power of Congress leaves off. [Instancing numerous cases in which exercises of the commerce power have been upheld though necessarily affecting state policy and control as to local matters; and numerous acts of Congress having such effect.]

There is no encroachment upon the reserved powers of the States. As said by Mr. Justice McKenna in *Hoke* v. *United States*, 227 U. S. 308, 320, "The power of Congress under the commerce clause of the Constitution is the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or States is not material to be considered."

The Constitution grants to Congress no more power over the public in the receiving than in the shipping State. Neither is mentioned. It is the public, wherever situated, that is entitled to protection.

The argument that the evil is complete prior to the interstate movement is fallacious, for Congress enacted the statute to protect citizens outside of the shipping State.

Congress was attempting to regulate commerce in good faith and not to do indirectly what it could not do directly. It sought only to prevent the evil resulting from the interstate transportation of child-made goods. The court is confined to the purpose as expressed in the act. *McCray* v. *United States*, 195 U. S. 27. Nor is it concerned with questions of the wisdom, expediency, or oppressive character of legislation. *Id.*

Mr. Morgan J. O'Brien and *Mr. W. M. Hendren*, with whom *Mr. Clement Manly*, *Mr. W. P. Bynum* and *Mr. Junius Parker* were on the brief, for appellees:

If the transaction or conduct is not within the grant of power to Congress, it lies within the controlling power of the State in the exercise of the police power. 10th Amendment; *Martin* v. *Hunter*, 1 Wheat. 304, 326; *House* v. *Mayes*, 219 U. S. 270, 281–282; *New York* v. *Miln*, 11 Pet. 102.

The only suggested source of authority to legislate on the subject of the act is the Commerce Clause, which Madison said (3 Farrand, Records of Federal Constitution) "was intended as a negative and preventive provision against injustice in the states themselves, rather than as a power to be used for the positive purposes of the general government."

Is the act a regulation of commerce in the constitutional sense? Or is it a regulation of some one of the many internal affairs of the States which Congress is not empowered to deal with? *United States* v. *De Witt*, 9 Wall. 41; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Employers' Liability Cases*, 207 U. S. 463, 502. A regulation of "all of these delicate, multiform and vital interests—interests which in their nature are, and must be, local in all the details of their successful management." *Kidd* v. *Pearson*, 121 U. S. 1, 21. The right of intercourse between the States has its source in the municipal law. The Constitution found it "an existing right and gave to Congress the right to regulate it," which is the right to prescribe the rule by which commerce is to be governed. *Gibbons* v. *Ogden*, 9 Wheat. 1, 211. With respect to his lawful goods, the citizen exercises a right. With respect to his unlawful goods, he enjoys a privilege, which Congress may withhold largely as it pleases.

While the power to regulate commerce among the several States is in the same grant and in the same terms with the power over foreign commerce, yet there is a difference with respect to the extent of that power growing out of the difference in the relation of the United

States to the two kinds of commerce, and the difference in the right of the citizen of the United States and the foreigner to engage therein. As to foreign commerce, the United States possesses and exercises all the attributes of sovereignty. As to interstate commerce, it exercises only that portion of sovereignty delegated to it. Prentice & Eagan, Commerce Clause of the Federal Constitution, 37–42; Judson on Interstate Commerce, Par. 2; 2 Tucker on the Constitution, Pars. 255, 256. This is illustrated in the plenary power of Congress over territory belonging to the United States and outside the boundaries of a State of the Union. The foreigner enjoys a privilege. The citizen exercises a right, subject only to that measure of interference to which he has consented.

It appears from the act itself: (1) That the articles made by children are in no way different from articles made by others. (2) That the purpose and effect of the act is to prevent the employment of children, and not to safeguard or promote commerce or the interests of persons or communities in the States into which child-made goods might be sent. That such is the purpose and expected effect, was avowed in the debates upon the floor of Congress, and before the committees to which the bill was referred.

The act itself shows the harmless quality of the goods. Articles heretofore barred and dealt with by this court have been such as could fairly be said to be "outlaws of commerce"; consequently all persons have been forbidden to ship them; the article itself is barred from commerce.

Does the power to regulate commerce extend to and include the power to prohibit harmless and useful commodities because of pre-commerce conditions of labor?

However much the *Knight Case*, 156 U. S. 1, may be weakened by later decisions, its distinction between production and commerce is still effective to prevent

direct congressional regulation of production as distinguished from sale and transportation.

It is not necessary to resort to the Fifth Amendment. But, if so, the grant of power in the Commerce Clause can not, in the guise of regulation, by a mere pretense of exercising this power, extend to the destruction of property interests only remotely related to commerce.

In regulating commerce, Congress regulates traffic in things, vehicles of transport and things *in transitu*, but not the things themselves. Before and after the *transitus*, they are beyond this power of regulation. The production and use of things in the *terminus a quo* and the *terminus ad quem* are not subjects of the commercial power, but of the State from which and to which they are transported. 2 Tucker, Const. 526.

The conditions reached and controlled by this act are subject only to that attribute of sovereignty called the "police power." With relation to matters of National import, has Congress all the attributes of sovereignty, or merely those surrendered to it by the people and not reserved to the States? Save in the instances provided therein the Fourteenth Amendment does not entrench upon the state police power. *Barbier* v. *Connolly*, 113 U. S. 21, 31. Is the only protection and security for the sovereignty and freedom of conduct sought to be reserved by the Tenth Amendment the limitation imposed upon Congress by the Fifth Amendment with respect to arbitrary action? Are not the rights so many and so vital and essential to the prosperity of the citizen and consequently of the Nation, as to indicate that their protection is entitled to and has a more fundamental basis, that is, that they have not been given over to the chance of arbitrary action?

The *Keller Case*, 213 U. S. 114, holds an act of Congress void, punishing harboring within a State an alien prostitute, as a regulation of a matter within the police

power reserved to the State. The power of Congress to regulate commerce among the States is not then the equivalent of the reserved police power of the States.

Congress has no general police power; it may exercise a police power only over a subject-matter already under its jurisdiction, by virtue of some authority delegated to it by the Constitution. In other words, a police purpose may be the reason for exercising a power possessed, but it is not a source of power. *Jacobson* v. *Massachusetts*, 187 U. S. 11; *Sherlock* v. *Alling*, 93 U. S. 99; 12 Corpus Juris, 910.

To uphold the act upon the theory of police power it must be clear that interstate commerce is menaced and not something else outside that domain.

Whatever menace there is in child labor has a locality. It cannot reasonably and fairly be said that the product of the factory where children are employed is so tainted by its origin that during or after transportation it constitutes a menace to health or morals or to any other subject within the domain of Congress. The menace, if it exists, is confined to where the child is employed. In invoking the police power, Congress is operating outside the domain of interstate commerce. A process of manufacture cannot obstruct or injuriously affect commerce when the product of that process is indistinguishable from the products of other processes. The statement that the power of Congress over commerce is full and complete does not aid the matter because that statement by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, is preceded by and predicated upon the proposition that the subject of regulation is within the power asserted.

That the possession of full and complete power does not warrant the exercise of that power to bring about a result or condition outside that power, is strikingly exemplified in cases decided by this court, of which *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, may be

mentioned, where the power of a State to fix the terms and conditions upon which foreign corporations may do business in the State was considered. So a general power of prohibition must exist to sustain the act. There is no such power. It is not a case of the possession of power restrained by certain limitations, but a case of the entire absence of power.

The authority of Congress to regulate commerce comprehends the power, within the limitations imposed by the nature and object of the grant, and those expressly set forth in the Constitution, to define what shall be commerce among the States, and, with a view to the effective exercise of its power to distinguish between things deleterious and things beneficial or innocuous, and to deny absolutely or conditionally entrance into such commerce to those things and persons which are deleterious, and, short of prohibition, to prescribe the rule by which the entrance to and movement in commerce of lawful and innocuous things and persons is to be governed. The *Obscene Literature Case*, the *Bad Egg Case*, the *White Slave Case* and the *Webb-Kenyon Case*, yield the principle that Congress may prevent the facility of interstate commerce from being made an instrument of evil, but in each of these cases, the subject of regulation retains, while moving in commerce, and at its journey's end, the inherent capacity to further the evil. The regulation did not reach back to the place of the creation of the subject as in the case at bar.

So far the adjudicated cases have gone and no further. A product of a condition which exists only within the confines of a State, before it may be said to affect commerce in such a way as to justify Congress in regulating it, must be one which retards or injures commerce, or in some manner burdens that commerce itself or one which retains its capacity to further an evil while actually moving in commerce.

Upon the assumption—which as a matter of fact is not correct—that the act prohibits only the product of child labor, it is said:—

The object of the act is not to regulate conditions of labor within the States individually, for these are primarily of concern only to the State, but to establish a certain plane of competition with respect to the utilization of such labor for the benefit of the country at large.

From this standpoint, the question raised by the act boils down simply to this: May Congress exercise its power to regulate commerce among the States for what it conceives the good of the country at large, even to the extent of prohibiting altogether harmless and useful articles of commerce produced under conditions of labor which from this point of view it deems detrimental?

Investigation of whether Congress has done by indirection that which it can not do directly, is not foreclosed by the statement that courts do not pass on the motives of Congress. They do not pass upon them to see whether they are good or bad, but when power is called into play, not for the purpose for which it was given, but for a covert purpose, it becomes not an abuse of a power, but the exercise of an unconferred power, and the duty is incumbent upon the court to determine this matter, and legislation may properly be characterized as covert, though its purpose and effect is to cure what is admitted to be an evil. *McCray* v. *United States*, 195 U. S. 27; *McCulloch* v. *Maryland*, 4 Wheat. 316. Covert legislation is legislation whose constitutional support bears no sincere relation to the legislative and popular purpose sought to be attained.

The act fixes a standard of child labor and debars from interstate and foreign commerce, for a period of thirty days from its production, *all* product of the mine, quarry, mill, factory or workshop in which the standard fixed by the act does not prevail, without regard to whether

child labor has entered in whole or in part into its production.

A congressional enactment can not be said to be a regulation of commerce among the several States within the meaning of the Constitution, unless it:

(1) Regulates some subject that is connected with interstate commerce directly or proximately and not merely remotely.

(2) Regulates commerce in some particular bearing a direct relation to interstate commerce.

(3) Can fairly be said, upon construing the whole scope of the law, that it is a regulation of interstate commerce and not a regulation of some other subject which Congress is not empowered to regulate. *Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186.

In the case at bar, there is no sincere and legitimate relation between the thing prohibited and the object to be attained. Congress is doing indirectly what it can not do directly. Certainly the grant was not intended to give Congress any greater power over interstate commerce than the States have over domestic commerce. The State can not close the door of commerce to lawful goods, though it may, by virtue of the police power, control the conditions out of which the commerce comes.

The act reaches beyond the body of commerce itself, and legislates in the *form* of a regulation of commerce to promote what is deemed to be the welfare of the people. It does more than prohibit the transportation of articles of commerce. In effect it is a prohibition of their creation, unless the local conditions of manufacture conform to the congressional standard.

The nature and ends of legislative power limit the extent of it, and the nature and extent of the grant must be determined in view of the object for which those powers are given. *Calder* v. *Bull*, 3 Wall. 388; *Legal Tender Cases*, 12 Wall. 531. The intention of the framers of the

Constitution in conferring the power to regulate commerce was (*Veazie* v. *Moore*, 14 How. 574):

"To establish perfect equality amongst the several states as to commercial rights," and (*Lehigh Valley R. R. Co.* v. *Pennsylvania*, 145 U. S. 200):

"The chief mischief intended to be obviated was the conflict between the commercial regulations of the several states, which was destructive of their harmony, and fatal to their commercial interest abroad."

The very essence of regulation is the existence of something to be regulated, and consequently the suggestion of a general power to prohibit is contrary to the reason of the thing. Of necessity, there must be some limit on the power to regulate, even when, under some circumstances, it may include prohibition. Otherwise, commerce may be destroyed. What fixes that limit? Public opinion as reflected by Congress, subject to the limited review permitted by the Fifth Amendment, or the logical and visible line of demarcation now drawn between "outlaws of commerce" and wholesome and lawful articles of commerce? That there is a difference with relation to the power of government between lawful and unlawful articles of commerce, appears from the opinions in the *Schollenberger Case*, 171 U. S. 1, and *McDermott* v. *Wisconsin*, 228 U. S. 115. The prohibitory power is limited to "the kind of traffic which no one" is "entitled to pursue as of right." The line of demarcation is found in the nature and quality of the goods, and the rights with respect thereto, rather than in the limited review permitted under the Fifth Amendment.

The ability to create, and free and unfettered action in transporting property, are essential to the citizen and to the welfare of the country. The right is so necessary and so paramount that it is difficult to say that the people would contemplate reposing in even an elective body like Congress an unlimited and unrestrained power over that

right, depending for its safety upon Congress refraining from arbitrary action. The right needs and has a more certain and fundamental protection. While the majority opinion in the *Lottery Case* maintained that Congress was vested with a wide discretion in matters of interstate commerce, yet it based the power to prohibit upon the inherent quality of illegality in the lottery tickets themselves.

The fundamental and far reaching question here to be determined is: Is there a line between "the commercial power of the Union and the municipal power of the State?" Has Congress absorbed the police power of the States? If Congress has the power here asserted, it is difficult to conceive what is left to the States.

MR. JUSTICE DAY delivered the opinion of the court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. Act of Sept. 1, 1916, c. 432, 39 Stat. 675.

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. The first section of the act is in the margin.[1]

[1] That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the

Other sections of the act contain provisions for its enforcement and prescribe penalties for its violation.

The attack upon the act rests upon three propositions: First: It is not a regulation of interstate and foreign commerce; Second: It contravenes the Tenth Amendment to the Constitution; Third: It conflicts with the Fifth Amendment to the Constitution.

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock P. M. or before the hour of 6 o'clock A. M.?

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the States.

In *Gibbons* v. *Ogden*, 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is

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product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian.

directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The first of these cases is *Champion* v. *Ames*, 188 U. S. 321, the so-called *Lottery Case*, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, this court sustained the power of Congress to pass the Pure Food and Drug Act which prohibited the introduction into the States by means of interstate commerce of impure foods and drugs. In *Hoke* v. *United States*, 227 U. S. 308, this court sustained the constitutionality of the so-called "White Slave Traffic Act" whereby the transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. In that case we said, having reference to the authority of Congress, under the regulatory power, to protect the channels of interstate commerce:

"If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

In *Caminetti* v. *United States*, 242 U. S. 470, we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, the power of Congress over the transportation of intoxicating liquors was sustained. In the course of the opinion it was said:

"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."

And, concluding the discussion which sustained the authority of the Government to prohibit the transportation of liquor in interstate commerce, the court said:

". . . 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."

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate

transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.

"When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state." (Mr. Justice Jackson in *In re Green*, 52 Fed. Rep. 113.) This principle has been recognized often in this court. *Coe* v. *Errol*, 116 U. S. 517; *Bacon* v. *Illinois*, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the

framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. *Kidd* v. *Pearson*, 128 U. S. 1, 21.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may coöperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the

States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. "This," said this court in *United States* v. *Dewitt*, 9 Wall. 41, 45, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." See *Keller* v. *United States*, 213 U. S. 138, 144, 145, 146. Cooley's Constitutional Limitations, 7th ed., p. 11.

In the judgment which established the broad power of Congress over interstate commerce, Chief Justice Marshall said (9 Wheat. 203): "They [inspection laws] act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., are component parts of this mass."

And in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 629, the same great judge said:

"That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that

the instrument they have given us is not to be so construed may be admitted."

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; "this principle," declared Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, "is universally admitted."

A statute must be judged by its natural and reasonable effect. *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *Pipe Line Cases*, 234 U. S. 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government.

New York v. *Miln*, 11 Pet. 102, 139; *Slaughter House Cases*, 16 Wall. 36, 63; *Kidd* v. *Pearson*, *supra*. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be

Affirmed.

MR. JUSTICE HOLMES, dissenting.

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States, in which within thirty days before the removal of the product children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between seven in the evening and six in the morning. The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate

commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the *Lottery Case* and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. *Champion* v. *Ames*, 188 U. S. 321, 355, 359, *et seq.* So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress. *McCray* v. *United States*, 195 U. S. 27. As to foreign commerce see *Weber* v. *Freed*, 239 U. S. 325, 329; *Brolan* v. *United States*, 236 U. S. 216, 217; *Buttfield* v. *Stranahan*, 192 U. S. 470. Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least

their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the act. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers." *Veazie Bank* v. *Fenno*, 8 Wall. 533. So it well might have been argued that the corporation tax was intended under the guise of a revenue measure to secure a control not otherwise belonging to Congress, but the tax was sustained, and the objection so far as noticed was disposed of by citing *McCray* v. *United States*. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. And to come to cases upon interstate commerce, notwithatanding *United States* v. *E. C. Knight Co.*, 156 U. S. 1, the Sherman Act has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold, but not proceeding because that commerce was the end actually in mind. The objection that the control of the States over production was interfered with was urged again and again but always in vain. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 68, 69. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 184. *Hoke* v. *United States*, 227 U. S. 308, 321, 322. See finally and especially *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 514, 515.

The Pure Food and Drug Act which was sustained in *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, with the intimation that "no trade can be carried on between the States to which it [the power of Congress to regulate commerce] does not extend," 57, applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks* v. *United States*, 245 U. S. 618. It does not matter whether the supposed

evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. *Hoke* v. *United States*, 227 U. S. 308, 323. *Caminetti* v. *United States*, 242 U. S. 470, 492. In *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 328, *Leisy* v. *Hardin*, 135 U. S. 100, 108, is quoted with seeming approval to the effect that "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." I see no reason for that proposition not applying here.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preëminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion* v. *Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

MR. JUSTICE MCKENNA, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this opinion.

UNION PACIFIC RAILROAD COMPANY *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 22. Argued November 15, 1916.—Decided June 3, 1918.

An appeal does not lie to this court from an order of the Circuit Court of Appeals which merely affirms, on interlocutory appeal, an order of the District Court refusing a preliminary injunction, even where the decisions below were rested on the ground of adequate legal remedy, which might have been made the basis for a final dismissal of the bill.

A certiorari may issue under Jud. Code, § 262, to review an interlocutory judgment of the Circuit Court of Appeals which, because the case is of a kind ultimately appealable, is not subject to certiorari under § 240.

Decision of an application for certiorari having been postponed to the hearing of the appeal which was also taken, and the appeal being found without jurisdiction, the certiorari, in this case, is granted and the record on appeal is treated as the return to the writ.

Equity has jurisdiction to enjoin the collection of illegally discriminatory taxes, where the existence of an adequate and complete remedy at law is doubtful.

Where the legal remedy by paying the taxes and suing to recover back necessitates separate actions against several school districts and towns, it will not displace the equitable remedy by injunction in one suit.

Section 5750, Colorado Rev. Stats., 1908, provided a plain, adequate and complete legal remedy in cases of illegal taxes by requiring the Board of County Commissioners to refund them when paid and by conferring impliedly on the taxpayer a right to recover them though levied for state, school district and town, as well as for county, purposes by one action against the Board; but, in view of later provisions of Laws, 1913, c. 134, § 5, the effect of which has not been determined by the state supreme court and which might be construed as

prohibiting the Board from refunding without the approval of the State Tax Commission and as withdrawing the right of action against the Board where the Commission disapproves, *held*, that the existence of an adequate legal remedy is so uncertain and debatable that jurisdiction in a suit for an injunction could not properly be declined.

217 Fed. Rep. 540; 222 *id.* 651, reversed.

THE case is stated in the opinion.

Mr. C. C. Dorsey, with whom *Mr. N. H. Loomis* was on the briefs, for appellant and petitioner.

Mr. Charles F. Tew for appellees and respondents.

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

This is a suit by the Union Pacific Railroad Company to enjoin the collection of a portion of the taxes levied on its property in Weld County, Colorado, in a particular year, the gravamen of the complaint being that the company's property was assessed at one-third of its value, while most of the other property was assessed at one-fifth and some not at all, and that this operated to place an undue burden of taxation on the company contrary to the constitution and laws of the State and to the due process and equal protection clauses of the Fourteenth Amendment. A portion of the taxes was conceded to be valid and was paid. The portion in dispute amounts to $31,127.37. An application for a temporary injunction, submitted on affidavits and other proofs, was denied by the District Court, and that interlocutory order was affirmed by the Circuit Court of Appeals, 217 Fed. Rep. 540; 222 Fed. Rep. 651, both courts being of opinion that relief by injunction was not admissible because there was a plain, adequate and complete remedy at law. While that

view might have resulted in a final decree dismissing the bill, such a decree was neither entered in the District Court nor directed by the Circuit Court of Appeals. In other words, an amendment of the bill and further proceedings were not precluded.

An appeal to this court from the affirmance of the District Court's interlocutory order was allowed, but the appeal is without statutory sanction and must be dismissed. Anticipating that this might be so, the company presented a petition for a writ of certiorari under § 262 of the Judicial Code (see *McClellan* v. *Carland*, 217 U. S. 268; *United States* v. *Beatty*, 232 U. S. 463, 467; *Meeker* v. *Lehigh Valley R. R. Co.*, 234 U. S. 749), consideration of which was postponed to the hearing on the appeal. We now grant the petition and treat the record on the appeal as the return to the writ. See *Farrell* v. *O'Brien*, 199 U. S. 89, 101; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 8.

For many years the revenue laws of Colorado have contained a section[1] imposing on the board of county commissioners "in all cases" the duty of refunding to the taxpayer "without abatement or discount" "any tax, interest or costs, or any portion thereof," which is found to have been "erroneous or illegal", and by a necessary implication conferring on him a correlative and substantive right to have the same so refunded. Laws 1870, p. 123, § 106; 2 Mills Ann. Stats., § 6463; Laws 1902, c. 3, § 202; Rev. Stats. 1908, § 5750; *Price* v. *Kramer*, 4 Colorado, 546, 555; *Woodward* v. *Ellsworth*, 4 Colorado, 580, 581; *Hallett* v. *Arapahoe County*, 40 Colorado, 308, 318; *Bent County* v. *Atchison, Topeka & Santa Fe Ry. Co.*,

[1] ". . . and in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

52 Colorado, 609, 612–614. If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions. *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, and cases there cited; *Pittsburg, etc., Ry. Co.* v. *Board of Public Works*, 172 U. S. 32; *Arkansas Building & Loan Assn.* v. *Madden*, 175 U. S. 269; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 38; *Johnson* v. *Wells, Fargo & Co.*, 239 U. S. 234, 243; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 519.

That the taxes were levied for state, school district and town, as well as for county, purposes is not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back the money. *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658, 661; *Arkansas Building & Loan Assn.* v. *Madden*, *supra*, 273.

Whether the section named is still in force, unqualified and unmodified, is the important question. If not in force, a single action at law would not suffice, for then it would be necessary to bring a separate action against each of several school districts and towns for its part of the tax. See *Raymond* v. *Chicago Union Traction Co.*, *supra*, pp. 39–40. And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for as this court has said, "It is a settled principle of equity jurisprudence that, if the remedy at

law be doubtful, a court of equity will not decline cognizance of the suit. . . . Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." *Davis* v. *Wakelee*, 156 U. S. 680, 688.

In 1911 Colorado established a state tax commission and conferred on it extensive supervisory powers over the administration of the revenue laws of the State, including the acts of assessors and boards of county commissioners. Laws 1911, c. 216. And in 1913, before the present suit was begun, the State adopted a statute extending the powers of the commission and repealing "all acts or parts of acts in conflict" therewith. Laws 1913, c. 134. The fifth section of that act says:

"No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being [be] first given to the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado Tax Commission their findings, giving the amount of such abatement, rebate or refund, and their reasons therefor, and such abatement, rebate or refund shall become effective upon the endorsement thereon of the approval of the Colorado Tax Commission and in case the said Colorado Tax Commission shall disapprove the recommendations of the county commissioners, they shall endorse their disapproval thereon and return it to the county commissioners with a statement of their reasons therefor and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado Tax Commission."

Counsel differ widely respecting the effect of this statute on the earlier section (§ 5750, Rev. Stats. 1908) and on the substantive right given by it to have an erroneous

or illegal tax refunded. On the one hand it is said that neither the earlier section nor the right thereby conferred is in any wise affected, and that one paying an erroneous or illegal tax still may call on the county board to refund it and, if the application be refused, has a right of action to compel the board to refund. On the other hand, it is said that the new statute qualifies and modifies the earlier section by restricting the power and duty of the county board to refund to instances in which the state tax commission approves the application, and that the correlative right of the taxpayer under the earlier section—the right impliedly arising out of the duty imposed on the county board—is qualified and modified accordingly; in other words, that the new statute prohibits any refunding of taxes by the county board save in instances having the approval of the state commission and that in other instances it operates to withdraw from the taxpayer all right of action against the county board under the earlier section.

An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the Supreme Court of the State has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined.

With the question of equitable jurisdiction out of the way, the District Court should dispose of the application for a temporary injunction on the merits and otherwise proceed with the suit in regular course. The controverted questions of fact arising on that application have not been

considered by us and we intimate no opinion respecting them. Such questions are rarely, if ever, regarded as properly subject to examination here on writ of certiorari.

Appeal dismissed; certiorari granted, record on appeal to stand as return to writ; decrees below reversed and cause remanded to the District Court for further proceedings in conformity with this opinion.

JEFERSON ET AL. *v.* FINK ET AL., ADMINISTRATORS OF SEVERS, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 242. Argued March 22, 25, 1918.—Decided June 3, 1918.

The policy and legislation of Congress respecting the descent of Indian allotments, particularly in the Five Civilized Tribes, reviewed.

An allotment made under the Supplemental Creek Agreement (Act of June 30, 1902, c. 1323, 32 Stat. 500), before the admission of the State of Oklahoma, to a Creek Freedman who died after the State's admission, descends (as among claimants who are all members of the Creek Tribe) according to the law of that State.

The Oklahoma Enabling Act of June 16, 1906, substituted in this respect the law of the State—i. e., the law of the Territory of Oklahoma as extended to, and as it might be changed by, the State—for the law of Arkansas, Mansfield's Digest, c. 49, which had been adopted provisionally in the Supplemental Agreement (§ 6) and in prior acts; and this substitution is recognized by the Act of May 27, 1908, c. 199, 35 Stat. 312, § 9.

In designating the Arkansas law as the rule of descent, the Supplemental Agreement was not intended and did not operate to confer any vested right of inheritance in respect of allotments made and deeded while such designation remained in force.

A prospective heir acquires no vested right in the land before the death of the ancestor, and the rules of descent are subject to be changed meanwhile by the law-making power.

53 Oklahoma, 272, affirmed.

THE case is stated in the opinion.

Mr. John T. Hays and *Mr. James M. Hays* for plaintiffs in error.

Mr. George S. Ramsey, with whom *Mr. N. A. Gibson*, *Mr. Joseph L. Hull*, *Mr. Edward H. Chandler*, *Mr. Farrar L. McCain*, *Mr. Edgar A. de Meules*, *Mr. Malcolm E. Rosser*, *Mr. Villard Martin* and *Mr. J. Berry King* were on the brief, for defendants in error.

Mr. John B. Campbell, by leave of court, filed a brief as *amicus curiæ*.

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

The title to a Creek allotment is here in controversy. The allotment was made under the Act of March 1, 1901, c. 676, 31 Stat. 861, known as the Original Creek Agreement, and the modifying Act of June 30, 1902, c. 1323, 32 Stat. 500, known as the Supplemental Creek Agreement. In 1903 the usual tribal deeds, approved by the Secretary of the Interior and passing the full title, were issued to the allottee. In June, 1908, she died intestate, leaving her surviving a father, brothers, and sisters, but no mother, husband or issue. The survivors, like the allottee, were enrolled members of the tribe, and all were freedmen. In determining who inherited the land the courts below applied the Oklahoma law of descent existing at the time of the allottee's death, 53 Oklahoma, 272; and the question for decision here is whether under the legislation of Congress an Arkansas law, theretofore put in force in the Indian Territory, should have been applied.

When the allotment was made and the tribal deeds issued the land was in the Indian Territory, but before

the allottee died that Territory and the Territory of Oklahoma had become the State of Oklahoma.

In early times, when allotments in fee simple to individual Indians were made only occasionally, there was no congressional enactment prescribing who should inherit allotted land on the death of the allottee, and in such cases it was held that while the tribal relation continued the applicable rule of descent was to be found in the laws and usages of the tribe, and not in the laws of the State or Territory in which the land lay. *Jones* v. *Meehan*, 175 U. S. 1, 29–32. In actual practice this rule proved unsatisfactory, because the tribal laws and usages were generally crude and often difficult of ascertainment; and so in later allotment acts Congress provided that the descent should be according to the state or territorial law. A notable illustration of what came to be the policy of Congress on the subject is found in the general allotment Act of February 8, 1887, c. 119, 24 Stat. 388, the fifth section of which says that for a designated period the United States will hold the land in trust for the allottee, "or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located," and at the expiration of that period will convey the same in fee to the allottee, "or his heirs as aforesaid;" and also "that the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered." True, that act has no direct application to the lands of the Five Civilized Tribes, of which the Creek tribe is one, but it does throw much light on what was intended by the subsequent legislation relating to the descent of those lands when allotted.

A territorial government never was established in the Indian Territory and it never had a territorial legislature. Apart from the tribal laws of the Indians, among which were laws relating to descent and distribution, the only

laws which became operative there were such as Congress enacted or put in force.

By acts passed in 1890, 1893, 1897 and 1898, Congress manifested its purpose to allot or divide in severalty the lands of the Five Civilized Tribes with a view to the ultimate creation of a State embracing the Indian Territory; put in force in the Territory several statutes of Arkansas, including Chapter 49 of Mansfield's Digest relating to descent and distribution; provided that those statutes should apply to all persons in the Territory, irrespective of race; and substantially abrogated the laws of the several tribes, including those relating to descent and distribution. Acts May 2, 1890, c. 182, 26 Stat. 81, § 31; March 3, 1893, c. 209, 27 Stat. 645, § 16; June 7, 1897, c. 3, 30 Stat. 83; June 28, 1898, c. 517, 30 Stat. 495, §§ 11 and 26. This was the situation when the Act of 1901, known as the Original Creek Agreement, was adopted. That act in the course of providing for the allotment in severalty of the lands of the Creeks revived their tribal law of descent and distribution by making it applicable to their allotments, §§ 7 and 28. But the revival was only temporary, for the Act of 1902, known as the Supplemental Creek Agreement, not only repealed so much of the Act of 1901 as gave effect to the tribal law but reinstated the Arkansas law with the qualification that Creek heirs, if there were such, should take to the exclusion of others.[1] *Washington* v. *Miller*, 235 U. S.

[1] The repealing and reinstating portion of the act was as follows:

"6. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek

422, 425–426. The allotment in question was made and the tribal deeds issued shortly after the Act of 1902 became effective. And this was followed by the Act of April 28, 1904, c. 1824, 33 Stat. 573, § 2, declaring that all statutes of Arkansas theretofore put in force in the Indian Territory should be taken "to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise."

Referring to the purpose with which the Arkansas statutes were put in force in that Territory and to their status there, this court said in *Shulthis* v. *McDougal*, 225 U. S. 561, 571: "Congress was then contemplating the early inclusion of that Territory in a new State, and the purpose of those acts was to provide, for the time being, a body of laws adapted to the needs of the locality and its people in respect of matters of local or domestic concern. There being no local legislature, Congress alone could act. Plainly, its action was intended to be merely provisional. . . ."

By the enabling act of June 16, 1906, c. 3335, 34 Stat. 267, provision was made for admitting into the Union both the Territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each Territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the Territory of Oklahoma had been enacted by the territorial legislature. Deeming it better that the new State should come into the Union with a body of laws applying with practical uniformity throughout the State, Congress provided in the enabling act (§ 13) that "the laws in force in the *Territory of Oklahoma*, as far as appli-

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citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

There was a like provision, but without the provisos, in the Act of May 27, 1902, c. 888, 32 Stat. 258.

cable, shall *extend over and apply to said State* until changed by the legislature thereof," and also (§ 21) that "all laws in force in the *Territory of Oklahoma* at the time of the admission of said State into the Union shall be in force *throughout said State*, except as modified or changed by this act or by the constitution of the State." The people of the State, taking the same view, provided in their constitution (Art. 25, § 2) that "all laws in force in the *Territory of Oklahoma* at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be *extended to and remain in force in the State of Oklahoma* until they expire by their own limitation or are altered or repealed by law."

The State was admitted into the Union November 16, 1907; and thereupon the laws of the Territory of Oklahoma relating to descent and distribution (Rev. Stats. Okla. 1903, c. 86, art. 4) became laws of the State. Thereafter Congress, by the Act of May 27, 1908, c. 199, 35 Stat. 312, § 9, recognized and treated "the laws of descent and distribution of the State of Oklahoma" as applicable to the lands allotted to members of the Five Civilized Tribes.

As before indicated, the allottee died in June, 1908, and the courts below in determining who inherited the land from her gave effect to the state law of Oklahoma existing at the time of her death.

Two objections to that ruling are pressed on our attention: One that the allotment was made and the tribal deeds issued under the Act of 1902, which contained a provision that the descent should be according to the Arkansas law, and that thereby those who would be heirs under that law became invested with a right to inherit which could not be taken away or impaired by subsequent legislation, either federal or state; and the other that, even if Congress possessed the power to substitute

some other law of descent, that power was not exercised. Both objections are untenable.

Through congressional action the Arkansas law found in Chapter 49 of Mansfield's Digest had become the local law of descent in the Indian Territory, and when the Act of 1902 provided that the descent of Creek allotments should be in accordance with that chapter, it was but another way of saying that the descent should be in accordance with the local law. In other words, that act was made to conform to the general policy of Congress in respect of the descent of Indian allotments. Other provisions dealt with the estate which the allottee was to receive and showed that it was to be a fee simple. What was said about the rules of descent was purely legislative, not contractual; and its presence in the act gave it no effect that it would not have had as a separate enactment. Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner. Not until the ancestor dies is there any vested right in the heir. Cooley's Constitutional Limitations, 7th ed. 512.

We have seen that Congress was accustomed to subjecting allotted Indian lands to the local laws of descent, and also that its action in putting the Arkansas law in force in the Indian Territory was intended to be merely provisional. With this in mind it seems very plain that the provisions before quoted from the enabling act were intended to result, at the time of the admission of the new State, in the substitution of the Oklahoma law of descent for that of Arkansas theretofore put in force in the Indian Territory. The recognition given to the Oklahoma law by Congress in the Act of 1908 hardly can be explained on any other theory.

It well may be, as held below, that the qualification which Congress placed on the application of the local

law—then the Arkansas law—by the Act of 1902 equally qualifies the application of the Oklahoma law, *Washington* v. *Miller*, 235 U. S. 422, but that question is not here, for the survivors of the allottee are all Creek citizens.

Judgment affirmed.

HARTRANFT *v.* MULLOWNY, JUDGE OF THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

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

No. 19. Argued February 23, 1916; restored to docket for reargument November 13, 1916; reargued November 7, 8, 1917.—Decided June 3, 1918.

Under Jud. Code, § 250, judgments of the Court of Appeals of the District of Columbia in criminal cases, and judgments which are not final, are not reviewable by writ of error upon the ground that the jurisdiction of the trial court is in issue, or upon the ground that the construction of a law of the United States was brought in question by the defendant.

The jurisdiction of the Supreme Court of the District of Columbia to supervise the criminal proceedings of inferior tribunals by removal and review through certiorari, is analogous to that of the Court of King's Bench; and the nature and functions of the writ in such cases are to be tested by common-law principles.

At common law, when a cause before judgment was removed by certiorari in order that justice might be done by quashing the indictment or information or proceeding to trial, or otherwise, as the circumstances might require, the nature of the cause was not changed by the removal and a judgment quashing the writ was followed by a *procedendo* as a matter of course.

The Supreme Court of the District, having by certiorari removed for consideration a criminal case from the local police court upon a petition alleging want of jurisdiction and insufficiency of the information, afterwards entered judgment that the writ be quashed, the

petition dismissed, and the record "remanded" to the police court "whence it came." This judgment having been appealed to and affirmed by the Court of Appeals, *Held:* (1) That the judgment was in a case arising under the criminal laws; (2) that it was not final; and (3) that for these reasons a writ of error under Jud. Code, § 250, would not lie.

Writ of error to review 43 App. D. C. 44, dismissed.

THE case is stated in the opinion.

Mr. Matthew E. O'Brien and *Mr. Henry E. Davis*, with whom *Mr. Walter Jeffreys Carlin* was on the briefs, for plaintiff in error.

Mr. Assistant Attorney General Frierson for defendant in error.[1]

MR. JUSTICE PITNEY delivered the opinion of the court.

On April 17, 1914, an information in behalf of the United States was filed by the United States attorney in the police court of the District of Columbia against the plaintiff in error (who will be called the petitioner) charging violations of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768. Having first objected to the jurisdiction of the police court by motion to quash, by demurrer, and by special plea in bar, all of which were overruled by that court, petitioner was arraigned upon the information and pleaded not guilty, after which, and before trial on the merits, he filed in the supreme court of the District a petition praying that a writ of certiorari might issue from that court to the present defendant in error as judge of the police court to bring up the record and proceedings, upon the grounds (1) that the police court was without jurisdiction to try petitioner upon the infor-

[1] *Mr. Assistant Attorney General Underwood* argued the case for the defendant in error at the first hearing.

mation, for several reasons specified, and (2) that the information did not sufficiently inform petitioner of the nature and cause of the accusation against him, and his trial thereon would deprive him of his constitutional right in that behalf. The writ of certiorari was issued as prayed, return was made setting forth the information and a memorandum of the proceedings thereon, and afterwards a motion was made in the supreme court by the United States attorney, in the name of the respondent, to quash the writ because the police court had jurisdiction and had assumed jurisdiction of the cause of action involved in the information. Upon consideration the supreme court granted this motion, petitioner appealed to the court of appeals of the District, that court affirmed the judgment of the supreme court (43 App. D. C. 44), and to review the judgment of affirmance the present writ of error was sued out.

At the threshold we are confronted with the question whether we have jurisdiction to proceed under the latter writ. If we have, it must arise under § 250, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1159), which, so far as need be quoted, runs as follows: "Any final judgment or decree of the court of appeals of the District of Columbia may be reëxamined and affirmed, reversed or modified by the Supreme Court of the United States, upon writ of error or appeal in the following cases:" specifying, among others, "cases in which the jurisdiction of the trial court is in issue," and "cases in which the construction of any law of the United States is drawn in question by the defendant;" and then proceeding: "Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases." The succeeding section confers upon this court the discretionary power to review, by certiorari

or otherwise, judgments and decrees of the court of appeals otherwise made final by § 250.

Our jurisdiction is invoked upon the ground that the police court has not jurisdiction to try the information, and that the construction of the Food and Drugs Act, a law of the United States, is drawn in question by plaintiff in error, who was defendant below. The motion to dismiss is based upon the twofold ground that the case is one arising under the criminal laws, and that the judgment of the court of appeals is not a final judgment within the meaning of the opening words of § 250. If the case is one so arising, or if the judgment is not final, the fact that the jurisdiction of the police court, or the construction of a law of the United States, is in question, will not give us jurisdiction. *Chott* v. *Ewing*, 237 U. S. 197, 201; see *McLish* v. *Roff*, 141 U. S. 661. It is conceded by petitioner that the information in the police court presents a case arising under the criminal laws within the meaning of the section, and that this has not proceeded to final judgment; the response to the motion to dismiss being that the proceeding by certiorari in the supreme court of the District was a separate and independent proceeding, not arising under the criminal laws, and that this has been finally concluded by the affirmance in the court of appeals of the judgment of the supreme court, leaving nothing to be done except the issuing of execution for costs.

Whether it was a separate and independent proceeding must be determined by a consideration of the nature and office of the writ of certiorari, as employed in this case, and its relation to the criminal proceeding.

The only provision of the District of Columbia Code respecting this form of writ is in § 68 (Act of March 3, 1901, c. 854, 31 Stat. 1189, 1200), which provides: "The said supreme court may, in its appropriate special terms, issue writs of quo warranto, mandamus, prohibition, scire facias, certiorari, injunction, prohibitory and mandatory,

ne exeat, and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction." Act of March 3, 1901, c. 854, 31 Stat. 1189, 1200.

Certiorari always has been recognized in the District as an appropriate process for reviewing the proceedings of a subordinate tribunal when it has proceeded, or is proceeding, to judgment without lawful jurisdiction. *Kennedy* v. *Gorman*, 4 Cranch C. C. 347; Fed. Cas. No. 7702; *Bates* v. *District of Columbia*, 1 Mac A. 433, 449. And the power to employ the writ inheres in the supreme court of the District as possessing a general common law jurisdiction and supervisory control over inferior tribunals, analogous to that of the king's bench. *United States* v. *West*, 34 App. D. C. 12, 17. The court of appeals, in a recent case, declared: "There is no statute prescribing the function of, or regulating the procedure by, certiorari in the District of Columbia, hence we must look, therefor, to the common law. The writ lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed if it be made plainly to appear that such inferior court or special tribunal had no jurisdiction of the subject-matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property, without due process of law." *Degge* v. *Hitchcock*, 35 App. D. C. 218, 226; affirmed 229 U. S. 162, 170.

At the common law certiorari was one of the prerogative or discretionary writs by which the court of king's bench exercised its supervisory authority over inferior tribunals, and it was employed in three classes of cases, among others, viz.: (1) to bring up an indictment or presentment before trial in order to pass upon its validity, to take cognizance of special matters bearing upon it, or to assure an impartial trial; if the accused was in cus-

tody, it was usual to employ a *habeas corpus* as a companion writ; (2) as a *quasi* writ of error to review judgments of inferior courts of civil or of criminal jurisdiction, especially those proceeding otherwise than according to the course of the common law and therefore not subject to review by the ordinary writ of error; and (3) as an auxiliary writ in aid of a writ of error, to bring up outbranches of the record or other matters omitted from the return.

The first of these functions is the one that now concerns us. Blackstone refers to it in these terms: "Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius:* or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those counties or places where the process of the inferior judges will not reach him. Such writ of *certiorari,* when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to

the court below, to be there tried and determined." 4 Black. Com. 320, 321. To the same effect is 2 Hale P. C. 210, where the learned commentator further says: "If there be an indictment to be removed and the party be in custody, it is usual to have an *habeas corpus* to remove the prisoner, and a *certiorari* to remove the record, for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner, with the cause of his commitment," etc. See also Fitz. Nat. Brev. 245; Bacon's Abr., tit. Certiorari (A); *Harris* v. *Barber*, 129 U. S. 366, 369.[1]

The function of the writ of certiorari, when thus issued prior to judgment, being simply to remove the record and proceedings into the superior court, to the end that justice may there be done, by quashing the indictment or information, by proceeding to trial upon it or otherwise as the circumstances of the case may require, it is obvious that it merely brings into play a supervisory jurisdiction, without changing the nature of the case that is to be heard and determined; that a decision by the

[1] The use of the writ of certiorari in conjunction with that of habeas corpus has been a familiar part of the appellate procedure of this court from an early period, under § 14 of the Judiciary Act of 1789, c. 20, 1 Stat. 73, 81; § 716, Rev. Stats.; § 262, Judicial Code; *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman and Swartwout*, 4 Cranch, 75, 101; *Ex parte Yerger*, 8 Wall. 85, 103; *Ex parte Lange*, 18 Wall. 163, 166; *Hyde* v. *Shine*, 199 U. S. 62, 85. It is obvious that this use of the certiorari is available before conviction, in a proper case.

An analogous use of the writ, before judgment in the court to which it is addressed, arises under § 239 or § 251, Judicial Code (36 Stat. 1157, 1159), where, upon questions of law being certified to us in any case pending in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, this court may require that the whole record and cause be sent up to it, and thereupon decide the whole matter in controversy as if it had been brought here by writ of error or appeal. In such a case the record is brought here by writ of certiorari, with the effect of submitting the cause to this court for decision instead of to the court of appeals.

reviewing court adverse to the accused upon any preliminary matter, and without trial upon the merits, followed by a remittitur to the court below, necessitates further proceedings before that court from the point at which they were interrupted by the allowance of the writ; and that a judgment quashing the writ of certiorari simply removes the obstacle that the writ interposed in the way of further proceedings in the court of first instance, so that a *procedendo* follows as a matter of course. And so are the authorities. "If an indictment be removed after issue joined and remanded, the inferior court shall proceed as if no certiorari had been granted. . . . (It is true, that while it continues on the file, the court cannot award a *procedendo*. But it may be taken off the file, if it have issued *improvide;* and when that is done, a *procedendo* will be granted.)" Bac. Abr., *tit.* Certiorari (K), citing *Rex* v. *Wakefield,* 1 Burr. 485, 488; *Rex* v. *Clace,* 4 Burr. 2456, 2459; *Rex* v. *Micklethwayte,* 4 Burr. 2522. And see Com. Dig., *tit.* Certiorari (G), citing *Anonymous,* 1 Salk. 144, to the effect that if a certiorari be granted to remove an indictment and the cause suggested should afterwards appear false, a *procedendo* should be awarded. See, also, *Kennedy* v. *Gorman,* 4 Cranch C. C. 347, 348; Fed. Cas. No. 7702.

The record in the present case shows that from beginning to end it was recognized that the writ of certiorari was a mere method of removing the information and the proceedings thereon from the police court into the supreme court, for purposes of review; that it was not a new or independent cause, but a mere step in the pending criminal case; so that when the supreme court reached the conclusion that the writ ought be quashed, the result was merely to remove this obstacle in the way of the exercise by the police court of its jurisdiction, and that the record ought to be remanded for further proceedings in that court. The prayer of the petitioner was "that

the writ of certiorari may issue from this court to the respondent, commanding him to certify to this court the record and proceedings in the said cause so as aforesaid instituted and pending against the petitioner, *to the end that the same may be considered by this court,* and that there may be done *in behalf thereof* what of law and right ought to be done in the premises." The writ issued in pursuance of this petition and addressed to the judge of the police court, after reciting that there was "now pending before you a suit between the United States and the above-named petitioner, William A. Hartranft," commanded the judge to send to the supreme court "the record and proceedings in the said cause, *so that the said Supreme Court may act therein* as of right and according to the laws and customs of the United States should be done." And the judgment of the supreme court was that the writ of certiorari be quashed and the petition dismissed, and that the record be "*remanded to the Police Court of the District of Columbia whence it came.*" Clearly, this was an implied mandate for further proceedings in the police court. The judgment for costs was but incidental.

The contention that the certiorari case in the supreme court was independent of the proceeding in the police court because the two cases bore different titles is without weight. The writ ran from the President of the United States to the judge by name, not in his personal but in his official capacity, as being in contemplation of law the custodian of the record (see *State* v. *Howell,* 24 N. J. L. 519; *Kirkpatrick* v. *Commissioners,* 42 N. J. L. 510; *Hutchinson* v. *Rowan,* 57 N. J. L. 530); but the substance of it was a command that the record of the cause pending in the police court be removed into the supreme court for its consideration; and the execution of the writ did not change the nature of the cause but merely transferred it to a different court.

There is a singular and fatal inconsistency between the

grounds on which plaintiff in error invokes our jurisdiction and the ground on which he endeavors to maintain it. He comes saying, in order to bring himself within § 250, Judicial Code, that in this case (a) the jurisdiction of the trial court is in issue, and (b) the construction of a law of the United States was drawn in question by himself as defendant. But, in resisting the objection that the case is one arising under the criminal laws and the judgment is not final, he is obliged to take refuge in the theory that the certiorari proceeding was separate and independent from the police court proceeding. This, if granted, would leave him without a footing here, because in the certiorari proceeding the supreme court was the "trial court," and its jurisdiction was not and is not in issue; and in that proceeding he was prosecutor or plaintiff, not defendant, and it does not appear that the construction of any law of the United States was there drawn in question by defendant in error, who was defendant if the proceeding was an independent one. There is no escape from the dilemma.

From what has been said it results that the decision of the supreme court was a decision in a case arising under the criminal laws; and, since it required further proceedings in the police court before the merits of the case could be determined, it was not a final judgment within the meaning of the opening words of § 250, Judicial Code. By § 226 of the District of Columbia Code, the court of appeals may review interlocutory orders of the supreme court, as well as final judgments; but it is unnecessary to say that if the judgment reviewed was interlocutory, so is the judgment affirming it. Were we to review and affirm the latter judgment, a trial upon the merits in the police court would still be necessary. The bearing of this is manifest. *Macfarland* v. *Brown*, 187 U. S. 239, 246.

Two cases very much in point are to be found in the reports of New Jersey; both being decisions of the court

of last resort. To show their pertinency, it should be premised that in that State the jurisdiction and practice of the supreme court are modeled after those of the king's bench, and there is a review of its decisions by the court of errors and appeals (as in the house of lords), but only after final judgment. The practice of employing the writ of certiorari for the removal of an indictment or presentment before trial from the court of first instance into the supreme court has been recognized from the beginning, and regulated by statutes not departing essentially from the common-law practice. Act of February 6, 1799, Paterson's Laws, p. 350; Rev. Stats. 1847, p. 983; Gen. Stats. 1895, p. 367; P. L. 1903, p. 343; 1 Comp. Stats. (1910), p. 402. Upon the removal of an indictment into the supreme court by this process, if that court determines that the indictment is not sufficient in law, the person indicted is discharged; but if it is found sufficient, the court may in its discretion retain it to be carried down for trial before the proper circuit court, or may order it returned to the court from which it was removed, there to be proceeded with in the same manner as if the writ had not been allowed. It is a common practice to use this writ in order to obtain the judgment of the supreme court upon the validity of an indictment, before trial. *Sailer* v. *State*, 16 N. J. L. 357; *State* v. *Powder Mfg. Co.*, 50 N. J. L. 75; *State* v. *New Jersey Jockey Club*, 52 N. J. L. 493; *State* v. *Nugent*, 77 N. J. L. 157; *State* v. *Kelsey*, 80 N. J. L. 641. Such being the practice, in *Parks* v. *State*, 62 N. J. L. 664, the return to a writ of error issued out of the court of errors and appeals to the supreme court disclosed that the latter court, by certiorari to the sessions, had removed an indictment and entertained and denied a motion to quash it, and ordered the record to be remitted to the sessions to be proceeded in according to law. A motion having been made to dismiss the writ of error, the court, speaking by

Chief Justice Magie, said: "When the Supreme Court, by virtue of its superintending power over inferior courts, brings, by certiorari, into it the proceedings of an inferior court upon an indictment, it has the option, at its discretion, to retain the cause and proceed to a final disposition of the issues presented, or to remit the proceedings to the inferior court. Gen. Stat. 368. Had the Supreme Court retained the cause now before us, it is obvious that no final judgment could have been reached until the accused had been convicted and sentenced or acquitted and discharged by that court. It is equally plain that, after the exercise of its option of remitting the proceedings to the sessions, no final judgment in the cause could have been reached until a similar result had been reached in that court. A *certiorari* in such cases is not the institution of a new suit, nor does it bring in question any final judgment. The result is that this writ was prematurely issued and must be dismissed." To the same effect is *State* v. *Kelsey*, 82 N. J. L. 542.

For both reasons, that the case is one arising under the criminal laws and that the judgment is not final, we have no jurisdiction under § 250, Judicial Code, and the writ of error must be and is

Dismissed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY *v.* UNITED STATES.

ERROR AND PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 48. Submitted November 12, 1917.—Decided June 3, 1918.

A judgment of the Circuit Court of Appeals is not reviewable by writ of error under Jud. Code, § 241, where the amount actually in dispute is less than $1,000.

Writ of error to review 220 Fed. Rep. 737, dismissed; certiorari denied.

THE case is stated in the opinion.

Mr. Alexander Britton, Mr. Evans Browne, Mr. F. W. Clements and *Mr. A. S. Halsted* for plaintiff in error and petitioner.

Mr. Assistant Attorney General Frierson and *Mr. S. Milton Simpson* for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

The judgment of the Circuit Court of Appeals that is sought to be reviewed affirmed in part and reversed in part a judgment of the District Court in an action brought by the United States to recover penalties for certain violations of the Hours of Service Act of March 4, 1907, c. 2939, 34 Stat. 1415, 1416. 220 Fed. Rep. 737. Defendant challenges and seeks to have reviewed only so much of the judgment as affirmed the recovery of six penalties of $150 each, for as many separate violations of the act. The employees involved are a conductor and two brakemen on each of two passenger trains, known as Nos. 1 and 7, starting from Las Vegas, Nevada, for

Los Angeles, California, on October 3 and 4, 1912. The cases are so much alike that a reference to train No. 1 will suffice. It occupied 27 hours in a journey from Las Vegas to Los Angeles, 334 miles, although the schedule running time between those points was only 13½ hours. The train left Las Vegas on schedule time and with a fresh crew, but was subsequently detained by an unavoidable and unforeseeable accident (a landslide, requiring a detour over another railroad), so that when it reached Daggett, a point in the route 158.6 miles from Los Angeles, the prescribed 16-hour period had expired by more than an hour. At this point the engine crew was relieved, their places being taken by men sent from Otis, a division point 4 miles distant. The conductor and brakemen were not relieved, but continued on duty to the destination of the train at Los Angeles, passing through San Bernardino, which is a passenger terminal but not for through trains. The conductor and brakemen might have been relieved either at Daggett or at San Bernardino, but no effort to do this was made. The question upon the merits is whether the act of Congress required the company, under the circumstances, to relieve them. The contention of plaintiff in error and petitioner is rested upon conference ruling No. 88 (b) of the Interstate Commerce Commission, published June 25, 1908, which, after quoting the first proviso of § 3 of the act: "*Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen"; added the following: "Any employee so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

Our jurisdiction by writ of error is governed by § 241, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157), which gives the right of review only where the matter in controversy exceeds one thousand dollars besides cost. The amount actually in dispute here being only nine hundred dollars, the writ of error must be dismissed. *Export Lumber Co.* v. *Port Banga Co.*, 237 U. S. 388.

There is an application for the allowance of a writ of certiorari under § 240, consideration of which has been postponed until the hearing on the writ of error; but, since it was presented, all occasion for granting it has been removed by our decision in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 244 U. S. 336, which in principle is indistinguishable from the present case, and was decided by the Circuit Court of Appeals (220 Fed. Rep. 748) upon the authority of its decision in the present case.

Writ of Error dismissed.
Petition for Writ of Certiorari denied.

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

UNITED STATES *v.* ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY ET AL.

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

No. 75. Argued January 15, 16, 1918.—Decided June 3, 1918.

The Act of March 2, 1896, c. 39, 29 Stat. 42, limiting the time within which suits may be brought to vacate land patents, contains a proviso "that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry." *Held*, that the proviso was a curative measure referring only to lands patented before the enactment and was no protection for a patent procured afterwards by fraud.

The general principle underlying the strict construction of statutes of limitation as applied to the Government, viz., that the public interest should not be prejudiced by negligence or default of public officials, applies with peculiar force in the construction of a provision which operates to bar absolutely the recovery of the value of land as well as the land itself, in favor of the immediate recipient of a fraudulent patent no less than a *bona fide* purchaser.

In the present case, resort to this principle and to the legislative history of the proviso, added to its apparent independence and the extraordinary and unreasonable effects of applying it to future cases, overweigh the general rule of prospective construction and the fact of immediate association with prospective provisions.

The equity of a statute barring equitable relief for fraud and mistake is on the side of a strict construction.

The remarks of the chairman of a congressional committee, referring to matters of common knowledge in explanation of an amendment offered by him to a bill which he has previously reported, may be considered as throwing light upon the subject-matter of the amendment, for the purpose of solving an ambiguity.

225 Fed. Rep. 27, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States.

Mr. I. Parker Veazey, Jr., with whom *Mr. E. C. Lindley* was on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit by the United States to annul a patent issued June 24, 1907, to the St. Paul, Minneapolis & Manitoba Railway Company (referred to below as the Manitoba Company), for certain lands in the State of Montana, upon the ground of fraud and mistake—fraud on the part of the agents of the company in representing that the land was non-mineral in character, and mistake on the part of the officers of the Land Department in failing to notify the register and receiver of the local land office that the lands had been classified as mineral and the classification sustained by the Secretary of the Interior under the Act of February 26, 1895, c. 131, 28 Stat. 683. The District Court granted a motion to dismiss the bill upon the ground that the suit was barred by the proviso of § 1 of the Act of March 2, 1896, c. 39, 29 Stat. 42; and its decision was affirmed by the Circuit Court of Appeals, 225 Fed. Rep. 27.

It appears that by Act of March 3, 1857, c. 99, 11 Stat. 195, certain public lands were granted to the Territory of Minnesota for the purpose of aiding in the construction of railroads, and the Manitoba Company afterwards succeeded to the rights and privileges of the Territory under the granting act. At the time of the grant the Missouri River formed the western boundary of the Territory; but in the following year the State of Minnesota was admitted into the Union, with its western boundary fixed on a line some distance east of that river (Act of May 11, 1858, c. 31, 11 Stat. 285); the excluded land being

left to become a part of the Territory of Dakota (Act of March 2, 1861, c. 86, 12 Stat. 239), afterwards admitted as the States of North Dakota and South Dakota. After the admission of Minnesota, the Land Department, in the administration of the land grant, rejected the claim of the Manitoba Company to lands within the limits of the grant but without the limits of that State, and recognized the rights of settlers and purchasers to Dakota lands within the limits of the grant. In *St. Paul, Minneapolis & Manitoba Ry. Co.* v. *Phelps* (1890), 137 U. S. 528, this court set aside the departmental construction and sustained the company's claim to the Dakota lands. To obviate the resulting hardships to settlers and patentees, Congress passed an Act of August 5, 1892, c. 382, 27 Stat. 390, providing that the Secretary of the Interior should cause to be prepared and delivered to the Manitoba Company a list of the lands claimed by purchasers or occupants, and that the company should be permitted to select in lieu of these "an equal quantity of non mineral public lands, so classified as non mineral at the time of actual Government survey . . . not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released." The Montana lands here in question were selected by the company in March, 1906, and patented to it in June, 1907, in lieu of Dakota lands relinquished by the company pursuant to its acceptance of the Act of 1892.

There is no question but that the bill of complaint sets forth sufficient grounds of fraud and mistake to warrant the annulment of the patent, were it not for the bar set up under the Act of March 2, 1896; and whether that bar applies is the sole matter presented for decision upon this appeal.

The act is entitled: "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," and its first section reads as follows: "*Be it Enacted* . . . That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto[1] is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

Laying aside other questions raised by the Government, we have reached the conclusion that, having regard to the general principle which requires a strict construction to be given to legislation in derogation of the public right, and in view of the legislative history of this particular enactment, the proviso must be given the effect of a curative measure confined to lands theretofore patented, and not granting dispensation for frauds or mistakes thereafter occurring.

It will be observed that the proviso is not a mere statute of limitation, but an absolute bar of suits by the United

[1] Act of March 3, 1891, c. 561, as amended by Act of the same date, c. 559 (26 Stat. 1099, 1093).

States; not merely of suits to vacate and annul patents, but of suits to recover either the land or the value thereof; not merely in favor of *bona fide* purchasers, but also of the immediate recipient of an unlawful certification or patent. The general principle of public policy applicable to all governments, that the public interest should not be prejudiced by the negligence or default of public officers, which underlies the rule of strict construction for statutes of limitation, applies with peculiar force to a statute of this character. *United States* v. *Knight*, 14 Pet. 301, 315; *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *United States* v. *Thompson*, 98 U. S. 486, 489; *Fink* v. *O'Neil*, 106 U. S. 272, 281; *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125; *United States* v. *Whited & Wheless*, 246 U. S. 552.

If the language of the proviso stood alone: "That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry," it hardly would be questioned that the rule of strict construction would confine its effect to past cases presumably known to the lawmaker. Aside from a nice grammatical criticism based upon the use of the imperfect tense, full effect can be given to its language by treating it as a validation of the title of lieu lands theretofore certified or patented under the conditions mentioned. The very particular specification of the circumstances under which it was to apply, with resulting narrowness of its scope, tends to negative the inference that it was designed to lay down a general policy for the future. It conveys rather the impression of a curative measure, upon which the general presumption that legislation is intended to operate prospectively and not retrospectively can have little if any bearing.

It is said that this view is untenable because in the former part of the section specific reference is made to patents "*heretofore* erroneously issued" and to "patents *hereafter* issued," and if Congress had intended to limit the proviso to lands certified or patented before the passage of the act it would have used appropriate and specific language for the purpose. The suggestion has weight, but we cannot regard it as determinative, in view of opposing considerations. Looking at the section as a whole, it will be seen that the proviso expresses a thought so different from what precedes, that it seems almost like a separate provision, inserted here for convenience, and without much regard for structural conformity with the context.

This impression is confirmed when we review the legislative history of the measure.

By an Act of March 3, 1887, c. 376, 24 Stat. 556, Congress had directed the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, railroad land grants theretofore unadjusted, with the object of restoring to the United States the title to lands erroneously certified or patented under such grants, saving the entries of *bona fide* settlers erroneously canceled on account of a railroad grant and the rights of *bona fide* purchasers from the grantee company of lands erroneously patented. The work of adjustment proved to be one of great magnitude, and it had not been completed at the time when the act under consideration was passed. Meanwhile the Acts of March 3, 1891 (c. 561, § 8, 26 Stat. 1095, 1099; c. 559, 26 Stat. 1093), had provided that suits by the United States to vacate and annul any patent theretofore issued should only be brought within five years thereafter (that is, within five years after March 3, 1891). Not long before the end of the period thus fixed, beyond which lands could not be recovered even if the investigation in progress under the 1887 Act should

disclose that they had been erroneously certified or patented, the President transmitted to Congress a special message, under date January 17, 1896 (House Doc. No. 151, 54th Cong., 1st sess.), explaining the situation and recommending that the Act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. This was referred to the Committee on Public Lands of the House of Representatives, and that committee, not acceding to the particular recommendation of the message, reported a bill intended to give five years' additional time for bringing to a conclusion the pending investigation and adjustment, but providing that as to *bona fide* purchasers even this extension should not apply (Report No. 253, House of Representatives, 54th Cong., 1st sess.; 28 Cong. Rec. Pt. 2, p. 1761). The first section of the bill as reported, with which alone we are concerned, is given verbatim in the margin.[1] As will be observed, it contained nothing corresponding to what is now the proviso.

The proviso was inserted, upon the motion of Mr. Lacey, chairman of the committee and in charge of the bill, while it was under consideration in the House, for the plainly declared purpose of providing for a specific case referred to in the debate as having arisen in the State of Nebraska, where lieu lands to the extent of more than 200,000 acres had been certified or patented to a railroad company to make good the loss of an equal acreage of lands within the limits of the grant due to an erroneous

[1] "Be it enacted," etc., "That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within ten years after the date of the issuance of such patents. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

ruling of the Land Department resulting in a failure to withdraw the granted lands from entry; and upon the ground that the lieu land locations were without warrant in law, suit had been brought, and was then pending, to cancel the patents.[1]

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[1] (From 28 Cong. Rec., Pt. 2, p. 1906.)

"Mr. Hepburn: . . . In another instance that I am familiar with, Mr. Speaker, in your own State [Mr. Mercer in the chair], there was a grant to a company when practically, by an error or an oversight on the part of the officers of the United States, the lands lying on the line on either side of the file plat of the road were not withdrawn from market for a considerable period. Settlers came in and took these lands. Later, when the railroad was constructed, it was found that there was not within the limits of the grant a sufficient quantity to meet the purposes of the grant. The Department held that lieu lands might be given—lands in another locality—and the company was compelled to go away beyond its grant to lands that did not have the benefit of the construction of this road and take 201,000 acres, and one block of 10,000 acres of it they sold for $2,500—25 cents an acre; but they took these lands under the then ruling of the Department. Under the advice of the law officers of the Department, subsequently the Department changed its view. . . . Then they changed the ruling and held that lands must be taken within the prescribed limits or else the entries and selections were void. Now, one of the suits ordered is to recover the title of these lands taken in lieu of those that the company lost through the failure of the federal officers to withdraw the lands from market. . . .

"Mr. Lacey: As to the instance that my colleague cites as having occurred in Nebraska, I propose at the proper time to offer an amendment which I think will cover the points he has in mind. I will send the amendment to the Clerk's desk to be read as a part of my remarks, so that it may appear in the Record for the information of members.

"The amendment was read, as follows:

"Add at the end of section 1: '*Provided*, that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.'"

On the following legislative day (p. 1937), the amendment was offered by Mr. Lacey, accompanied with this explanation: "My

It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 318. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. *Blake* v. *National Banks*, 23 Wall. 307, 317; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464; *Dunlap* v. *United States*, 173 U. S. 65, 75; *Binns* v. *United States*, 194 U. S. 486, 495; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 20; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198; *Five Per Cent. Discount Cases*, 243 U. S. 97, 107. The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy.

The case of the Nebraska lands, mentioned in the debate, is easily identified from public sources of infor-

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colleague [Mr. Hepburn] on yesterday explained that in Nebraska and in some other localities 'lieu lands' had been patented in place of lands that the railroad companies had lost by reason of mistake in the Department in allowing settlement upon those lands. The amendment that I offer confirms the title to those lands that have been thus patented to railroad companies where they have lost other lands by reason of mistake committed in the Department."

The amendment was agreed to (p. 1938).

mation. By Act of July 2, 1864, c. 216, § 19, 13 Stat. 356, 364, the Burlington & Missouri River Railroad Company was granted ten alternate sections per mile on each side of its road in that State. Owing to the failure of the Land Department to take the proper steps about withdrawing the land from the entry, large quantities of the granted lands south of the line were taken up by settlers, and in lieu of this the company was permitted by the Department to take excess lands on the north side of the line to the amount of over 200,000 acres. In *United States* v. *Burlington & Missouri River R. R. Co.* (1878), 98 U. S. 334, this court held that the grant was not limited to lands situate within twenty miles of the road, nor confined to the land opposite to each twenty-mile section of the line, as the Department had held; the court saying (p. 340): "If, as in the present case, by its [the Department's] neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section of the road has been taken up by others and patented to them, there can be no just objection to allowing the grant to the company to be satisfied by land situated elsewhere along the general line of the road." At the same time the court held (p. 342): "The Act of Congress contemplates that one-half of the land granted should be taken on each side of the road; and the department could not enlarge the quantity on one side to make up a deficiency on the other." However, because the bill as drawn did not identify that part of the land as to which the company's patents were invalid, the decree of the circuit court in favor of the company was affirmed. Soon after the passage of the Act of March 3, 1887, an adjustment was directed for the purpose of distinguishing the tracts erroneously patented to the company on the north side in excess of the amount to which it was entitled on that side, the excess being 200,364.70 acres, and procuring a relinquishment by the company or a cancellation of the pat-

ents in accordance with the Act of 1887. *Burlington & Missouri River R. R. Co.*, 6 L. D. 589; *Chapman* v. *Burlington & Missouri River R. R. Co.*, 20 L. D. 496. It appears that a suit to carry out the adjustment by vacating the erroneous patents was pending at the time of the passage of the Act of 1896. The language of the proviso was aptly chosen to bar such a suit.

But it is said that there is no reason for confining the policy of the proviso to past patents; that if it is only fair, honest, and just that lands patented in lieu of others lost or relinquished by the grantee in consequence of some failure on the part of the Government or its officers should be held by indefeasible title, the same policy would with equal reason apply to future patents. In short, the appeal is to the equity of the statute. But equity implies equality; equal fairness and honesty on both sides. If the prospective interpretation of the proviso could be confined to future patents obtained without fraud or mistake, there would be force in the argument; but suits for the annulment of patents based upon fraud or mistake are the very ones that are proposed to be barred; and in such circumstances no appeal to the equity of the statute can carry us beyond what is clearly expressed in the language of the lawmaker; equitable considerations lie on the side of a strict construction of a statutory provision that proposes to bar an equitable remedy.

And we deem the prospective interpretation as unreasonable as it is inequitable. It was one thing for Congress to pass an act to prevent further prosecution of a suit or suits to annul patents that already had been made, unlawfully indeed, but for the purpose of making good the consequences of previous mistakes by the Land Department. Thus far it could act in the reasonable belief that it knew the extent and consequences of the immunity it was granting. But to say that where lieu lands were thereafter certified or patented in place of

lands lost or relinquished by the grantee no suit should be maintained nor recovery had either for the lands or their value, no matter through what fraud or mistake they might be acquired, would be an entirely different matter, and would offer a premium for future wrongdoing, the extent of which could not easily be foreseen. We cannot attribute such a purpose to Congress without plainer language than is contained in this act.

For the reasons stated, we hold that the proviso is not a bar to the present suit, brought to annul a patent applied for and issued long after its enactment; and the decree under review is

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

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

UNITED STATES GLUE COMPANY *v.* TOWN OF OAK CREEK.

ERROR TO THE CIRCUIT COURT OF MILWAUKEE COUNTY, STATE OF WISCONSIN.

No. 233. Argued March 21, 1918.—Decided June 3, 1918.

A State, in laying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Constitution.

So *held* in respect of the Wisconsin income tax law (Laws 1911, c. 658), as applied to income from sales to customers outside the State of goods delivered from the company's factory within it, and from

sales to such customers and shipment from the company's branches in other States of goods previously made at its factory within the State and sent to such branches.

161 Wisconsin, 211, affirmed.

THE case is stated in the opinion.

Mr. George Lines, with whom *Mr. Willet M. Spooner* and *Mr. Louis Quarles* were on the briefs, for plaintiff in error, in support of the proposition that a tax on income of property or business is a tax upon the property or business itself, cited *Dobbins* v. *Erie County Commrs.*, 16 Pet. 435; *Collector* v. *Day*, 11 Wall. 113; *Weston* v. *Charleston*, 2 Pet. 449; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 27.

The fact that the law is general and lays a tax upon income within the State's power will not justify the attempt by virtue of it to tax income which is not taxable by the State. *Crew Levick Co.* v. *Pennsylvania, supra; Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 228; *Minnesota Rate Cases*, 230 U. S. 352; *Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342; *American Express Co.* v. *Caldwell*, 244 U. S. 617; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

Mr. H. J. Killilea and *Mr. Walter Drew* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The judgment brought up by this writ of error was entered by the Circuit Court of Milwaukee County upon the mandate of the Supreme Court of the State of Wisconsin issued on reversal of a previous judgment of the circuit court in an action brought by plaintiff in error to recover the sum of $2,835.38, paid under protest as part of a tax assessed and levied by the taxing authorities of the State upon plaintiff's income for the year 1911, under c. 658, Wisconsin Laws 1911. The Supreme Court overruled plaintiff's contention that the portion of the tax that was in controversy, having been imposed upon income derived by plaintiff from interstate commerce, amounted to a burden upon that commerce, contravening the commerce clause of § 8 of Article 1 of the Constitution of the United States. 161 Wisconsin, 211. And this is the sole question presented for our consideration.

The act, which was passed under the authority of an amendment to the state constitution (*Income Tax Cases*, 148 Wisconsin, 456), imposes a tax upon incomes received during the year ending December 31, 1911, and annually thereafter; defines the term "income" as including (a) rent of real estate; (b) interest derived from money loaned or invested in notes, mortgages, bonds, or other evidences of debt; (c) wages, salaries, and the like; (d) dividends or profits derived from stock, or from the purchase and sale of property acquired within three years previous, or from any business whatever; (e) royalties derived from the possession or use of franchises or legalized privileges; and (f) all other income derived from any source, except such as is exempted. There is a provision, "That any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is

derived from business transacted and property located within the state," which is to be determined in a particular manner specified in § 1770b, as far as applicable.

Corporations are allowed to make certain deductions from gross income, including amounts paid for personal services of officers and employees and other ordinary expenses paid out of income in the maintenance and operation of business and property, including a reasonable allowance for depreciation, losses not compensated for by insurance or otherwise, taxes, etc. These need not be further mentioned, beyond saying that the intent and necessary effect of the act is to tax not gross receipts but net income; that from the stipulated facts it appears that the tax in question was imposed upon plaintiff's net income; and that this is in accord with the construction of the act adopted by the supreme court of the State in this and other cases. *State ex rel. Manitowoc Gas Co.* v. *Wisconsin Tax Commission*, 161 Wisconsin, 111, 116; *United States Glue Co.* v. *Oak Creek* (the present case), 161 Wisconsin, 211, 221; *State ex rel. Bundy* v. *Nygaard*, 163 Wisconsin, 307, 310.

In order to determine what part of the income of a corporation engaged in business within and without the State (other than that derived from rentals, stocks, bonds, securities, etc.) is to be taxed as derived from business transacted and property located within the State, reference is had to a formula prescribed by another statute [§ 1770b, subsec. 7, par. (e) of Wisconsin Stats.] for apportioning the capital stock of foreign corporations, under which the gross business in dollars of the corporation in the State, added to the value in dollars of its property in the State, is made the numerator of a fraction of which the denominator consists of the total gross business in dollars of the corporation both within and without the State, added to the value in dollars of its property within and without the State. The resulting fraction is taken by the income tax law as representing the

proportion of the income which is deemed to be derived from business transacted and property located within the State. This formula was applied in apportioning plaintiff's net "business income" for the year 1911, and upon the portion thus attributed to the State, plus the income from rentals, stocks, bonds, etc., the tax in question was levied.

Plaintiff was and is a corporation organized under the laws of the State of Wisconsin, having its principal office and place of business in the Town of Oak Creek, where it conducted an extensive manufacturing plant, selling its products throughout the State and in other States and foreign countries. Its net "business income" in the year 1911, exclusive of that derived from rentals, stocks, bonds, etc., and after making the deductions allowed by the act, amounted to about $124,000, derived from the following sources: (a) about $16,000 from goods sold to customers within the State and delivered from its factory; (b) about $65,000 from goods sold to customers outside of the State and delivered from its factory; (c) about $31,000 from goods sold to customers outside of the State, the sales having been made and goods shipped from plaintiff's branches in other States, and the goods having been manufactured at plaintiff's factory and shipped before sale to said branches; (d) about $7,000 from goods sold to customers outside of the State, the sales having been made and goods shipped from plaintiff's branches without the State, these goods having been purchased by plaintiff outside of the State and shipped to plaintiff's factory in the State, and thence shipped before sale from the factory to the branches; (e) about $5,000 from goods sold outside of the State, the sales having been made and goods shipped from said branches, and the goods having been purchased by plaintiff outside of the State and shipped from the points of purchase to the branches without coming into the State of Wisconsin.

No contention was made as to the taxability of the income designated in item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the State was upheld by the state courts. Thus the controversy is narrowed to the contention, overruled by the supreme court, that items (b) and (c) were not taxable because derived from interstate commerce.

Stated concisely, the question is whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States.

It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. Thus, it was declared in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695–696: "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right

to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." Again, in *Atlantic & Pacific Telegraph Co.* v. *Philadelphia*, 190 U. S. 160, 163, the court upon a review of numerous previous cases laid down certain propositions as established, among them these: (a) that the immunity of an individual or corporation engaged in interstate commerce from state regulation does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce; and (b) that the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise be not derived from the United States. See, also, *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 365.

Yet it is obvious that taxes imposed upon property or franchises employed in interstate commerce must be paid from the net returns of such commerce, and diminish them in the same sense that they are diminished by a tax imposed upon the net returns themselves.

The distinction between direct and indirect burdens, with particular reference to a comparison between a tax upon the gross returns of carriers in interstate commerce and a general income tax imposed upon all inhabitants incidentally affecting carriers engaged in such commerce, was the subject of consideration in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 345, where the court, by Mr. Justice Bradley, said: "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of

the Federal government." Many previous cases were referred to.

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in *Peck & Co.* v. *Lowe*, *ante*, 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and inci-

dental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.

And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, can not be deemed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the State are taxed upon that proportion of their income derived from business transacted and property located within the State, whatever the nature of their business.

Judgment affirmed.

MR. CHIEF JUSTICE WHITE concurs in the result.

SOUTHERN PACIFIC COMPANY *v.* LOWE, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK.

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

No. 452. Argued March 4, 5, 6, 1918.—Decided June 3, 1918.

Accumulations that accrued to a corporation through surplus earnings or appreciation in property value, before the adoption of the Sixteenth Amendment (February, 1913), and the effective date (March, 1913), of the Income Tax Act of 1913 (Act October 3, 1913, c. 16, 38 Stat. 166), are to be regarded as its capital, not as its income for the purposes of that act.

Although, in general, the Income Tax Act of 1913, unlike that of June 30, 1864, treated corporate earnings as not accruing to the shareholders until the time when a dividend was paid (*Lynch* v. *Hornby*, *post*, 339), and although in ordinary cases the mere accumulation of adequate surplus does not entitle a shareholder to dividends until the directors, in their discretion, declare them, yet, where the shares of a corporation were all owned, and its property and funds possessed, and its operations and affairs completely dominated, by another corporation, so that the two were in substance but one, and where dividends from the one to the other were consummated, after the Act of 1913 became effective, by a mere paper transaction—formal vote of the directors of the first company and entries on the books of the two—and represented merely what the second company was entitled to have as shareholder before January 1, 1913, from a surplus theretofore accumulated, *held*, that such dividends were not taxable as income of the shareholding company within the true intent and meaning of the Income Tax Act of 1913.

238 Fed. Rep. 847, reversed.

THE case is stated in the opinion.

Mr. Gordon M. Buck for plaintiff in error.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for defendant in error.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case presents a question arising under the Federal Income Tax Act of October 3, 1913, c. 16, 38 Stat. 114, 166. Suit was brought by plaintiff in error against the Collector to recover taxes assessed against it and paid under protest. There were two causes of action, of which only the second went to trial, it having been stipulated that the trial of the other might be postponed until the final determination of this one. So far as it is presented to us, the suit is an effort to recover a tax imposed upon certain dividends upon stock, in form received by the plaintiff from another corporation in the early part of the year 1914, and alleged by the plaintiff to have been paid out of a surplus accumulated not only prior to the effective date of the act but prior to the adoption of the Sixteenth Amendment to the Constitution of the United States. The District Court directed a verdict and judgment in favor of the Collector, 238 Fed. Rep. 847, and the case comes here by direct writ of error under § 238, Judicial Code, because of the constitutional question. That our jurisdiction was properly invoked is settled by *Towne* v. *Eisner*, 245 U. S. 418, 425.

The case was submitted at the same time with several other cases arising under the same act and decided this day, viz., *Lynch* v. *Turrish*, *ante*, 221; *Lynch* v. *Hornby*, *post*, 339, and *Peabody* v. *Eisner*, *post*, 347.

The material facts are as follows: Prior to January 1, 1913, and at all times material to the case, plaintiff, a

corporation organized under the laws of the State of Kentucky, owned all the capital stock of the Central Pacific Railway Company, a corporation of the State of Utah, including the stock registered in the names of the directors.[1] This situation existed continuously from the incorporation of the Railway Company in the year 1899. That company is the successor of the Central Pacific Railroad Company and acquired all of its properties, which constitute a part of a large system of railways owned or controlled by the Southern Pacific Company. The latter company, besides being sole stockholder, was in the actual physical possession of the railroads and all other assets of the Railway Company, and in charge of its operations, which were conducted in accordance with the terms of a lease made by the predecessor company to the Southern Pacific and assumed by the Railway Company, the effect of which was that the Southern Pacific should pay to the lessor company $10,000 per annum for organization expenses, should operate the railroads, branches, and leased lines belonging to the lessor, and account annually for the net earnings, and if these exceeded 6 per cent. on the existing capital stock of the lessor the lessee should retain to itself one-half of the excess; advances by the lessee for account of the lessor were to bear lawful interest, and the lessee was to be entitled at any time and from time to time to refund to itself its advances and interest out of any net earnings which might be in its hand. The provisions of the lease were observed by both corporations for bookkeeping purposes. The Southern Pacific acted as cashier and banker for the entire system; the Central Pacific kept no bank account, its earnings being deposited with the bank account of the Southern Pacific; and if the

[1] There was another question, concerning a dividend paid by the Reward Oil Company, whose stock likewise was owned by the Southern Pacific Company, but the contention of plaintiff in error respecting this item has been abandoned.

Central Pacific needed money for additions and betterments or for making up a deficit of current earnings, the necessary funds were advanced by the Southern Pacific. As a result of these operations and of the conversion of certain capital assets of the Central Pacific Company, that company showed upon its books a large surplus accumulated prior to January 1, 1913, principally in the form of a debit against the Southern Pacific, which at the same time, as sole stockholder, was entitled to any and all dividends that might be declared, and being in control of the board of directors was able to and did control the dividend policy. The dividends in question were declared and paid during the first six months of the year 1914 out of this surplus of the Central Pacific accumulated prior to January 1, 1913; but the payment was only constructive, being carried into effect by bookkeeping entries which simply reduced the apparent surplus of the Central Pacific and reduced the apparent indebtedness of the Southern Pacific to the Central Pacific by precisely the amount of the dividends.

The question is whether the dividends received under these circumstances and in this manner by the Southern Pacific Company were taxable as income of that company under the Income Tax Act of 1913.[1]

The act provides in § II, paragraph A, subdivision 1 (38 Stat. 166): "That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year" to every person residing in the United States a tax of 1 per centum per annum, with exceptions not now

[1] In addition, a question was made in the District Court as to a special dividend declared by the Central Pacific out of the proceeds of sale of certain land on Long Island, taken in satisfaction of a debt and sold in December, 1913. As to this, however, no argument is submitted by plaintiff in error, the facts are not clear, and we pass it without consideration.

material. By paragraph G (a) (p. 172), it is provided: "That the normal tax hereinbefore imposed upon individuals [1 per cent.] likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation . . . organized in the United States," with other provisions not now material.

It is provided in paragraph G (b), as to domestic corporations, that such net income shall be ascertained by deducting from the gross amount of the income of the corporation (1) ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals and the like; (2) losses sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any, and in the case of mines a certain allowance for depletion of ores and other natural deposits; (3) interest accrued and paid within the year upon indebtedness of the corporation, within prescribed limits; (4) national and state taxes paid. It will be observed that moneys received as dividends upon the stock of other corporations are not deducted, as they are in computing the income of individuals for the purpose of the normal tax under this act (p. 167), and as they were in computing the income of a corporation under the Excise Tax Act of August 5, 1909, c. 6, 36 Stat. 11, 113, § 38.

By paragraph G (c), the tax upon corporations is to be computed upon the entire net income accrued within each calendar year but for the year 1913 only upon the net income accrued from March 1 to December 31, to be ascertained by taking five-sixths of the entire net income for the calendar year.

The purpose to refrain from taxing income that accrued prior to March 1, 1913, and to exclude from con-

sideration in making the computation any income that accrued in a preceding calendar year, is made plain by the provision last referred to; indeed, the Sixteenth Amendment, under which for the first time Congress was authorized to tax income from property without apportioning the tax among the States according to population, received the approval of the requisite number of States only in February, 1913. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; 158 U. S. 601, 637; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 16.

We must reject in this case, as we have rejected in cases arising under the Corporation Excise Tax Act of 1909 (*Doyle* v. *Mitchell Brothers Co.*, *ante*,179, and *Hays* v. *Gauley Mountain Coal Co.*, *ante*, 189) the broad contention submitted in behalf of the Government that all receipts—everything that comes in—are income within the proper definition of the term "gross income," and that the entire proceeds of a conversion of capital assets, in whatever form and under whatever circumstances accomplished, should be treated as gross income. Certainly the term "income" has no broader meaning in the 1913 Act than in that of 1909 (see *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 416, 417), and for the present purpose we assume there is no difference in its meaning as used in the two acts. This being so, we are bound to consider accumulations that accrued to a corporation prior to January 1, 1913, as being capital, not income, for the purposes of the act. And we perceive no adequate ground for a distinction, in this regard, between an accumulation of surplus earnings, and the increment due to an appreciation in value of the assets of the taxpayer.

That the dividends in question were paid out of a surplus that accrued to the Central Pacific prior to January 1, 1913, is undisputed; and we deem it to be equally clear that this surplus accrued to the Southern Pacific Company prior to that date, in every substantial sense

pertinent to the present inquiry, and hence underwent nothing more than a change of form when the dividends were declared.

We do not rest this upon the view that for the purposes of the Act of 1913 stockholders in the ordinary case have the same interest in the accumulated earnings of the company before as after the declaration of dividends. The act is quite different in this respect from the Income Tax Act of June 30, 1864, c. 173, 13 Stat. 223, 281, 282, under which this court held, in *Collector* v. *Hubbard*, 12 Wall. 1, 16, that an individual was taxable upon his proportion of the earnings of the corporation although not declared as dividends. That decision was based upon the very special language of a clause of § 117 of the act (13 Stat. 282) that "the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise." The Act of 1913 contains no similar language, but on the contrary deals with dividends as a particular item of income, leaving them free from the normal tax imposed upon individuals, subjecting them to the graduated surtaxes only when received as dividends (38 Stat. 167, paragraph B), and subjecting the interest of an individual shareholder in the undivided gains and profits of his corporation to these taxes only in case the company is formed or fraudulently availed of for the purpose of preventing the imposition of such tax by permitting gains and profits to accumulate instead of being divided or distributed.[1] Our view of the effect of this act upon

[1] "For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed

dividends received by the ordinary stockholder after it took effect but paid out of a surplus that accrued to the corporation before that event, is set forth in *Lynch* v. *Hornby*, *post*, 339.

We base our conclusion in the present case upon the view that it was the purpose and intent of Congress, while taxing "the entire net income arising or accruing from all sources" during each year commencing with the first day of March, 1913, to refrain from taxing that which, in mere form only, bore the appearance of income accruing after that date, while in truth and in substance it accrued before; and upon the fact that the Central Pacific and the Southern Pacific were in substance identical because of the complete ownership and control which the latter possessed over the former, as stockholder and in other capacities. While the two companies were separate legal entities, yet in fact, and for all practical purposes they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control. And, besides, the funds represented by the dividends were in the actual possession and control of the Southern Pacific as well before as after the declaration of the dividends. The fact that the books were kept in accordance with the provisions of the lease, so that these funds appeared upon

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of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation . . . is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be *prima facie* evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business." (38 Stat. 166, 167.)

the accounts as an indebtedness of the lessee to the lessor, cannot be controlling, in view of the practical identity between lessor and lessee. Aside from the interests of creditors and the public—and there is nothing to suggest that the interests of either were concerned in the disposition of the surplus of the Central Pacific—the Southern Pacific was entitled to dispose of the matter as it saw fit. There is no question of there being a surplus to warrant the dividends at the time they were made, hence any speculation as to what might have happened in case of financial reverses that did not occur is beside the mark.

It is true that in ordinary cases the mere accumulation of an adequate surplus does not entitle a stockholder to dividends until the directors in their discretion declare them. *New York, Lake Erie & Western Railroad* v. *Nickals*, 119 U. S. 296, 306; *Gibbons* v. *Mahon*, 136 U. S. 549, 558. And see *Humphreys* v. *McKissock*, 140 U. S. 304, 312. But this is not the ordinary case. In fact the discretion of the directors was affirmatively exercised by declaring dividends out of the surplus that was accumulated prior to January 1, 1913; it does not appear that any other fair exercise of discretion was open; and the complete ownership and right of control of the Southern Pacific at all times material makes it a matter of indifference whether the vote was at one time or another. Under the circumstances, the entire matter of the declaration and payment of the dividends was a paper transaction to bring the books into accord with the acknowledged rights of the Southern Pacific; and so far as the dividends represented the surplus of the Central Pacific that accumulated prior to January 1, 1913, they were not taxable as income of the Southern Pacific within the true intent and meaning of the Act of 1913.

The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been

raised. *Pullman Car Co.* v. *Missouri Pacific Ry. Co.*, 115 U. S. 587, 596; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 391.

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

Mr. Justice Clarke dissents.

LYNCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA, *v.* HORNBY.

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

No. 422. Argued March 4, 5, 6, 1918.—Decided June 3, 1918.

The Income Tax Act of October 3, 1913, c. 16, 38 Stat. 166, drew a distinction between a shareholder's undivided interest in the gains and profits of a corporation prior to declaration of a dividend, and his participation in the dividends declared and paid; treating the latter, in ordinary circumstances, as part of his income for the purpose of the "surtax," and not regarding the former as taxable to him unless fraudulently accumulated to evade the tax.

Under the Sixteenth Amendment, Congress may tax without apportionment dividends received in the ordinary course by a shareholder from a corporation, even though extraordinary in amount and derived from a surplus of corporate assets existing before the Amendment.

Under the Income Tax Act of 1913, dividends declared and paid in the ordinary course by a corporation to its shareholders after March 1, 1913, whether from current earnings or from a surplus accumulated before that date, were taxable to the individual shareholders as income, under the "surtax" provision. *Lynch* v. *Turrish*, *ante*, 221, and *Southern Pacific Co. v. Lowe*, *ante*, 330, distinguished.

236 Fed. Rep. 661, reversed.

The case is stated in the opinion.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for petitioner.

Mr. A. W. Clapp, with whom *Mr. N. H. Clapp*, *Mr. H. Oldenburg* and *Mr. H. J. Richardson* were on the brief, for respondent.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

Hornby, the respondent, recovered a judgment in the United States District Court against Lynch, as Collector of Internal Revenue, for the return of $171, assessed as an additional income tax under the Act of October 3, 1913, c. 16, 38 Stat. 114, 166, and paid under protest. The Circuit Court of Appeals affirmed the judgment, 236 Fed. Rep. 661, and the case comes here on certiorari. It was submitted at the same time with *Lynch* v. *Turrish*, *ante*, 221; *Southern Pacific Co.* v. *Lowe*, *ante*, 330; and *Peabody* v. *Eisner*, *post*, 347, arising under the same act, and this day decided.

The facts, in brief, are as follows: Hornby, from 1906 to 1915, was the owner of 434 (out of 10,000) shares of the capital stock of the Cloquet Lumber Company, an Iowa corporation, which for more than a quarter of a century had been engaged in purchasing timber lands, manufacturing the timber into lumber and selling it. Its shares had a par value of $100 each, making the entire capital stock $1,000,000. On and prior to March 1, 1913, by the increase of the value of its timber lands and through its business operations, the total property of the company had come to be worth $4,000,000, and Hornby's stock, the par value of which was $43,400, had become

worth at least $150,000. In the year 1914 the company was engaged in cutting its standing timber, manufacturing it into lumber, selling the lumber, and distributing the proceeds among its stockholders. In that year it thus distributed dividends aggregating $650,000, of which $240,000, or 24 per cent. of the par value of the capital stock, was derived from current earnings, and $410,000 from conversion into money of property that it owned or in which it had an interest on March 1, 1913. Hornby's share of the latter amount was $17,794, and this not having been included in his income tax return, the Commissioner of Internal Revenue levied an additional tax of $171 on account of it, and this forms the subject of the present suit.

The case was tried in the District Court and argued in the Circuit Court of Appeals together with *Lynch* v. *Turrish*, (236 Fed. Rep. 653), and was treated as presenting substantially the same question upon the merits. In our opinion it is distinguishable from the *Turrish Case*, where the distribution in question was a single and final dividend received by Turrish from the Payette Company in liquidation of the entire assets and business of the company and a return to him of the value of his stock upon the surrender of his entire interest in the company, at a price that represented its intrinsic value at and before March 1, 1913, when the Income Tax Act took effect.

In the present case there was no winding up or liquidation of the Cloquet Lumber Company, nor any surrender of Hornby's stock. He was but one of many stockholders, and had but the ordinary stockholder's interest in the capital and surplus of the company, that is, a right to have them devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion might declare. *Gibbons* v. *Mahon*, 136 U. S. 549, 557. The operations of this company in the year 1914

were, according to the facts pleaded, of a nature essentially like those in which it had been engaged for more than a quarter of a century. The fact that they resulted in converting into money, and thus setting free for distribution as dividends a part of its surplus assets accumulated prior to March 1, 1913, does not render Hornby's share of those dividends any the less a part of his income within the true intent and meaning of the act, the pertinent language of which is as follows (38 Stat. 166, 167):

"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, . . . and to every person residing in the United States, . . . a tax of 1 per centum per annum upon such income, except as hereinafter provided; . . .

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service . . . , also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

Among the deductions allowed for the purpose of the normal tax is "seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, . . . which is taxable upon its net income as hereinafter provided." There is a graduated additional tax, commonly known as a "surtax," upon net income in excess of $20,000, including income from dividends, and for the purpose of this additional tax "the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations . . . formed or fraudulently

availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed."

It is evident that Congress intended to draw and did draw a distinction between a stockholder's undivided share or interest in the gains and profits of a corporation, prior to the declaration of a dividend, and his participation in the dividends declared and paid; treating the latter, in ordinary circumstances, as a part of his income for the purposes of the surtax, and not regarding the former as taxable income unless fraudulently accumulated for the purpose of evading the tax.

This treatment of undivided profits applies only to profits permitted to accumulate after the taking effect of the act, since only with respect to these is a fraudulent purpose of evading the tax predicable. Corporate profits that accumulated before the act took effect stand on a different footing. As to these, however, just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a prëexisting surplus. The act took effect on March 1, 1913, a few days after the requisite number of States had given approval to the Sixteenth Amendment, under which for the first time Congress was empowered to tax income from property without apportioning the tax among the States according to population. *Southern Pacific Co.* v. *Lowe, supra.* That the retroactivity of the act from the date of its passage (October 3, 1913) to a date not prior to the adoption of the Amendment was permissible is settled by *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 20. And we deem it equally clear that Con-

gress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing. Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation. The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him *ab extra*, and as constituting a part of his income when they came to hand.

Hence we construe the provision of the act that "the net income of a taxable person shall include gains, profits, and income derived from . . . interest, rent, dividends, . . . or gains or profits and income derived from any source whatever" as including (for the purposes of the additional tax) all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913. In short, the word "dividends" was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the in-

terest and rent received upon other forms of invested capital.

In the more recent Income Tax Acts, provisions have been inserted for the purpose of excluding from the effect of the tax any dividends declared out of earnings or profits that accrued prior to March 1, 1913. This originated with the Act of September 8, 1916, and has been continued in the Act of October 3, 1917.[1] We are referred to the legislative history of the Act of 1916, which it is contended indicates that the new definition of the term "dividends" was intended to be declaratory of the mean-

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[1] In Act of September 8, 1916, c. 463, 39 Stat. 756, 757, which took the place of the Act of 1913, the substance of what we have quoted from paragraph B of the 1913 Act was embodied in § 2 (a), but with this proviso: "*Provided*, That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation . . . *out of its earnings or profits accrued since March first, nineteen hundred and thirteen*, and payable to its shareholders, whether in cash or in stock of the corporation," etc. And by the Act of October 3, 1917, c. 63, 40 Stat. 300, 329, 337–8, § 2 (a) of the 1916 Act was amended by being repeated without the proviso (p. 329), while the proviso was inserted as a new section—31 (a)—and to it was added a subsection, (b), as follows:

"(b) Any distribution made to the shareholders or members of a corporation . . . in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, . . . but *nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen*, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March first, nineteen hundred and thirteen, has been made. This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings or profits accrued prior to March first, nineteen hundred and thirteen."

ing of the term as used in the 1913 Act. We cannot accept this suggestion, deeming it more reasonable to regard the change as a concession to the equity of stockholders granted in the 1916 Act, in view of constitutional questions that had been raised in this case, in the companion case of *Lynch* v. *Turrish*, and perhaps in other cases. These two cases were commenced in October, 1915; and decisions adverse to the tax were rendered in the District Court in January, 1916, and in the Circuit Court of Appeals September 4, 1916.

We repeat that under the 1913 Act dividends declared and paid in the ordinary course by a corporation to its stockholders after March 1, 1913, whether from current earnings or from a surplus accumulated prior to that date, were taxable as income to the stockholder.

We do not overlook the fact that every dividend distribution diminishes by just so much the assets of the corporation, and in a theoretical sense reduces the intrinsic value of the stock. But, at the same time, it demonstrates the capacity of the corporation to pay dividends, holds out a promise of further dividends in the future, and quite probably increases the market value of the shares. In our opinion, Congress laid hold of dividends paid in the ordinary course as *de facto* income of the stockholder, without regard to the ultimate effect upon the corporation resulting from their payment.

Of course we are dealing here with the ordinary stockholder receiving dividends declared in the ordinary way of business. *Lynch* v. *Turrish* and *Southern Pacific Co.* v. *Lowe*, rest upon their special facts and are plainly distinguishable.

It results from what we have said that it was erroneous to award a return of the tax collected from the respondent, and that the judgment should be

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

PEABODY *v.* EISNER, COLLECTOR OF INTERNAL REVENUE.

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

No. 705. Argued March 4, 5, 6, 1918.—Decided June 3, 1918.

A dividend received by a shareholder after, from surplus profits of the corporation existing before, March 1, 1913, was subject to the "surtax" under the Income Tax Act of 1913. *Lynch* v. *Hornby*, *ante*, 339.

A dividend by a corporation of shares owned by it in another corporation is not a stock dividend and is subject to the tax, like an equivalent distribution of money. *Towne* v. *Eisner*, 245 U. S. 418, distinguished.

Affirmed.

THE case is stated in the opinion.

Mr. Henry W. Clark for plaintiff in error.

The Solicitor General, with whom *Mr. Wm. C. Herron* was on the brief, for defendant in error.

Mr. Robert R. Reed, by leave of court, filed a brief on behalf of the Investment Bankers' Association of America, as *amicus curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case arose under the Federal Income Tax Act of October 3, 1913, c. 16, 38 Stat. 114, 166. The controversy is over the first cause of action set up by plaintiff in error in a suit against the Collector for the recovery of an additional tax exacted in respect of a certain dividend

received by plaintiff in the year 1914, the facts being as follows: On and prior to March 1, 1913, and thenceforward until payment of the dividend in question, plaintiff was owner of 1,100 shares (out of a total of 2,000,000 shares outstanding) of common stock of the Union Pacific Railroad Company, of the par value of $100 each, and during the same period the company had large holdings of the common and preferred stocks of the Baltimore & Ohio Railroad Company. On March 2, 1914, the Union Pacific declared and paid an extra dividend upon each share of its common stock, amounting to $3 in cash, $12 in par value of preferred stock of the Baltimore & Ohio, and $22.50 in par value of the common stock of the same company; the result being that petitioner received as his dividend upon his holding of Union Pacific common stock $3,300 in cash, 132 shares of Baltimore & Ohio preferred and 247½ shares of Baltimore & Ohio common stock. In his income return for 1914 he included as taxable income $4.12 per share of this dividend, or $4,532 in all, and paid his tax upon the basis of this return. Afterwards he was subjected to an additional assessment upon a valuation of the balance of his dividend, and this, having been paid under protest, is the subject of the present suit, the theory of which is that the entire earnings, income, gains, and profits from all sources realized by the Union Pacific Railroad Company from March 1, 1913, to March 2, 1914, remaining after the payment of prior charges, did not exceed $4.12 per share of the Union Pacific common stock, and that the cash and Baltimore & Ohio stock disposed of in the extra dividend (so far as they exceeded the value of $4.12 per share of Union Pacific) did not constitute a gain, profit, or income of the Union Pacific, and therefore did not constitute a gain, profit, or income of the plaintiff arising or accruing either in or for the year 1914 or for any period subsequent to March 1, 1913, the date when the Income

Tax Law took effect. The District Court overruled this contention upon the authority of *Southern Pacific Co.* v. *Lowe*, 238 Fed. Rep. 847, and *Towne* v. *Eisner*, 242 Fed. Rep. 702. The latter case has since been reversed (245 U. S. 418), but only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest. *Southern Pacific Co.* v. *Lowe*, has been reversed this day, *ante*, 330, but only upon the ground that the Central Pacific Railway Company, which paid the dividend, and the Southern Pacific Company, which received it, were in substance identical corporations because of the complete ownership and control which the latter possessed over the former as stockholder and in other capacities, so that while the two companies were separate legal entities, yet in fact and for all practical purposes the former was but a part of the latter, acting merely as its agent and subject in all things to its direction and control; and for the further reason that the funds represented by the dividend were in the actual possession and control of the Southern Pacific Company as well before as after the declaration of the dividend. In this case the plaintiff in error stands in the position of the ordinary stockholder, whose interest in the accumulated earnings and surplus of the company are not the same before as after the declaration of a dividend; his right being merely to have the assets devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors in their discretion may declare; and without right or power on his part to control that discretion.

It hardly is necessary to say that this case is not ruled by our decision in *Towne* v. *Eisner*, since the dividend of Baltimore & Ohio shares was not a stock dividend but

a distribution *in specie* of a portion of the assets of the Union Pacific, and is to be governed for all present purposes by the same rule applicable to the distribution of a like value of money. It is controlled by *Lynch* v. *Hornby*, this day decided, *ante*, 339.

Judgment affirmed.

SUNDAY LAKE IRON COMPANY *v.* TOWNSHIP OF WAKEFIELD.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 38. Argued November 9, 1917.—Decided June 3, 1918.

An unequal tax assessment cannot be held in violation of the equal protection clause of the Fourteenth Amendment, where a purpose of the assessing board to discriminate is not clearly established and where the discrimination may be attributed to an honest mistake of judgment and lack of time and evidence for making general revaluations when objection was made.

The good faith of tax assessors and the validity of their acts are presumed; when assailed the burden of proof is upon the complaining party.

186 Michigan, 626, affirmed.

THE case is stated in the opinion.

Mr. Horace Andrews, with whom *Mr. William P. Belden* was on the briefs, for plaintiff in error:

The question of assessing other property was brought to the attention of the State Board at the earliest opportunity in connection with the holding of the special review ordered by the board. It knew of the general under-assessment of property in the district, and had ac-

cess to information sufficient for its guidance in adjusting and equalizing the values. It is no answer to say that no notice had been given of the purpose of the board to hold a general review. Since it had knowledge of the general under-valuation, it should either have called a meeting for a general review, where all property could have been raised justly and relatively in the same proportion, or it should have waited until such time as it could do this in a manner satisfactory to itself. If lack of time can operate as an excuse for failure to treat taxpayers equally under the law, then taxing and other officers can with impunity deny the equal protection of the law to the citizens of a State. On principle, the action of the board was violative of the plaintiff's constitutional rights. It resulted in taking from it thousands of dollars which it did not rightfully owe. Lack of time to make a proper assessment cannot justify such a wrong.

The plaintiff does not seek relief because of the over-assessment of its property. It complains because the Board of State Tax Commissioners raised the assessed value of its property to 100 per cent., while it knowingly left other property generally in the tax district assessed at $33^1/_3$ per cent. of its value. The board, like any individual, is presumed to have intended all the natural consequences of its acts. It intended, therefore, to assess the plaintiff's property on a basis three times as high as the property generally in the taxing district—on a basis which was not just and equal, and to cause it to pay more than its fair and ratable share of taxes.

Cases wherein the complaint was as to the unreasonable amount of the assessment—that the taxing officers had gone too far in the matter admittedly within their discretion and had assessed the property too high—are here irrelevant.

The board had no discretion or jurisdiction to change the assessment of plaintiff's property so as to make it

relatively three times as high as all other assessments. It was an arbitrary act.

Mr. James A. O'Neill for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This is a writ of error to a state court and the only matter for our consideration is the claim that contrary to the Fourteenth Amendment plaintiff in error was denied equal protection of the laws by the State Board of Tax Assessors which assessed its property for 1911 at full value, whereas other lands throughout the county were generally assessed at not exceeding one-third of their actual worth. Proceeding in entire good faith, an inexperienced local assessor adopted the valuation which his predecessor had placed upon the company's property —$65,000.00; the County Board of Review approved his action. Reviewing this in the light of a subsequent detailed report by experts appointed under a special act of the legislature passed in April, 1911, to appraise all mining properties, the State Board raised the assessment to $1,071,000.00; but, because of alleged lack of time and inadequate information, it declined to order a new and general survey of values or generally to increase other assessments, notwithstanding plaintiff in error represented and offered to present evidence showing that they amounted to no more than one-third of true market values.

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of

other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 35, 37. It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. *Head Money Cases*, 112 U. S. 580, 595; *Pittsburgh &c. Ry. Co.* v. *Backus*, 154 U. S. 421, 435; *Maish* v. *Arizona*, 164 U. S. 599, 611; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 229; *New York State* v. *Barker*, 179 U. S. 279, 284, 285; *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 608; *Chicago, Burlington & Quincy Ry. Co.* v. *Babcock*, 204 U. S. 585, 597.

The record discloses facts which render it more than probable that plaintiff in error's mines were assessed for the year 1911 (but not before or afterwards) relatively higher than other lands within the county although the statute enjoined the same rule for all. But we are unable to conclude that the evidence suffices clearly to establish that the State Board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal. When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration nor was there sufficient evidence before the Board to justify immediate and general revaluations. The very next year a diligent and, so far as appears, successful effort was made to rectify any inequality. The judgment of the court below must be

Affirmed.

McCOY ET AL., EXECUTORS OF McCOY, *v.* UNION ELEVATED RAILROAD COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 190. Argued March 14, 15, 1918.—Decided June 3, 1918.

The contract clause relates to legislative, not to judicial, action impairing obligation of contracts.

In an action for damages to abutting property due to construction, maintenence and operation of an elevated railroad, in a street of which the fee was in the public, the state court held that recovery depended upon the effect on market value, in determining which increase of such value arising from increase of travel should be considered and treated as a special benefit, though enjoyed also by other neighboring property. *Held*, that there was no basis for invoking the equal protection clause, and that the ruling did not deprive of property without due process of law.

Where private property is taken for public purposes, the fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value under a rule of law which makes it impossible for him to obtain just compensation. There is no guarantee that the rule adopted by the State shall be the one best supported by reason or authority, or against mere errors in the course of the trial.

It is almost universally held that, in arriving at the amount of damages to property not taken, allowance should be made for peculiar and individual benefits conferred upon it, and it cannot be said that extension of the rule to include increase of market value resulting directly from the public improvement where all property in the neighborhood is similarly benefited deprives of the fundamental right protected by the Amendment.

271 Illinois, 490, affirmed.

THE case is stated in the opinion.

Mr. Harry S. Mecartney, with whom *Mr. John S. Miller* was on the briefs, for plaintiffs in error.

Mr. Francis W. Walker and *Mr. Roger L. Foote*, with whom *Mr. Addison L. Gardner* and *Mr. Randall W. Burns* were on the brief, for defendants in error.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

William A. McCoy, testator of plaintiffs in error, owned a hotel situated at the northwest corner of Clark and Van Buren Streets, Chicago. During 1897 defendants constructed along the latter street and in front of the building an elevated passenger railroad of the ordinary type and have continued to maintain and operate it. Charging that construction, maintenance and operation of the railroad had caused and would continue to cause injury to the property by noise, smoke, dirt, shutting off air and light, disturbing privacy and impairing the freedom of ingress and egress and that its market value had been greatly reduced, McCoy brought a common law action (September, 1902) in a state court to recover the entire damage.

The declaration does not allege plaintiff's ownership of the fee in the street, but asserts his interest in the lot and right to the "easements and privileges which legally appertain and rightfully belong to property abutting public streets" in Chicago, including the right of light, air, access, privacy, view, etc. Trial to a jury upon plea of not guilty, during February, 1914, resulted in verdict for defendants and judgment thereon was affirmed by the Supreme Court, a writ of error having been sued out by McCoy's executors. 271 Illinois, 490. That court's statement of facts follows:

"During the years 1896 and 1897 what is generally known as the 'loop' was constructed, under authority conferred by ordinances of the city of Chicago, for the joint use of the three systems above mentioned and an-

other elevated system then in course of construction. The loop consists of an elevated structure in the streets encircling the central portion of the business district of the city, upon which are laid tracks for the passage of the elevated trains of all of the defendant companies completely around the central portion of the business district. Before the construction of the loop the elevated trains of the defendant companies stopped at their respective terminals. The structure forming the south side of the loop was placed in that portion of Van Buren street extending from Wabash avenue on the east to Fifth avenue on the west, Clark street being one of the streets intersecting Van Buren street between these two avenues. Stations to permit passengers to board and leave the elevated trains were established at intervals around the loop and stairways were constructed leading from each station to the surface of the street. One of these stations in Van Buren street was established at La Salle street, about one hundred feet west from the McCoy Hotel, and another was established at Dearborn street, about three hundred feet east from the hotel. The elevated structure in Van Buren street obstructed the passage of light to the store rooms in McCoy's building, and the noise from the passage of trains over the structure and the fact that passing trains were on a level with the windows of the second floor of the building rendered the rooms on the south side of the second and third floors of the building less desirable for hotel purposes. Large upright columns supporting the elevated structure were placed just inside the curb in front of the premises and rendered the premises less accessible from the street.

"There is no material controversy over the facts in the case. The witnesses all agree that the matters above mentioned, when considered by themselves, would be detrimental to the premises. They also agree that there was a steady increase of from five to ten per cent. per year

in the value of the premises from the construction of the loop until 1905. It also appears from the evidence that the rents from the store rooms on the ground floor constantly increased after 1897. The plaintiff called but one real estate expert as a witness. He testified that the damages to the property from the construction of the elevated structure, and the operation of the trains thereon, amounted to $81,999, being fifteen per cent. of the value which the witness placed upon the interest of McCoy in the premises. He admitted that there had been a continuous increase in the value of the premises since the completion of the loop, and that a portion of that increase, which he said it was impossible to estimate, was due to the increased travel brought to the premises by the elevated railroad, but that he did not take that into consideration in fixing the damages. The real estate experts called by the defendants, on the other hand, testified that at least one-half of the increase in the value of the premises was due to the increased travel in front of the premises resulting from the operation of the elevated railroad in Van Buren street as a part of the loop. In support of the testimony of these witnesses defendants proved that the number of persons boarding the elevated trains at the La Salle street station, in Van Buren street, during the three months of the year 1897 in which trains were operated around the loop, was 161,763, and that the number constantly increased until in 1905 there was 3,659,583 persons who boarded the trains at that station. It was also shown that during the period in 1897 above mentioned 194,904 persons boarded the elevated trains at the Dearborn street station, in Van Buren street, and that the number constantly increased each year until in 1905 there were 2,558,976 persons who boarded the trains at that station."

During the trial, over plaintiff's objections, questions concerning evidence were determined in accordance with

repeated rulings by the Illinois Supreme Court that the effect of construction, maintenance and operation of an elevated road upon market value was the point for determination; and that increase in such value caused by the improvement itself should be considered and treated as a special benefit, although enjoyed by other neighborhood property.

Among others, plaintiff requested the following instructions:

"The jury are instructed that the constitution of this state provides that 'private property shall not be taken or damaged for public use without just compensation.' This action is brought by plaintiff for an alleged damage to the property of plaintiff arising from the construction [maintenance and operation] of the structure in the abutting street for elevated railroad purposes. Such damages in the eye of the law can only be a loss in the market value of the property arising from the said construction, [maintenance and operation] for the purposes aforesaid. Whether the premises in question have in fact been so damaged is for the jury to find from the evidence, according to the method and within the limitations of other instructions given you.

"The court instructs the jury that 'benefits' and 'damages' spoken of in the instruction mean benefits and damages to the market value thereof, and that by the term 'market value' of property, as used in these instructions, is meant the price at which the owner if desirous of selling, would under ordinary circumstances surrounding the sales of property have sold the property for, and what a person desirous as purchaser would have paid for it under the same circumstances."

"The jury are instructed that in considering the question of whether the premises in question were or were not damaged by the construction of the structure in the abutting street for elevated railroad purposes,

they are to exclude from consideration all benefit which accrued to the said premises or to the owners thereof by reason of improved travel facilities furnished by said elevated railroad."

The words "maintenance and operation" were inserted in the first of these requests and as thus amended it was given; the others were refused.

The following instructions were also given:

"The court instructs the jury that benefits and damages spoken of in these instructions mean benefits and damages to the fair cash market value thereof and that by the term fair cash market value of the property as used in these instructions is meant its value as determined by what it would sell for in the market for cash in the due course of business. This does not mean the price at which it would sell under special circumstances, but its value as sold in the market under ordinary circumstances for cash, and not on time, and assuming that the owner is willing and not compelled to sell and the purchaser is willing and under no compulsion to purchase."

"The jury is instructed that if you believe from the evidence that plaintiff's premises have been increased in their fair, cash, market value by the construction, maintenance and operation of defendants' said railroad, and if you also believe from the evidence that other property in the neighborhood of the plaintiff's premises not abutting upon the defendants' railroad have been likewise increased in their fair, cash, market value by the construction, maintenance and operation of said railroad, but to a greater extent than the plaintiff's said premises, you have no right from that fact to find that the plaintiff's premises have been damaged.

"Special benefits are such benefits as are special or peculiar to a particular piece of property, and which beneficially affect its fair, cash, market value, as distinguished from those benefits which are common to the

public at large, and which are termed general benefits; and you are instructed that in determining the effect of the construction, maintenance and operation of defendants' elevated railroad upon the fair, cash, market value of plaintiff's said premises, you are not to take into consideration any general benefits which you may believe from the evidence to have arisen out of the construction, maintenance and operation of said elevated railroad, but you should take into consideration special benefits, if any, shown by the evidence, to plaintiff's said premises from the construction, maintenance and operation of defendants' said elevated railroad.

"The jury is instructed that if you believe from the evidence that the property of the plaintiff described in the declaration of this case was enhanced in its fair, cash, market value by reason of the construction, maintenance and operation of the elevated railroad of the defendants, such increase in market value is a special benefit to the property of the plaintiff and not a general benefit, notwithstanding you may believe from the evidence that the other property in the vicinity of plaintiff's property also was enhanced in fair, cash, market value to a greater or less degree by reason of the construction, maintenance and operation of defendants' said elevated railroad."

"The jury is instructed that the measure of damages in a case of this kind is the difference between the fair, cash, market value of the premises with the elevated railroad constructed, maintained and operated in the street in front of it, and what the fair, cash, market value of said premises would have been had not said elevated railroad been so constructed, maintained and operated. If you believe from the evidence that the fair, cash, market value of the plaintiff's premises with the railroad constructed, maintained and operated in Van Buren street has not been diminished below what you believe

from the evidence the fair, cash, market value of said premises would have been if the said elevated railroad had not been constructed, maintained and operated in said street, then said plaintiff's premises have not been damaged by the construction, maintenance and operation of defendants' elevated railroad."

The Supreme Court said:

"The contention made by plaintiffs in error upon which most of the assignments of error depend is, that the benefits to the premises by reason of the increased travel in front of the premises resulting from the operation of the elevated railroad in Van Buren street as a part of the loop cannot be considered in determining whether the premises have been damaged by the construction of the elevated structure and the operation of trains thereon, first, because such benefits are general benefits, common to all the property in the vicinity; and second, because such benefits are conjectural and speculative. The same contention was made in *Brand* v. *Union Elevated Railroad Co.*, 258 Ill. 133, *Geohegan* v. *Union Elevated Railroad Co.*, 258 *id.* 352, and *Geohegan* v. *Union Elevated Railroad Co.*, 266 *id.* 482, and in each of those cases we held that such benefits should be considered in determining whether premises abutting on a public street have been damaged by the construction and operation of an elevated railroad in such street. The reasons for such holding were fully set forth in the opinions filed in the cases above mentioned and it would serve no useful purpose to repeat them here. It is sufficient to say that we adhere to the views expressed in the former cases involving the same question as is here presented. . . . Complaint is made of the action of the court in giving certain instructions on behalf of defendants in error and in refusing or modifying certain instructions submitted by complainant. . . . Moreover, the evidence in this case would not have sustained a verdict in favor of the plain-

tiff, and any error committed by the trial court in giving, refusing or modifying instructions was therefore harmless."

In their brief here counsel for plaintiffs in error declare:

"Plaintiff presented his case, therefore, upon the basis that his damage was to be estimated:

"(1) By taking the market value of the premises immediately before the advent of the Loop; then

"(2) To consider how the structure in question placed in the block upon which his premises abutted (which defined the 'physical' scope of his property or rights)—*forever dedicated to railroad uses and to be operated therefor*, would actually interfere with the *actual use and enjoyment* of the premises; and then

"(3) To estimate to what extent such structure put or dedicated to such use, would reduce that market value. That is, to *capitalize* the permanent *interference*, i. e., damage. (As laid down in Lewis, 3d Ed., § 693.)

"In the trial court the main conflict was waged over the question as to whether or not the court should admit on behalf of defendants evidence of 'general' or 'travel' benefits occurring from the establishment of the Loop in its *entirety*, or whether the evidence should be held down to the issue of 'direct, proximate and physical effect.' Said court, following the late ruling of the Illinois Supreme Court in *Brand* v. *Union Elev. R. R. Co.*, 258 Ill. 133 (a review of which was asked in this court in 238 U. S. 586, same title), tried the case upon the basis of allowing this special damage to be offset or reduced by, or considered in connection with the estimated amount of market benefit that accrued to the premises from 'travel benefits.'"

And they now maintain that the judgment below is erroneous because it (1) impairs the contract which their testator made when he purchased the property contrary to § 10, Article I, Federal Constitution, (2) denies to them

the equal protection of the laws and (3) deprives them of property without due process of law in violation of the Fourteenth Amendment. The first claim is clearly untenable; the contract clause prohibits legislative not judicial action. *Ross* v. *Oregon*, 227 U. S. 150, 161, 164; *Moore-Mansfield Co.* v. *Electrical Co.*, 234 U. S. 619, 623, 624; *Frank* v. *Mangum*, 237 U. S. 309, 344. Nothing in the record affords support for the second claim. The third demands consideration.

We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without such compensation then due process of law was denied him, contrary to Fourteenth Amendment. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 246; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 565; *Fayerweather* v. *Ritch*, 195 U. S. 276, 298. Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right. *Appleby* v. *Buffalo*, 221 U. S. 524, 532. And see *McGovern* v. *New York*, 229 U. S. 363, 371. And here it must be noted that the claim is for damages to property not actually taken from the owner's dominion.

The Illinois constitution provides: "private property shall not be taken or damaged for public use without just compensation." In *Peoria, Bloomington & Champaign Traction Co.* v. *Vance*, 225 Illinois, 270, 272, where the owner sought damages to the balance of his farm resulting from taking a right-of-way for an electric road, the court pointed out the applicable doctrine long established in the State. It said:

"Since the adoption of the constitution of 1870 it has

been uniformly held by this court, in such cases as this, that the measure of damages to land not taken is 'the difference in the fair cash market value of the land before and after the construction of the railroad,' or 'the amount, if any, which lands not taken will be depreciated in their fair cash market value by the construction and operation of the proposed road.' . . . Under the rule adopted in this State for determining whether, or in what amount, property not taken will be damaged by the construction and operation of a railroad, any benefits which are not conjectural or speculative, and which actually enhance the market value of such property, are to be considered as special benefits and not as general benefits, within the meaning of the rule that general benefits cannot be considered in determining whether, or in what amount, property not taken will be damaged. Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged, and if it has, the extent of the depreciation in value."

This doctrine was again expressly affirmed in *Brand* v. *Union Elevated R. R. Co.*, 258 Illinois, 133—a proceeding like the present one to recover damages caused by constructing, maintaining and operating an elevated railroad along the street. The trial court below accepted and applied the approved rule and we are now asked to declare that it absolutely disregards the owner's fundamental right to just compensation—that it necessarily deprives him of such compensation.

How far benefits must be considered in determining damages to property when claimed on account of a public improvement is a vexed question which has given occasion

for numberless decisions in different States, as well as much legislation. The matter is elaborately treated and the cases collected in Lewis on Eminent Domain and Nichols on Eminent Domain. In the former, § 687, 3d ed., it is said: "The decisions may be divided into five classes, according as they maintain one or the other of the following propositions: First. Benefits cannot be considered at all. Second. Special benefits may be set off against damages to the remainder, but not against the value of the part taken. Third. Benefits, whether general or special, may be set off as in the last proposition. Fourth. Special benefits may be set off against both damages to the remainder or the value of the part taken. Fifth. Both general and special benefits may be set off as in the last proposition." The latter work at § 256, 2d ed., says: "It is universally recognized that when there is no taking the damages to a tract of land from the construction of a public work cannot be correctly ascertained without determining whether the tract has been depreciated in value, and to determine this all the effects of the public work, beneficial or injurious, must be considered. Strictly speaking, it is said, it is not a question of benefits at all, except that proof of benefits might be one way of showing that there had been no injury. The real question is, had the property in question been decreased in market value by the construction of the public improvement, and the amount of damage is the decrease in such value. In most States however it is only special benefits that can be set off; but in the States which allow the set-off of general benefits to remaining land when part of a tract is taken, the same latitude is given in awarding damages when no land is taken."

The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation.

There is no guarantee that he shall derive a positive pecuniary advantage from a public work whenever a neighbor does. It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it—compensation to the owner in that form is permissible. And we are unable to say that he suffers deprivation of any fundamental right when a State goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

This subject was much discussed in *Bauman* v. *Ross*, 167 U. S. 548, 574, 584. Through Mr. Justice Gray we there said: "The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. . . . The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for pri-

vate property taken for public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken." See *Martin* v. *District of Columbia*, 205 U. S. 135.

The judgment below is

Affirmed.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY ET AL. *v.* HARRIS, ADMINISTRATRIX OF HARRIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 276. Argued April 30, 1918.—Decided June 3, 1918.

In actions against a railroad for injuries to employees resulting from its negligence, it has long been the rule of the federal courts that the negligence is to be established affirmatively by the plaintiff.

In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts; and negligence is essential to recovery.

Hence it is erroneous in such a proceeding to apply a state statute (Mississippi Code, 1906, § 1985, and Laws 1912, c. 215, p. 290),

making proof of injury by an engine propelled by steam *prima facie* evidence of a railroad's negligence in an action against it for damages.

Under the federal act, there is no cause of action for pain and suffering if the employee die of his injuries without regaining consciousness.

Under that act, no cause of action accrues for the benefit of a dependent mother where the deceased employee leaves a widow who, although she lived apart from him at the time of his death, was neither remarried nor divorced and where the rights and liabilities consequent upon their marriage had not ceased under the local law.

Reversed.

THE case is stated in the opinion.

Mr. J. Blanc Monroe with whom *Mr. Monte M. Lemann*, *Mr. Robert H. Thompson* and *Mr. L. E. Jeffries* were on the brief, for plaintiffs in error.

Mr. Thomas G. Fewell and *Mr. C. B. Cameron*, for defendant in error, submitted.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

While employed in interstate commerce by plaintiff in error, a common carrier by railroad then engaging in such commerce, Van Harris a brakeman was run over by the tender of an engine moving in the yard at New Orleans, Louisiana—February 5, 1914. He died within a few minutes without regaining consciousness. Having qualified as administratrix, his mother (defendant in error), charging negligence and relying upon the Federal Employers' Liability Act, sued for damages in a state court for Lauderdale County, Mississippi. A judgment in her favor was affirmed by the Supreme Court without opinion.

The declaration contained no averment of conscious pain or suffering by deceased. It alleged: "That by reason of the negligence hereinabove set out, the defendant railroad company is liable for the killing of said Van Harris and the administratrix is given the right to sue by the Act of Congress, she therefore brings this, her suit, and demands judgment against the defendant for the sum of ten thousand dollars." It further charged that the dead son had been his mother's sole support but contained no reference to his widow.

One witness who claimed to have seen the accident gave evidence tending to show negligence by the railroad; but his presence at the scene was not left free from doubt and other eye witnesses narrated the circumstances differently. Concerning deceased's contributions to his mother's support, she said he was her sole dependence, paid her house rent, gave her something to eat, looked after her, was regularly at work and would bring home thirty or forty dollars a month. Her statements are the only evidence concerning the son's marriage and widow. He duly married Mollie on an undisclosed date; after living together for six months he fell ill and she left; thereafter her whereabouts were unknown to him; she was alive at time of trial (October, 1914); he left no child. Nothing indicates a divorce proceeding. Answering "Do you know whether Mollie ever married anybody else or not?" the witness replied, "I don't know sir; I hear them say she married."

Upon request of the administratrix, the following instructions (among others) were given to the jury:

"No. 1. The court charges the jury for the plaintiff in this case that under the rule of evidence in the State of Mississippi all that is required of the plaintiff in this case is to prove that injury was inflicted by the movement of the defendant's train or engine and then the law presumes negligence and then the burden of proof shifts to the

defendant to prove all of the facts and circumstances surrounding the injury and from those facts so shown exonerate itself from all negligence.

"No. 2. The court charges the jury for the plaintiff that under the rule of evidence under the Mississippi statutes known as the *prima facie* statute all that the plaintiff need prove to entitle her to a judgment or verdict is that the defendant's engine or train caused the injury complained of and then the plaintiff is entitled to a verdict at the hands of the jury unless the defendant has shown all of the facts surrounding the injury and from such facts has shown by a preponderance of the evidence that its servants were not guilty of negligence.

"No. 3. The court charges the jury for the plaintiff that if you believe from the evidence that deceased was injured by the running of defendant's engine, then the burden placed on defendant by the *prima facie* statute cannot be met or overcome by mere speculation or conjecture, but it devolves on defendant the duty of showing by a preponderance of the evidence all of the facts and circumstances surrounding the injury and by such proof thus exonerate itself from negligence."

"No. 8. The court charges the jury for the plaintiff in this case that if your verdict shall be for the plaintiff then it should be in such sum as you may believe from the evidence would fully compensate the deceased for his pain and suffering, if any have been shown by the evidence, and the value of his life reckoned according to the American Mortality table had the deceased survived and that such amount or the measure of same is peculiarly within the province of the jury reckoned as above outlined. And that the law does not require the plaintiff to prove the damages in dollars and cents but the amount thereof is to be fixed by the jury in all not to exceed the sum of ten thousand dollars."

The so-called "Prima Facie Act" of Mississippi set

out below [1] provides, that in actions against railroads for damages proof of injury inflicted by an engine propelled by steam shall be *prima facie* evidence of negligence. Relying upon and undertaking to apply this statute, the trial court gave the quoted instructions; and in so doing, we think, committed error.

The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such neglegence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case*, 15 Wall. 524, 537; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 663; *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 487; *Southern Ry. Co.* v. *Bennett*, 233 U. S. 80, 85. In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 501, 502; *Southern Ry. Co.* v. *Gray*, 241 U. S. 333, 339; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 150; *Erie R. R. Co.* v. *Winfield*, 244

[1] Mississippi Code 1906, § 1985, as amended by c. 215, Laws 1912, p. 290.

"1985 (1808). *Injury to Persons or Property by Railroads Prima Facie Evidence of Want of Reasonable Skill and Care, etc.* In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be *prima facie* evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employes of railroad corporations and of such other corporations, companies, partnerships, and individuals."

U. S. 170, 172. These established principles and our holding in *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 511, 512, we think make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several States.

It was also error to give quoted instruction number eight. Since the deceased endured no conscious suffering he had no right of action; and possible recovery was limited to pecuniary loss sustained by the designated beneficiary. *Garrett* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 308, 312; *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 489.

The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother's pecuniary loss could not support a recovery.

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

Reversed.

CHELENTIS *v.* LUCKENBACH STEAMSHIP COMPANY, INCORPORATED.

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

No. 657. Argued April 18, 1918.—Decided June 3, 1918.

By the general maritime law, the vessel owner is liable only for the maintenance, cure and wages of a seaman injured in the service of his ship, by the negligence of a member of the crew, whether

a superior officer or not; and this liability is not subject to be enlarged to full common-law indemnity by the law of a State. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. So *held*, in a case brought in a state court of New York, and removed to the District Court, to recover full common-law damages from a Delaware owner for injuries received at sea on a voyage to New York.

Section 20 of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1185, declaring "seamen having command shall not be held to be fellow-servants with those under their authority," was not intended to substitute the common-law measure of liability for the maritime rule in such cases.

The Judiciary Act of 1789, § 9, giving exclusive original admiralty and maritime jurisdiction to the District Courts, saves "to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." *Held*, that this, recognizing the fundamental distinction between rights and remedies, allows a right sanctioned by maritime law to be enforced through an appropriate common-law remedy, but does not give a plaintiff his election to have the defendant's liability measured by common-law standards instead of those prescribed by the maritime law.

243 Fed. Rep. 536, affirmed.

THE case is stated in the opinion.

Mr. Silas B. Axtell, with whom *Mr. Arthur L. Burchell* was on the brief, for petitioner:

All decisions concede to the common-law courts the right to apply their own remedies in accordance with the provisions of the saving clause in § 9 of the Judiciary Act of 1789. As concurrent remedies existed at common law and under the maritime law in such cases, a suitor always enjoyed the right to determine which remedy should be pursued. *Leon* v. *Galceran*, 11 Wall. 185 (an action for wages); *Schoonmaker* v. *Gilmore*, 102 U. S. 118 (a collision case); *Chappell* v. *Bradshaw*, 128 U. S. 132 (damages by fire caused by negligence); *Knapp* v. *McCaffrey*, 177 U. S. 638 (lien for towage); *Kalleck* v. *Deering*, 161 Massachusetts, 469 (personal injuries to a seaman, opinion per Mr. Justice Holmes).

The concurrent jurisdiction of the two systems of law arises from the saving clause and it has been held many times that the only remedy which the common law is not competent to give under that section is the right to an action *in rem* in a maritime matter. Of those cases the admiralty courts have unquestioned and exclusive jurisdiction. *McDonald* v. *Mallory*, 77 N. Y. 546; *The Hamilton*, 207 U. S. 398; *Rounds* v. *Cloverport Foundry*, 237 U. S. 301; *The Hine* v. *Trevor*, 4 Wall. 555. In saving the common law Congress intended to save the common law of the States, there being no United States common law. *Wheaton* v. *Peters*, 8 Pet. 591–657; *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92–101. This intention was crystallized by § 721, Rev. Stats. Congress intended to supplement the very limited law of the sea by saving rights at common law. See *The Moses Taylor*, 4 Wall. 411; *Waring* v. *Clarke*, 5 How. 440, 460–461; *American Steamboat Co.* v. *Chase*, 16 Wall. 522, 530, 532, 534; *Atlee* v. *Packet Co.*, 21 Wall. 389, 395.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205; and *Schwede* v. *Zenith S. S. Co.*, 244 U. S. 646, show clearly that there are two jurisdictions, each independent of the other and each working out its own body of law according to its own ideas. A few illustrations will serve to show the application of different law upon the same facts in these two courts. *Erie R. R. Co.* v. *Erie Transportation Co.*, 204 U. S. 220; *Belden* v. *Chase*, 150 U. S. 674; *Workman* v. *New York City*, 179 U. S. 552; *The China*, 7 Wall. 53; *Homer Ramsdell Co.* v. *Compagnie Générale, etc.*, 182 U. S. 406; *Quebec S. S. Co.* v. *Merchant*, 133 U. S. 375; *The Osceola*, 189 U. S. 158. In England the courts of common law apply common-law principles (*Hedley* v. *Pinkney*, [1894] A. C. 222); also in Ireland (*Ramsay* v. *Quinn*, Ir. Rep. 8 C. L. 322), and in Scotland (*Leddy* v. *Gibson*, 11 Ct. Sess. Cas., 3d series, 304).

The liability of the master to the servant is a liability

imposed by law and is not a matter of contract. The contract fixes the relation of the parties, the law does the rest. *The John G. Stevens*, 170 U. S. 113; *Knapp* v. *McCaffrey*, 177 U. S. 638; *Martin* v. *Pittsburgh Ry. Co.*, 203 U. S. 284; *Keithley* v. *Northern Pacific S. S. Co.*, 232 Fed. Rep. 255, 259; *Swayne & Hoyt* v. *Barsch*, 226 Fed. Rep. 581, 590; *The Quickstep*, 9 Wall. 665, 670.

The principles here contended for do not tend to destroy the uniformity of the admiralty law. When Congress left open the common law over torts committed at sea it must have contemplated just such a case as this. If it had been essential that the admiralty jurisdiction be made exclusive, we believe that Congress could, without offense to constitutional provisions, have made it so. If at any time it should develop that greater uniformity is needed, the power always rests with Congress to attain that end by appropriate legislation, as in the analogous situation covered by the Federal Employers' Liability Act.

Admiralty courts often follow the common law, for the reason that the law of admiralty, being, as it is, a collection of a few rules and customs of the sea which are grossly inadequate to cover its needs, literally borrowed common-law principles. Common-law courts on the other hand never administer the admiralty law. In a common-law action on a maritime contract, as where a seaman sues for damages for failure of the ship owner to supply him with treatment for injuries, the contract is interpreted in the light of admiralty law but that law is not the basis of recovery. *Harden* v. *Gordon*, 2 Mason, 541; *Holt* v. *Cummings*, 102 Pa. St. 212. When, however, a case arises in a common-law court where the relief demanded cannot be sustained on some principle known to the common law, the court will refuse to act. Unless such a principle can be applied, the remedy asked for is not a remedy which the common law is competent to

give. See, e. g., *Lipson* v. *Harrison*, Q. B., 1854, 24 Eng. L. & Eq. 208; *Merritt* v. *Tice*, 77 App. Div. 326.

Section 20 of the Seamen's Act of 1915 removed the only obstacle to recovery in a common-law action by abolishing the fellow-servant rule.

The same is true of its effect upon the maritime law, for there also it was the fellow-servant rule alone which prevented recovery by a seaman from the owner on account of personal injuries received in his work and not due to unseaworthiness of the ship. Save for this rule, it is incorrect to say that in maritime law recovery was limited to maintenance and cure. Those were independent contractual rights, really part of the seaman's wages (*Harden* v. *Gordon*, 2 Mason, 541). There is nothing in the maritime law which makes them exclusive of other claims.

The admiralty courts have followed the courts of common law, and the reason why the ship owner is liable only for failure to supply a seaworthy ship is that, under that law, unamended, all on board a ship are fellow servants, and if the ship be seaworthy, then, obviously, any injury which occurred would have to be caused by either the negligence of the injured person or one of his fellow servants, and, therefore, there could be no recovery. If, on the other hand, the ship were unseaworthy and a seaman were injured because of it, he was allowed to recover damages upon the theory that the ship owner had failed to supply him with a reasonably safe place in which to work, that expression being synonymous with "seaworthy vessel." The matters decided in *The Osceola*, 189 U. S. 158, are not inconsistent with this view. The court was not promulgating any new rules in that case, and an examination of the decisions upon which it based its rulings will show them all founded on the fellow-servant doctrine. See also *The Queen*, 40 Fed. Rep. 694, 697; *The Sachem*, 42 Fed. Rep. 66; *The Bolivia*, 59 Fed. Rep. 626, 628; *The Miami*, 93 Fed. Rep. 218; *The Egyptian Monarch*,

36 Fed. Rep. 773; *The New York*, 204 Fed. Rep. 765; *The Nyack*, 199 Fed. Rep. 383; *The Buffalo*, 154 Fed. Rep. 815; *Bettis* v. *Leyland*, 153 Fed. Rep. 571; *Matter of Tonawanda Iron & Steel Co.*, 234 Fed. Rep. 198.

After a careful review of all the cases reported involving torts occurring on shipboard, we find that, with the exception of the case at bar and *Cornell Steamboat Co.* v. *Fallon*, 179 Fed. Rep. 293, where the opinion was by the same judge, both state and federal courts have considered the common-law principles which determine liability as between master and servant on land to be the principles which determine liability as between seaman and owner on board ship.

Mr. Peter S. Carter, for respondent, submitted.

On the evidence the trial court was, as a matter of law, justified in finding that the respondent was free from negligence, dismissing the complaint and directing a verdict in favor of the respondent.

Even if it had been shown by the testimony of the petitioner that the respondent was liable for the acts of the officer, the respondent still would not have been liable for the petitioner's injuries beyond his maintenance and cure, within the law established by the following decisions: *Globe S. S. Co.* v. *Moss*, 245 Fed. Rep. 54, 60; *The Bouker No. 2*, 241 Fed. Rep. 831; *The Osceola*, 189 U. S. 158; *The Bunker Hill*, 198 Fed. Rep. 587, 588, 591; *Cornell Steamboat Co.* v. *Fallon*, 179 Fed. Rep. 293–295; *The P. P. Miller*, 180 Fed. Rep. 288, 290; *The Nyack*, 199 Fed. Rep. 383, 389, 390; *Wilson* v. *Manhattan Canning Co.*, 205 Fed. Rep. 996. As no claim is made in the case under review for maintenance and cure, and as the petitioner stands upon his common-law rights, he cannot recover any damages from the respondent where his injuries are caused by his fault.

As a matter of law the trial court was justified in finding,

on the evidence, that the petitioner was guilty of contributory negligence. Petitioner relies on § 20 of the Seamen's Act of 1915, claiming that it applies to subordinate officers, as well as the master and chief engineer, of a vessel, as to negligence in the performance of their duties, and relieves the seaman (the petitioner) from his acts of contributory negligence. We maintain that the section was passed to put at rest all uncertainty as to whether the master of the vessel or those as high in command as the master—the chief engineer—were fellow servants with the seamen under them, as that question of law was left open in the case of *The Osceola*, 189 U. S. 158, and the case of *The Hamilton*, 207 U. S. 406. In the admiralty contributory negligence of a seaman does not bar his his right to recover; but the case under review is a common-law action, and in the common law contributory negligence, however slight, bars the right to recover.

As a matter of law the trial court was justified in finding that the petitioner assumed the risk.

Mr. Justice McReynolds delivered the opinion of the court.

In December, 1915, petitioner was employed by respondent, a Delaware corporation, as fireman on board the steamship "J. L. Luckenbach" which it then operated and controlled. While at sea, twenty-four hours out from New York, the port of destination, petitioner undertook to perform certain duties on deck during a heavy wind; a wave came aboard, knocked him down and broke his leg. He received due care immediately; when the vessel arrived at destination he was taken to the marine hospital where he remained for three months; during that time it became necessary to amputate his leg. After discharge from the hospital, claiming that his injuries resulted from the negligence and an improvident order of a superior

officer, he instituted a common law action in Supreme Court, New York County, demanding full indemnity for damage sustained. The cause was removed to the United States District Court because of diverse citizenship. Counsel did not question seaworthiness of ship or her appliances and announced that no claim was made for maintenance, cure, or wages. At conclusion of plaintiff's evidence the court directed verdict for respondent, and judgment thereon was affirmed by the Circuit Court of Appeals. 243 Fed. Rep. 536. The latter court said:

"The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola* [189 U. S. 158]; and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori. If a seaman who had been locked up or put in irons for disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. So a seaman bringing suit in a common law court for personal injuries could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not; and a seaman suing in a common law court for personal injuries could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial

considerations in this case; the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter.

"Has Congress changed the situation by section 20 of the Seamen's Act [c. 153, 38 Stat. 1164, 1185] as the plaintiff contends? He argues that the act makes the master a fellow servant of the seaman and therefore that Congress intended to make the relation between the seaman and all the officers throughout the same as at common law. But the Supreme Court, in the case of *The Osceola, supra,* while reserving the question whether the master and seaman were fellow servants, held that it made no difference whatever in respect to the liability of the shipowners for an improvident order of the master which resulted in personal injuries to the seaman. . . .

"It follows that whether the master and seaman are fellow servants or not is quite immaterial in the case of a suit for injuries resulting from an improvident order of the master. For this reason the court was right in directing a verdict for the defendant and the judgment is affirmed."

In *The Osceola,* 189 U. S. 158, 175, a libel *in rem* to recover damages for personal injuries to a seaman while on board and alleged to have resulted from the master's negligence, speaking through Mr. Justice Brown we held:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"2. That the vessel and her owner are both by English and American law, liable to an indemnity for injuries

received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff* v. *Metcalf*, 107 N. Y. 211.

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

After reference to Article 1, § 8, and Article 3, § 2, of the Constitution, we declared in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215, 216: "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction." Concerning extent to which the general maritime law may be changed, modified or affected by state legislation this was said: "No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such

law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*" (21 Wall. 558, 575). Among such quotations is the following: "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. *Atlantic Transportation Co.* v. *Imbrovek*, 234 U. S. 52, 59, 60. And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the "unformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Two acts of Congress are relied upon, and it is said that under each petitioner has the right to recover full indem-

nity according to the common law. They are: (1) Section 9, Judiciary Act of 1789, 1 Stat. 76, 77, whereby District Courts of the United States were given exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it" (Judicial Code, §§ 24, 256); and (2) section 20 of Act to Promote the Welfare of American Seamen, approved March 4, 1915, c. 153, 38 Stat. 1164, 1185, which provides—"That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

The precise effect of the quoted clause of the original Judiciary Act has not been delimited by this court and different views have been entertained concerning it. In *Southern Pacific Co.* v. *Jensen* we definitely ruled that it gave no authority to the several States to enact legislation which would work "material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." In *The Moses Taylor*, 4 Wall. 411, 431, we said: "That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law." And in *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644, 648: "Some of the cases already cited recognize the distinction between a common law action and a common law remedy. Thus in *The Moses Taylor*, . . . it is said of the saving clause of the Judiciary Act: 'It is not a remedy in the common law courts which is saved, but a

common law remedy.'" "If the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute . . . of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction."

The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea.

Section 20 of the Seamen's Act declares "seamen having command shall not be held to be fellow-servants with those under their authority," and full effect must be given this whenever the relationship between such parties becomes important. But the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence therefore to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant. The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common

law prescribes for employers in respect of their employees on shore.

The judgment of the court below is

Affirmed.

MR. JUSTICE HOLMES concurs in the result.

MR. JUSTICE PITNEY, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.

PHILIPPINE SUGAR ESTATES DEVELOPMENT COMPANY, LIMITED, *v.* GOVERNMENT OF THE PHILIPPINE ISLANDS.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 189. Argued March 13, 1918.—Decided June 3, 1918.

Where, owing to a mutual mistake, a written contract fails to express the intention of the parties, it may be reformed to express their true intention, although the mistake was one of law respecting its interpretation and construction.

Reformation will be granted only where the evidence of mistake is clear and satisfactory.

Relief in such cases may be obtained by a defendant under Philippine Code of Civil Procedure, § 285, upon appropriate pleadings, without resort to an independent suit for reformation of the contract.

In this case it is established by proof of the clearest and most satisfactory character that certain rails and sugar-mill machinery were intended not to go with a sale and conveyance of land to the Philippine Government, and that the failure of the written contract and deed to except them was due to a mutual mistake of law.

The court cannot accept a construction placed upon a Philippine statute by the Supreme Court of the Islands, when it is clearly erroneous.

Upon an appeal from a decree of the Supreme Court of the Philippine Islands erroneously reversing the trial court solely on a question of

law, this court, to dispose finally of the case, may decide the facts, when all evidence proffered was admitted and is in the record, and when the appellant in the court below sought to review the trial court's findings, under § 497, par. 2, of the Philippine Code of Civil Procedure.

Where, in an action at law on a contract, the answer set up was, in effect, a bill in equity, seeking reformation and incidentally to enjoin the action at law, the proceeding was converted into an equitable one, and hence can be reviewed only by appeal and not by writ of error.

30 Phil. Rep. 27, reversed.

THE case is stated in the opinion.

Mr. Antonio M. Opisso for plaintiff in error and appellant.

Mr. Edward S. Bailey, with whom *Mr. Samuel T. Ansell* was on the brief, for defendant in error and appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

When Spain ceded the Philippine Islands to the United States large tracts of agricultural lands were owned by the great religious orders. For political reasons it was deemed advisable that our Government should acquire the Friar lands and sell them to tenants in small holdings on easy terms. Lengthy negotiations conducted to that end by the Civil Governor were concluded in 1903. Most of the lands owned by the Dominicans, amounting to 60,461 hectares, had been conveyed to the Philippine Sugar Estates Development Company, Limited; and with that corporation a contract of sale and purchase was executed by the Government of the Philippine Islands under date of December 22, 1903. The agreement covered eight haciendas including that of Calamba in the

province of Laguna, said to contain 16,424 hectares and 14 ares. Owing to delays incident to resurveys and perfecting of titles, the deed of the Calamba estate was not delivered until October, 1905, when the purchase price, 1,385,443.29 pesos, was paid and possession taken by the grantee.[1] Later the Philippine Government learned that the grantor had removed certain sugar mill machinery and the rails of a light railroad which had formerly been upon the estate. The contract made no mention of sugar mills, machinery, or railroad; but it contained, after the description of the estates and specified properties to be conveyed, the words, "and all other improvements"; and these words were also in the deed. The Government, claiming that the machinery and railroad were covered by this and other clauses and passed as part of the realty, brought suit, in 1906, against the Company [2] in the Court of First Instance of Manila for their value, alleged to be 50,000 pesos.

The Code of Civil Procedure of the Philippine Islands, § 285, permits to be introduced, in case of written contracts, "evidence of the terms of agreement other than the contents of the writing," "where a mistake or imperfection of the writing, or its failure to express the true intent and agreement of the parties, is put in issue by the pleadings." [3] The defence was rested, under appropriate

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[1] U. S. Philippine Commission Reports (1901), vol. 2, Part 1, p. 24; (1902), Part 1, p. 24; (1903), Part 1, pp. 38–44; (1904), Part 1, p. 16; Part 2, p. 477; (1905), Part 1, p. 65; (1906), Part 1, p. 58. A hectare equals 2.471 acres; two pesos equal one dollar, gold.

[2] The Dominican Order of Friars was joined in the complaint as a party defendant; but it was not mentioned in the judgments entered in either of the lower courts; and it did not become a party to the proceedings in this court.

[3] "*Written Agreement presumed to Contain all the Terms of the Agreement.* When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives

pleadings, on the ground, among others, that the contracting parties understood that the sugar mills and machinery and the railroad were not to be included as a part of the real estate and that they did not come under any of the terms used in the contract or the deed, and that, for this reason, the instrument did not express the intention and actual agreement of the parties. The trial court held this defence good in law and sustained by the evidence; and entered judgment for the defendant. The Supreme Court of the Philippine Islands reversed the judgment of the trial court solely on the ground that, where parties to a written contract have deliberately adopted the language therein used, a court of equity will not reform the instrument because the parties were "mistaken as to its legal interpretation and effect, nor will such a mistake be recognized as any defense to a suit upon the contract or instrument"; and that relief against such a mistake cannot be afforded under § 285 of the Code. Upon the evidence which had been introduced below the Supreme Court also entered a judgment of 50,000 pesos for the Government. (30 Phil. Rep. 27.) The case comes here under § 248 of the Judicial Code.

The case is brought here both by writ of error and by appeal. The complaint set forth a cause of action at law on the contract. The answer was, in effect, a bill in equity for reformation and incidentally to enjoin the

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or successors in interest, no evidence of the terms of agreement other than the contents of the writing, except in the following cases:

" (1) Where a mistake or imperfection of the writing, or its failure to express the true intent and agreement of the parties, is put in issue by the pleadings;

" (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, or to explain an intrinsic ambiguity, or to establish its illegality or fraud. The term 'agreement' includes deeds and instruments conveying real estate, and wills as well as contracts between parties."

action at law. Compare *Bradbury* v. *Higginson*, 167 California, 553. The proceeding became thus an equitable one. See *Surgett* v. *Lapice*, 8 How. 48, 64–65; *Clark* v. *Mosher*, 107 N. Y. 118; *Turner* v. *Johnson*, 29 Ky. Law Rep. 543. The proper method of review by this court is, therefore, by appeal; and the writ of error is dismissed. *Gsell* v. *Insular Collector of Customs*, 239 U. S. 93; *Montelibano y Ramos* v. *La Compania General de Tabacos de Filipinas*, 241 U. S. 455, 461.

It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties. The fact that interpretation or construction of a contract presents a question of law and that, therefore, the mistake was one of law is not a bar to granting relief. *Snell* v. *Insurance Co.*, 98 U. S. 85, 88–91; *Griswold* v. *Hazard*, 141 U. S. 260, 283–284.[1] This rule of equity was adopted in the Philippine Code without restriction; and the relief is afforded, under appropriate pleadings, without resort to an independent suit for reformation of the contract. The language of § 285 is clearly broad enough to include relief for such mistakes of law; and the earlier decisions of the Supreme Court of the Philippine Islands to which that court refers in its opinion are not inconsistent with this conclusion. Some of them are instances of the futile attempt to vary, supplement, or contradict a written contract by parol evidence. In none of them was evidence offered under appropriate pleadings with a view to reforming the instrument.[2] It is urged that § 285 was

[1] See also *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290, 319, 320; *Maher* v. *Hibernia Insurance Co.*, 67 N. Y. 283, 291; *Wisconsin Marine & Fire Ins. Co. Bank* v. *Mann*, 100 Wis. 596, 617–620.

[2] *Pastor* v. *Gaspar*, 2 Phil. Rep. 592; *Icaza* v. *Ortega*, 5 Phil. Rep. 166; *Sanz* v. *Lavin Brothers*, 6 Phil. Rep. 299; *Testagorda* v. *Commanding General*, 6 Phil. Rep. 573; *Muguruza* v. *International Bank*,

borrowed from § 1856 of the Code of Civil Procedure of California; and that the courts of that State deny relief under circumstances like those here under consideration. No case sustaining this assertion was cited by counsel and none has been found by us. Furthermore the provisions of the two sections differ materially; the significant clause of § 285, namely, "or its failure to express the true intent and agreement of the parties," is not contained in § 1856 of the California Code. It is also urged that, since the construction of § 285 is a matter of purely local concern, we should not disturb the decision of the Supreme Court of the Philippine Islands. This court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute. *Phoenix Ry. Co.* v. *Landis*, 231 U. S. 578. But that disposition may not be yielded to, where the lower court has clearly erred. *Carrington* v. *United States*, 208 U. S. 1. Here, the construction adopted was rested upon a clearly erroneous assumption as to an established rule of equity. The Supreme Court erred in refusing to consider the evidence of mutual mistake; and its judgment must be reversed.

It remains to consider the further proceedings which should be taken. The judgment of the trial court was reversed by the Supreme Court solely on the ground that the defence of mutual mistake relied upon was not good in law; but the case had been taken to that court on a bill of exceptions which contained the whole record in the trial court, including all the evidence introduced; and the refusal of the trial judge to grant a new trial on the ground that the evidence did not justify the findings of the courts had been duly excepted to. This exception

10 Phil. Rep. 346; *DeGuzman* v. *Balarag*, 11 Phil. Rep. 503; *United States* v. *Macaspac*, 12 Phil. Rep. 26; *Jose* v. *Damian*, 14 Phil. Rep. 104; *Sy Joc Lieng* v. *Sy Quia*, 16 Phil. Rep. 137; *Lozano* v. *Tan Suico*, 23 Phil. Rep. 16.

was apparently insisted upon before the Philippine Supreme Court, and the same contention is made by the Government here. Its purpose was obviously to seek a review of those findings under § 497, par. 2, of the Code of Civil Procedure, which provides that where a motion was made in the trial court for a new trial "upon the ground that the evidence was insufficient to justify the decision, and the judge overruled said motion, and due exception was taken to his overruling the same, the Supreme Court may review the evidence and make such findings upon the facts by a preponderance of the evidence, and render such final judgment, as justice and equity may require." We might require that the review of the evidence to which the Government is entitled should be made by that court. But, as the case is here on appeal and all proffered evidence was admitted below and is in the record before us, we may now finally dispose of the case.

The burden of proof resting upon the appellant cannot be satisfied by mere preponderance of the evidence. It is settled that relief by way of reformation will not be granted, unless the proof of mutual mistake be "of the clearest and most satisfactory character." *Snell* v. *Insurance Co.*, 98 U. S. 85, 89–90; *Baltzer* v. *Raleigh & Augusta Railroad*, 115 U. S. 634, 645; *Maxwell Land Grant Case*, 121 U. S. 325, 381; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 435; *Campbell* v. *Northwest Eckington Co.*, 229 U. S. 561, 584. The evidence introduced by appellant meets this stringent requirement.

The following, among other, facts were established by uncontradicted evidence: Prior to May, 1903, the sugar mills had been in part destroyed by revolutionists, and the mills and machinery had fallen into disrepair. In that month the Company gave orders to remove the machinery and the rails from the hacienda and store them elsewhere. In October, 1903, the Company contracted to sell all the

machinery and rails to one Rueda. They were not included in the detailed appraisal of the property which the Government caused to be made. Before the contract with the Government was executed all the rails and a part of the machinery had been removed from the hacienda. In the typewritten draft of this contract with the Government which its counsel prepared and which was submitted by Governor Taft to the Company's representative for consideration, it was expressly stated that "sugar and rice mills and machinery" together with "irrigation work, dams, tunnels, ditches, and all other improvements thereon" should be included in the "sale and conveyance." The Company's representative corrected the draft of agreement by striking out with a pen the words "sugar and rice mills and machinery." This correction was acquiesced in by the Government's representatives; and in the final draft of the contract which was executed December 22, 1903, there was no reference to sugar mills, machinery, or tramway, although the paragraph, as modified, contained the following explicit and detailed provision:

"This sale and conveyance shall include all the dwelling houses, farm houses, warehouses, camarines and other buildings, irrigation works, dams, tunnels, ditches, and all other improvements, together with all water and other rights and all hereditaments belonging to the Company on every part of the estates hereby agreed to be conveyed."

The words sugar mills were also included in the draft of the final deed of conveyance, but they were stricken out after a conference between the Company's representative and the Civil Governor, so that the words do not appear in the final deed of conveyance.

This clear and uncontradicted testimony as to the agreement actually made is supported by the production of the original draft of the agreement in which the words

"sugar and rice mills and machinery" were stricken out in ink, and also by production from the files of the Executive Bureau of the stenographic report of the interview with Governor Wright, above referred to. As against this strong evidence the Government can point only to the fact that in the deed, the hacienda is first described as "the description, area and boundaries" thereof "appear in the title deeds," then as it appears from the recent Government surveys; and that in the description according to the title deeds, the several sugar mills are named, and following them is the clause, "though it is believed that these mills were destroyed in part at least, by the revolutionists." This recital, itself of ambiguous import, is of no significance. This description was in no way relied upon by the Supreme Court of the Philippine Islands. Their decision was based entirely upon the alleged inclusion of sugar mills and machinery in the phrase, "improvements and accessories." As found by the trial judge, the evidence "shows, without the slightest doubt, that the parties, on striking out said words [the sugar mills] from the document, agreed not to include them in the sale, as demanded by the representative of the vendor, because they were not legally part of the Hacienda, for the reason that they had already been sold to Enrique Rueda prior to the preliminary agreement."

The judgment entered in the Supreme Court of the Philippine Islands is reversed and that entered by the Court of First Instance of Manila is affirmed.

Reversed.

SUPREME COUNCIL OF THE ROYAL ARCANUM *v.* BEHREND.

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

No. 267. Argued April 25, 1918.—Decided June 3, 1918.

In the absence of a special provision of law or rule of the association to the contrary, the naming of a person as beneficiary in the benefit certificate of a fraternal benefit association confers an expectancy merely, which may be defeated by the act of the insured member in taking out a substitute certificate changing the beneficiary.

The fact that the first-named beneficiary had paid the assessments before the change raises no legal claim upon the insurance.

A benefit certificate expressed a promise to pay the beneficiary therein named, upon the insured member's death, provided the "certificate shall not have been surrendered by said member and another certificate issued at his request," and bore a printed form providing for "surrender and return" of the certificate by the member in changing the beneficiary. *Held:* That the requirement of surrender did not necessarily imply a return of the original paper.

A requirement that a certificate of a fraternal benefit association shall be surrendered by the insured member before a new one is issued, is for the protection of the association, and, if waived by it or complied with to its satisfaction during the member's lifetime, it cannot be availed of by a former beneficiary.

45 App. D. C. 260, reversed.

THE case is stated in the opinion.

Mr. Howard C. Wiggins, with whom *Mr. Philip Walker* was on the brief, for petitioner.

Mr. W. Gwynn Gardiner for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Supreme Council of the Royal Arcanum is incorporated under the laws of Massachusetts as a fraternal benefit society, and it is licensed as a fraternal beneficial association in the District of Columbia.[1] The character and purposes of the organization and the relation to its members are described in *Supreme Council of the Royal Arcanum* v. *Green*, 237 U. S. 531. Samuel K. Behrend became a member of a local lodge of the order in Washington, known as "Oriental Council, No. 312, Royal Arcanum." On March 1, 1899, a $3,000 "Benefit Certificate" was issued to him there, payable on his death to his wife, Sue, as beneficiary; and there the first premium or assessment was paid. He delivered the certificate to her, giving it as a wedding present. From that time on, the certificate remained in her possession; and until August, 1913, most of the premiums and assessments were paid by her. On August 8, 1913, Behrend, having ceased to live with his wife, requested the Order to change the beneficiary from his wife to his son and his daughter. As the original certificate was still in the wife's possession and she refused to surrender it, Behrend made affidavit that the certificate was beyond his control and in writing relinquished all interest therein. Thereupon a new certificate was issued by the Order payable to the children, as requested; and the wife was notified that the certificate held by her had been canceled. On October 20, 1914, Behrend died. On December 21, 1914, the Order paid to his son and to his daughter each $1,500 upon surrender of the new certificate. Thereafter the widow brought, in the Supreme Court of the District of Columbia, this action to recover $3,000 under the original certificate.

[1] District Code, § 749 (Act of Congress, March 3, 1897, § 1, c. 382, 29 Stat. 630).

The Order set up, by plea and affidavit of defence, the facts showing the change of beneficiary and payment to the new beneficiaries, which it alleged was in accordance with the contract contained in the benefit certificate and the constitution and laws of the organization. The case was heard by the Supreme Court on motion for judgment against the defendant for failure to file a good and sufficient affidavit of defence; and judgment was entered for $3,000 with interest. The Court of Appeals of the District reversed this judgment, but later granted a rehearing, the order reciting: "The question to be argued is this: Had the beneficiary of the certificate a vested interest in the same that could not be divested by the issue of a substitute certificate without the surrender of the original and without the consent of the beneficiary named in the original certificate?" Upon the rehearing the judgment of the lower court was affirmed. (45 App. D. C. 260.) The case comes here on writ of certiorari under § 251 of the Judicial Code.

The benefit certificate provided, among other things, that the corporation will pay "out of its Widows and Orphans' Benefit Fund to Sue B. Behrend (wife) a sum not exceeding three thousand dollars in accordance with and under the provisions of the laws governing said Fund, upon satisfactory evidence of the death of said member, and upon the surrender of this Certificate; provided that said member is in good standing in this Order at the time of his death, and provided also that this Certificate shall not have been surrendered by said member and another Certificate issued at his request, in accordance with the laws of this Order." On the back of said Certificate appears the following:

"Form for Change of Beneficiary."

———Council No.———, R. A.

"To.....Sup. Sec., S. C. R. A.: I herewith surrender and return to the Supreme Council

of the Royal Arcanum, the within Benefit Certificate No....., and direct that a new one be issued to me, payable to.....Residing at..... Related to me as.....

.....

Member will write his name in full.

Attest:

[Seal of Sub. Council.] .....*Secretary.*"

The general laws of the Order, in force at latest when the new certificate was issued, provide that a member in good standing may at any time make "a written surrender of his Benefit Certificate, and direct that a new certificate be issued to him, payable to such beneficiary or beneficiaries as such member may designate" and that the issue of such new certificate shall cancel all previous certificates. They also provide that in case "a Benefit Certificate is lost or beyond a member's control," he may, upon making satisfactory proof of the fact by affidavit or otherwise and paying the required fee of fifty cents, "in writing, surrender all claim thereto, and direct that a new Certificate be issued to him, payable to the same or a new beneficiary or beneficiaries." These conditions were complied with before the new certificate making the son and daughter beneficiaries was issued.

Act of Congress, January 26, 1887, c. 46, § 6, (24 Stat. 367,) provided that each life insurance company doing business within the District should attach to each policy a copy of the application "so that the whole contract may appear in said application and policy." Section 657 of the District of Columbia Code as amended June 30, 1902, c. 1329, (32 Stat. 534,) extended the provision to benefit orders and associations and declared that, in case of failure to furnish a copy of the application, "no defence shall be allowed to such policy on account of anything contained in, or omitted from, such application." The

Court of Appeals decided that Mrs. Behrend acquired a vested interest in the benefit certificate which could not be divested by the issue of a substitute certificate without the surrender of the original and without her consent as beneficiary; that the rights of the parties were governed by the laws of the District of Columbia; that the benefit certificate was an insurance policy within the meaning of both the above acts; that the Order was an assessment insurance company and as such came within the scope of both acts, so that the fact that the benefit certificate was issued before the amendment of 1902 was immaterial; that it did not appear that there had been attached to the certificate a copy of the application therefor; that the failure to annex the application precluded allowing as a defence any matter not appearing on the face of the benefit certificate; that the change of beneficiary was such a defence; and that since matters found only in the application and laws of the association could not be availed of, the court must "look solely to the terms of the contract, that is, to the terms of this so-called benefit certificate, to determine the measure of the insured's right to change the beneficiary;" and that by its terms there was no such right.

This court held in *Washington Central Bank* v. *Hume*, 128 U. S. 195, 206, that under the ordinary policy of life insurance, when no right is reserved to surrender the policy or to change beneficiaries, the beneficiary named therein acquires, at the moment it is issued, a vested right which cannot be affected by any act of the insured subsequent to the execution of the policy. The rule there declared was deemed by the Court of Appeals to control the case at bar. But it was not applicable; because the contract sued on was a benefit certificate of a fraternal benefit association, not an ordinary policy of life insurance; and also because the benefit certificate on its face reserves the right to change beneficiaries.

First: The difference between ordinary life insurance and that furnished by the fraternal benefit societies has been universally recognized in legislation and is a matter of common knowledge. The differences in the legal incidents of these different forms of protection have been illustrated by numerous decisions. The difference in respect to the insured's right to change the beneficiary has been frequently commented on and is firmly established. In the absence of a special provision of law or of a rule of the association to the contrary, the naming of a person as beneficiary in the benefit certificate of a fraternal benefit association confers not a vested right, but an expectancy merely which may be defeated at any time by act of the insured member.[1] A different case is presented where the insured has contracted with the beneficiary that he shall remain such. A contract of that nature may be enforced by appropriate proceeding if

[1] *Slaughter* v. *Grand Lodge*, 192 Ala. 301; *Jory* v. *Supreme Council A. L. H.*, 105 Cal. 20; *Masonic Mutual Benefit Ass'n* v. *Tolles*, 70 Conn. 537, 544; *Smith* v. *Locomotive Engineers Mutual Life & Accident In. Assn.*, 138 Ga. 717; *Delaney* v. *Delaney*, 175 Ill. 187; *Masonic Mutual Benefit Society* v. *Burkhart*, 110 Ind. 189, 194–195; *Carpenter* v. *Knapp*, 101 Ia. 712; *Titsworth* v. *Titsworth*, 40 Kans. 571; *Marsh* v. *American Legion of Honor*, 149 Mass. 512; *Schoenau* v. *Grand Lodge A. O. U. W.*, 85 Minn. 349; *Carson* v. *Vicksburg Bank*, 75 Miss. 167; *Masonic Benevolent Assn.* v. *Bunch*, 109 Mo. 560; *Knights of Maccabees* v. *Sackett*, 34 Mon. 357, 363; *Ogden* v. *Sovereign Camp, W. O. W.*, 78 Neb. 804; *Barton* v. *Provident Mutual Relief Assn.*, 63 N. H. 535; *Spengler* v. *Spengler*, 65 N. J. Eq. 176; *Lahey* v. *Lahey*, 174 N. Y. 146; *Pollock* v. *Household of Ruth*, 150 N. C. 211; *Lentz* v. *Fritter*, 92 Oh. St. 186; *Noble* v. *Police Beneficiary Assn.*, 224 Pa. St. 298; *Catholic Knights of America* v. *Morrison*, 16 R. I. 468; *Christenson* v. *El Riad Temple*, 37 S. D. 68, 71; *Alfsen* v. *Crouch*, 115 Tenn. 352; *Byrne* v. *Casey*, 70 Tex. 247; *Cade* v. *Head Camp, W. O. W.*, 27 Wash. 218; *Supreme Conclave, Royal Adelphia* v. *Cappella*, 41 Fed. Rep. 1.

The right of a member of a fraternal benefit society to change the beneficiary has been denied in a few cases which have failed to distinguish between benefit certificates and ordinary life policies. See *Pittinger* v. *Pittinger*, 28 Colo. 308.

consistent with the general law and with the laws of the association.[1] But the remedy to enforce rights arising out of such a contract would obviously not be a suit, like that at bar, upon the certificate. Nor is it contended that Behrend made any such contract concerning the certificate with his wife. The mere fact that she paid some, and possibly all, of the assessments, prior to the change of beneficiary, even if paid out of her separate estate, raises no legal claim.[2] Perhaps there was not even a moral claim; since throughout the period during which she paid assessments, she enjoyed the full protection which the Order agreed to furnish; and for this alone payments were made. Under the form of insurance furnished by fraternal beneficial associations no reserve is accumulated.

Second: The certificate, on its face, expressed not an unconditional promise to make payment to the wife therein named, but a conditional promise to pay provided the "Certificate shall not have been surrendered by said member and another Certificate issued at his request, in accordance with the laws of this Order." The plaintiff alleged that the certificate had not been surrendered and

[1] *Grimbley* v. *Harrold*, 125 Cal. 24; *McGrew* v. *McGrew*, 190 Ill. 604; *In re Reid's Estate*, 170 Mich. 476; *Catholic Benevolent Legion* v. *Murphy*, 65 N. J. Eq. 60; *Stronge* v. *Knights of Pythias*, 189 N. Y. 346; *Supreme Lodge, Knights & Ladies of Honor* v. *Ulanowsky*, 246 Pa. St. 591. Section 758 of the Code of the District of Columbia (§ 10 of the Act of March 3, 1897, *supra*) provides in regard to fraternal beneficiary associations, that "No contract with any such association shall be valid when there is a contract, agreement, or understanding between the member and the beneficiary prior to or at the time of becoming a member of the association that the beneficiary, or any person for him, shall pay such member's assessments and dues, or either of them."

[2] *Jory* v. *Supreme Council A. L. H.*, 105 Cal. 20, 30; *Supreme Lodge, N. E. O. P.* v. *Hine*, 82 Conn. 315, 320; *Schiller-Bund* v. *Knack*, 184 Mich. 95; *Spengler* v. *Spengler*, 65 N. J. Eq. 176, 180; *Fischer* v. *Fischer*, 99 Tenn. 629, 636; *Preusser* v. *Supreme Hive L. O. T. M.*, 123 Wis. 164.

that she had not been requested to surrender or deliver up the same for change of beneficiary. The latter allegation is denied by the affidavit of defence and the statements therein contained must be taken as true. But the fact is not material. As indicated by the printed "Form for Change of Beneficiary" endorsed on the Certificate, which refers to both "surrender and return," the requirement of a surrender does not necessarily imply a return to the Order of the original paper called the Benefit Certificate. Furthermore, requirements of that character are made for the protection of the society and, if complied with to its satisfaction or if waived by it during the lifetime of the insured, cannot be availed of to support the claim of a former beneficiary.[1] It is unnecessary therefore to determine whether, under this form of certificate, the burden rested upon the plaintiff to prove, as she alleged, that she had remained the beneficiary. As the judgment of the Court of Appeals must be reversed for the reasons stated above, we express no opinion upon other questions argued by counsel and, in part, passed upon below.

Reversed.

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[1] *Ladies of the Modern Maccabees* v. *Daley*, 166 Mich. 542, 545; *Fischer* v. *Malchow*, 93 Minn. 396; *Lentz* v. *Fritter*, 92 Oh. St. 186, 194–195; *Noble* v. *Police Beneficiary Assn.*, 224 Pa. St. 298; *Schardt* v. *Schardt*, 100 Tenn. 276. 279. 280.

TOLEDO NEWSPAPER COMPANY ET AL. *v.* UNITED STATES.

ERROR AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 371. Argued March 7, 8, 1918.—Decided June 10, 1918.

A summary conviction for criminal contempt is not within the jurisdiction of this court by writ of error but reviewable by certiorari.

Judicial Code, § 268 (Act of March 2, 1831), is merely declaratory of the inherent power of the federal courts to punish summarily for contempt, and, in providing that the power "shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," does no more than express a limitation imposed by the Constitution. The power, as in the case of the legislature (*Marshall* v. *Gordon*, 243 U. S. 521), is essentially one of self-preservation.

The test of the power is in the character of the acts in question: when their direct tendency is to prevent or obstruct the free and unprejudiced exercise of the judicial power, they are subject to be restrained through summary contempt proceedings.

Newspaper publications, concerning injunction proceedings pending in the District Court, and tending in the circumstances to create the impression that a particular decision would evoke public suspicion of the judge's integrity or fairness and bring him into public odium and would be met by public resistance, and tending in the circumstances to provoke such resistance in fact, *held*, contemptuous, rendering the company owning the paper and its editor subject to summary conviction and punishment.

Such wrongful publications are not within the "freedom of the press;" nor does the Act of 1831, *supra*, Jud. Code, § 268, intend to sanction them.

As it is the reasonable tendency of such publications that determines their contemptuous character, it is not material that they were not circulated in the court room or seen by the judge or that they did not influence his mind.

In determining whether there was any evidence to justify attributing such a tendency to the publications in question, this court considers the evidentiary facts found by the District Court only so far as to

determine whether they have any reasonable tendency to sustain the general conclusions of fact based upon them by that court and the Circuit Court of Appeals.

In a summary proceeding for criminal contempt, *semble*, that a single penalty based upon a conviction under all of several distinct charges in the information cannot be upheld unless all of the charges are sustained by the facts.

But where the Circuit Court of Appeals, upon concluding that the conviction was justified under one count and the facts relative thereto, affirmed the District Court without considering other counts upon which the punishment was also based, this court examined the findings as to all the counts, and, holding them sufficient, affirmed the judgment.

237 Fed. Rep. 986, affirmed.

THE case is stated in the opinion.

Mr. Lawrence Maxwell, with whom *Mr. Charles S. Northup*, *Mr. Jay W. Curts* and *Mr. Joseph S. Graydon* were on the brief, for petitioners:

The power of the District Courts to punish summarily for contempt has been limited by Congress (Const., Art. III, § 1, Art. I, § 8), by the Act of March 2, 1831, Rev. Stats., § 725, Jud. Code, § 268, so that it cannot apply to newspaper comments and criticisms concerning pending cases which do not amount to misbehavior of any person in the presence of such courts or so near thereto as to obstruct the administration of justice. In this case it was neither alleged, proved nor found that any of the publications complained of was brought into the court room or court building or read by the District Judge.

Prior to the impeachment of Judge Peck, whose acquittal was followed by this act, the question of the power of the courts in this regard does not appear to have been agitated except in the State of Pennsylvania. Two reported cases (*Respublica* v. *Oswald*, 1 Dall. 318, in the Supreme Court of Pennsylvania [1788], and *Hollingsworth* v. *Duane*, Fed Cas., No. 6616, in the United States Circuit Court for Pennsylvania [1801], promulgated the doctrine that courts in the United States had a common-

law power to punish in such cases, and held that the constitutional guarantee of trial by jury had no application. The judges erroneously supposed that, by the common law, courts of record in England possessed this power, whereas in truth it had never been so held except as to the courts constituting the *aula regis*, and in respect to them on the theory that the sovereign personally dispensed justice. *Reg.* v. *Lefroy*, L. R., 8 Q. B. 134; Oswald on Contempt, 3d ed., p. 3; 3 Holdsworth, History English Law, p. 312. The *Oswald Case* and *Respublica* v. *Passmore*, 3 Yeates, 441 (1804) gave rise eventually to an act of the Pennsylvania legislature, passed in 1809, which limited the power to cases of official misconduct of court officers, disobedience by officers, parties, jurors or witnesses of lawful process, and "misbehavior of any person in the presence of the court, thereby obstructing the administration of justice," besides providing specifically that publications out of court should not be made the basis of summary attachment and punishment. The history of this controversy is found in the note to the *Oswald Case*, in the report of the *Passmore Case*, *supra*, and in "Constructive Contempt" by Judge John L. Thomas.

The immediate occasion of the Act of 1831 was the impeachment and acquittal in Congress of Judge Peck, who had assumed to punish summarily for a publication referring to a case that had terminated. But it does not follow that Congress intended to confine the limitations of the statute to such cases. It is rather to be presumed that Congress had in mind the controversy in Pennsylvania, the more so because Mr. Buchanan who was one of the prosecutors of Peck, and who also reported the bill for this act, was from that State and undoubtedly was familiar with the occasion of the Pennsylvania statute and held strong views on the subject. Gales and Seatons Register of the Debates, 1831, p. 42.

That this meaning of the statute, which seems upon its

face to present no ambiguity, was clearly understood at the time of its enactment is shown by the first decision under it. *Ex parte Poulson*, Fed. Cas., No. 11350. See also the following: *United States* v. *Holmes*, Fed. Cas., No. 15853; *Ex parte Bradley*, 7 Wall. 364; Curtis, Jurisdiction of the United States Courts, 2d ed., p. 176; *Ex parte Robinson*, 19 Wall. 505, 510; *McCaully's Case*, 25 App. D. C. 404; *In re May*, 1 Fed. Rep. 737; *United States* v. *Anonymous*, 21 Fed. Rep. 761, 768; *Ex parte Schulenburg*, 25 Fed. Rep. 211; *Savin, Petitioner*, 131 U. S. 267; *Cuddy, Petitioner*, 131 U. S. 280; *Morse* v. *Montana Ore Purchasing Co.*, 105 Fed. Rep. 337; *Boyd* v. *Glucklich*, 116 Fed. Rep. 131; *Ex parte McLeod*, 120 Fed. Rep. 130; *Cuyler* v. *Atlantic & N. C. R. Co.*, 131 Fed. Rep. 95; *Myers* v. *State*, 46 Ohio St. 473 (first official syllabus, and opinion p. 474).

In *United States* v. *Huff*, 206 Fed. Rep. 700, the letters were sent to the judge while the case was pending. In *In re Independent Publishing Co.*, 228 Fed. Rep. 787; 240 Fed. Rep. 849, the publication was read by the jurors. *United States* v. *Providence Tribune Co.*, 241 Fed. Rep. 524, involved an article concerning grand jury proceedings.

Patterson v. *Colorado*, 205 U. S. 454, merely decided that the case did not involve a federal question. The Act of 1831 was not involved or mentioned. And see the dissenting opinions. *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31, was also a writ of error to a state court, involving a proceeding in contempt for wilful disobedience of an injunction. This court held that the Fourteenth Amendment did not guarantee a trial by jury in such a case.

Where the question is, whether a newspaper article published outside the court constitutes misbehavior so near thereto as to obstruct the administration of justice, the necessary nearness cannot be imputed in the absence

of such knowledge of the publication by the court or jury as did or might have obstructed the administration of justice, as in the *Huff* and *Myers Cases, supra.* It may be conceded that in such cases the "physical or topographical nearness" of the place where the article is written or printed becomes immaterial, and it may be that an act which is in intention and effect contumacious, committed in the presence of the court, is punishable without regard to whether it actually obstructs justice. But you cannot bring a publication outside of court within the terms of the statute on the theory that its communication to the court or jury does away with any other physical or topographical nearness required by the statute, and at the same time dispense with the essential requirement that it should actually be brought to the attention of the court or jury in such manner as to interfere with or obstruct their deliberations.

The contempt proceeding was not instituted, nor were the sentences imposed, for any purpose authorized by § 1 of the Act of 1831, but for the punishment of past offenses punishable only by indictment under § 2. *Marshall* v. *Gordon,* 243 U. S. 521, 540, 542.

On the strict view of this power in England and its common-law limitations: *McLeod* v. *St. Aubyn,* [1899] A. C. 549; 2 Bac. Abr., 7th ed., p. 399; 3 Encyc. of Laws of England, p. 500, "Contempt of Court;" *In re Clements,* [1876] 46 L. J. Ch. 375, 385; *Hunt* v. *Clarke,* [1899], 37 W. R. 724, 725.

The alleged incitement to disregard the court's order stands on the same ground as if it were made orally in a speech away from the presence of the court. Such incitement is not the misbehavior in court or near thereto that the statute deals with. The word "misbehavior" generally, and especially as used in the Act of 1831, connotes action or deportment in respect to the presence of another, and implies such presence. The actual resistance or ob-

struction to the execution of any writ or order of the court, committed out of the presence of the court, is punishable by indictment under § 2 of the Act of 1831. *Hillmon* v. *Mutual Life Insurance Co.*, 79 Fed. Rep. 749; *United States* v. *Carroll*, 147 Fed. Rep. 947.

The Court of Appeals erred in holding that it was immaterial whether the record showed error as to the second and third counts. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 440; *Claassen* v. *United States*, 142 U. S. 140, distinguished.

Mr. William L. Day and *Mr. Assistant Attorney General Fitts* for the United States:

Error will not lie to review a judgment of the Circuit Court of Appeals in a contempt proceeding.

Parties have a constitutional right to have their causes tried fairly by an impartial court uninfluenced by newspaper dictation or popular clamor. The courts below applied the law of contempt as it is administered in substantially all the state jurisdictions, as it always was and is now at common law, (*Patterson* v. *Colorado*, 205 U. S. 454, 462; Bishop's New Criminal Law, §§ 259, 260, 261; Bailey, Habeas Corpus, c. 7; Oswald, Contempt, pp. 91, 92, 97; Rapalje on Contempt, § 56; 9 Cyc. 20), and as it is now in England, and as it was in the federal jurisdiction prior to 1831 (*Hollingsworth* v. *Duane*, Fed. Cas., No. 6616; *United States* v. *Hudson*, 7 Cranch, 32). See Lord Chancellor Hardwicke in 2 Atkyns, 471. Likewise, 2 Vesey, 520; 1 P. Wms. 675; 4 Blackstone Com. 282; 2 Hawkins, Pleas of the Crown, 230; 29 Am. Law Reg. 82.

The language employed need not have brought the court into disfavor or endangered proper respect, or actually embarrassed or impeded the progress of the proceedings or the administration of justice therein, if it was of a character calculated to produce such effects, in a case pending.

The Act of 1831 was adopted by Virginia and by Ohio soon after its passage, and in both States received the same construction as was given it by the courts below. *Carter* v. *Commonwealth*, 96 Virginia, 791; *Myers* v. *State*, 46 Ohio St. 473; *Steube* v. *State*, 3 Ohio Cr. Ct. 383; 2 O. C. D. 216.

The statute, as its title indicates, is declaratory of the common law. It did not change the procedure, nor did it change the class of things punishable as contempts at common law. *Cuyler* v. *Atlantic & N. C. R. Co.*, 131 Fed. Rep. 95, 97.

A statute should not be held to limit powers inherently possessed by courts and necessary to their protection, unless such an intention is clearly and explicitly stated.

The tendency of the publication or act to interfere with the administration of the law is enough. *Patterson* v. *Colorado*, 205 U. S. 454, 463; *In re Independent Publishing Co.*, 240 Fed. Rep. 849; *United States* v. *Providence Tribune Co.*, 241 Fed. Rep. 524; *Gorham Mfg. Co.* v. *Emery-Bird-Thayer Dry Goods Co.*, 92 Fed. Rep. 774. It has never been held, except for the language of Justice Baldwin in *In re Poulson*, Fed. Cas., No. 11350, that the statute was intended as a limitation upon the inherent power of a federal court to punish as contemptuous the publication of offensive news articles during the pendency of the litigation. *Cuyler* v. *Atlantic & N. C. R. Co.*, *supra*, merely follows that case, and what was said on this subject in *In re May*, 1 Fed. Rep. 737, 742, and *Morse* v. *Montana Ore Purchasing Co.*, 105 Fed. Rep. 337, is *dictum*.

The statute is too plain to permit resort to its legislative history. But, if this were otherwise, a careful examination, as shown by the opinion of the District Court in the present case, serves rather to prove a purpose not to exempt any class of persons than a purpose to establish the immunity claimed. See *Carter* v. *Commonwealth*, *supra*. The act followed proceedings taken in Congress

against Judge Peck because he had inflicted punishment for a publication made after the case to which it referred had terminated. The views expressed in the *Poulson Case* are based on a misunderstanding of the controversy thus engendered, and are wholly unsound—as to which see: 1 Kent Com., 301, note; *State* v. *Galloway*, 5 Cold. (Tenn.) 326, 330; *Myers* v. *State*, *supra*.

Comparison of this act with the earlier one of Pennsylvania demonstrates that Congress, while in part it adopted the substance and phraseology of the state law, took pains to eliminate the express provision granting immunity to publications out of court and added the new provision for punishing misbehavior beyond the presence of the court, yet "so near thereto as to obstruct the administration of justice," thus evincing a clear intent not to give immunity to newspapers.

The tendency of the act complained of to affect a pending cause is the test under this statute. Aside from the *Poulson Case*, and dicta in the *Morse* and *May Cases*, *supra*, *Ex parte Schulenburg*, 25 Fed. Rep. 211, and *Ex parte Robinson*, 19 Wall. 505, this proposition is sustained in principle by all the decisions. *Savin, Petitioner*, 131 U. S. 267; *Sharon* v. *Hill*, 24 Fed. Rep. 726; *Cuddy, Petitioner*, 131 U. S. 280; *McCaully's Case*, 25 App. D. C. 404; 198 U. S. 582, 586; *United States* v. *Anonymous*, 21 Fed. Rep. 761; *In re Brule*, 71 Fed. Rep. 943; *Ex parte McLeod*, 120 Fed. Rep. 130; *United States* v. *Carroll*, 147 Fed. Rep. 947; *United States* v. *Zavelo*, 177 Fed. Rep. 536; *Kirk* v. *United States*, 192 Fed. Rep. 273; *In re Steiner*, 195 Fed. Rep. 299, 303; *United States* v. *Huff*, 206 Fed. Rep. 700; *O'Neal* v. *United States*, 190 U. S. 36.

The question as to press comments is answered by the state courts in *Myers* v. *State*, *supra*; *Tate* v. *State*, 132 Tennessee, 131; *People* v. *Wilson*, 64 Illinois, 195, 211; *Telegram Newspaper Co.* v. *Commonwealth*, 172 Massachusetts, 294; and *State* v. *Howell*, 80 Connecticut, 668.

The essence of the offense is conduct reasonably calculated to produce an atmosphere of prejudice where the pending case is being tried. *State* v. *Hazeltine*, 82 Washington, 81. The liberty of the press does not permit publications respecting pending causes which are reasonably calculated to interfere with the due administration of justice. *State* v. *Morrill*, 16 Arkansas, 384; *People* v. *News-Times Publishing Co.*, 35 Colorado, 253; 205 U. S. 454; *McDougall* v. *Sheridan*, 23 Idaho, 191; *State* v. *Shepherd*, 177 Missouri, 205; *State* v. *Rosewater*, 60 Nebraska, 438; *Burdett* v. *Commonwealth*, 103 Virginia, 838; *State* v. *Hazeltine*, *supra*.

United States v. *Huff*, and *United States* v. *Anonymous*, *supra*, discuss the relation to this question of the federal act. There is no reason why federal courts should not apply this statute as state courts apply local statutes of similar import.

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

This case is before us on error to review the action of the court below affirming a judgment of the trial court holding the defendants guilty of a summary contempt and imposing a fine upon them both. There is also pending an application for certiorari made upon the assumption that if jurisdiction on error was wanting the case involved questions of such importance as to justify our interposition.

We are of opinion that a motion to dismiss the writ of error must prevail since it is settled that a conviction for a criminal, although summary, contempt is for the purposes of our reviewing power a matter of criminal law not within our jurisdiction on error. *Cary Manufacturing Co.* v. *Acme Flexible Clasp Co.*, 187 U. S. 427, 428; *O'Neal* v. *United States*, 190 U. S. 36, 38; *Bessette* v. *W. B. Conkey*

Co., 194 U. S. 324, 335; *In re Merchants' Stock & Grain Co.*, 223 U. S. 639; *Gompers* v. *United States*, 233 U. S. 604, 606. But this does not relieve us from the duty of exerting jurisdiction, as we are of opinion that the case calls for the exertion of the discretionary power with which we are vested. The writ of certiorari is therefore granted, and we proceed to examine and dispose of the case to the extent rendered necessary by that conclusion.

The case is this. The Toledo Railways and Light Company in 1913 controlled and operated practically all the street railways in Toledo. The franchises under which it did so, however, it was generally considered, expired on the 27th of March, 1914. In anticipation of this fact, negotiations as to the terms upon which they should be renewed were broached between the city and the company, and pronounced differences were manifested. This gave rise to public agitation and discussion over the question which had become acute in November, 1913. In that month, evidently in order to enable the city to secure from the company such terms of agreement as it might impose, an ordinance was passed, without giving any new franchise or in terms making any new contract with the company, providing that after the 27th of March, 1914, the assumed day of the expiration of the franchises, three-cent fares should be charged from day to day. Complaint, alleging the injustice of this provision and the wrong which the railroad asserted would be produced by giving it effect, increased the agitation.

In January, 1914, creditors of the company filed in the District Court of the United States their bill against the company to enjoin it from obeying the ordinance on the ground that to do so would confiscate the property which they held in the company and would destroy the franchises which the company enjoyed and which, it was asserted, only expired in the following October. On March 24th

the creditors filed a supplemental bill making the city a party to the suit and asking preliminary and permanent injunctions against the city. On the same day, the company also filed its bill against the city seeking to restrain the enforcement of the ordinance both by preliminary and final injunctions.

At this juncture and before action had been taken by the court, The Toledo News-Bee, a daily paper, published in Toledo by The Toledo Newspaper Company, began publications adverse to the rights asserted against the city by the creditors and the railway company and in no uncertain terms avouched the right of the city to have enacted the ordinance which the suits assailed and challenged the right of the court to grant the relief prayed. On March 30th the court, after hearing on the applications for preliminary injunctions, denied them on the ground that the assailed ordinance was not self-enforcing, that it required an application of judicial power to put it into effect and that it would be time enough when the city invoked such relief by such power to assert by way of defense the matters which were made the basis of the prayer for affirmative relief in the pending controversies.

In September following, under a new prayer, the court reconsidered its action and awarded the preliminary injunction prayed on the ground that as the city had in the meanwhile treated the ordinance as enforcible without resort to judicial process and was acting against the company and the creditors and their alleged rights on that assumption, the duty was cast upon the court of protecting such rights pending the decision of the causes. In the meanwhile, however, the agitation over the questions which the suits involved had unremittingly continued and was beyond doubt fanned by continuous publications on the subject in the stated newspaper into a more exaggerated—not to use a stronger word—and

vociferous expression which embraced the whole field; that is, not only the relative rights of the city and the corporation, but also, at least by indirection, the duty and power of the court and its right to afford any relief in the matters before it.

Immediately preceding the action of the court taken on September 12th granting the preliminary injunction, and while that subject was before it for consideration, an attachment for contempt was issued against one Quinlivan for words spoken by him at a meeting of a labor union concerning the court and the matter which it was then engaged in considering. And a few days following, on September 15th, a similar process was issued against the managing editor of the Toledo News-Bee for publications written by him in the paper concerning the action of the court in the Quinlivan case.

On September 29th following, the court directed the district attorney to present an information for contempt against the newspaper company and its editor for the publications which had been made concerning the controversy, and on October 28th, giving effect to this order, an information was filed charging the newspaper company and the editor with contempt. The charges were stated in three counts. The first embraced matters published during the pendency of the suit from the time, March 24th, when the action was taken to make the city a party and the respective preliminary injunctions were prayed, up to and including the time when the ultimate action of the court on the subject in September was taken. The two other counts related, the one to publications made at the time of and concerning the attachment for contempt against Quinlivan, and the other to publications concerning the attachment against the managing editor. The defendants demurred on the ground that the information stated no act within the power of the court to

punish for contempt, and, on the overruling of the demurrer, they answered, not disputing the publications charged, but challenging the innuendoes by which in the information they were interpreted and reiterating the denial of all power in the court to punish.

Coming to dispose of the information, the court found both of the defendants guilty under all the counts and imposed upon both a punishment by way of fine. The court sustained its authority to so act by an elaborate opinion which, after stating the evidentiary facts—the publications and their environment—, drew from them ultimate conclusions of fact and held that from such conclusions it clearly resulted that the publications complained of constituted a contempt within the power of the court to punish, because, by their terms, they manifestly tended to interfere with and obstruct the court in the discharge of its duty in a matter pending before it. Condensing for the sake of brevity and looking at the substance of things, these conclusions of the court embraced four grounds: (a) Because, leaving aside the attempted ridicule, not to say vituperation, concerning the court which was expressly or impliedly contained in the publications, their manifest purpose was to create the impression on the mind of the court that it could not decide in the matter before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind as would leave no room for doubt that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. (c) Because the publications also obviously were intended to produce the impression that any order which might be rendered by the court in the discharge of its duty, if not in accord with the con-

ceptions which the publications were sustaining, would be disregarded and cause a shrinking from performing duty to avoid the turmoil and violence which the publications, it may be only by covert insinuation, but none the less assuredly, invited. And (d) because the publications were of a character, not merely because of their intemperance but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publications. 220 Fed. Rep. 458.

The affirmance by the court below of the action of the trial court thus stated, is the matter now before us for review. That court, not asserting the right or attempting to exert the power to review the merely evidentiary facts found by the trial court, but accepting them, in express terms sanctioned the inferences of ultimate fact drawn from them by the trial court. The court said: "The publications had reference to pending judicial action, and there is a finding of fact ('as alleged in the information') that they tended and were intended to provoke public resistance to an injunctional order, if one should be made, and there is a finding that they constituted an attempt to intimidate,—at least unduly to influence,—the district judge with reference to his decision in the matter pending before him. That each of these findings is supported by competent evidence and for that reason binding upon this court is too clear for dispute; but we may rightly go further and say that it is difficult to see how any other findings could have been made." This view, however, was restricted to the matters embraced by the first count, since it was decided that it was irrelevant to consider whether the same view would obtain as to the subject-matters of the second and third counts because it was held that in any event the finding of guilt under the first

count was adequate to justify the penalty imposed, thus rendering a consideration of the other two counts unnecessary. 237 Fed. Rep. 986.

Under the case and the action of the courts below concerning it, nothing further would seem to be required to establish the correctness of that action, since no other course, under the statement, is possible compatibly with the sacred obligation of courts to preserve their right to discharge their duties free from unlawful and unworthy influences and, in doing so, if need be, to clear from the pathway leading to the performance of this great duty all unwarranted attempts to pervert, obstruct or distort judgment. Nevertheless, in view of the gravity of the subject, we proceed to consider and dispose of the elaborate arguments pressed to the contrary. They are all embraced by the three following propositions: first, that there was a total want of power in the court to treat the matters charged in the information as a contempt and punish it accordingly, as a result of the provisions of § 268 of the Judicial Code (embodying the text of the Act of March 2, 1831, 4 Stat. 487); second, that, irrespective of the prohibitions of that act, there was a want of power to abridge the freedom of the press by punishing as for a summary contempt comments made by a newspaper upon matters of public concern; and third, that, whatever be the view of the two former propositions, as there was an entire absence of proof sustaining the ultimate inferences of fact upon which the court based its conclusion, such conclusion was wholly erroneous as a matter of law. We dispose of these propositions under separate headings.

1. *Section 268 of the Judicial Code and its forerunner, the Act of 1831.*

It is essential to recall the situation existing at the time of the adoption of the Act of 1831 in order to elucidate its provisions. In *Marshall* v. *Gordon*, 243 U. S. 521, the power of Congress to summarily punish for contempt

came under consideration and it was there pointed out that the enlarged legislative power on that subject which prevailed in England prior to the separation, whether based upon the commingling of legislative and judicial authority or upon any other cause, was necessarily in this country greatly restricted and changed by the effect of the adoption of the Constitution and the operation of the division of powers and the guarantees and limitations which that instrument embodied. Considering this condition in the light of the colonial legislation on the subject and the previous state constitutions, it was pointed out that it had come to be established, either by express constitutional or legislative provisions or by inevitable implications resting upon the very existence of government, that, while the limitations as to mode of accusation of crime and methods of trial had fundamentally changed the situation which had previously existed, such change had not deprived the legislative power of the right, irrespective of its authority by legislation to provide for the trial and punishment of criminal acts, in addition to summarily deal by way of contempt proceedings with wrongful acts obstructing the legislative power in the performance of its duty. This authority, it was held, was but an incident of the powers conferred, and, indeed, that its exertion in ultimate analysis was a means of securing the effective operation of the constitutional limitations as to mode of accusation and methods of trial. It was pointed out that the authority thus recognized automatically inhered in the government created by the Constitution, was sanctioned by a long line of judicial decisions and by state and federal practice, although the legislative power, doubtless as a mere consequence of a reminiscence of what had gone before, and momentarily forgetful of the limitations resulting from the Constitution, had sometimes exerted authority in excess of that which it was decided was really possessed.

While the *Marshall Case* concerned the exercise of legislative power to deal with contempt, the fundamental principles which its solution involved are here applicable, to the extent that they may not be inapposite because of the distinction between legislative and judicial power. Indeed the identity of the constitutional principles applicable to the two cases, subject to the differences referred to was pointed out on pages 542 and 543, where it was said: "So also when the difference between the judicial and legislative powers are considered and the divergent elements which in the nature of things enter into the determination of what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt, that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831, 4 Stat. 487."

The pertinent provision of § 268 of the Judicial Code is as follows: "The said courts [United States courts] shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice . . . ."

Clarified by the matters expounded and the ruling made in the *Marshall Case*, there can be no doubt that the provision conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed. And this is not at all modified

by conceding that the provision was intended to prevent the danger, by reminiscence of what had gone before, of attempts to exercise a power not possessed which, as pointed out in the *Marshall Case*, had been sometimes done in the exercise of legislative power. The provision therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly. The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty,—a conclusion which necessarily sustains the view of the statute taken by the courts below and brings us to the second question, which is:

2. *The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.*

We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however com-

plete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing.

The contention so earnestly pressed, that the express provision, found in a statute enacted in Pennsylvania in 1809, following impeachment proceedings against certain judges of that State and dealing with the extent of the power to base a contempt proceeding upon a newspaper publication, should be by implication read into the Act of 1831 and by filtration implied in § 268, Judicial Code, we think is answered by its mere statement, since, if it be conceded for argument's sake only that the provision in the Pennsylvania statute relied upon had the significance now attributed to it and that the Pennsylvania statute was the model of the Act of 1831, the omission from that act of the provision referred to as it existed in the Pennsylvania law is the strongest possible evidence of the purpose not to enact such provision. And thus we come to the third and final subject, which is:

3. *The contention that there was no evidence whatever to justify attributing to the publications the consequence of obstruction and therefore no legal basis for the conclusion of guilt and resulting right to impose penalties.*

It is to be observed that our power in disposing of this objection is not to test divergent contentions as to the weight of the evidence but simply to consider the legal question whether the evidentiary facts found had any reasonable tendency to sustain the general conclusions of fact based upon them by the courts below. Considering the subject in this aspect, again we are constrained to say that the contention on the face of the record is too plainly devoid of merit to require any detailed review. Indeed, we are of opinion that the court below was right in saying concerning the ultimate conclusions of fact upon which its action was based that it was "difficult

to see how any other findings could have been made." True, it is urged that, although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated in a daily paper having large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject. Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts.

This disposes of the case, for although the court below, we think mistakenly, considered that it was not under the duty to determine how far the facts sustained the charges under counts 2 and 3 because the conviction might be referred wholly to the first count (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 440), we are of opinion, after examining the facts as to both of

those counts, that they also sustain the conviction within the principles which we have just previously stated.

Affirmed.

MR. JUSTICE DAY and MR. JUSTICE CLARKE took no part in the decision of this cause.

MR. JUSTICE HOLMES, dissenting.

One of the usual controversies between a street railroad and the city that it served had been going on for years and had culminated in an ordinance establishing three cent fares that was to go into effect on March 28th, 1914. In January of that year the people who were operating the road began a suit for an injunction on the ground that the ordinance was confiscatory. The plaintiffs in error, a newspaper and its editor, had long been on the popular side and had furnished news and comment to sustain it; and when, on March 24, a motion was made for a temporary injunction in the suit, they published a cartoon representing the road as a moribund man in bed with its friends at the bedside and one of them saying "Guess we'd better call in Doc Killits." Thereafter pending the controversy they published news, comment and cartoons as before. The injunction was issued on September 12. The Judge (Killits) who was referred to took no steps until September 29, when he directed an information to be filed covering publications from March 24 through September 17. This was done on October 28. In December the case was tried summarily without a jury by the judge who thought his authority contemned, and in the following year he imposed a considerable fine. The question is whether he acted within his powers under the statutes of the United States.

The statute in force at the time of the alleged contempts confined the power of Courts in cases of this sort to where

there had been "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." § 268, Jud. Code, Act of March 3, 1911, c. 231, 36 Stat. 1163. Before the trial took place an act was passed giving a trial by jury upon demand of the accused in all but the above mentioned instances. October 15, 1914, c. 323, §§ 22, 24, 38 Stat. 738, 739. In England, I believe, the usual course is to proceed in the regular way by indictment. I mention this fact and the later statute only for their bearing upon the meaning of the exception in our law. When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case "to insure order and decorum in their presence" as is stated in *Ex parte Robinson*, 19 Wall. 505. See Prynne, Plea for the Lords, 309, cited in McIlwain, The High Court of Parliament and its Supremacy, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point and point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months as the Court did in this case. Without invoking the rule of strict construction I think that "so near as to obstruct" means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. "So near as to" refers to an accomplished fact, and the word "misbehavior" strengthens the construction I adopt. Misbehavior means something more than adverse comment or disrespect.

But suppose that an imminent possibility of obstruction is sufficient. Still I think that only immediate and necessary action is contemplated, and that no case for sum-

mary proceedings is made out if after the event publications are called to the attention of the judge that might have led to an obstruction although they did not. So far as appears that is the present case. But I will go a step farther. The order for the information recites that from time to time sundry numbers of the paper have come to the attention of the judge as a daily reader of it, and I will assume, from that and the opinion, that he read them as they came out, and I will assume further that he was entitled to rely upon his private knowledge without a statement in open court. But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty. I am not considering whether there was a technical contempt at common law but whether what was done falls within the words of an act intended and admitted to limit the power of the Courts.

The chief thing done was to print statements of a widespread public intent to board the cars and refuse to pay more than three cents even if the judge condemned the ordinance, statements favoring the course, if you like, and mention of the city officials who intended to back it up. This popular movement was met on the part of the railroad by directing its conductors not to accept three cent fares but to carry passengers free who refused to pay more; so that all danger of violence on that score was avoided, even if it was a danger that in any way concerned the Court. The newspaper further gave one or two premature but ultimately correct intimations of what the judge was going to do, made one mistaken statement of a ruling which it criticised indirectly, uttered a few expressions that implied that the judge did not have the last word and that no doubt contained innuendoes not flattering to his personality. Later there was an account

of a local socialist meeting at which a member, one Quinlivan, spoke in such a way that the judge attached him for contempt and thereupon, on the same day that the decree was entered in the principal case, the paper reported as the grounds of the attachment that Quinlivan had pronounced Judge Killits to have shown from the first that he was favorable to the railroad, had criticised somewhat ignorantly a ruling said to put the burden of proof on the city, and had said that Killits and his press were unfair to the people, winding up "impeach Killits." I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.

In the elaborate opinion that was delivered by Judge Killits to justify the judgment it is said "In this matter the record shows that the court endured the News-Bee's attacks upon suitors before it and upon the court itself, and carried all the embarrassment inevitable from these publications, for nearly six months before moving to vindicate its independence." It appears to me that this statement is enough to show that there was no emergency, that there was nothing that warranted a finding that the administration of justice was obstructed, or a resort to this summary proceeding, but that on the contrary when the matter was over, the judge thought that the "consistently unfriendly attitude against the court," and the fact that the publications tended "to arouse distrust and dislike of the court," were sufficient to justify this information and a heavy fine. They may have been, but not, I think, in this form of trial. I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law

deals with other illegal acts. Action like the present in my opinion is wholly unwarranted by even color of law.

MR. JUSTICE BRANDEIS concurs in this opinion.

GRINNELL WASHING MACHINE COMPANY *v.* E. E. JOHNSON COMPANY.

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

No. 272. Argued April 26, 29, 1918.—Decided June 10, 1918.

Patent No. 950,402, granted to W. F. Phillips, for a gearing device applied to a washing machine whereby the operation of wringing, in either direction, may be conducted and controlled simultaneously with the operation of washing, or separately, with one motor, is void for want of invention.

A combination of old elements, evolving no new coöperative function and producing no new result, other than convenience and economy, *held* not patentable.

231 Fed. Rep. 988, affirmed.

THE case is stated in the opinion.

Mr. Melville Church for petitioner.

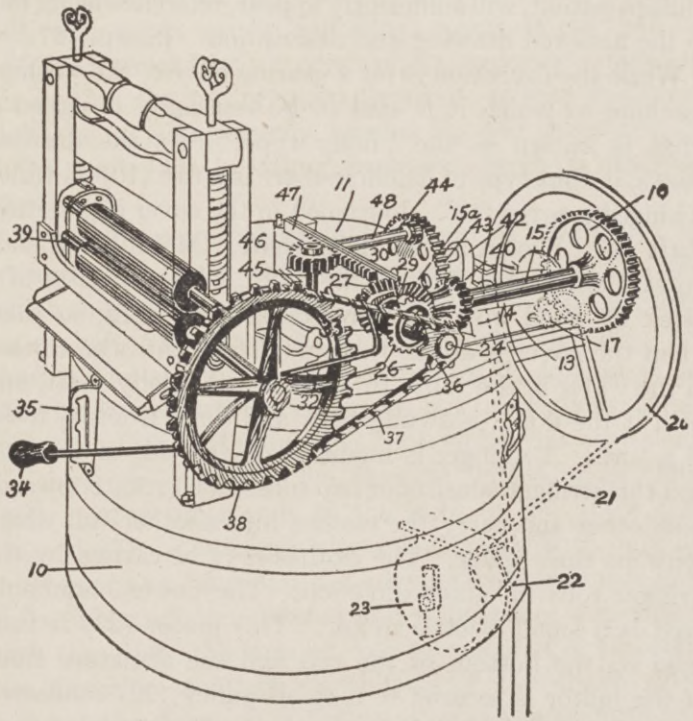
Mr. Clarence E. Mehlhope for respondent.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by the Grinnell Washing Machine Company against the E. E. Johnson Company for infringement of letters patent No. 950,402 granted to W. F. Phillips February 22, 1910. The patentee states the object of the invention to be "to provide a gearing

device of simple, durable and inexpensive construction, especially designed for use in operating washing machines and wringers, by means of power applied by an electric motor or other source of power."

The patent has been several times in litigation. In the United States District Court for the Southern District



of Iowa it was held valid and infringed. 209 Fed. Rep. 621. It was again sued upon in the same District Court, and upon appeal to the Circuit Court of Appeals for the Eighth Circuit a decree holding the patent valid and infringed was sustained. 222 Fed. Rep. 512. In the case at bar the patent was sustained in the District Court for the Southern District of Illinois where it was held valid and infringed, and a decree entered accordingly. From

this decree an appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, and that court reversed the decree below, and held the patent invalid. 231 Fed. Rep. 988. A writ of certiorari brings the last-named case here.

The gearing device, which is the subject-matter of the Phillips patent, will sufficiently appear, reference being had to the annexed drawing and description. [See p. 427.]

While the invention is for a gearing device, the washing machine to which it is said to be especially designed is what is known as the "dolly type." As the drawing shows, in that type of machine there is a tub (10) on which is hinged a cover (11). Journaled in the cover is a vertical shaft (45), known as the dolly shaft. Mounted to slide up and down this shaft is the dolly, which consists of a block of wood with pins projecting downward, so that, when the cover is down, the pins extend into the clothes in the water in the tub. In operation the dolly shaft, and with it the dolly, is swung back and forth from ½ to ¾ of a turn. A wringer is mounted on the side of the tub, and this wringer consists of two rolls which rotate towards each other and carry the clothes into another tub which contains rinse water. The clothes may be carried by the wringer rolls in either direction. The power commonly used is a small electric motor. This motor (23) is fastened on the bottom of the tub and the armature shaft of the motor is secured to a small pulley (22) connected by a belt (21), with a balance wheel (20) journaled on a stub shaft supported from the bracket (13). This large pulley wheel or belt wheel has secured on the hub a small spur gear pinion (17), which meshes with a large spur gear wheel (16), which is secured on the outer end of the horizontal power shaft (15), which is journaled in two bearings (14) projecting upward from the bracket or bearing. When the motor is running the train of gearing keeps the power shaft (15) running always in the same

direction at an average slower rate of speed than the armature shaft of the motor. The power shaft swings and rotates the vertical dolly shaft back and forth. A spur gear pinion (40), secured on the shaft (15), meshes with the larger spur gear wheel (44), secured on the shaft (43), journaled in bearings (42). The spur gear wheel (44) carries an eccentric gear, which is connected by a pitman (48) with a pin on the horizontal reciprocating rack bar (47). This rack bar is in mesh with a spur gear pinion (46) secured on the top of the dolly shaft, so that the power shaft being continuously rotated in one direction, the dolly shaft (45) is swung back and forth in alternate directions.

From the power shaft (15) a train of gearing to the wringer rolls has secured on it a small bevel gear (15a), which meshes with two mitre gears (26 and 27) mounted on a shaft (24) extending at right angles to the power shaft. The shaft (24) has secured on it, so that it can slide back and forth on the shaft, but must always rotate with the shaft, a clutch sleeve (30), which has on its ends clutch teeth shaped to be engaged with similar clutch teeth on the inner ends of the hubs of the mitre gears (26 and 27). The clutch sleeve is engaged with only one mitre gear at a time, and if it engages with one mitre gear, the wringer rolls are rotated in one direction; if it engages with the other, the wringer rolls are rotated in the opposite direction, so that the shifting of the clutch sleeve reverses the direction of the rotation of the wringer rolls. To do this shifting there is an operating handle (34), which extends beneath the wringer to a position where it can be readily operated by the person doing the washing. The handle (34) is secured on the end of a rock shaft (32), which has an upwardly projecting arm (33) that fits into an annular groove (30), into the clutch sleeve (29), so that as you swing the handle the clutch sleeve is moved from one position to another. The connection between

shaft (24) and shaft (39) on which the wringer roll is secured, consists of a sprocket pinion (36) secured on the outer end of the shaft (24) connected by a sprocket chain (37) with a large sprocket wheel (38) secured on the outer end of the shaft (39).

The method of operation is to place a batch of clothing in soapy water in the tub, and, when the electric motor is started, the driving shaft and the spur gear pinion, secured thereon, are put into rotation; when the hinged cover of the machine is brought down it has the effect of causing the spur gear wheel to go into mesh with the spur gear pinion and to set the dolly shaft and its head into reciprocating motion, thus scrubbing the clothes in the tub. When the cover of the washer is swung up, the gear of the dolly is automatically thrown out of gear with the pinion, the main driving shaft still continuously rotating. The operating handle is shifted so as to cause the clutch sleeve to engage with the hub of the bevel pinion, thereby causing the bevel pinion secured to the end of the main drive shaft to drive the shaft (24) and through the latter the sprocket wheel (36), the chain (37), the sprocket wheel (38) and the shaft of the lower wringer roll, causing the wringer rolls to rotate so that a garment placed between them will be carried outwardly. When the first batch of clothes has been washed, and passed through the wringer, a second batch of clothes is inserted in the soapy water in the washer, and the cover of the washer again swung down, thereby, in the manner described, putting the dolly into action again. While the second batch of clothes is being washed, the operator shifts the handle which controls the wringing mechanism, so as to reverse the motion of the wringer rolls, so that the garments in the rinse water tub may be passed back through the rolls of the wringer, and cast into a hamper. The second action of the wringer rolls takes place simultaneously with the washing of the second batch of clothes.

The net result, it is contended, of the Phillips patent is that the washing and wringing are carried on simultaneously and the operations of the wringer rolls are controlled by the handle described.

The claims alleged to be infringed are numbers five to eight inclusive. Number six was selected by the petitioner as typical in character, and is as follows:

"6. A gearing device of the class described, comprising a support, a power shaft mounted on the support, means for imparting a continuous rotary motion to the power shaft, an upright shaft 45 mounted in the support, a driving device for the upright shaft operatively connected with the power shaft and capable of imparting an alternating rotary motion to the upright shaft, a horizontal shaft 39, a driving mechanism for the said shaft 39 connected with the power shaft and capable of imparting a rotary motion to the shaft 39, and a controlling means applied to the driving device for the shaft 39, for reversing the movement thereof and also for operatively disconnecting the shaft 39 from the driving shaft."

Confessedly all the elements of the Phillips patent are old. The merits of the combination, which, it is contended, involve invention and validate the patent, are that this gearing device, applied and operated as specified, enables the washing of a part of the clothes to be performed at the same time that the wringing process is being applied to other clothes. Thus, it is said, saving time in doing the washing, and, furthermore, by the operation of the control handle the rolls may be reversed or instantly stopped as the need, convenience and safety of the operator may require. These things, the simultaneous washing and wringing, with the operation of the control handle, for the purposes stated, embrace the advances alleged to have been accomplished upon the prior art. In this view it is unnecessary to particularize the prior patents disclosed in the art. The question is, does this

bringing together of old elements accomplishing the purposes stated amount to that combination which is invention within the meaning of the patent law; or does the gearing device, thus applied and used, show only an aggregation of old elements performing well-known functions, producing no novel and useful result entitling the aggregation to the protection of a patent?

It is not always easy to decide this question, as the difference of opinion in the Circuit Courts of Appeals in this case illustrates. Generally speaking, a combination of old elements in order to be patentable must produce by their joint action a novel and useful result, or an old result in a more advantageous way. To arrive at the distinctions between combinations and aggregations definite reference must be had to the decisions of this court. The subject was fully discussed in *Palmer* v. *Corning*, 156 U. S. 342, wherein the previous decisions were reviewed. The rule stated in *Hailes* v. *VanWormer*, 20 Wall. 353, 368, was quoted with approval, wherein the court said:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from

using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination." *Hailes* v. *VanWormer*, 20 Wall. 353, 368.

In *Richards* v. *Chase Elevator Co.*, 158 U. S. 299, 302, the rule was stated as follows:

"Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements."

In *Specialty Manufacturing Co.* v. *Fenton Metallic Manufacturing Co.*, 174 U. S. 492, 498, the rule was again tersely stated:

"Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes* v. *VanWormer*, 20 Wall. 353, 368; *Reckendorfer* v. *Faber*, 92 U. S. 347, 356; *Phillips* v. *Detroit*, 111 U. S. 604; *Brinkerhoff* v. *Aloe*, 146 U. S. 515, 517; *Palmer* v. *Corning*, 156 U. S. 342, 345; *Richards* v. *Chase Elevator Co.*, 158 U. S. 299."

Applying the rule thus authoritatively settled by this court, we think no invention is shown in assembling these old elements for the purposes declared. No new function is "evolved from this combination;" the new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.

In the gearing specified every element is old. The operations of the wringer and the washing machine, although simultaneous, are independent one of the other. The control of the operation of the wringer is by an old and well-known method. From the coöperation of the ele-

ments, here brought together, no new result, involving the exercise of the creative faculty which is invention, is achieved. Phillips may have produced a more convenient and economical mechanism than others who preceded him, but superiority does not make an aggregation patentable. *Specialty Manufacturing Co.* v. *Fenton Metallic Manufacturing Co., supra.* The assemblage of the old elements, and their operation in the manner indicated, may save time, and the mechanism may meet with a readier sale than other similar devices, but these things may result from mechanical skill and commercial enterprise, and do not necessarily involve invention.

To borrow an illustration made at the argument, we think the Phillips aggregation of elements may be likened to the operation of a number of different machines in a factory by power applied from the same line shaft, each operation contributing its separate part to the production of a given result. So in this instance we think the combination accomplished by Phillips fails to show that exercise of invention, producing a novel and useful result from the coöperating action of the elements, which is essential to distinguish patentable combination from an aggregation of old elements so placed by mechanical skill as to do work more rapidly and economically.

We agree with the conclusion reached by the court below.

Affirmed.

Mr. Justice McKenna dissents.

EXPLORATION COMPANY, LIMITED, ET AL. *v.* UNITED STATES.

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

No. 277. Argued May 1, 1918.—Decided June 10, 1918.

Statutes of limitation upon suits to set aside fraudulent transactions do not begin to run until discovery of the fraud. *Bailey* v. *Glover*, 21 Wall. 342.

This rule applies to the provision of the Act of March 3, 1891, 26 Stat. 1093, that suits to vacate land patents shall only be brought within six years after the dates of the issuance of the patents.

235 Fed. Rep. 110, affirmed.

THIS suit was brought in the United States District Court for the District of Colorado to cancel nine coal land patents embracing 1120 acres of land in Colorado which, it was charged, had been procured from the United States by fraud. A further purpose of the suit was to cancel deeds of the same land from various persons to one Philip L. Foster alleged to be in secret trust for the Exploration Company, a foreign corporation, for whose benefit it is alleged the frauds were committed. Six of the patents were of date of October 16, 1902, and three of date of September 6, 1902. The suit was brought March 3, 1911, about eight and a half years after the dates of the patents, the bill alleging that the fraud by which the patents were obtained was self-concealing in its nature, was concealed from the Government by the wrongdoers and was not discovered until 1909. The defendants demurred on the ground that the suit was barred by the statute of limitations, and the demurrer was sustained by the District Court. 190 Fed. Rep. 405. The Circuit Court of Appeals for the Eighth Circuit reversed this decision, and the

case was sent back to the District Court, 203 Fed. Rep. 387. After trial a decree was rendered against the defendants, the present appellants. 225 Fed. Rep. 854. This decree was affirmed by the Circuit Court of Appeals, 235 Fed. Rep. 110, and the case comes here.

The District Court found the following facts:

The Exploration Company, defendant herein, is a corporation of Great Britain, authorized to purchase, own, and operate mines, and to purchase and own shares of stock in mines in all parts of the world. It was the owner of mines and mining lands in different parts of the world, and also of shares of stock of corporations engaged in mining in the United States and other countries. In 1901, and for several years thereafter, its representative in this country was Charles A. Molson, to whom it had executed a general power of attorney to represent it in all matters in the United States. The Exploration Company desired to acquire certain coal lands in the State of Colorado, which were a part of the public domain of the United States, but was unable to do so because it was a foreign corporation, and desired more of these coal lands than a domestic corporation could obtain under the laws of the United States. It therefore conceived and carried into effect the following scheme for the purpose of acquiring them: Mr. Molson employed one Henry Burrell to obtain title to the lands. Burrell employed other agents, who were sent to residents of Colorado, legally entitled to acquire public coal lands from the United States, and induced them to make entry of such lands as were pointed out to them by the Exploration Company's agents, and which were supposed to contain valuable veins of coal. A large number of such entries were made on lands situated in the counties of Gunnison and Delta, the parties having filed declaratory statements as required by law. Many of these lands were abandoned and no patents applied for, but the filings on the lands herein involved were paid for and

patents therefor secured. Henry Burrell was a witness in most, if not all, of these entries. The parties who made the entries were promised the sum of twenty-five dollars for their services in so doing. Burrell was to pay all fees, as well as the purchase money, with funds furnished by the Exploration Company. The entrymen and women executed deeds of conveyance for their respective tracts of land and delivered them to Burrell as soon as the final proofs were made and the money paid by the Exploration Company's agent to the respective officers of the land offices within whose jurisdiction the lands were situated. Henry Burrell caused these deeds to be made to Alexander Burrell, his brother, and Alexander Burrell later conveyed the lands to Albert L. Smith, a resident of Montana, the only consideration for the conveyance being that Smith promised to hold them in trust for and to convey them to any person designated by the agent of the Exploration Company. The agent Charles A. Molson having died, the Exploration Company appointed Philip L. Foster to succeed him as its duly authorized general agent in the United States, and Smith conveyed these lands to Foster, without any other consideration, who holds the legal title in secret trust for the Exploration Company. In 1902 patents to these lands were issued by the United States, but the fact that they were secured by false affidavits, and not for the benefit of the entrymen and women, but for the sole benefit of the Exploration Company, who in reality paid the Government the purchase money, was kept secret, and did not become known to any of the officers of the Government, nor did any facts become known to them which could arouse the suspicion of one reasonably diligent that the patents had been obtained by false affidavits for the sole benefit of the Exploration Company until 1909, more than six years after issuance of the patents, and then it only became known to the officers of the Government by reason of the fact that a

Utah corporation had acquired a great many of the public coal lands in the same manner that these lands were obtained, and this being discovered in 1909, the Secretary of the Interior directed in that year an examination of all coal-land entries made in the States of Utah and Colorado. The facts were for the first time discovered in this investigation. There was nothing in the records, or on file in the General Land Office of the United States or the Department of the Interior, which could possibly have aroused a suspicion that these lands had been obtained for the sole benefit of the Exploration Company until the reports of the special agents of the General Land Office were made in the latter part of 1909. As soon as the facts were ascertained, the Secretary of the Interior transmitted them to the Department of Justice, with the request to institute suits to set aside the patents to the lands, and this suit was accordingly instituted on March 3, 1911, several months less than two years after the discovery of the alleged fraudulent acts.

The District Court found that the defendants did not actively conceal the facts which constitute fraud in this case by enjoining silence on the entrymen and patentees, or by directing them or the agents who acted for the Company to refuse to give any information relating to the entries, if asked by the officers of the Government, but were guilty of a passive concealment. When the investigation was made by the agents of the General Land Office, in 1909, in relation to these entries, the patentees, as well as the Company's agents stated the facts truthfully, but until that time the fact that the entries were all made for the benefit of the Exploration Company, and that the legal title held by the defendant Foster was for the benefit of the Company, was concealed. There were no facts or circumstances within the knowledge of any official of the Government prior to the investigation in 1909 which could arouse even a bare suspicion that the entries were made in

the manner hereinbefore described and for the benefit of the Exploration Company.

Mr. Henry McAllister, Jr., with whom *Mr. George E. Tralles* was on the brief, for appellants:[1]

The history of this act (and the associated Act of 1896) indicates that it was intended to include patents secured through fraud, which might be actively concealed and which naturally would be passively concealed; and the failure of Congress to insert any excepting clause covering cases of concealed or unknown fraud indicates that no such exception was intended.

The statute means what it in plain terms says. Construing it this court has held that the lapse of six years from "the date of the issuance" of the patent, without suit, takes away the right as well as the remedy; even void patents are thereby forever validated; *a fortiori*, patents merely voidable because of fraud can never thereafter be challenged. The only open question is whether the land was public land of the United States subject to sale and conveyance through the land department at the time the patent issued. *United States* v. *Winona R. R. Co.*, 165 U. S. 463, 476; *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 477; *Louisiana* v. *Garfield*, 211 U. S. 70; *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 693; *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574, 578; *Hoglund* v. *Lane*, 44 App. D. C. 310, *s. c.*, 244 U. S. 174, 177.

The principle of *Bailey* v. *Glover*, 21 Wall. 342, and kindred cases, to the effect that, where the statute prescribes a limit after "the cause of action accrues" for the institution of the suit, time does not begin to run until the discovery of the fraud, particularly concealed fraud, is based on the theory that until such discovery the cause of action does not accrue. This court and the lower

[1] Counsel, on both sides, referred to the legislative history of the act under construction and that of March 2, 1896, 29 Stat. 42.

federal courts have so held, and it is evidenced by statutory enactments. The principle does not apply to statutes such as the one now in question. The English cases are predicated upon the fact that Statute 21 James I applied solely to actions at law, and therefore the chancery courts might ingraft exceptions in equity cases. *Bond* v. *Hopkins*, 1 Sch. & Lef. 413, 428, 431; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 630; *Ecclesiastical Commissioners* v. *Northeastern Ry. Co.*, L. R., Ch. Div., vol. 4, 845, 859; *Kane* v. *Bloodgood*, 7 John. Ch. 88, 113. Of course, the statute now before us, by its very terms, affects suits in equity, because none other than an equity proceeding could be invoked for the purpose of annulling a patent. Furthermore, it is exclusively confined to "suits by the United States." The "cause of action does not accrue until the discovery of the fraud," is the principle upon which the federal courts predicate their construction of the ordinary statute of limitations. *Bailey* v. *Glover*, *supra; Hovenden* v. *Lord Annesley*, *supra*, 634; *Sherwood* v. *Sutton*, 5 Mason, 143; *Carr* v. *Hilton*, 1 Curtis, 230; *Norris* v. *Haggin*, 28 Fed. Rep. 275; *Kirby* v. *Lake Shore R. R. Co.*, 120 U. S. 130, 138; *Goodridge* v. *Union Pacific Ry. Co.*, 35 Fed. Rep. 35, 37; *First Massachusetts Turnpike Corp.* v. *Field*, 3 Massachusetts, 201, 207.

In the light of these decisions, there is no merit in the contention that no distinction can be made between a limitation dating from the accrual of the cause of action and one dating from the issuance of the patent. The view so asserted seems to be that both limitations are identical, as both starting points are the same. This assumption of identity of the initial dates rejects the only ground upon which *Bailey* v. *Glover* and other similar cases can be logically sustained, and indicates that the courts below must have taken those cases as authority for the arbitrary suspension of the operation of an unambiguous statute. While, in technical strictness, both starting

points are probably the same, the fact remains that the courts have not considered them to be the same but have held the "date of the accrual of the cause of action" to be dependent upon when that cause was discovered. This is not illogical and does no violence to the language of the statute involved in *Bailey* v. *Glover*. But it is not logical or fairly possible to say in our case that the date of the discovery of the fraud is the date of the "passage of this act" or the date of the "issuance of such patent."

This same principle is fortified by many statutes, which, adopting it, have provided that in the case of fraud "the cause of action shall not be deemed to have accrued until the discovery thereof."

The preceding discussion demonstrates that the application of the "equitable principle" to statutes such as the one involved in *Bailey* v. *Glover* is not the creation of a judicial exception from the terms of the statute—it is merely by way of judicial interpretation.

The principle does not apply to a statute such as the one in question, where the language is not only explicit but inflexible. *Pickett* v. *McGavick*, Fed. Cas. No. 11126; *In re Brown*, Fed. Cas. No. 1983; *Matter of Herzig*, 15 Abb. New Cases, 179; *Mall & Co.* v. *Ullrich*, 37 Fed. Rep. 653; *Kinder* v. *Scharff*, 231 U. S. 517, 521.

The provision in the statute relative to patents issued before its passage makes it impossible, in such instances, to apply the argument that a statute of limitations may run in certain cases from the discovery of the fraud. The same construction must be given to the entire statute.

Congress was presumptively aware of the rulings that the "cause of action does not accrue until the discovery of the fraud"; and in selecting another and inflexible date from which to measure the period of limitation intended to depart from this principle.

The equitable principles announced in *Bailey* v. *Glover* related solely to statutes affecting private litigants. The

Acts of 1891 and 1896 created self-imposed barriers against suits by the Government only, respecting which the equitable rule now invoked had never been, and cannot be, applied. The statutes neither continued nor repealed any such rule because none had ever existed.

The cause of action was not concealed.

Mr. Assistant Attorney General Kearful for the United States:

When the object of a suit is to obtain relief against a fraud, concealment of the cause of action by the wrongdoer suspends the bar of the statute. This is an old and familiar rule of law and equity, as binding on the courts of the jurisdictions in which it prevails as any statute ever enacted by a legislative body. It is applied in mitigation of the strict letter to the limitation statute as if it were written there in the form of an exception to its general language. The reason of the rule is that statutes of limitation are designed to prevent the wrongful assertion of rights after the evidence to repel them has been impaired by lapse of time, and therefore it could never have been intended by any general words of limitation to provide an instrument for the encouragement and promotion of wrong. Counsel assert that the rule has never been applied in courts of law unless the statute under consideration contained an express exception of concealed fraud, and that it has only been applied in courts of equity in the absence of such exception where the statute related solely to actions at law. Hence, it is argued, where the statute contains no such exception, and expressly bars suits in equity, the rule is inadmissible. The correctness of their premise is the vital point of this case. The exact point was carefully examined and determined by this court in *Bailey* v. *Glover*, 21 Wall. 342, which has been cited often since and never questioned. *Gifford* v. *Helms*, 98 U. S. 248, 252; *Upton* v. *McLaughlin*, 105 U. S. 640, 642; *Rosen-*

thal v. *Walker*, 111 U. S. 185, 190; *Traer* v. *Clews*, 115 U. S. 528, 537; *Kirby* v. *Lake Shore, etc., Railroad*, 120 U. S. 130, 136; *Avery* v. *Cleary*, 132 U. S. 604, 609; *Pearsall* v. *Smith*, 149 U. S. 231, 236; *Kinder* v. *Scharff*, 231 U. S. 517, 521.

The rule of *Bailey* v. *Glover* has been applied to the statute now under consideration, upon facts similar to those of the case at bar, in *Linn & Lane Timber Co.* v. *United States*, 196 Fed. Rep. 593; 203 Fed. Rep. 394, affirmed on another point, 236 U. S. 574; *United States* v. *Puget Sound Co.*, 215 Fed. Rep. 436; *United States* v. *Southern Pacific Co.*, 225 Fed. Rep. 197; *United States* v. *Booth-Kelly Lumber Co.*, 246 Fed. Rep. 970. See also *State* v. *Stone Cattle Co.*, 66 Texas, 363, where the rule of *Bailey* v. *Glover*, was applied to a similar statute upon a state of facts like the present.

The English cases were examined in *Bailey* v. *Glover*. Previously, in 1828 Mr. Justice Story in the law action of *Sherwood* v. *Sutton*, 5 Mason, 143, had reviewed them exhaustively and demonstrated that in England the exception was allowed in equity both in cases where the limitation act was applicable by analogy merely and in those of concurrent jurisdiction, where the statute bound courts of law and equity alike; and not only in equity but also by the courts of law, without dissent. For a full discussion of the early English and American decisions, leading to the same result, see Angell on Limitations, 6th ed., §§ 183–186, which was written prior to *Bailey* v. *Glover*. See also *Bank* v. *Fairbank*, 49 N. H. 131, 141; *Way* v. *Cutting*, 20 N. H. 187, 190–194; *Bowman* v. *Sanborn*, 18 N. H. 205, 208. The statement of Vice Chancellor Malins in *Ecclesiastical Commissioners* v. *Northeastern Ry. Co.*, L. R., 4 Ch. Div. 845, 859, is true, if at all, only with respect to such equitable claims and titles as were not also cognizable in courts of law. It was not pertinent to the case before him, and was later disapproved by the

Privy Council. *Bulli Coal Mining Co.* v. *Osborne* [1899], A. C. 351, 362.

There is nothing in *Bailey* v. *Glover* to indicate that a period running from the time the cause of action accrued was considered any less definite or more susceptible of interpretation than one running from the date of a designated transaction. On the contrary, the court very plainly regarded the statute as precisely like those dealt with in the cases which it cited. The English statute of 21 James I, c. 16, in the application of which the rule originated, concededly did not employ such language, and "it is to be remembered," as Mr. Justice Story said in *Sherwood* v. *Sutton*, 5 Mason, 143, 153, "that most if not all the statutes of limitations existing [in 1828] in the several States of this Union have borrowed the language of the statute of 21 of James." It was upon the authorities applying the rule to those statutes that the court relied in *Bailey* v. *Glover*. See also *Kirby* v. *Lake Shore Railroad*, 120 U. S. 130; *Greenwald* v. *Appell*, 17 Fed. Rep. 140, 141; *Linn & Lane Timber Co.* v. *United States*, 196 Fed. Rep. 593, 599; *United States* v. *Southern Pacific Co.*, 225 Fed. Rep. 197, 202; *State* v. *Stone Cattle Co.*, 66 Texas, 363; *State* v. *Wichita Land & Cattle Co.*, 73 Texas, 450; *Wichita Land & Cattle Co.* v. *State*, 80 Texas, 684; *Johnston* v. *Roe*, 1 Fed. Rep. 692, 694; *Eddy* v. *Eddy*, 168 Fed. Rep. 590; *Bank* v. *Fairbank*, 49 N. H. 131; *Newberry* v. *Wilkinson*, 199 Fed. Rep. 673, 682–686.

The fact that the rule of *Bailey* v. *Glover* has been very generally adopted by statute in the States, proves only the solid sense and natural justice of the rule. The effect of those statutes is practically to overrule the decisions which were disapproved in *Bailey* v. *Glover* and to make the rule of that case universal in its application. *State* v. *Stone Cattle Co.*, 66 Texas, 363, 367; *Bank* v. *Fairbank*, 49 N. H. 131, 141.

The Act of 1896 concerned only patents "erroneously

issued" under railroad and wagon road grants, and the committee report which accompanied that act shows that the Act of 1891 grew out of the confusion resulting from the administration of railroad grants. But even if it appeared that Congress intended to deal specifically with cases of fraud in the acquisition of coal lands by the use of dummy entrymen, yet, as said in *State* v. *Stone Cattle Co.*, 66 Texas, 363, 367: " It could scarcely have been intended that the fraudulent purchaser should reap a benefit from an aggravation of his offense by the fraudulent concealment."

The greater liability of the Government to fraudulent imposition is all the more reason why it should have the benefit of this "universally implied" qualification of the broad language of the statute.

The Government may receive the notice through its proper officer, like a corporation. See *People* v. *Blankenship*, 52 California, 619; *State* v. *Giles*, 52 Indiana, 356; *State* v. *Furlong*, 60 Mississippi, 839; *State* v. *Warner Valley Stock Co.*, 56 Oregon, 283, 304; *State* v. *Wichita Land & Cattle Co.*, 73 Texas, 450.

There were affirmative acts of concealment; but it is enough that the fraud was such as to conceal itself.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court.

The Circuit Court of Appeals found that the evidence fully supported the findings of the trial court. We find no occasion to disturb the findings of fact by two courts. The question presented for our consideration is whether the suit was barred by the statute of limitations under the Act of March 3, 1891, 26 Stat. 1093, which provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

As averred in the bill, and found by the courts, the frauds were concealed until after six years had elapsed from the issuance of the patents—"After it was supposed the statute of limitations had barred any action, the participants in the fraud talked very freely, telling the truth when it was thought it would do no harm." It is the contention of the appellants that the statute was intended to bar all actions after six years from the date of the issuance of the patent, that if for six years the Government has failed to discover the fraud, no matter what its diligence in that respect may be, its action against the guilty parties is forever barred and they may hold in security the lands thus obtained by grant from the United States by means of fraud perpetrated in defiance of its laws enacted for the disposition of the public domain. We are unable to agree with this contention. We think the true rule is established in federal jurisprudence by the decision of this court in *Bailey* v. *Glover*, 21 Wall. 342. In that case a question was presented under the Bankruptcy Act of 1867, which provided that no suit at law or in equity should be maintained by or against an assignee in bankruptcy, or by or against any person claiming an adverse interest, touching the property or rights of property of the bankrupt, in any court whatever, unless the same should be brought within two years from the time the cause of action accrued for or against the assignee. The action was brought to set aside a conveyance on the ground of fraud. Among other things it was charged that the bankrupt, his wife, son and father-in-law being defendants in the case, kept secret their fraudulent acts, and endeavored to conceal them from the knowledge both of the assignee and of Winston & Company, a creditor proving a debt, whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the previous two years, and that even up to the time suit was instituted they had not been able to obtain

full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property. A general demurrer was filed to the bill on the ground that the suit was not brought within two years as required by the statute. It is thus apparent that no attempt was made to prosecute the action within two years from the time the same accrued. It was contended that the statute was imperative, that it made no exceptions, and that the action was consequently barred by limitation. This court, after a full review of decisions English and American, decided that, notwithstanding the positive terms of the statute, it did not begin to run until after the discovery of the fraud. In the course of the opinion Mr. Justice Miller said: "They [statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

It will be observed in that statute, as in the one now under consideration, there was no provision that the cause of action should not be deemed to have accrued until the discovery of the fraud. But it was held that for the purpose of such statutes the cause of action did not accrue until the discovery of the fraud; that such was the undisputed doctrine of courts of equity, and that the weight of authority, English and American, applied the same rule to actions at law.

Among other cases cited by Mr. Justice Miller, is the decision of Mr. Justice Story at the Circuit in *Sherwood*

v. *Sutton*, 5 Mason, 143, *s. c.*, 21 Fed. Cas. No. 12,782, p. 1303. That case involved a statute of the State of New Hampshire which provided that actions for fraud and deceit should be brought within six years. It contained no exception as to actions founded on fraud where the same had been concealed during the period of limitation, and the question was whether such exception was implied. The cases were very fully reviewed by Mr. Justice Story, and, in holding that the statute did not begin to run until the discovery of the fraud, he said (p. 1307):

"What then, is the reason, upon which this exception has been established? It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason, on which the exception is built, and not merely, that there is an equity binding upon the conscience of the party, which the statute does not reach or control."

Bailey v. *Glover* has never been overruled nor modified in this court and has been approved and followed. *Rosenthal* v. *Walker*, 111 U. S. 185, 190; *Traer* v. *Clews*, 115 U. S. 528, 537, 538; *Kirby* v. *Lake Shore & Michigan Southern Railroad*, 120 U. S. 130, 136; *Avery* v. *Cleary*, 132 U. S. 604, 609. It was also applied in the Court of Appeals for the Ninth Circuit in the case of *Linn & Lane Timber Co.* v. *United States*, 196 Fed. Rep. 593; 203 Fed. Rep. 394.

It is true that Mr. Justice Brewer, in delivering the opinion of the court in *United States* v. *Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476, said that no matter what the mistake or error of the Land Department was, or what the frauds of the patentee, the patent would become conclusive as a transfer of title after the lapse of six years. But the learned Justice said in the same opinion that this limitation could not be availed of because the suit was commenced before the expiration of the time prescribed, and that it was referred to as showing the purpose of Congress to uphold titles arising under certification or patent after the lapse of a certain time. It therefore appears that the question was not involved in that case. Nor does it contain any discussion of the doctrine previously laid down in *Bailey* v. *Glover*, *supra*.

In *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, cited by appellants, no question was made as to the effect of concealment of fraud until after the running of the statute. The same is true of *Louisiana* v. *Garfield*, 211 U. S. 70, also relied upon by appellants.

When Congress passed the act in question the rule of *Bailey* v. *Glover* was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind. We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the Government. We are aware of no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the Government as well as a private individual. It is not our belief that Congress intended that the Government should be deprived of title to public lands by those who added to the fraud by which they were obtained, artifices which enabled them to conceal the fraudulent manner

in which they were secured until the action was supposed to be barred by the lapse of six years.

The decree of the Circuit Court of Appeals is

Affirmed.

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

MR. JUSTICE MCREYNOLDS took no part in this decision.

JIM BUTLER TONOPAH MINING COMPANY *v.* WEST END CONSOLIDATED MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

No. 249. Argued March 26, 27, 1918.—Decided June 10, 1918.

The end lines of a lode mining claim, in the sense of the mining law, are those which are laid across the vein to show how much of it in length is appropriated and claimed by the miner. All other lines are side lines.

To sustain the extralateral right, the end lines must be parallel and straight, but this is not required of the side lines.

A mining claim was laid out as a parallelogram 1500 by 600 feet, but with two diagonally opposite angles truncated so that what would have been end lines in the absence of the truncation were thereby shortened substantially, but less than one half. *Held*, that these shortened lines, which were straight and parallel, were the end lines within the meaning of the mining law and for the purpose of determining the extralateral right, and that the truncating lines were parts of the side lines.

The extralateral right is a creation of the federal mining laws and they alone must be looked to in defining it.

Where a single vein, whose apex is within the boundaries of the claim, in its descent separates into two limbs—one being the discovery vein

—which dip downward through the vertical planes of the side lines, the extralateral right, its other elements being present, applies to each.

The findings showed a fissure vein with two dipping limbs whose course downward was substantial, regular and practically free from undulation. For 750 feet out of a total length of 1150 feet within the claim each was practically a separate vein with a distinct summit or terminal edge. For the remaining 400 feet the two were united and from the place of union mineralized rock continued upward for from 20 or 30 to 100 feet. There was no contention that a top or apex had been found elsewhere. *Held*, that it could not be said as a matter of law that there was no top or apex within the claim, in the sense of the mining law.

39 Nevada, 375, affirmed.

THE case is stated in the opinion.

Mr. Curtis H. Lindley, with whom *Mr. Hugh H. Brown*, *Mr. Wm. E. Colby* and *Mr. J. H. Evans* were on the brief, for plaintiff in error:

One of the essential elements of an apex is a "terminal edge"; and, when the vein turns over and dips in the opposite direction, the resulting anticlinal roll has no legal apex, as is held by all the authorities that have considered the question. *Iron Silver Mining Co.* v. *Murphy*, 3 Fed. Rep. 368, 371, 375; *Stevens* v. *Williams*, Fed. Cas. No. 13,413, pp. 40, 43; *Stewart Min. Co.* v. *Ontario Min. Co.*, 237 U. S. 350, 360; *Alameda Min. Co.* v. *Success Min. Co.*, 29 Idaho, 618, 630; *Eureka Cons. Min. Co.* v. *Richmond Min. Co.*, 4 Sawyer, 302, 311; *Duggan* v. *Davey*, 4 Dakota, 110; *Illinois Silver M. Co.* v. *Raff*, 7 N. Mex. 336; Costigan, Mining Law, 139; Barringer and Adams, Law of Mines and Mining, 442; Shamel, Mining, Mineral and Geolog. Law, 193, 194; Mines and Minerals, 27 Cyc. 537; Raymond, Glossary of Min. and Met. Terms., Trans. Am. Inst., M. E., Vol. IX, 102.

Section 2322 of the Revised Statutes does not justify the exercise of an extralateral right on the same vein on two downward courses and in opposite directions, since

the wording of the statute will not permit such a construction. This is especially true where the limb of the vein on which the discovery was made dips in the opposite direction from the limb in which the disputed ore bodies occur.

The westerly end line of the West End claim is a broken line, which is in contravention of the mandatory provision of the statute requiring end lines to be parallel and necessarily straight.

Mr. W. H. Dickson, with whom *Mr. S. S. Downer*, *Mr. A. C. Ellis, Jr.*, and *Mr. H. H. Atkinson* were on the brief, for defendant in error.

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

This is a suit by the owner of two lode mining claims—the Eureka and the Curtis—to enjoin the owner of an adjoining lode claim—the West End—from exercising an asserted extralateral right in respect of a vein extending beneath the surface from the latter claim into the others. All the claims are patented and their ownership is conceded. The Eureka adjoins the West End on the south and the Curtis lies immediately south of the Eureka. The state courts, both trial and appellate, upheld the defendant's asserted right to follow the vein extralaterally, 39 Nevada, 375, and the plaintiff seeks a reversal of that decision on the theory that it is in contravention of the mining laws of Congress, in that (a) the end lines of the West End claim are not parallel and straight, and therefore an essential element of the right to follow the vein extralaterally is wanting, (b) this right can be exercised only in one direction, that is, beyond one side line, not both, and as the discovery vein [1] dips to the north the

[1] The discovery was on the northerly limb hereinafter described.

right can be exercised only in that direction, and (c) the facts specially found do not show that the top or apex of the vein is within the vertical limits of the West End claim.

For present purposes the West End claim may be described as having the form of a parallelogram 1500 feet in length from east to west and 600 feet in width from north to south, but with a small portion of the northeast corner cut off by a diagonal line and a somewhat larger portion of the southwest corner similarly cut off (see diagram, 39 Nevada, 389). Thus what would be the end lines of the parallelogram, if it were complete, are substantially shortened, but the major part of each remains. These shortened lines are not only parallel but straight. Are they the end lines of the claim in the sense of the statute? Or do its end lines consist of the shortened lines and the diagonal lines? End lines in the sense of the statute are those which are laid across the vein to show how much of it, in point of length, is appropriated and claimed by the miner. All other lines are side lines. True, the end lines must be both parallel and straight, Rev. Stats., §§ 2320, 2322; *Walrath* v. *Champion Mining Co.*, 171 U. S. 293, 311, but it is not so with the side lines. They may have angles and elbows and be converging or diverging so long as their general course is along the vein and the statutory restriction on the width of claims is respected. *Del Monte Mining Co.* v. *Last Chance Mining Co.*, 171 U. S. 55, 84. Applying these tests to the bounding lines of the West End claim, we regard it as plain that the diagonal lines at the two corners are part of its side lines, and not of its end lines. In this respect the case is like *Walrath* v. *Champion Mining Co.*, *supra*, where in determining what was the northerly end line of the Providence claim (see diagram, 171 U. S. 298), the line g-h was held to be the true end line and the diagonal line f-g to be no part of it. Thus the objection that

the end lines of the West End claim are not parallel and straight is untenable.

What in mining cases is termed the extralateral right is a creation of the mining laws of Congress, and to learn what it is we must look to them rather than to some system of law to which it is a stranger. Besides, as Congress has plenary power over the disposal of the mineral-bearing public lands, it rests with it to say to what extent, if at all, the right to pursue veins on their downward course into the earth shall pass to and be reserved for those to whom it grants possessory or other titles in such lands. What it has said is this, Rev. Stats., § 2322:

"The locators of all mining locations . . . on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

It will be seen that the extralateral right so created is subject to three limitations. One conditions it on the presence of the top or apex inside the boundaries of the claim. Another restricts it to the dip or course downward, and so excludes the strike or onward course along the top or apex. And the last confines it to such outside parts as lie between the end lines continued outwardly in their own

direction and extended vertically downward. But otherwise it is without limitation or exception and broadly includes "all veins, lodes, and ledges throughout their entire depth,"—one as much as another, and all whether they depart through one side line or the other. Given two veins which in their descent pass, one through one side line and the other through the other side line, how could it be held that the right applies to one vein and not to the other, when the statute says "all veins . . . throughout their entire depth"? By what rule would a court be guided in making a selection between the two when the statute makes none? And where a single vein in its descent separates into two limbs which depart through the opposite side lines, on what theory could the right be sustained as to one limb and rejected as to the other? The terms of the statute, as we think, do not lend themselves to any such distinctions, but, on the contrary, show that none such is intended.

In *Mining Co.* v. *Tarbet*, 98 U. S. 463, 467, this court in pointing out the intent of the statute said that "the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally." And in *Del Monte Mining Co.* v. *Last Chance Mining Co.*, 171 U. S. 55, a case in which the statute was much considered, it was said, p. 88: "Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, 'although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side

lines of such surface locations.' In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines." And again, p. 89: "The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines." In *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.*, 182 U. S. 499, it was added, p. 508: "There are no exceptions to its language. The locators 'of any mineral veins, lode or ledge' are given not only 'an exclusive right of possession and enjoyment' of all the surface included within the lines of their locations, but '*of all veins, lodes and ledges throughout their entire depth*, the top or apex of which lies inside of such surface lines extended downward vertically.' A locator therefore is not confined to the vein upon which he based his location and upon which the discovery was made." And also, p. 509: "Blind veins are not excepted, and we cannot except them. They are included in the description 'all veins' and belong to the surface location."

We conclude therefore that, when the other elements of the extralateral right are present, it may be exercised beyond either or both side lines depending on the direction which the departing vein or veins take in their downward course.

So much of the special finding as bears on the character of the vein and the presence of its top or apex inside the vertical lines of the West End claim is as follows:

"The said vein does not on its upward course, or at its top or apex, outcrop or reach the present surface, but is covered or buried to a considerable depth by lava, locally known as and called 'Midway' andesite, which, after the formation of the vein, flowed over the then surface of the territory in which the vein exists; that at and for a distance of 360 feet westerly from where said vein

or lode crosses the easterly end line of said West End claim, which crossing is at a distance of 135 feet northerly from the southeast corner of said West End claim, there is a juncture or union between two limbs or sides of said vein, and from the summit of said juncture or union the downward course of one limb or side thereof is in a northerly direction, and the downward course of the other limb or side thereof is in a southerly direction; that there is a continuation upward from the summit of said juncture or union of said northerly and southerly dipping limbs or sides of said vein of ore and silver-bearing quartz or rock in place for a distance from 20 or 30 to more than 100 feet, and to what was the surface before the same was buried beneath the said lava flow; that such ore and silver-bearing quartz were deposited where the same are now found at the same time and during the same period that the main vein below was created, and from mineral-bearing solutions having the same source; that the dip is fairly conformable, and the strike or course of such upward continuation of ore and silver-bearing quartz is conformable to the dip and strike or course of said northerly dipping limb or side of said vein from the summit of said juncture downward, and the Court finds that said upward continuation is a part of said vein or lode; that thence westerly, and for a distance of 360 feet, the northerly and southerly dipping limbs, sides, or slopes of said vein do not unite or form a union or juncture in their upward course, but for that distance each of said limbs or sides has a separate and independent top or apex; that thence westerly, for a distance of 40 feet, the northerly and southerly dipping limbs, sides or slopes of said vein are again found in conjunction, as in the said most easterly 360 feet; that thence westerly, and until said northerly and southerly dipping limbs, sides, or slopes of said vein intersect with and cross said northerly side line of said mining claim, they do not unite or form a union or junc-

ture in their upward course, but for that distance [1] each of said limbs or sides has a separate and independent top or apex; that between said distance of 40 feet, where said northerly and southerly dipping limbs, sides, or slopes of said vein, as aforesaid, unite or form a union or juncture in their course upward, and said points on said northerly side line of said mining claim where, as aforesaid, said contra-dipping limbs, sides, or slopes of said vein respectively intersect said side line and cross the same and so depart from said mining claim, there are two points at which it appears that said contra-dipping limbs, sides or slopes of said vein on their upward course approach closely to a juncture or union but as to said contra-dipping limbs, sides or slopes of said vein at said two points actually forming a juncture or union on their upward course, the evidence is meager and unsatisfactory; that the point where the said northerly dipping limb or side of said vein departs from the said mining claim through the northerly side line thereof is 1120 feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that the point where said southerly dipping limb or side of said vein departs from said mining claim through the northerly side line thereof is 1142¼ feet westerly from the northeast corner of said claim, measured along the northerly side line thereof; that throughout said distance of 40 feet, where the contra-dipping limbs on sides of said vein are found in conjunction, as hereinbefore stated, there is a continuation upward from the summit of the juncture or union of said two limbs or sides of said vein of ore or vein quartz to what was the surface before the same was covered by the lava flow; that the dip or downward course of both the northerly and southerly dipping sides or limbs of the vein where the two are found in conjunction, as aforesaid, and also in the places where each, as aforesaid,

[1] Approaching 400 feet.

has its separate and independent top or apex, is regular and practically free from undulations; that the said southerly dipping limb or side of the vein in the easterly portion of the West End claim, that is to say, the easterly 360 feet thereof, has been developed from the top or summit of said juncture of said contra-dipping limbs to and beyond the southerly side line of said claim, or for a distance, measured on the slope or downward course of said southerly dipping limb or side, of 800 feet or thereabouts, the average dip there being 17 degrees from the horizontal; that the westerly portion, that is to say, the westerly 300 feet of said southerly dipping limb or side of said vein found in the West End claim, has been developed from its top to and beyond the southerly side line of said claim, or for a distance, measured on its slope or downward course, of 1000 feet or thereabouts, the average dip there being 30 degrees from the horizontal; that the average dip of said northerly dipping limb or side of said vein, so far as the same has been developed in its downward course, is 17 degrees from the horizontal; that said vein is a fissure vein; that there is a difference in the strikes or courses of said northerly and southerly dipping limbs of said vein of about 40 degrees; that at said places and throughout said distances, where said contra-dipping limbs of said vein are found to intersect and form a juncture, as aforesaid, there has been a mingling of the mineralizations of said two limbs of said vein within the angle beneath the juncture of the said two limbs; that at such places and throughout said distances the footwall of said two limbs of said vein, within the angle beneath their said juncture, by the process of replacement has been converted into mineralized quartz for considerable distances below said juncture, said replacement quartz extending from limb to limb."

Giving due effect to the finding, it is manifest that the vein in controversy is not a flat or horizontal vein or one

which would be practically horizontal but for a succession of rolls or waves in its elevation. On the contrary, it is shown to be a fissure vein with two dipping limbs whose course downward is substantial, regular and practically free from undulations. For 750 feet out of its total length of 1150 feet within the West End claim each limb is practically a separate vein with a distinct summit or terminal edge. For the remaining 400 feet the two limbs are united and from the point of union the mineralized quartz or rock continues upward for from 20 or 30 to more than 100 feet, and this seems to answer all the calls of a summit or terminal edge. In these circumstances we hardly would be warranted in saying as matter of law that the vein has no top or apex within the claim in the sense of the statute. See *Stewart Mining Co.* v. *Ontario Mining Co.*, 237 U. S. 350.

It is well to remember, as this court has indicated in other mining cases, that to take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery is unreasonable.

The contention is not that the top or apex of this vein has been found elsewhere, but only that what is found in the West End claim is not such in the sense of the statute. "The law," as has been truly said, "assumes that the lode has a top, or apex, and provides for the acquisition of title by location upon this apex." Probably this assumption could not be indulged where the fact appeared to be otherwise, but it serves to show that the absence of a top or apex ought not to be adjudged in the presence of such a finding as we have here.

Judgment affirmed.

STATE OF ARKANSAS *v.* STATE OF TENNESSEE.

INTERLOCUTORY DECREE. IN EQUITY.

No. 4. Original. Entered June 10, 1918.

Defining the principles determining the boundary between Arkansas and Tennessee in accordance with the previous opinion and decision, 246 U. S. 158, and appointing a commission, duly empowered, to locate and designate the line, with instructions to report, etc.

THIS cause came on to be heard at this Term and was argued by counsel; and thereupon and on consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz:

1. The true boundary line between the States of Arkansas and Tennessee, aside from the question of the avulsion of 1876, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi river as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion of March 7, 1876, which resulted in the formation of a new channel known as the Centennial Cut-off, the boundary line between said States was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said States should now be located along that portion of the bed of said river that was left dry as the result of said avulsion, according to the middle of the main navigable channel as it existed at the time the current ceased to flow therein as the result of said avulsion.

4. A commission consisting of C. B. Bailey, of Wynne,

Arkansas, Horace Vandeventer, of Knoxville, Tennessee, and Charles A. Barton, of Memphis, Tennessee, competent persons, is here and now named by the court, upon the suggestion of counsel, to run, locate, and designate the boundary line between said States along that portion of the bed of said river that was left dry as the result of said avulsion, in accordance with the above principles: Commencing at the upper end of the abandoned portion of the river bed at or about the beginning or head of said Centennial Cut-off, and thence following along the middle of the former main channel of navigation by its several courses and windings to the lower end of the abandoned portion of said river bed at or about the terminus or outlet of said Centennial Cut-off.

5. In the event the said Commission cannot now locate with reasonable certainty the line of the river as it then ran, that is, at or immediately before the avulsion of 1876, it shall report the nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said Commission shall give its findings of fact and the evidence on which the same are based.

6. Before entering upon the discharge of their duties, each of said commissioners shall be duly sworn to perform faithfully, impartially, and without prejudice or bias the duties herein imposed; said oaths to be taken before the Clerk of this court, or before the Clerk of any District Court of the United States, or before an officer authorized by law to administer an oath in the State of Arkansas or of Tennessee, and returned with their report; that said Commission is authorized and empowered to make examination of the territory in question, and to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line; to summon

witnesses and take evidence under oath; to compel the attendance of witnesses and require them to testify; to call for and require the production of papers and other documentary evidence; such evidence, however, to be taken upon notice to the parties, with permission to attend by counsel and cross-examine the witnesses; and all evidence taken and all exceptions thereto and rulings thereon shall be preserved and certified and returned with the report of said commissioners; and said commissioners are also at liberty to refer to and consult the printed record in the cause and the opinion of this court delivered on March 4, 1918, and to do all other matters necessary to enable them to discharge their duties and attain the end to be accomplished conformably to this decree.

7. It is further ordered that should any vacancy or vacancies occur in said board of commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies, the Chief Justice acting upon such information in the premises as may be satisfactory to him.

8. It is further ordered that said commissioners do proceed with all convenient dispatch to discharge their duties conformably to this decree, and they are authorized, if they deem it necessary, to request the coöperation and assistance of the state authorities of Arkansas and Tennessee, or either of those States, in the performance of the duties hereby imposed.

9. It is further ordered that the Clerk of this court shall forward at once to the Governor of each of said States of Arkansas and Tennessee and to each of the commissioners hereby appointed a copy of this decree and of the opinion of this court delivered herein March 4, 1918, duly authenticated.

10. The said commissioners shall make a report of their proceedings under this decree as soon as practicable and on or before such date as hereafter shall be fixed by the court, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

11. All other matters are reserved until the coming in of said report.

POSTAL TELEGRAPH CABLE COMPANY *v.* CITY OF NEWPORT, KENTUCKY.

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

No. 273. Argued January 18, 21, 1918.—Decided June 10, 1918.

This court will review and correct the error of a state supreme court, in assuming a state of facts without any support in the record as a basis for denying asserted federal rights.

When the case has been disposed of on the pleadings, every uncontradicted allegation by the unsuccessful party must be taken as true, including denials of material facts previously averred by his opponent.

The sole ground upon which a judgment against a prior owner is conclusive against his successor in interest is that the estoppel runs with the property, that the grantor can convey no better right or title than he had himself, and that the grantee takes *cum onere*.

Hence, a judgment holding a telegraph company bound by a license agreement with a city touching the use of the streets, but rendered in a suit begun after the company had conveyed to another, does not estop its remote successor in interest from claiming against the city that the agreement was never accepted.

While *res judicata* ordinarily is a matter of state law, a decision of the state court which denies asserted federal rights through the application of a former judgment will not conclude this court, if such application be clearly inconsistent with the right to due process of law.

It is a violation of the due process of the Fourteenth Amendment for

a State to give conclusive effect to a prior judgment against one who was neither a party, nor in privity with a party, therein.

160 Kentucky, 244, reversed.

THE case is stated in the opinion.

Mr. John Randolph Schindel, with whom *Mr. Morison R. Waite* was on the briefs, for plaintiff in error.

Mr. Brent Spence for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

On December 5, 1895, the council of the City of Newport, Kentucky, passed an ordinance purporting to grant to the Postal Telegraph Cable Company and its successors, subject to certain limitations, the right and privilege of erecting poles and stretching wires over the streets and alleys of the city necessary to the establishment, operation, and maintenance of a telegraph system connecting that city with other towns and cities. Among its provisions were these: (a) that unless the company should within thirty days, and in writing, accept the grant subject to the limitations, the grant should become void; (b) that nothing in the ordinance should be construed as granting a franchise to the company; and (c) that the company should pay to the city a "special license tax" of $100 per annum. This company was a New York corporation having the same name as that of plaintiff in error, and will be referred to hereinafter as the first New York company.

On or about January 1, 1897, that company conveyed its property in the State of Kentucky, including all its rights and interests in the City of Newport, to another New York corporation known as the Commercial Cable Company; in 1898 this company conveyed the same property and privileges to another New York corporation

known as the Commercial Cable & Telegraph Company; and on or about December 31, 1900, all of said rights and property were transferred and conveyed by the latter company to the plaintiff in error, the Postal Telegraph Cable Company, which is a corporation of the State of Kentucky, and since then has owned and operated the property.

In 1908 suit was brought in a state court by the city against plaintiff in error (hereinafter referred to as defendant) to recover "license taxes" as specified in the ordinance for a series of years, and a judgment in favor of the city for the years 1903 to 1907 inclusive was sustained by the Court of Appeals of Kentucky, notwithstanding certain contentions of defendant based upon the provisions of the Constitution of the United States respecting the regulation of commerce among the States and the establishment of post offices and post roads (Art. 1, § 8, pars. 3 & 7), upon the Act of Congress of July 24, 1866 (c. 230, 14 Stat. 221; Rev. Stats. U. S. § 5263 *et seq.*) and upon the "equal protection" clause of the Fourteenth Amendment. 160 Kentucky, 244. A writ of error under § 237, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156), issued before the taking effect of the Act of September 6, 1916, c. 448, 39 Stat. 726, brings the judgment here for review.

The case was decided upon the pleadings and exhibits, which latter included a copy of the ordinance and what was treated as a transcript of the record of a previous suit brought by the city against the first New York company in a state court of Kentucky to recover license taxes under the ordinance for two years ending December 5, 1898, resulting in a judgment in favor of the city, which was affirmed by the Court of Appeals, opinion reported in 25 Ky. Law Rep. 635; the judgment being pleaded as a bar to the defense set up in this action.

The pleadings in the present suit are so involved and

prolix that a particular recital of them would be tedious. We will present a sufficient summary to show the questions raised and how they were disposed of.

The city alleged the passage of the ordinance, and averred that shortly after its passage and in pursuance of it the first New York company erected poles and strung wires in the streets, and established, operated, and maintained a telegraph system in the city, and thereby the ordinance became a binding contract between the city and the company; but that defendant had failed and refused to pay the sum of $100 per annum for the several years in question, in disregard of its contract.

Defendant's answer alleged that at the time of the enactment of the ordinance defendant was not in existence, and that the Postal Telegraph Cable Company therein referred to was the first New York company; denied that either that company or defendant in any manner or at any time accepted the ordinance, or that the same became a binding contract between plaintiff and either company; admitted that shortly after its passage the first New York company began the erection of its poles and wires and the establishment of its telegraph system, but denied that this was done under or by virtue of the ordinance; alleged on the contrary that that company did not accept but declined to accept the ordinance, as plaintiff well knew, and that the poles were erected and wires strung in and over the streets and alleys of the city by the company under another and independent claim of right, as plaintiff well knew; that that company had accepted the Act of Congress approved July 24, 1866, c. 230, 14 Stat. 221; Rev. Stats. U. S. § 5263, *et seq*, and acts amendatory thereof, and had complied with their terms, and thereby obtained the right to construct, maintain, and operate its lines of telegraph over and along all post roads of the United States; that under § 3964, Rev. Stats. U. S., and the Act of Congress of March 1, 1884, c. 9, 23 Stat. 3, all

the streets and alleys of the City of Newport were such post roads, and by virtue of these provisions of the laws of the United States said New York company was entitled to erect its poles and string its wires over and along the streets and alleys of the city, and did so under that authority and not in pursuance of any acceptance of the ordinance, nor under any contract with the city.

Partly in an amendment to the answer, and partly in a rejoinder filed at the same time in response to plaintiff's reply, defendant set up the conveyance by said New York company on or about January 1, 1897, of all its property, rights, and lines of telegraph in the State of Kentucky and elsewhere, including its rights over the roads, streets and alleys in said State and in the various cities and municipalities thereof, to the Commerical Cable Company, a corporation of the State of New York; set up the subsequent conveyances of the same property as we have recited them, terminating with the conveyance to the defendant on or about December 31, 1900; alleged that from January 2, 1897, until June 30, 1898, the Commercial Cable Company of New York operated the Kentucky lines in the name of the Postal Telegraph Cable Company of New York; that from June 30, 1898, until December 31, 1900, the Commercial Cable & Telegraph Company of New York did the same; and that since the last mentioned date defendant had owned and operated and still owned and operated said lines, and was entirely separate and distinct from the first New York company and had no relations with it; that since the last mentioned date defendant had been engaged in operating and maintaining a system of telegraphy in the State of Kentucky between cities and towns in that State and, in connection with other companies, between various other cities and towns in other States; that before the last mentioned date defendant had accepted the Act of Congress of July 24, 1866, and had complied with its terms and ever since had been subject

thereto, and thus had obtained the right to construct, maintain, and operate its lines of telegraph over the streets and alleys of the City of Newport, and was doing so pursuant to this right and not by virtue of any contract with the city.

Defendant in its answer further set up that the payment of $100 per annum mentioned in the ordinance was not imposed as a rental but as a special license tax; and that it was not a reasonable rental or a reasonable or lawful exaction as a license tax. Also that the ordinance was void and inoperative because said right and privilege was not conferred in accordance with § 164 of the constitution of the Commonwealth of Kentucky then in force, and § 3068, Kentucky Statutes. And also that the alleged contract was beyond the powers of the city, *ultra vires*, and void.

Defendant further alleged that other telegraph companies and telephone companies were using the streets and alleys of the city for poles and wires in a manner substantially similar to their use by the first New York company and by defendant; that none of these companies was subject to the payment of any license tax or was required to pay or agreed to pay any compensation to the city by way of rental, license, or otherwise; that the attempted exaction from defendant of $100 per annum was an unreasonable discrimination between defendant and other telegraph and telephone companies, contrary to the laws of the State of Kentucky and in violation of the constitution of that State, and also in violation of the first section of the Fourteenth Amendment to the Constitution of the United States; and also that it was an unreasonable, excessive, and unlawful exaction, in violation of those provisions of the Constitution of the United States conferring upon Congress the power to regulate commerce among the States and to establish post-offices and post-roads (Art. 1, § 8, pars. 3 & 7), and the laws

enacted in pursuance thereof, and was therefore null and void.

In what was entitled a "second amended petition," but was ordered by the court to be taken as a reply to defendant's answer, plaintiff set up in substance that in a suit brought by it against the first New York company on September 9, 1899, the city alleged that the ordinance of December 5, 1895, was a contract consented to by that company and under which it derived and enjoyed its privilege to erect poles and string wires in the streets and alleys of the city and establish and maintain a telegraph system therein, that in consideration of this right and privilege the company agreed to pay to the city the sum of $100 per year as specified in the ordinance, and that under its terms $200 was due to the city for two years ending December 5, 1898, for which recovery was prayed; and that in this action a judgment was rendered in the trial court in favor of the city for the amount claimed, which was affirmed by the Court of Appeals of Kentucky, its opinion being reported in 25 Ky. Law Rep. 635. The same pleading alleged that the Postal Telegraph Cable Company of Kentucky, defendant in the present action, was the same Postal Telegraph Cable Company that was organized under the laws of the State of New York and was defendant in the former action, or that defendant was the lessee or successor, and succeeded to all the rights, privileges, and duties of the defendant in the former action, and was using, operating, and controlling the same poles, wires, and equipment as those used, operated, and controlled by the defendant in the former action; and plaintiff pleaded said proceedings and judgment as a bar to the defense set up in the present action.

By way of rejoinder, defendant denied its identity with the Postal Telegraph Cable Company of New York, defendant in the former action, denied that defendant in

the present action was the lessee or successor of said company or had succeeded to all its rights, or to any of its rights under the ordinance, and denied that it had succeeded to any of the duties of said New York company. In the same pleading were the averments respecting its acquisition of title to the property, its operation thereof, and its want of relation with the New York company, which we have recited.

The Court of Appeals, in disposing of the case (160 Kentucky, 244), laid aside the questions that were raised under both state and federal law as to the validity and effect of the ordinance, including the authority of the city to grant the privilege or exact the tax, upon the ground that the first New York company had agreed to the ordinance, and it and its successors, including defendant, had since been in possession of the streets under and by virtue of it, and would not be heard to dispute its validity while thus occupying the streets. Referring to the statement in the ordinance that it was not to be construed as granting a franchise, the court said: "Doubtless it was well known that a franchise such as is contemplated and required by the [state] constitution could not be secured in this way. In accepting the use of the streets under this ordinance, the company merely obtained the right, for the stipulated compensation, to occupy the streets until such time as the city might see proper to revoke the license. But so long as the company occupies the streets under the license it must pay the agreed price. The compensation provided by the ordinance is not a license tax upon the right of the company to do business in the city, but merely a charge against the company for the use of the streets with its poles and wires." The contention that the exaction of $100 per annum for the use of the streets was unreasonable was passed by a reference to the previous decision, where it was held (25 Ky. Law Rep. 637) that the question of the reasonableness of the grant

and what was a fair compensation for the servitude was a question for the parties to decide. Finally, the contention that the enforcement of the ordinance denied to defendant the equal protection of the laws was rejected upon the ground that it did not appear that any other telegraph company was occupying the streets of Newport under a grant like the one conferred by the ordinance in question; the court declaring that a corporation accepting a privilege under one grant cannot complain that other corporations are occupying the streets under different grants imposing other conditions, and that cities may make reasonable classifications of grants and privileges, and attach dissimilar conditions and impose dissimilar burdens upon each class, without violating the equal protection feature of the Federal Constitution.

It will be observed that every point raised by defendant, whether of fact or of state or federal law, was held immaterial upon the ground that (a) the first New York company had accepted the grant subject to the payment of the charge of $100 per annum; (b) its liability to pay the same had been adjudicated in the former suit; and (c) defendant, as successor to the rights and privileges of that company, was concluded by the former judgment against it.

It is true that, in answer to the assertion of a right under the Act of Congress of July 24, 1866, to erect poles and string wires in the streets without the consent of the city, the court declared that the act did not take from the city the right to charge a telegraph company for using its streets a reasonable compensation in the way of a license fee or occupation tax, citing *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, and *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160. In each of these cases, however, it was assumed, in the absence of anything to the contrary, that under the state constitution and laws the municipality represented the public in the control of

the streets (148 U. S. 100; 224 U. S. 171); in the *St. Louis Case* it was so held upon rehearing (149 U. S. 465); in both cases it was held that the question of reasonable compensation was a question of fact, to be determined in the usual way (148 U. S. 104–105; 224 U. S. 171–172); and in the *St. Louis Case*, upon a retrial, the ordinance charge was found to be unreasonable in fact (166 U. S. 388, 391). But in the present case, both the power of the city under the constitution and laws of the State, and the reasonableness in fact of the charge of $100 per annum, were denied by defendant, and the court declined to pass upon either question, deeming that defendant was concluded upon both points by the consent of its predecessor.

We assume that if the first New York company did at the outset accept the ordinance, either in writing according to its terms or by erecting poles and wires and occupying the streets thereunder or in any other manner satisfactory to the city, that company and its successors in the ownership of the telegraph system, including defendant, were bound to comply with the terms of the ordinance as to the "special license tax" (which evidently in that case would be regarded as an agreed rental), so long as they continued to retain and enjoy the privileges conferred; that in that event every claim of federal right here asserted would be without foundation; and that, if the fact of acceptance had been conclusively adjudged in a former proceeding against defendant or its privy, the same result would follow.

But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 259; *Carlson* v. *Curtiss*, 234 U. S. 103, 106; *Norfolk & Western Ry. Co.* v.

West Virginia, 236 U. S. 605, 610; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 567.

Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. This applies to the denial by defendant that either it or the first New York company accepted the ordinance, the averment that the latter company declined to accept it and erected its poles and strung its wires in the streets of the city under another and independent claim of right as plaintiff well knew, and other averments bearing upon the question of acceptance in fact.

There remains only the adjudication in the former suit against the first New York company, which we assume to have been sufficiently pleaded, and to have substantially involved the points that are now material so as to make them *res judicata* in a subsequent suit between the parties and their privies although based on a different demand (*Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Wilson's Executor* v. *Deen*, 121 U. S. 525, 534; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610), and which the Court of Appeals regarded as concluding defendant upon matters of fact as well as law. But there is nothing in the record to make this judgment conclusive as against defendant except upon the theory of a privity of estate between it and the first New York company. And, as to this, it appears from the averments in defendant's pleadings—indeed, it is stated as a fact in the opinion of the court—that the suit against that company was brought in the year 1899, two years after it had conveyed its property in the State of Kentucky, including all its rights and interests in the City of Newport, to another corporation through which defendant afterwards acquired title.

The ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the

property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes *cum onere*. From this it follows that nothing which the grantor can do or suffer after he has parted with the title can affect rights previously vested in the grantee, for there is no longer privity between them. This doctrine is universally accepted, and was applied by this court in *Keokuk & Western R. R. Co.* v. *Missouri*, 152 U. S. 301, 314; *Keokuk & Western R. R. Co.* v. *Scotland County*, 152 U. S. 318, 322; *Dull* v. *Blackman*, 169 U. S. 243, 248; *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 122. We infer that its obvious application to the facts of this case was inadvertently overlooked by the Court of Appeals, because the general principle is recognized in previous decisions of that court as a limitation upon the doctrine of *lis pendens*. *Clarkson* v. *Morgan's Devisees*, 45 Kentucky (6 B. Mon.), 441, 446, 453; *Parks* v. *Smoot*, 105 Kentucky, 63, 67.

Res judicata, like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment? *Eustis* v. *Bolles*, 150 U. S. 361, 366; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 610; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164.

Waiving the doubt whether, under the particular facts of this case, the question of *res judicata* can be regarded as independent of the federal questions that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment;

and this for the reason that it is inconsistent with another federal right of defendant, fundamental in character.

The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48; Greenleaf Ev., §§ 522–523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (*Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

It follows that in this case *res judicata* cannot be regarded as an adequate support for the judgment; and since, without that, we have not the materials necessary for a proper disposition of the federal questions that were raised, we express no opinion upon them.

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

Counsel for Plaintiff in Error.

NORTHERN PACIFIC RAILWAY COMPANY *v.* SOLUM.

NORTHERN PACIFIC RAILWAY COMPANY *v.* MONARCH ELEVATOR COMPANY.

NORTHERN PACIFIC RAILWAY COMPANY *v.* DULUTH ELEVATOR COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 205, 206, 526. Argued March 19, 1918.—Decided June 10, 1918.

The duty of a carrier to ship by the cheapest route in the absence of shipping instructions is not absolute; it is a duty to deal fairly with the shipper, with due regard also for the carrier's own interest and its obligation to the public.

Resort to the more expensive of two of the carrier's routes may be justified by a reasonable general practice of the carrier.

The Northern Pacific, having two routes between Duluth and other Minnesota points farther west, one intrastate, with a heavy upgrade westward, the other interstate, of lighter grades, used, in the absence of other shipping directions, the former for Minnesota traffic bound to Duluth and the latter for like traffic in the other direction. The charges under the interstate tariff were more than those allowed between the same points by Minnesota law. *Held*, that the reasonableness of this practice of routing was an administrative question within the jurisdiction of the Interstate Commerce Commission, whose decision the state courts had no jurisdiction to anticipate.

133 Minnesota, 93; *id.* 461, reversed.

Writ of error to review 136 Minnesota, 468, dismissed.

THE cases are stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for plaintiff in error.

Mr. Henry C. Flannery, Assistant Attorney General of the State of Minnesota, with whom *Mr. Lyndon A. Smith*, Attorney General of the State of Minnesota, was on the brief, for defendant in error in No. 205.

Mr. Ernest E. Watson, for defendants in error in Nos. 206 and 526, submitted.

Mr. Justice Brandeis delivered the opinion of the court.

These three cases were heard together. In each of them the plaintiff below sought to recover from the Northern Pacific Railway Company, in a state district court of Minnesota, an amount equal to that by which the freight collected for coal carried on an interstate route from Duluth to some other city in the State, exceeded the rate prescribed by the Minnesota law for carriage between those points on another route, wholly within the State. In each case judgment was entered in the trial court for the plaintiff for such amount; and the judgments were affirmed by the Supreme Court of Minnesota. Each case comes here on writ of error.

Carlton is situated on the Northern Pacific Railway, west of Duluth. Between these Minnesota cities that company operates two lines of railroad, each mainly single track. The northerly line, about 20.9 miles in length, lies wholly within Minnesota; the southerly line, 27.5 miles in length, extends for 11.7 miles through Wisconsin. The southerly is the original Northern Pacific line which was built in 1885. It has relatively light grades. The northerly line was built by the St. Paul and Duluth Railroad Company and came under the management of the Northern Pacific in 1900. It has a heavy upgrade from Duluth to Carlton. Since 1900 both lines have been operated continuously by the Northern

Pacific. Because of these grades, the northerly route has been used almost exclusively for such Duluth shipments as are inbound and the southerly route has been used for such as are outbound. Until June, 1907, the rates were the same over the two routes. They were duly filed with the Minnesota Railroad and Warehouse Commission and with the Interstate Commerce Commission.

In 1907 the legislature of Minnesota fixed for intrastate carriage of coal, maximum rates which were lower than the published rates theretofore charged. The rates so fixed were to take effect June 1, 1907; but before that date their enforcement was enjoined by the proceedings which were reviewed in *The Minnesota Rate Cases*, 230 U. S. 352. This injunction remained in effect until July, 1913, when it was dissolved pursuant to that decision. Until then the Northern Pacific continued to charge the published rates (and therefore the same rates) on all shipments of coal from Duluth to Minnesota points, whether moving via the interstate route or the intrastate route. After dissolution of the injunction, the company refunded on the few shipments which had moved over the intrastate route, the amount by which the charges actually collected exceeded the charges which would have been collected had the rates fixed by the legislature been observed. It refused, however, to make refunds on shipments made over the interstate route, on the ground that the state statute did not affect them.

Among such shipments were those involved in these cases, from Duluth by the interstate route to three Minnesota points, Hitterdal, Battle Lake, and Hawley, cities on the Northern Pacific lying west of Carlton. The shipment in each case was delivered to the Railway without any instruction as to how it should be routed; but the plaintiffs contended that, in the absence of instructions, it was the duty of the carrier to select that

route which was for the interest of the shipper, namely the intrastate route; because it would prove to be the cheaper, if the rates prescribed by the State were upheld. The several shippers claimed that they were entitled to the same refunds which would have been made if the coal had been carried on the intrastate route; and the suits were brought to recover these amounts.

The Railway answered in the first two cases, that, at the time of the shipments, the rates published were (because of the injunction in effect) identical on the two routes; that "in the ordinary and proper and economical operation of its property, it was necessary to move, and this defendant in general did and does now, move all out-bound shipments from Duluth via the interstate line and all in-bound shipments into Duluth via the intrastate line, and that to have carried the shipments referred to in the complaint to their destination . . . via said intrastate line instead of via the interstate line, over which they were actually carried, would have entailed great additional expense upon this defendant"; and that these rates were just and reasonable for the service performed and were collected pursuant to the tariffs published and filed with the Interstate Commerce Commission. In the third case the answer alleged in addition, that, on December 24, 1915, and prior to the commencement of that action, the Interstate Commerce Commission had, in *Holmes & Hallowell Co.* v. *Great Northern Ry. Co.*, 37 I. C. C. 627, decided that the practice of defendant in routing its westbound shipments from Duluth over its interstate line was a proper and reasonable practice and had denied the application for reparation on shipments of coal made over that route.

The judgments entered were upon demurrers to the answers. That in number 205 was entered May 28, 1916; that in number 206 on May 23, 1916; that in number 526 on May 2, 1917. (133 Minnesota, 93; *Id.* 461; 136 *Id.* 468.)

In each case it is assigned as error that the state court held that the cause of action therein is not affected by the federal statute regulating interstate commerce; and also that the state court assumed jurisdiction in advance of a determination by the Interstate Commerce Commission as to whether the practice of the Northern Pacific Railway, in sending via its interstate route all shipments of the character involved in these cases, was reasonable. In the third case the additional error is assigned that the court held that the intrastate rate should be applied, although the Interstate Commerce Commission had found that the practice of routing outbound shipments from Duluth via the interstate route was proper and reasonable. The objection that the court lacked jurisdiction to entertain the proceeding was not made in the answers in the trial court; but it was insisted upon before the Supreme Court of Minnesota; was considered and overruled by that court (133 Minnesota, 93, 97); and is available here. In numbers 205 and 206 judgment was entered before the Act of September 6, 1916. A federal question is involved; and the cases are properly here under § 237 of the Judicial Code. In number 526 the judgment was entered after the Act of September 6, 1916, c. 448, 39 Stat. 726, took effect. In that case there was not drawn in question the validity of a statute or treaty nor the validity of any authority exercised under the State. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; *Ireland* v. *Woods*, 246 U. S. 323; *Stadelman* v. *Miner*, 246 U. S. 544. The writ of error in number 526 must therefore be dismissed; although the defendant in error has not objected to the jurisdiction of this court.

We proceed to consider numbers 205 and 206. In those cases the Supreme Court of Minnesota declared that the carrier's duty was governed by the common law and it stated the applicable principle as follows (p. 96):

"Where a railroad company operates two lines of railroad between the same points, and the freight rate over one line is less than such rate over the other line, if other conditions are reasonably equal, it is the duty of the company to transport shipments between those points over the line which will give the shipper the benefit of the cheaper rate. To justify transporting such shipments over the other line and thereby compel the shipper to pay the higher rate, the company must show that such line was chosen by the shipper or that the circumstances or exigencies were such that a proper regard for the interests of the shipper precluded the use of the cheaper line."

In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only "if other conditions are reasonably equal." Resort to the more expensive route may be justified. And the justification may rest either upon the peculiar circumstances of a particular case or upon a general practice. In the cases before us the justification is rested upon a general practice. The answers allege that, because of the grades of the two lines, all outbound shipments were and are in general moved over the southerly route on account of the very great expense which another arrangement would entail. It may well be, under such circumstances, that carriage over the interstate route would be justified, even if it appeared that it was feasible to haul freight out of Duluth over the intrastate line. Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower

intrastate route was open to it, presents an adminstrative question, one of perhaps considerable complexity.

The Railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the court had no jurisdiction to adjudicate the controversy until that administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate. *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 147; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 131; *Pennsylvania R. R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456, 469. The Interstate Commerce Commission has frequently entertained proceedings for refunds for misrouting under such circumstances.[1] Indeed, long before these suits were filed, proceedings had been begun before the Interstate Commerce Commission against this and other railroad companies to secure the refunds of amounts paid for shipment over the interstate routes between Minnesota points in excess of that which would have been payable, if shipment had been made over the intrastate routes. *Holmes & Hallowell Co.* v. *Great Northern Ry. Co.*, 37 I. C. C. 627,

[1] *Willman & Co.* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 22 I. C. C. 405; *Lathrop Lumber Co.* v. *Alabama Great Southern R. R. Co.*, 27 I. C. C. 250; *Texarkana Pipe Works* v. *Beaumont, Sour Lake & Western Ry. Co.*, 38 I. C. C. 341; *McCaull-Dinsmore Co.* v. *Great Northern Ry. Co.*, 41 I. C. C. 178; *Cardwell* v. *Chicago, Rock Island & Pacific Ry. Co.*, 42 I. C. C. 730.

630, 645, 649. And before the judgments were entered by the Supreme Court of Minnesota in these cases, the Interstate Commerce Commission had determined that, under the circumstances, "the carrier was not required by law to change its methods of operation and abandon the use of its more favorable interstate line"; and had refused to grant refunds in respect to the shipment of other commodities, under circumstances precisely like those presented here.

The fact that the administrative question presented involves an intrastate as well as interstate route does not prevent the application of the rule, that the courts may not be resorted to until the administrative question has been determined by the Commission. It is sufficient that one of the routes is interstate. Compare *Minnesota Rate Cases*, 230 U. S. 352, 419–420; *Houston, East & West Texas Ry. Co.* v. *United States*, 234 U. S. 342.

In numbers 205 and 206 judgments reversed.

In number 526 writ of error dismissed.

AIKINS *v.* KINGSBURY, AS REGISTER OF THE STATE LAND OFFICE.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 265. Submitted April 25, 1918.—Decided June 10, 1918.

By the law as it was when he bought, a purchaser of state lands in default as to interest on a deferred payment was liable to have his interest in the land and in the contract foreclosed by a court proceeding begun on summary notice, but subject to his right to redeem by paying interest and costs within 20 days from judgment.

An act was passed declaring forfeiture in such cases in which the default had continued for five years and in which the State prior to the passage of the act had issued another certificate for the same land to a subsequent purchaser, unless all arrears of interest were paid within 6 months of its passage. *Held*, a change of remedy, not impairing the obligation of the contract of purchase.

One whose contract for the purchase of state lands had been for many years in default for nonpayment of interest both before and after the passage of a law forfeiting such contracts if the interest were not paid within a time stated, and who conceded the default and offered no excuse, *held*, not in a position to object that the law lacked due process in failing to allow time and opportunity for testing the liability to forfeiture in a court proceeding.

170 California, 674, affirmed.

THE case is stated in the opinion.

Mr. R. P. Henshall for plaintiff in error.

Mr. U. S. Webb, Attorney General of the State of California, and *Mr. Robert W. Harrison*, Deputy Attorney General of the State of California, for defendant in error.

Mr. Fred W. Lake, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

On June 3, 1869, the State of California sold to Charles A. B. Brackett three hundred and twenty acres of school land, and delivered to him a "certificate of purchase" for it. Twenty per cent. of the purchase money was payable at the time of the purchase and the remainder "within one year after the passage of any act of the Legislature requiring such payment, or before, if desired by the purchaser."

The unpaid purchase money was to bear interest at the rate of ten per cent. per annum, payable in advance.

The purchaser paid interest to January 1, 1873, and nothing further for thirty-eight years, when, on October 26,

1911, a state official, without authority to waive the default, accepted the amount of the unpaid purchase money and interest from the plaintiff in error, as transferee of the certificate, who thereupon demanded a patent for the land, which was refused for the reason that on December 29, 1886, a certificate of purchase for the same land had been issued by the State to Michael Phillips, on which the principal and interest was paid in full on August 28, 1911.

Upon this refusal by the State, the plaintiff in error filed the petition in this case "for a writ of mandate" to compel the defendant in error, as Register of the Land Office of the State, to prepare a patent for the land in controversy and to send the same to the Governor of the State, together with a certificate that the laws had been complied with, and that he as transferee of Charles A. B. Brackett was entitled thereto. Such a suit is said by the Supreme Court of California to be "in effect an action to require specific performance on the part of the State" of the contract evidenced by the certificate of purchase.

A judgment of the Superior Court granting the prayer of the petition was affirmed by the District Court of Appeals, and this in turn was reversed by the decision of the Supreme Court of the State which is now before us for review.

In 1889 the legislature of California passed an act providing that in all cases in which a certificate of purchase of public land had been issued prior to March 27, 1872, on which arrears of principal or interest had remained due and unpaid for five years, and in which, prior to the passage of the act, the State had issued to a subsequent purchaser another certificate for the same land, the owner of the first issued certificate should be deemed to have lost the right to the land or to complete the contract for the purchase of it, unless he should pay all unpaid interest within six months from the passage of the act.

If this act is a valid law it is obvious that it cut off the plaintiff in error's transferor from all interest in the land in controversy, for the Brackett certificate was issued prior to March 27, 1872, interest on it had been due and unpaid for sixteen years, and another certificate had been issued to Phillips, when the act was passed, and nothing further was paid until 1911.

But the plaintiff in error claims that this act of 1889 is invalid because it impairs the obligation of his contract of 1869 and deprives him of his property without due process of law.

These are large claims, made in impressive terms, but in reality the only obligations of this simple contract were, that the State, on the one hand, should furnish a patent to the land when it should be paid for at the times and in the manner stipulated, and that the purchaser, on the other hand, should make payment as he had agreed to make it.

For the enforcement of the contract the law gave to the State a remedy by foreclosure, in a court proceeding, for default of the purchaser, and to the purchaser or his assigns was given the privilege to redeem at any time before the expiration of twenty days from entry of judgment of foreclosure against him.

And now, after having neglected, if not repudiated, his obligation under the contract, by failing to pay the interest due upon it for 16 years before the act was passed and for 22 years thereafter, the plaintiff in error comes complaining that the State by the Act of 1889 impaired his right under it by taking away the twenty-day period of redemption, which the prior law allowed, even though a six months' period of redemption, from the passage of the act, was substituted for it.

It is sufficient answer to this contention to say that:

The right of the State to foreclose such a contract for default in payment, and the right of the purchaser to

redeem after a default decree, relate to the remedy as distinguished from the obligation of the contract, and both of these rights are constitutionally subject to modification by the State, within limits which were not exceeded in the act before us, as is decided in *Wilson* v. *Standefer*, 184 U. S. 399, and in *Waggoner* v. *Flack*, 188 U. S. 595, which are strikingly similar in their facts and in their applicable law to the case we are considering. The right of the purchaser to redeem under the prior law was limited to paying before the expiration of twenty days from entry of default "the amount due the State and the costs of suit" and this right was modified by the Act of 1889 so as to permit redemption by paying "the interest remaining unpaid for such purchase within six months from and after the passage of this act." The notice to defendants in a suit for default under the prior law was of such a summary character that we cannot doubt that the privilege of the purchaser to redeem under the Act of 1889 is as liberal as it was before the act was passed and the change, therefore, did not deprive him of any substantial right or benefit.

It is, however, pressed upon our attention as an important difference between the Texas act involved in these cited cases and the California act before us, that the former, in terms, gives to the purchaser of public land the privilege for six months after a decree of forfeiture has been entered against him, by a designated state officer, of resorting to a court proceeding to set aside such default on the ground that it was not authorized, while no such provision is contained in the latter. It is asserted that this distinguishes the two acts, and that the absence of authority for such a court proceeding renders the California act invalid, by depriving the plaintiff in error of his property without due process of law.

It would be sufficient reply to this to say that the right to redeem after default decreed, which the purchaser had

under the California statute when his contract was made, was limited to payment of "the amount due the State and the costs of suit," and that, therefore, the Act of 1889 did not deprive him of such a privilege as the Texas act gave, of setting aside the decree in a court proceeding on the ground that it was not authorized.

But it is not important for us to consider such a question, for it is not presented in the record before us. The plaintiff in error comes admitting that for thirty-eight years he and the persons through whom he claims were in default, and, since he does not offer any excuse for such abandonment of the contract, even if the California act had contained the provision of the Texas act allowing a court review of the default defined in it, such remedy could not have been of any avail to the plaintiff in error for he makes no case upon which he could possibly have made use of it, and he is, therefore, not in any position to attack the constitutionality of the act involved for an omission which does not injure him, and which, if supplied, would not benefit him. He who would successfully assail a law as unconstitutional must come showing that the feature of the act complained of operates to deprive him of some constitutional right. *Tyler* v. *Judges*, 179 U. S. 405; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56.

We quite agree with the Supreme Court of California that this case is ruled in all essentials by the *Waggoner Case, supra*, and this renders unnecessary the consideration of the applicability of the doctrine of laches.

The judgment of the Supreme Court of California must be

Affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL. *v.* MINNEAPOLIS CIVIC AND COMMERCE ASSOCIATION.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 283. Argued May 1, 2, 1918.—Decided June 10, 1918.

Two railroad companies, between them owning all the stock and controlling completely the property and operations of a third company, which had legal title to terminal tracks, caused separate switching charges to be made in its name on traffic moved by them over those tracks, although for substantially the same service over terminals which each owned separately, neither made any charge in addition to its line-haul rates. A state commission, finding that the practice discriminated against shippers on the third company's tracks, ordered that the separate charges be discontinued and that the tracks be operated as a part of the terminal properties of the other companies, in intrastate traffic. *Held:* (1) Upon examination of the findings and evidence, that the commission and the courts below were justified in holding the third company a mere agency or instrumentality of the other two; (2) that its technical corporate individuality and its technical ownership of the tracks in question did not entitle it to be treated as an independent carrier, and that the order did not deprive it or the other companies of property without compensation or due process of law; (3) that the order imposed no unlawful burden on interstate commerce.

134 Minnesota, 169, affirmed.

THE case is stated in the opinion.

Mr. James B. Sheean and *Mr. O. W. Dynes*, with whom *Mr. F. W. Root*, *Mr. William H. Norris* and *Mr. Edward M. Hyzer* were on the briefs, for plaintiffs in error.

Mr. Frank J. Morley, with whom *Mr. Clifford L. Hilton*, Attorney General of the State of Minnesota, and

Mr. Lyndon A. Smith were on the briefs, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

We shall adopt the designation of the parties which is used in the record: the Chicago, Milwaukee & St. Paul Railway Company as the "Milwaukee Company;" the Chicago, St. Paul, Minneapolis & Omaha Railway Company as the "Omaha Company;" the Minneapolis Eastern Railway Company as the "Eastern Company;" the Minneapolis Civic and Commerce Association as the "Civic Association," and the Railroad & Warehouse Commission of the State of Minnesota as the "Commission."

This proceeding originated in a petition filed by the Civic Association with the Commission against the three railway corporations plaintiffs in error, in which it is alleged that the tracks of the Eastern Company are mere switching or terminal facilities, in the City of Minneapolis, of the Milwaukee and Omaha companies, and that an unreasonable extra charge is made for the receipt and delivery of cars over them. The prayer is that the plaintiffs in error be required to treat the tracks of the Eastern Company as if they were a part of the terminal systems of the Milwaukee and Omaha companies, and that they be required to publish and maintain fair and reasonable tariffs applicable to traffic moving over them.

A hearing upon this petition resulted in findings of fact by the Commission, among others: that the Eastern Company was then operating only one mile of main track and one mile and a half of yard track and sidings in the City of Minneapolis; that the Milwaukee and Omaha Companies each owned one-half of its capital stock and were in control of its operations; and that, assuming to be

an independent railroad company, the Eastern Company had filed tariffs with the Interstate Commerce Commission and with the Minnesota Commission, pursuant to which it was charging and collecting, in addition to the line rate from point of origin, an extra charge of $1.50 per car for inbound loaded cars and ten cents per ton, with a minimum of $1.50 per car, for outbound loaded cars, moving over its tracks.

As conclusions of law the Commission found that the tracks of the Eastern Company were a part of the terminal property of the Milwaukee and Omaha companies; that it was the legal duty of these companies to deliver cars to and to receive them from industries on the tracks of the Eastern Company without charge other than that made for the line haul; and that the extra charge which the Eastern Company was making resulted in discrimination against inbound shippers of grain to industries located upon its tracks.

Upon these findings of fact and conclusions of law the Commission entered an order, requiring that the three companies cease charging $1.50 per car for inbound shipments over either the Milwaukee or Omaha lines which are delivered over the Eastern Company's tracks to industries located upon them or to connecting carriers; that the Eastern Company cease from charging any sum for delivering carload shipments of freight moving from connecting carriers to the Milwaukee or Omaha companies, or moving from mills and elevators located on the Eastern Company's tracks to the Milwaukee or Omaha companies; and that the Omaha and Milwaukee companies in the future shall operate the tracks of the Eastern Company as a part of the terminal property of each of them in the City of Minneapolis. The order is made applicable only to intrastate shipments of freight.

On appeal to a state district court the order of the Commission was affirmed and adopted as the order of the

court, and the decision of the Supreme Court of Minnesota affirming this judgment is now before us for review.

The contention of the railway companies in this court is stated by them "to be reduced to the single proposition:" That the Supreme Court of Minnesota erred in affirming the judgment of the District Court in finding, as did the Commission, that "the tracks operated by the Eastern Company are important, convenient and necessary terminal facilities of the Milwaukee and Omaha companies, and that these companies directly control and operate the Eastern Company;" and in adjudging, "that the Milwaukee and Omaha companies be required to operate the Eastern Company's tracks as a part of their terminal property at Minneapolis, without making any extra charge for moving traffic over them."

Review by this court is prayed for on the ground that to give effect to the judgment and order of the Minnesota court will deprive each of the three railroad companies of its property without compensation and without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and, earnestly insisting that the findings of fact upon which the judgment proceeds are without support in the evidence, the plaintiffs in error urge that it be determined from the entire record before us whether substantial evidence was introduced to sustain the denial of their claimed federal right. *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 566; *Jones National Bank* v. *Yates*, 240 U. S. 541, 552.

Thus, the question presented for our decision is whether the Eastern Company, in form a corporate entity, separate and distinct from the Milwaukee and Omaha companies, is in reality an independent carrier, exercising an independent control over the railroad to which it holds the legal title and over the conduct of its business affairs, or whether it is a mere agency or instrumentality of the two corporations, which own all of its capital stock,

through which they collect an extra charge from the public for rendering by indirection a service which as common carriers they are legally required to render without such charge under the conditions of operation which prevail at Minneapolis.

It is obvious that this is a mixed question of fact and of law, and from the findings of fact as made by the Commission and by the District Court, which differ only in unimportant details, and from evidence undisputed in the record, we derive the following statement, which we think embraces all that is essential to a decision of the case.

The Eastern Company is a Minnesota corporation, with an authorized capital stock of one million dollars, organized in 1878 for the declared purpose of building and operating a railroad from the City of Minneapolis to the City of St. Paul, with branches connecting with all railroads now built or hereafter to be built to or into said cities, and with branches to the mills and manufacturing establishments located therein.

The formal organization of the company was by a group of mill-owners, but before any right of way was acquired or construction work done the Milwaukee and Omaha companies came into exclusive control of the corporation and a board of directors satisfactory to them was elected, with the result that the only road which the company ever built or operated (omitting small fractions) was one mile of main track and one mile and a half of yard track and sidings in the City of Minneapolis. At the time of the trial the Eastern Company served several mills and warehouses and one elevator, it had no stations or freight depots, its only rolling stock was two engines, and the average number of its employees varied from twenty to thirty men. Its tracks are used for interchange by the Milwaukee and Omaha lines, but other companies use them for this purpose to such a limited extent, that the part of the Commission's order relating to such use is

neglected in the evidence and arguments and in the decisions of the state courts.

Almost immediately after the organization of the Eastern Company, the three companies entered into a written contract, effective for over 39 years, until May 1, 1918, which is of much significance in determining the decisive fact in the case, as we have stated it.

This contract provides:

(1) That only 300 shares of the authorized 10,000 shares of capital stock of the Eastern Company shall be issued, and of these, 75 shares each must be issued to the Omaha and Milwaukee companies, 145 shares to a trustee for the Eastern Company, and the remaining 5 shares shall be issued as qualifying shares to directors. The 145 trust shares "shall not be transferable except by the written consent of all (3) said parties hereto, and any transfer thereof without such consent shall be void and of no force or effect."

(2) The Eastern Company shall execute in proper form 150 bonds of $1,000 each and a mortgage on all the property and franchises of the company to secure their payment. The Milwaukee and Omaha companies agree each to purchase, at 80% of their par value, one-half the amount of such of these bonds as it may be necessary to issue to pay for the right of way, construction and equipment of the railroad;

(3) That the Milwaukee and Omaha companies shall have "equal and the same rights in and to the said railway . . . in all respects;" that they shall pay the same charge for switching their respective cars by said railway, and that no partiality or favor shall be shown to either;

(4) That the superintendent having charge of the operation of the railroad, shall be appointed "by the consent and mutual agreement of all the parties to these presents;"

(5) That the Eastern Company shall charge all parties one dollar for switching each loaded car, but a rebate of fifty per cent. of this charge shall be made to the Milwaukee and Omaha companies;

(6) If any other company having equal facilities with the Eastern Company for reaching mills in Minneapolis shall promptly and satisfactorily do the switching for the second and third parties (the Milwaukee and Omaha companies) then the Eastern Company with the written consent of the Omaha and Milwaukee companies, will do switching for such railroad companies over the said railroad of the Eastern Company on the same terms that switching is done for the said second and third parties (the Milwaukee and Omaha companies) over such other railroad but without rebate to any company.

It is quite true, as is argued, that some of the provisions of this contract have been departed from, and that others have been rendered unlawful and void by statutes enacted, and by decisions of courts rendered, since its date. But this does not lessen its evidential value in determining whether the interest of the Milwaukee and Omaha companies in the Eastern Company was that of mere stockholders in an independent public service corporation or whether they intended to and did exercise the power which they possessed as stockholders to immediately and directly control the property and the conduct of the business of the Eastern Company.

Whether because the Milwaukee and Omaha companies distrusted each other or for other cause, it is plain that this contract was designed to take away from the Board of Directors of the Eastern Company, the usual and lawful governing body of a corporation, the normal legal control of the company's affairs in several most important respects. It deprived the Board of the power: to issue the capital stock of the company and to finance its affairs; to select a superintendent to operate the company's two

and one-half miles of track, by requiring that such selection be made only with the consent and mutual agreement of the three companies; to make mutual agreements for the interchange of business with any other company except with the mutual consent of the Milwaukee and Omaha companies; and it renders one-half (save five shares) of the stock which it permits to be issued, transferable only with the written consent of the Milwaukee and Omaha companies. Thus, the making of this contract was an obvious surrender by the Eastern Company of substantially all freedom of corporate action and an assumption of control over that company by the Milwaukee and Omaha companies, which converted it largely into a mere agency or instrumentality for doing their bidding.

That this preliminary program of control was carried forward to realization is abundantly shown by the record.

An accumulated surplus of $95,000 was distributed by the Eastern Company in the form of stock dividends in 1906, by dividing it equally between the Milwaukee and Omaha companies, and when the original seven per cent. loan of $150,000 was refunded into a four and one-half per cent. loan the new bonds were taken equally by the two companies. Thus the equal interest of the two owning companies and the financial dependence of the Eastern Company were maintained.

The management and control of all the operations of the Eastern Company has always been kept in charge of a "Managing Committee" of two members, one of whom for many years before the evidence was taken was the general manager of the Omaha Company and the other the general superintendent of the Milwaukee Company. The Eastern Company did not pay either of these men any salary for their services.

The auditor of the Omaha Company has been the auditor of the Eastern Company, which paid no part of

his salary, and the established practice has long been for the one bookkeeper of the Eastern Company to take his journal and ledger to the auditor of the Omaha Company monthly for verification.

Seven of the nine directors of the Eastern Company at the time the evidence was taken were officers either of the Milwaukee or Omaha company; the eighth, the attorney of the Eastern, had desk room in the Milwaukee Company's legal department, of which he had recently been a member; and the ninth director, the president, was not an employee of either of the two owning companies.

With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public.

The record further shows that the Milwaukee and Omaha companies separately own many tracks in Minneapolis, on which large mills and elevators are located and that they render to such industries "substantially the same service" as is required in delivering and receiving cars to and from like industries on the Eastern Company's track for which they make no charge whatever in addition to the line-haul rate. The general manager of the Omaha Company, who was one of the two members of the "Managing Committee" of the Eastern Company, testifies that the line-haul rate to Minneapolis on the Omaha line "includes switching to any industry on its tracks" in that city regardless of the relative distance or expense of such delivery; that this rule prevails at all points on the Omaha line; that, generally

speaking, this is the custom of all railroads, and that if the Eastern tracks were exclusively owned by the Omaha Company deliveries to and from industries located upon them would be made without any switching charge additional to the line-haul rate. The Milwaukee Company also delivers on tracks exclusively owned by it at Minneapolis, without charge additional to the line-haul rate.

The Eastern Company, assuming the character of an independent common carrier, pursuant to tariffs filed, collects the switching charge, which is objected to, of $1.50 per car on inbound loaded cars and a charge of ten cents per ton, with a minimum charge of $1.50 per car on outbound loaded cars, which move over its tracks, in addition to the line-haul rate. But the practice of the Milwaukee and Omaha companies (with negligible exceptions) is to "absorb" this extra charge made against outbound cars, so that as both the Commission and the Court find, "from a practical standpoint shippers on inbound grain are the only persons who have to pay the charge" of the Eastern Company.

The Eastern Company does not issue bills of lading and does not make any collection from shippers, but charges its switching rate against the Omaha and Milwaukee companies, and it is paid by them from the line-haul rate on outbound traffic, and from the line-haul rate plus the switching charge, which they also collect, on inbound grain. Under such a system of doing business, the controversy in the case really relates only to the charge of the Eastern Company on inbound grain, for as to all other traffic the charge by the Eastern Company is simply a bookkeeping one which does not involve any extra switching charge to the shipper. Thus, the charge of the Eastern Company, when paid by the shipper in addition to the line-haul rate, is obviously a discrimination against industries located on the Eastern Company's

tracks when compared with those similarly situated on other industrial spur delivery tracks which are wholly owned by either company.

This discussion of the evidence in the case renders it very clear that the purpose of the Milwaukee and Omaha companies from the beginning was to construct and operate but one track to the group of industries to be served, instead of each building and maintaining its own track, and to construct and use that track in common so that each might have the benefit of it as fully as if it were the sole owner. To accomplish this end they resorted to the familiar device of incorporating the Eastern Company, and in order that their purpose might not be defeated in the future, by the design or business necessity of either company, the contract between them which we have discussed, was entered into to prevent the corporate organization of the Eastern Company and the control of its operations from being changed by either owning company without the consent of the other, and the evidence makes it very clear that all through its corporate life the Eastern organization has been consistently used as a mere agency of the two owning companies to accomplish their original purpose.

Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two. *Pullman's Palace Car Co.* v. *Missouri Pacific Ry. Co.*, 115 U. S. 587; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 391; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 413; *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 108; and *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238

U. S. 516, 529, 530, and it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valueless its capital stock owned by the Milwaukee and Omaha companies.

While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257, 273, and *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516. In such a case the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies. The order of the Commission affirmed by the Supreme Court of Minnesota, so far from being arbitrary, is plainly just, and clearly it does not deprive the plaintiffs in error of their

property without compensation or without due process of law, by requiring, as it does, that for ratemaking purposes the Milwaukee and Omaha companies shall extend to shippers over their tracks the legal title to which is in the Eastern Company, equality of treatment with that which they give to shippers over their separately owned tracks, where similar service is rendered.

The claim that an unlawful burden is imposed upon interstate commerce by requiring that the one delivery track here involved shall be treated with respect to intrastate traffic precisely as many other similarly used and situated tracks have always been treated by the owning companies is too unsound to merit consideration.

The judgment of the Supreme Court of Minnesota is

Affirmed.

DECISIONS PER CURIAM, FROM MAY 6, 1918, TO JUNE 10, 1918, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 863. LUIS HULLER ET AL., PLAINTIFFS IN ERROR, *v.* STATE OF NEW MEXICO ON THE RELATION OF NORTHWESTERN COLONIZATION & IMPROVEMENT COMPANY OF CHIHUAHUA. In error to the Supreme Court of the State of New Mexico. Motion to dismiss submitted April 29, 1918. Decided May 6, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *Equitable Assurance Society* v. *Brown*, 187 U. S. 308, 311, 314; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 596, 599–600. (2) § 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726; *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162. *Mr. Walter D. Hawk, Mr. Samuel S. Holmes, Mr. A. B. Renehan, Mr. Charles A. Douglas* and *Mr. Jo V. Morgan* for plaintiffs in error. *Mr. James R. Garfield, Mr. D. J. Cable, Mr. Harry L. Patton* and *Mr. Francis C. Wilson* for defendant in error.

No. 245. E. B. HOWARD, AS AUDITOR OF THE STATE OF OKLAHOMA, ET AL., APPELLANTS, *v.* GIPSY OIL COMPANY;

No. 246. E. B. HOWARD, AS AUDITOR OF THE STATE OF OKLAHOMA, ET AL., APPELLANTS, *v.* INDIAN TERRITORY ILLUMINATING OIL COMPANY;

No. 247. E. B. HOWARD, AS AUDITOR OF THE STATE OF OKLAHOMA, ET AL., APPELLANTS, *v.* OKLAHOMA OIL COMPANY; and

No. 248. E. B. HOWARD, AS AUDITOR OF THE STATE OF OKLAHOMA, ET AL., APPELLANTS, *v.* BARNSDALL OIL COM-

PANY. Appeals from the District Court of the United States for the Western District of Oklahoma. Argued March 26, 1918. Decided May 6, 1918. *Per Curiam.* Judgments affirmed with costs upon the authority of *Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292; *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522. *Mr. R. E. Wood* and *Mr. S. P. Freeling*, for appellants, submitted. *Mr. James B. Diggs, Mr. Frederick de C. Faust, Mr. Charles F. Wilson, Mr. F. C. Proctor* and *Mr. D. E. Green* for appellee in No. 245. *Mr. John H. Burford, Mr. John H. Brennan, Mr. I. B. A. Robertson, Mr. Frank B. Burford* and *Mr. Burdette Blue* for appellees in Nos. 246 and 248. No appearance for appellee in No. 247.

No. 813. DONALD STEPHENS, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the District Court of the United States for the District of Delaware. Motion to dismiss or affirm submitted May 20, 1918. Decided June 3, 1918. *Per Curiam.* Judgment affirmed upon the authority of *Selective Draft Law Cases*, 245 U. S. 366; *Yanyar* v. *United States*, 246 U. S. 649. *Mr. Henry Budd* for plaintiff in error. *The Solicitor General* for the United States.

No. 5. ATLANTIC, GULF & PACIFIC COMPANY, APPELLANT, *v.* UNITED STATES; and

No. 6. UNITED STATES, APPELLANT, *v.* ATLANTIC, GULF & PACIFIC COMPANY. Appeals from the Court of Claims. Argued March 9, 10, 1916. Restored to docket for reargument November 13, 1916. Reargued January 23, 24, 1917. Decided June 3, 1918. *Per Curiam.* Judgment affirmed with costs by an equally divided court.

(Mr. Justice McReynolds took no part in the consideration and decision of these cases.) *Mr. George A. King, Mr. William B. King* and *Mr. W. E. Harvey* for Atlantic, Gulf & Pacific Company. *Mr. Assistant Attorney General Thompson* and *Mr. P. M. Ashford* for the United States.

No. ——. Original. *Ex parte:* IN THE MATTER OF GEORGE O. KITZEROW, PETITIONER. Submitted May 20, 1918. Decided June 3, 1918. Motion for leave to file petition for writ of mandamus denied. *Mr. Frank T. Boesel* for petitioner.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM MAY 6, 1918, TO JUNE 10, 1918.

No. 957. W. GORDON MCCABE, JR., AND WILLIAM F. GRAY, PETITIONERS, *v.* GUARANTY TRUST COMPANY OF NEW YORK, AS SUBSTITUTED TRUSTEE, ETC., ET AL. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. David Hunter Miller* and *Mr. Gordon Auchincloss* for petitioners. *Mr. Emanuel J. Myers* and *Mr. Gordon S. P. Kleeberg* for respondents.

No. 924. GREAT BEAR SPRING COMPANY, PETITIONER, *v.* BEAR LITHIA SPRINGS COMPANY. May 6, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Edward S. Beach* for petitioner. *Mr. Fritz V. Briesen* for respondent.

No. 925. FULTON WATER WORKS COMPANY, PETITIONER, *v.* BEAR LITHIA SPRINGS COMPANY. May 6, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Edward S. Beach* for petitioner. *Mr. Fritz V. Briesen* for respondent.

No. 938. JAMES C. CHUPCO ET AL., PETITIONERS, *v.* JAMES A. CHAPMAN ET AL. May 6, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Lewis C. Lawson* and *Mr. James C. Davis* for petitioners. *Mr. Harry H. Rogers* for respondents.

No. 942. ISABELLA GARWOOD, PETITIONER, *v.* JOSEPH SCHEIBER ET AL. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederick S. Tyler* and *Mr. Jeremiah F. Sullivan* for petitioner. *Mr. William B. Bosley* for respondents.

No. 943. GOULD MINES COMPANY, PETITIONER, *v.* BERTHA D. BAUR, ADMINISTRATRIX, ETC. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John S. Miller, Mr. William C. Rigby* and *Mr. Benjamin F. Ninde* for petitioner. *Mr. Horace Kent Tenney* and *Mr. Roger Sherman* for respondent.

No. 948. FIFTH NATIONAL BANK OF THE CITY OF NEW YORK, PETITIONER, *v.* JOHN L. LYTTLE, AS TRUSTEE, ETC.

May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William C. Beecher* and *Mr. Richard Kelly* for petitioner. *Mr. Irving L. Ernst* for respondent.

No. 951. National Bank of Bakersfield, Petitioner, *v.* William H. Moore, Jr., as Trustee, etc. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William J. Hunsaker* and *Mr. E. W. Britt* for petitioner. *Mr. Lynn Helm* for respondent.

No. 956. R. A. Graham, Petitioner, *v.* J. D. Spreckels & Brothers' Company. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lindley M. Garrison* and *Mr. Frederic D. McKenney* for petitioner. *Mr. P. F. Dunne* for respondent.

No. 966. Vulcan Metals Company, Inc., and Albert Freeman, Petitioners, *v.* Simmons Manufacturing Company. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Wilson B. Brice* for petitioners. *Mr. Clarke M. Rosencrantz* and *Mr. E. H. Sykes* for respondent.

No. 972. Cherokee Oil & Gas Company, Petitioner, *v.* Charles L. Melton et al. May 6, 1918. Petition

for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. C. B. Ames, Mr. Russell G. Lowe, Mr. W. P. Thompson* and *Mr. W. C. Franklin* for petitioner. No appearance for respondents.

No. 974. W. J. CARRELL, PETITIONER, *v.* UNITED STATES. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Atwell* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

No. 975. JARED FLAGG, PETITIONER, *v.* ELLSWORTH E. COOK. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John M. Coleman* for petitioner. *Mr. Gilbert E. Roe* for respondent.

No. 1000. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, PETITIONER, *v.* IGNATZ PETROWSKY, AN INFANT, ETC. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. W. S. Jenney* and *Mr. Austin J. McMahon* for petitioner. *Mr. Baltrus S. Yankaus* and *Mr. Albert Massey* for respondent.

No. 1002. *Ex Parte:* CLOYD H. DUNCAN, PETITIONER. May 6, 1918. Petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Cloyd H. Duncan pro se.*

No. 1009. CHICAGO BONDING & SURETY COMPANY, PETITIONER, *v.* AUGUSTA-SAVANNAH NAVIGATION COMPANY. May 6, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles B. Stafford* for petitioner. *Mr. Harrison Musgrave* amd *Mr. William S. Oppenheim* for respondent.

No. 988. CAMP BIRD, LIMITED, PETITIONER, *v.* FRANK W. HOWBERT, AS COLLECTOR OF INTERNAL REVENUE, ETC. May 20, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. William V. Hodges* and *Mr. George L. Nye* for petitioner. No brief for respondent.

No. 976. WILLIAM SCHALL, JR., ET AL., PETITIONERS, *v.* FREDERICK CAMORS ET AL., TRUSTEES, ETC. May 20, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Ralph S. Rounds* for petitioners. *Mr. Monte M. Lemann* for respondents.

No. 970. JULIAN H. EVRARD, CLAIMANT, ETC., PETITIONER, *v.* EUGENE HIGGINS. May 20, 1918. Petition for a writ of certiorari to the United States Circuit Court

of Appeals for the Second Circuit denied. *Mr. Charles Stewart Davison* for petitioner. *Mr. Selden Bacon* for respondent.

No. 990. CHICAGO & NORTHWESTERN RAILWAY COMPANY, PETITIONER, *v.* F. E. CURTICE. May 20, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Wisconsin denied. *Mr. William G. Wheeler* for petitioner. *Mr. Joseph Martin* for respondent.

No. 1007. JOSEPH L. LACKNEY, ADMINISTRATOR, ETC., PETITIONER, *v.* JOHN S. MILLER ET AL. May 20, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles H. Aldrich* and *Mr. Lawrence Maxwell* for petitioner. *Mr. George W. Manierre* for respondents.

No. 1010. MINNIE A. RANKIN ET AL., PETITIONERS, *v.* CHARLES FREDERICK GRAFF ET AL. May 20, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William J. Graham* for petitioners. No appearance for respondents.

No. 985. POSTAL TELEGRAPH-CABLE COMPANY, PETITIONER, *v.* WARREN-GODWIN LUMBER COMPANY. June 3, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi granted. *Mr. James N. Flowers* for petitioner. No appearance for respondent.

No. 989. HARRY WRONKOW KEATLEY, PETITIONER, *v.* UNITED STATES TRUST COMPANY ET AL. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. W. Bourke Cockran* for petitioner. *Mr. Edward W. Sheldon* and *Mr. Charles B. Fernald* for respondents.

No. 1039. UNION PACIFIC COAL COMPANY, PETITIONER, *v.* MARK A. SKINNER, COLLECTOR of INTERNAL REVENUE, ETC. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Henry W. Clark* for petitioner. No brief for respondent.

No. 920. BEN J. TILLAR, PETITIONER, *v.* COLE MOTOR CAR COMPANY. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. M. M. Crane* for petitioner. *Mr. Francis Marion Etheridge* and *Mr. Joseph Manson McCormick* for respondent.

No. 973. ATLANTIC COAST LINE RAILROAD COMPANY, PETITIONER, *v.* W. M. STEELE. June 3, 1918. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. P. A. Willcox, Mr. F. D. McKenney* and *Mr. Henry E. Davis* for petitioner. *Mr. J. W. Ragsdale* for respondent.

No. 986. PENNSYLVANIA RAILROAD COMPANY, PETITIONER, *v.* MINNIE ROSENFELD. June 3, 1918. Petition

for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph H. Hayes* for petitioner. *Mr. William J. Hughes* for respondent.

No. 991. B. S. PARKER ET AL., PETITIONERS, *v.* STATE OF ARKANSAS EX REL. MILES THOMPSON. June 3, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied. *Mr. Julian C. Wilson* and *Mr. Walter P. Armstrong* for petitioners. *Mr. Edward L. Westbrooke* for respondent.

No. 1001. C. L. WOOD, AS TRUSTEE, ETC., PETITIONER, *v.* KIRK BROTHERS ET AL. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Allan D. Cole* for petitioner. No appearance for respondents.

No. 1005. JOHN A. JESSON ET AL., PETITIONERS, *v.* F. G. NOYES, AS RECEIVER, ETC. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Metson* for petitioners. *Mr. Orion L. Rider* for respondent.

No. 1006. R. C. WOOD, PETITIONER, *v.* F. G. NOYES, AS RECEIVER, ETC. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Metson* for petitioner. *Mr. Orion L. Rider* for respondent.

No. 1013. First National Bank of San Francisco et al., Petitioners, *v.* Detroit Trust Company et al. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. O. K. Cushing, Mr. Charles S. Cushing* and *Mr. Jackson H. Ralston* for petitioners. *Mr. W. Lair Thompson* for respondents.

No. 1019. W. S. Raydure, Petitioner, *v.* John W. Lindley et al. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward C. O'Rear* for petitioner. *Mr. A. R. Burnam, Jr.*, for respondents.

No. 1020. Thomas Tipton, Petitioner, *v.* John W. Lindley et al. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward C. O'Rear* for petitioner. *Mr. A. R. Burnam, Jr.*, for respondents.

No. 1021. Equitable Trust Company of New York, as Sole Trustee, etc., et al., Petitioners, *v.* Great Shoshone & Twin Falls Water Power Company et al. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Oliver O. Haga, Mr. James H. Richards* and *Mr. Henry H. Pierce* for petitioners. *Mr. T. A. Walters* for respondents.

No. 1025. Sun Company, Petitioner, *v.* D. W. Ryan Towboat Company et al. June 3, 1918. Petition for a

writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John F. Lewis* for petitioner. No appearance for respondents.

No. 1027. D. W. RYAN TOWBOAT COMPANY, INC., CLAIMANT, ETC., PETITIONER, *v.* BOWERS SOUTHERN DREDGING COMPANY ET AL. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Charles Harris* for petitioner. No appearance for respondents.

No. 1030. CORNELIUS O'SULLIVAN, PETITIONER, *v.* UNITED STATES. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. E. S. B. Sutton* for petitioner. *The Solicitor General* for the United States.

No. 1031. CHICAGO HOUSE WRECKING COMPANY, PETITIONER, *v.* WEST INDIA STEAMSHIP COMPANY. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry B. Gayley* for petitioner. *Mr. Ralph James M. Bullowa* and *Mr. F. E. M. Bullowa* for respondent.

No. 1034. SUN COMPANY ET AL., PETITIONERS, *v.* VINTON PETROLEUM COMPANY. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. Alexander W. Smith* and *Mr. Victor Lamar Smith* for petitioners. *Mr. William D. Gordon* and *Mr. Arsene P. Pujo* for respondent.

No. 1040. AJAX RAIL ANCHOR COMPANY, PETITIONER, *v.* THE P. AND M. COMPANY. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Thomas F. Sheridan, Mr. Frederic D. McKenney* and *Mr. Glen E. Smith* for petitioner. *Mr. Edward Rector* for respondent. *Mr. George S. Payson* as *amicus curiæ.*

No. 1041. COMPAGNIE GENERALE TRANSATLANTIQUE, OWNER AND CLAIMANT, ETC., PETITIONER, *v.* A. J. AND J. J. MCCOLLUM, INC., ET AL. June 3, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph P. Nolan* for petitioner. *Mr. Nelson Zabriskie* for respondents.

No. 1042. WELLS-FARGO & COMPANY, PETITIONER, *v.* OSCAR G. TAYLOR. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Branch P. Kerfoot, Mr. E. O. Sykes* and *Mr. Charles W. Stockton* for petitioner. No appearance for respondent.

No. 1061. MATTHEW T. CHAPMAN ET AL., PETITIONERS, *v.* JOHN A. WINTROATH. June 10, 1918. Petition for a

writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. John L. Jackson*, *Mr. Albert H. Adams* and *Mr. A. V. Cushman* for petitioners. No appearance for respondent.

No. 1066. SOUTHERN PACIFIC COMPANY, PETITIONER, *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. June 10, 1918. Petition for a writ of certiorari to the Supreme Court of the State of California granted. *Mr. William F. Herrin* and *Mr. Henley C. Booth* for petitioner. No appearance for respondents.

No. 1087. CHARLES A. HITCHCOCK, PETITIONER, *v.* ALFRED G. SCATTERGOOD ET AL. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. Horace L. Cheyney* for petitioner. No appearance for respondents.

No. 1095. INTERNATIONAL PAPER COMPANY, PETITIONER, *v.* THE SCHOONER "GRACIE D. CHAMBERS," HER TACKLE, ETC., FLORENCE G. PAYNE, CLAIMANT. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. William C. Cannon* for petitioner. No appearance for respondent.

No. 1003. BUTTE & SUPERIOR COPPER COMPANY, LIMITED, PETITIONER, *v.* CLARK-MONTANA REALTY COMPANY ET AL. June 10, 1918. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. H. Dickson, Mr. J. Bruce Kremer* and *Mr. William Scallon* for petitioner. *Mr. John P. Gray* for respondents.

No. 514. MARCEL AKALITIS, PETITIONER, *v.* PHILADELPHIA & READING COAL & IRON COMPANY. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Alvin Cushing Cass* for petitioner. *Mr. Pierre M. Brown* for respondent.

No. 1008. THOMAS MANUFACTURING COMPANY, PETITIONER, *v.* THE AEOLIAN COMPANY. June 10, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Howard S. Smith* for petitioner. *Mr. James L. Norris* for respondent.

No. 1026. MARGARET CORWIN RADCLIFFE GOOCH, PETITIONER, *v.* ANNIE WAYNE SUHOR ET AL. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edward P. Buford, Mr. J. S. Flannery* and *Mr. Frederic D. McKenney* for petitioner. *Mr. S. S. P. Patteson* for respondents.

No. 1038. WESTERN UNION TELEGRAPH COMPANY, PETITIONER, *v.* DETROIT, TOLEDO & IRONTON RAILROAD

COMPANY. June 10, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. John B. Corliss* and *Mr. Paul B. Moody* for petitioner. *Mr. Elliott G. Stevenson* and *Mr. William L. Carpenter* for respondent.

No. 1033. AMERICAN TRADING COMPANY (PACIFIC COAST), PETITIONER, *v.* NORTH ALASKA SALMON COMPANY. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel Knight* for petitioner. *Mr. Walter D. Mansfield* for respondent.

No. 1049. E. KIRBY-SMITH, PETITIONER, *v.* JOHN O. SHEATZ, RECEIVER, ETC. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Fred H. Atwood* and *Mr. Henry J. Scott* for petitioner. *Mr. Owen J. Roberts* for respondent.

No. 1050. LEE MOW LIN AND LEE BING, PETITIONERS, *v.* UNITED STATES. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Chester H. Krum* for petitioners. *The Solicitor General* for the United States.

No. 1051. SOUTHERN RAILWAY COMPANY, PETITIONER, *v.* JOHN C. WEBB, INDIVIDUALLY AND FOR THE USE OF QUEEN INSURANCE COMPANY AND LONDON & LANCASHIRE

INSURANCE COMPANY. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John K. Graves* for petitioner. *Mr. Alex. C. King* and *Mr. A. M. Garber* for respondent.

No. 1052. O. T. PEEPLES, TRUSTEE, ETC., PETITIONER, *v.* GEORGIA IRON & COAL COMPANY ET AL. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. O. R. Hood* and *Mr. S. M. Chambliss* for petitioner. *Mr. Clifford L. Anderson* and *Mr. Alex. C. King* for respondents.

No. 1059. REPUBLIC RUBBER COMPANY, PETITIONER, *v.* CONSOLIDATED RUBBER TIRE COMPANY ET AL. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William H. Dyrenforth, Mr. George A. Chritton* and *Mr. Francis M. Phelps* for petitioner. *Mr. Charles W. Stapleton* for respondents.

No. 1086. B. F. GOODRICH COMPANY, PETITIONER, *v.* CONSOLIDATED RUBBER TIRE COMPANY ET AL. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles Neave* and *Mr. Samuel E. Hibben* for petitioner. *Mr. Charles W. Stapleton* for respondents.

No. 1060. CHESAPEAKE & OHIO RAILWAY COMPANY OF INDIANA, PETITIONER, *v.* NATIONAL BANK OF COM-

MERCE OF NORFOLK. June 10, 1918. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied. *Mr. David H. Leake* and *Mr. Walter Leake* for petitioner. No appearance for respondent.

No. 1062. GEORGE T. CHARLTON AND JOHN L. CRONE, LOCAL INSPECTORS, ETC., ET AL., PETITIONERS, *v.* NEW YORK & PORTO RICO STEAMSHIP COMPANY. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *The Solicitor General* for petitioners. *Mr. Roscoe H. Hupper* for respondent.

No. 1064. SCHRAM GLASS MANUFACTURING COMPANY, PETITIONER, *v.* HOMER BROOKE GLASS COMPANY. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James Love Hopkins* and *Mr. George A. Chritton* for petitioner. *Mr. Charles Neave* and *Mr. William G. McKnight* for respondent.

No. 1065. FREDERICK KRAFFT, PETITIONER, *v.* UNITED STATES. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter Nelles* for petitioner. No brief for the United States.

No. 1067. DUD MOORE, PETITIONER, *v.* UNITED STATES. June 10, 1918. Petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James C. Denton* and *Mr. Frank Lee* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Brown* for the United States.

No. 1082. ALEXANDER GLADSTONE, ALIAS WILLIAM VINES, PETITIONER, *v.* UNITED STATES. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederick S. Tyler* and *Mr. Benjamin L. McKinley* for petitioner. *The Solicitor General* for the United States.

No. 1083. DAN A. WARD AND W. A. GREENWOOD, PETITIONERS, *v.* THOMAS W. MORGAN, WARDEN, ETC. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edwin A. Krauthoff* for petitioners. No brief for the United States.

No. 1088. COAL & COKE RAILWAY COMPANY, PETITIONER, *v.* OSCAR V. EWING. June 10, 1918. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. George E. Price* and *Mr. Buckner Clay* for petitioner. *Mr. Edward M. Surber* for respondent.

No. 1090. MIDLAND LINSEED PRODUCTS COMPANY, PETITIONER, *v.* THE STEAMSHIP "SATURNUS," HER

TACKLE, ETC., ET AL. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Herman S. Hertwig* for petitioner. *Mr. Chauncey I. Clark* for respondents.

No. 1091. JOHN W. ROBERTS, PETITIONER, *v.* UNITED STATES. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frederick S. Tyler* and *Mr. Benjamin L. McKinley* for petitioner. No brief for the United States.

No. 1094. PHILADELPHIA & READING COAL & IRON COMPANY, PETITIONER, *v.* CARMINE SACCRIPANTE. June 10, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Pierre M. Brown* for petitioner. *Mr. Samuel Seabury* and *Mr. W. M. Seabury* for respondent.

No. 1096. ERIE RAILROAD COMPANY, PETITIONER, *v.* JOHN DOWNS. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William C. Cannon* for petitioner. *Mr. Sydney A. Syme* for respondent.

No. 1100. UNITED STATES, PETITIONER, *v.* GEORGE W. HEIM. June 10, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *The Solicitor General* for the United States. *Mr. Matthew E. O'Brien* for respondent.

No. 1101. LOGAN BILLINGSLEY AND FRED BILLINGSLEY, PETITIONERS, *v.* UNITED STATES. June 10, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles A. Spirk* for petitioners. No brief for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MAY 6, 1918, TO JUNE 10, 1918.

No. 1022. CLINTON H. PIERCE, ANGELO CREO, CHARLES Z. ZEILMAN, AND CHARLES NELSON, PLAINTIFFS IN ERROR, *v.* UNITED STATES. In error to the District Court of the United States for the Northern District of New York. May 6, 1918. Docketed and dismissed, on motion of *The Solicitor General* for the United States. No one opposing.

No. 175. LUCY O. AYRES, EXECUTRIX, ETC., PETITIONER, *v.* BENJAMIN F. GRAHAM ET AL. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. May 20, 1918. Dismissed for the want of prosecution. *Mr. E. F. Thompson* for petitioner. No appearance for respondent.

No. 1054. WILLIAM C. SANDBERG, PLAINTIFF IN ERROR, *v.* UNITED STATES;

No. 1055. GEORGE E. LEUSER, PLAINTIFF IN ERROR, *v.* UNITED STATES;

No. 1056. AXEL C. MATTSON, PLAINTIFF IN ERROR, *v.* UNITED STATES;

No. 1057. BEN ANDERSON, PLAINTIFF IN ERROR, *v.* UNITED STATES; and

No. 1058. ALFRED TIALA, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the District Court of the United States for the District of Minnesota. May 20, 1918. Docketed and dismissed, on motion of *The Solicitor General* for the United States. No one opposing.

No. 155. MOTION PICTURE PATENTS COMPANY ET AL., APPELLANTS, *v.* UNITED STATES. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. June 3, 1918. Dismissed per stipulation, on motion of *Mr. Alexander S. Steuart* in behalf of counsel. *Mr. R. O. Moon, Mr. Charles F. Kingsley, Mr. Samuel Owen Edmunds, Mr. Melville Church, Mr. Frederic R. Coudert, Mr. Howard Thayer Kingsbury, Mr. Samuel Seabury* and *Mr. William M. Seabury* for appellants. *The Attorney General* and *The Solicitor General* for the United States.

No. 763. J. A. GATES ET AL., APPELLANTS, *v.* W. O. BERRYHILL, AS TAX COLLECTOR, ETC. Appeal from the District Court of the United States for the Southern District of Florida. June 3, 1918. Dismissed with costs, on motion of counsel for appellants. *Mr. Clair D. Vallette* for appellants. *Mr. Glenn Terrell* for appellee.

No. 336. LEW YOU, APPELLANT, *v.* EDWARD WHITE, COMMISSIONER OF IMMIGRATION, ETC. Appeal from the

District Court of the United States for the Northern District of California. June 3, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Jackson H. Ralston* for appellant. *The Attorney General* for appellee.

No. 462. THOMAS D. PALMER, AS ADMINISTRATOR, ETC., PLAINTIFF IN ERROR, *v.* WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY ET AL. In error to the Supreme Court of the State of Oklahoma. June 3, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles A. Loomis* for plaintiff in error. *Mr. A. H. McKnight* for defendants in error.

No. 479. GEORGE D. FARWELL ET AL., PLAINTIFFS IN ERROR, *v.* CITY OF SEATTLE. In error to the Supreme Court of the State of Washington. June 3, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles E. Shepard* for plaintiffs in error. No appearance for defendant in error.

No. 648. NATIONAL CITY BANK OF CHICAGO, PLAINTIFF IN ERROR, *v.* MRS. GEORGIA S. BARRINGER. In error to the Court of Appeals of the Second Circuit, State of Louisiana. June 3, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Henry Bernstein* for plaintiff in error. *Mr. John C. Theus* for defendant in error.

No. 780. WILLIAM SMITH AND ELIZABETH SMITH, PLAINTIFFS IN ERROR, *v.* THOMAS ELEVATOR COMPANY

ET AL. In error to the Supreme Court of the State of Illinois. June 3, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Edward H. Kubitz* for plaintiffs in error. No appearance for defendants in error.

No. 841. NORA HERLIHY, ADMINISTRATRIX ETC., PLAINTIFF IN ERROR, *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY. In error to the Superior Court of the State of Massachusetts. June 3, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles Toye* for plaintiff in error. No appearance for defendant in error.

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2. Shipment by more expensive of two routes may be justified by reasonable general practice of carrier. *Id.*

3. Reasonableness of practice of carrier in shipping intrastate by one of two routes, the charges on which under interstate tariff were more than those allowed on the other by state law, *held* an administrative question within jurisdiction of Interstate Commerce Commission, whose decision state courts without jurisdiction to anticipate. *Id.*

4. Two railroad companies, between them owning all stock and controlling completely property and operations of third company, which had legal title to terminal tracks, caused separate switching charges to be made in its name on traffic moved by them over those tracks, although for substantially same service over terminals which each owned separately, neither made any charge in addition to its line haul rates. *Held*, that state commission and lower courts were justified in holding third company mere agency or instrumentality of other two; that its technical corporate individuality and ownership of tracks in question did not entitle it to be treated as independent carrier; and that order requiring separate charges to be discontinued and that tracks be operated as part of terminal properties of the other companies, in intrastate traffic did not deprive it or them of property without compensation or due process of law, nor impose unlawful burden on interstate commerce. *Chicago, M. & St. P. Ry.* v. *Minneapolis Civic Assn.* 490

5. Switch tender *held* within class described in proviso of § 2 of Hours of Service Act, whose service is thereby limited to 9 hours in 24. *Chicago & Alton R. R.* v. *United States* 197

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1. Nature and functions of writ, employed to supervise criminal proceedings of inferior tribunals in District of Columbia, are to be tested by common-law principles. *Hartranft* v. *Mullowny*. 295

2. At common law, where cause before judgment removed by certiorari in order that justice might be done by quashing indictment or information or proceeding to trial, nature of cause not changed by removal, and quashing of writ was followed by *procedendo* as matter of course. *Id.*

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3. Upon review by certiorari court confines its discussion to matter relied on in procuring writ. *Alice State Bank* v. *Houston Pasture Co.* 240

4. A summary conviction for criminal contempt is reviewable by this court by certiorari. *Toledo Newspaper Co.* v. *United States* 402

5. Writ may issue under Jud. Code, § 262, to review interlocutory judgment which is not subject to certiorari under § 240. *Union Pacific R. R.* v. *Weld County* 282

6. Where petition for certiorari postponed to hearing of appeal and latter found without jurisdiction, certiorari granted and record on appeal treated as return to writ. *Id.*

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I. **Army Power: Militia Power.**
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1. Power to regulate interstate commerce is power to prescribe rule by which commerce is to be governed—to control means by which it is carried on. *Hammer* v. *Dagenhart*. 251

2. Such power not intended as means of enabling Congress to equalize economic conditions in States for prevention of unfair competition among them, nor was it intended as au-

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thority to control States in exercise of their police power over local trade and manufacture. *Id.*

3. Child Labor Law of Sept. 1, 1916, *held* unconstitutional as exceeding power of Congress and invading powers reserved to States. *Id.*

4. Manufacture of goods is not commerce, nor do facts that they are intended for, and are afterwards shipped in, interstate commerce, make their production part of that commerce subject to control by Congress. *Id.*

5. Right to exclude from interstate commerce not recognized save in cases where character of particular things excluded is such as to bring them peculiarly within governmental authority of State or Nation and render their exclusion, in effect, but a regulation of interstate transportation, necessary to prevent accomplishment, through that means, of evils inherent in them. *Id.*

6. State in laying general income tax upon gains and profits of domestic corporation may include in computation net income derived from transactions in interstate commerce. So *held* as to Wisconsin Income Tax Law, as applied to income from sales outside of State of goods delivered from factory within it, and from company's branches in other States of goods previously made within State. *United States Glue Co.* v. *Oak Creek* 321

7. Order of state commission requiring discontinuance of terminal charges exacted by company having legal title to terminal tracks, but which in fact was but a mere agency or instrumentality of other railroad companies, neither of which made any charge for substantially same service over terminals each owned separately, and requiring that such terminal tracks be operated as part of terminal properties of such other companies in interstate traffic, *held* to impose no unlawful burden on interstate commerce. *Chicago, M. & St. P. Ry.* v. *Minneapolis Civic Assn* 490

8. Tax on life insurance business is not tax on interstate commerce. *Northwestern Life Ins. Co.* v. *Wisconsin* 132

9. Assuming that foreign investment business of domestic life insurance company amounts to interstate commerce, a state tax of 3% of gross income from all sources during

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year, except rents from real estate and premiums collected outside of State on policies of non-residents, casts no burden upon such commerce, where gross receipts are in effect used as fair measure of value of property and franchise taxable, but not otherwise taxed, within State. *Id.*

10. Transmission of stock quotations by wire from New York Stock Exchange to Boston where they were decoded and wired to tickers of subscribers there, *held* to remain interstate commerce until completed in the subscribers' offices; and that order of Massachusetts commission requiring telegraph companies to cease discriminating against a would-be subscriber whom Stock Exchange disapproved was direct interference with such commerce, infringing constitutional rights. *Western Union Tel. Co.* v. *Foster*..... 105

11. Provisions of interstate contract for sale of complicated plant, whereby purchaser agreed to pay expert sent by seller to supervise assembling and testing, obligation to accept plant being made dependent upon test, *held* not to involve doing of local business subjecting seller to state regulations concerning foreign corporations. *York Mfg. Co.* v. *Colley*... 21

12. Exclusion of evidence in prosecution under drug law of State *held* to deny federal right of defendants arising under commerce clause. *McGinis* v. *California*.....91, 95

III. **Contract Clause.**

1. Legislative, not judicial, action, impairing obligation of contracts, contemplated by clause. *McCoy* v. *Union Elevated R. R.*..... 354

2. By law as it was when he bought, purchaser of state lands in default as to interest on deferred payment was liable to have his interest in land and contract foreclosed by court proceeding begun on summary notice, but with right of redemption. A later act declared forfeiture in such cases in which default had continued for five years and in which State prior to passage of act had issued another certificate for same land to subsequent purchaser, unless all arrears of interest were paid within six months of its passage. *Held* a change of remedy, not impairing obligation of contract of purchase. *Aikins* v. *Kingsbury*..... 484

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goods from States and selling them abroad, levied under Income Tax Act of 1913, held not contrary to Art. I, § 9, cl. 5. *Peck & Co.* v. *Lowe* 165

V. **Full Faith and Credit Clause.**

1. When laws of State provide that final settlement of estate in probate court on behalf of person under interdiction can only be had by proceedings there setting aside interdiction or appointing curator, decree of court of another State purporting to establish sanity will not operate upon the interdiction directly, but, at most, would be conclusive in such probate proceeding; and District Court in former State cannot dispense with such proceedings in local probate court and require settlement from executors. *Gasquet* v. *Fenner* 16

2. Order of assessment in proceeding to sequester assets of local corporation and assess stockholders to pay its debts, made by state court having jurisdiction of corporation and stockholders, must be given effect in action brought by receiver, appointed in such proceedings, to enforce the assessment against a shareholder in the courts of another State, and refusal of those courts to be bound by it, upon ground that corporation was of excepted class, and erroneously treating this exception as jurisdictional, fails to afford due faith and credit to which order entitled. *Marin* v. *Augedahl* 142

VI. **First Amendment: Freedom of Press.**

Newspaper publications concerning pending proceedings and tending to create impression that a particular decision would evoke public suspicion of judge's integrity or fairness and bring him into public odium and would be met by public resistance, and tending in the circumstances to provoke such resistance in fact, are not within the "freedom of the press." *Toledo Newspaper Co.* v. *United States* 402

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One who voluntarily and to subserve his own interest has produced exhibits owned by him, as part of his testimony in equity suit, is not subjected to an unreasonable seizure, or made to bear witness against himself, by use of such ex-

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Order of District Court transferring count in action at law for damages to equity docket upon ground that under law of State it could not be entertained at law, *held* a deprivation of right of trial by jury. *Ex parte Simons* 231

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1. Child Labor Law of Sept. 1, 1916, *held* to invade powers reserved to States. *Hammer* v. *Dagenhart* 251

2. Police power over local trade and manufacture was expressly reserved to States. *Id.*

XI. **Fourteenth Amendment.**

(1) *Notice and Hearing.*

1. Violation of right for State to give conclusive effect to prior judgment against one who was not a party, nor in privity with a party, therein. *Postal Telegraph Cable Co.* v. *Newport* 464

(2) *Depriving of Property.*

2. Where private property taken for public purposes, fundamental right guaranteed is that owner shall not be deprived of market value under rule of law which makes it impossible for him to obtain just compensation. There is no guarantee that rule adopted by State shall be the one best supported by reason or authority, or against mere errors in course of trial. *McCoy* v. *Union Elevated R. R.* 354

3. There is no deprivation of fundamental right protected by Amendment by extension of rule as to benefits to property not taken to include increase of market value resulting directly from the public improvement though all property in neighborhood is similarly benefited. *Id.*

4. In action for damages to abutting property due to construction, maintenance and operation of elevated railroad, in street of which fee in public, ruling that recovery de-

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pended upon effect on market value, in determining which increase of such value arising from increase of travel should be considered and treated as a special benefit, though enjoyed also by other neighboring property, *held* to afford no basis for invoking equal protection clause, nor to deprive of property without due process of law. *Id.*

5. Order of state commission requiring discontinuance of terminal charges exacted by company having legal title to terminal tracks, but which in fact was but a mere agency or instrumentality of other railroad companies, neither of which made any charge for substantially same service over terminals each owned separately, and requiring that such terminal tracks be operated as part of terminal properties of such other companies in interstate traffic, *held* not to deprive either former or latter of property without compensation or due process of law. *Chicago, M. & St. P. Ry.* v. *Minneapolis Civic Assn* 490

6. State statute giving attorney lien on cause of action or its proceeds for agreed portion of recovery and rendering defendant directly liable to him in case of settlement after notice and without his consent, does not deprive party liable of any constitutional right, even where settlement made under judgment recovered upon cause of action through another attorney in federal court, and by satisfying such judgment by payment to clerk of that court. *Union Pacific R. R.* v. *Laughlin* 204

(3) *Equal Protection of the Laws.* See 4, 6, *supra.*

7. Unequal assessment not violative of clause where purpose of assessing board to discriminate not clearly established and discrimination attributable to honest mistake of judgment and lack of time and evidence for making general revaluations when objection made. *Sunday Lake Iron Co.* v. *Wakefield* 350

8. State may impose license or privilege tax upon domestic old-line, level-premium life insurance companies, while exempting fraternal societies having lodge organizations and insuring only lives of members. *Northwestern Life Ins. Co.* v. *Wisconsin* 132

9. State may tax domestic life insurance companies by taking percentage of gross receipts, although it exacts a fixed

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and comparatively slight fee from similar foreign corporations for privilege of doing local business of same kind. *Id.*

XII. **Sixteenth Amendment: Income Tax.**

1. Congress may tax without apportionment dividends received in ordinary course by shareholder from corporation, even though extraordinary in amount and derived from surplus of corporate assets existing before Amendment. *Lynch* v. *Hornby* 339

2. Amendment does not extend power of taxation to new or excepted subjects, but merely removes occasion for apportioning taxes on income among the States. *Peck & Co.* v. *Lowe* 165

XIII. **Who May Question Constitutionality of Statutes.**

One whose contract for purchase of state lands had been for many years in default for nonpayment of interest both before and after passage of law forfeiting such contracts if interest not paid within time stated, and who conceded default and offered no excuse, *held* not in position to object that law lacked due process in failing to allow time and opportunity for testing liability to forfeiture in a court proceeding. *Aikins* v. *Kingsbury* 484

CONSTRUCTION. See **Admiralty; Constitutional Law; Contracts; Contempt; Employers' Liability Act; Indians; Insurance; Interstate Commerce Acts; Jurisdiction; Mines and Mining; Negligence; Public Lands; Seamen; Statutes; Taxation.**

CONTEMPT:

1. A summary conviction for criminal contempt is not within jurisdiction of this court by writ of error, but reviewable by certiorari. *Toledo Newspaper Co.* v. *United States* 402

2. Judicial Code, § 268, is merely declaratory of inherent power of federal courts to punish for contempt, and, in providing that the power "shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," does no more than express a limitation imposed by the Constitution. The power is essentially one of self-preservation. *Id.*

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3. Test of power to punish for contempt is in character of acts in question: when their direct tendency is to prevent or obstruct free and unprejudiced exercise of judicial power they are subject to be restrained through summary contempt proceedings. *Id.*

4. Newspaper publications concerning pending proceeding and tending to create impression that a particular decision would evoke public suspicion of the judge's integrity or fairness and bring him into public odium and would be met by public resistance, and tending in the circumstances to provoke such resistance in fact, *held*, contemptuous and not within the "freedom of the press." *Id.*

5. It is not material that such publications were not circulated in the court room or seen by the judge or that they did not influence his mind. *Id.*

6. In determining whether there was any evidence to justify attributing such tendency to the publications, this court considers evidentiary facts found by District Court only so far as to determine whether they have any reasonable tendency to sustain the general conclusion of fact based upon them by that court and the Circuit Court of Appeals. *Id.*

7. In a summary proceeding for criminal contempt, *semble*, that a single penalty based upon a conviction under all of several distinct charges in information cannot be upheld unless all of the charges are sustained by facts; but where Circuit Court of Appeals, holding conviction justified under one count and facts relative thereto, affirmed District Court without considering other counts upon which the punishment was also based, this court examined findings as to all counts, and, holding them sufficient, affirmed judgment. *Id.*

CONTRACTS:

Impairment of obligation. See **Constitutional Law**, III.
Effect of judgment on successors in interest. See **Estoppel.**
Insurance contracts. See **Insurance.**
Validity of contracts for purchase of patents and for assignment of future inventions. See **Anti-Trust Act**, 5–7.
Validity of leases of patented machines on royalty basis. See **Anti Trust Act**, 8; **Patents for Inventions**, 4.
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1. *Reformation.* Written contract failing, through mutual mistake, to express intention of parties, may be reformed to express true intent, although mistake one of law respecting interpretation and construction. *Philippine Sugar &c. Co.* v. *Philippine Islands* 385

2. *Id.* Reformation granted only where evidence of mistake is clear and satisfactory. *Id.*

3. *Id.* Relief in case of contract which, owing to mutual mistake, fails to express intention of parties, may be obtained by defendant under Philippine Code Civ. Proc., § 285, upon appropriate pleadings, without resort to independent suit for reformation of contract. *Id.*

CONTRIBUTORY NEGLIGENCE. See **Negligence.**

CORPORATIONS. See **Taxation.**

Doing of local business by interstate vendor subjecting it to state regulations. See **Constitutional Law,** II, 11.

Assessment of stockholders to pay debts of corporation. See **Constitutional Law,** V, 2.

1. In ordinary cases mere accumulation of adequate surplus does not entitle shareholders to dividends until directors, in their discretion, declare them. *Southern Pacific Co.* v. *Lowe* 330

2. Exception of corporations organized for carrying on manufacturing business, in state law providing for stockholders' liability, goes not to jurisdiction but only to merits in proceedings to sequester assets of local corporation and assess stockholders to pay its debts; and an order of assessment made in proper court of general jurisdiction, which in other respects has acquired jurisdiction over corporation and shareholders, necessarily involves determination that corporation is not of excepted class, and in that respect is conclusive against collateral attack by shareholder, whether or not he personally was party to proceeding. *Marin* v. *Augedahl* 142

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COSTS:

Provision of Act of 1917, relative to actions by seamen, does not apply to appellate proceedings. *Ex parte Abdu* 27

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Who entitled to maintain action as such. See **Employers' Liability Act,** 2.

DESCENT AND DISTRIBUTION. See **Indians.**
Prospective heir acquires no vested right in land before death of ancestor, and rules of descent are subject to change meanwhile by law-making power. *Jefferson* v. *Fink* 288

DIRECT TAXES. See **Taxation,** I, 1, 2.

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DISTRICT OF COLUMBIA:
Judgment of Court of Appeals reviewable under § 250, Jud. Code. See **Jurisdiction,** II (3).
Jurisdiction of Supreme Court of, to supervise criminal proceedings of inferior tribunals through certiorari. See **Jurisdiction,** V.

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ECCLESIASTICAL BODIES:
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ELECTION OF REMEDIES. See **Admiralty,** 3; **Limitations,** 2. PAGE

EMINENT DOMAIN:

1. Fundamental right guaranteed is that owner shall not be deprived of market value under rule of law which makes it impossible for him to obtain just compensation. There is no guarantee that rule adopted by State shall be the one best supported by reason or authority, or against mere errors in course of trial. *McCoy* v. *Union Elevated R. R.* 354

2. In arriving at amount of damages to property not taken, allowance should be made for peculiar and individual benefits conferred upon it; and extension of rule to include increase of market value resulting directly from the public improvement, though all property in neighborhood is similarly benefited, cannot be said to deprive of fundamental right guaranteed by Fourteenth Amendment. *Id.*

EMPLOYERS' LIABILITY ACT:

1. Under federal act there is no cause of action for pain and suffering if employee dies without regaining consciousness. *New Orleans & N. E. R. R.* v. *Harris* 367

2. No cause of action accrues for benefit of dependent mother where deceased leaves widow who, although living apart from him, was neither remarried nor divorced, and where marital rights and liabilities had not ceased under local law. *Id.*

3. In proceedings under Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied by federal courts; and negligence is essential to recovery. *Id.*

4. In actions against railroad for injuries to employees resulting from its negligence rule of federal courts is that negligence is to be established affirmatively by plaintiff; state law presuming negligence from accident inapplicable. *Id.*

ENCLOSURES. See **Adverse Possession.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** XI, 4, 6, 7–9.

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Right of appeal from order affirming order refusing preliminary injunction. See **Jurisdiction,** II, 2.
Jurisdiction of District Court to restrain action by state officers. See **Jurisdiction,** III, 1.

1. *Adequate remedy at law.* Existence, under Colorado statutes, of adequate legal remedy for recovery of taxes illegally paid, held so uncertain and debatable that jurisdiction in suit for injunction could not properly be declined. *Union Pacific R. R.* v. *Weld County* 282

2. *Id.* Jurisdiction exists to enjoin collection of illegally discriminatory taxes, where existence of adequate and complete remedy at law is doubtful. *Id.*

3. *Id. Multiplicity of Suits.* Where legal remedy by paying taxes and suing to recover back necessitates separate actions against several school districts and towns, it will not displace equitable remedy by injunction in one suit. *Id.*

4. *Injunction to Restrain Executive Action.* Suit against Secretary of Interior and Commissioner of Land Office, brought by State to enjoin issuance of patents to public lands, held not maintainable, where action of such officers in issuing patents not arbitrary. *Minnesota* v. *Lane* 243

5. *Transfer to Law Side; Fraud; Statute of Limitations.* Where suit to cancel contract for exchange of lands and for incidental damages, on ground of fraud, was transferred by order of court to law side under Equity Rule 22 as action for damages for deceit, amendment held not to constitute beginning of new case which would be barred by statute of limitations. *Friederichsen* v. *Renard* 207

6. *Equitable Counterclaim; Effect in Law Action.* Where, in action at law on contract, answer set up was in effect bill in equity seeking reformation and incidentally to enjoin action at law, proceeding held converted into equitable one. *Philippine Sugar &c. Co.* v. *Philippine Islands* 385

7. *Fraud; Limitations.* A statute barring equitable relief for fraud and mistake should be strictly construed. *United States* v. *St. Paul, M. & M. Ry.* 310

8. *Transfer to Equity. Trial by Jury.* Unjustified transfer of count in law action to equity side violates right. *Ex parte Simons* 231

ESTATES OF DECEDENTS. See **Constitutional Law,** V, 1; **Descent and Distribution; Indians.** PAGE

ESTOPPEL. See **Jurisdiction,** III, 2.

Sole ground upon which judgment against prior owner is conclusive against successor in interest is that estoppel runs with the property, that grantor can convey no better right or title than he had himself, and that grantee takes *cum onere.* Hence judgment holding telegraph company bound by license agreement with city touching use of streets, but rendered in suit begun after company had conveyed to another, does not estop its remote successor in interest from claiming against city that agreement was never accepted. *Postal Telegraph Cable Co.* v. *Newport* 464

EVIDENCE. See **Anti-Trust Act; Contempt.**

Of capacity of Indian to alienate. See **Indians.**

As to compelling one to bear witness against himself. See **Constitutional Law,** VII.

As to unreasonable seizures. See **Constitutional Law,** VII.

1. Where evidence strongly conflicting, especial weight attaches to findings of trial court. *United States* v. *United Shoe Mach. Co.* 32

2. In actions under Federal Employers' Liability Act, rule is that negligence must be established affirmatively by plaintiff; state law presuming negligence from injury, inapplicable. *New Orleans & N. E. R. R.* v. *Harris* 367

3. Good faith of tax assessors and validity of acts presumed; burden of proof is on party assailing them. *Sunday Lake Iron Co.* v. *Wakefield* 350

4. Upon question whether opium was in transit through California to Mexico, or was in possession of defendants in violation of state law, evidence that purpose of customs officer in weighing it at boundary with assistance of one of defendants was to make out papers necessary for exportation and that defendants had authority from Treasury Department to export was competent in prosecution for unlawful possession; and exclusion denied federal right. *McGinis* v. *California* 91

5. In prosecution for possession of cocaine in violation of

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state law, defendants held entitled to prove that drug was in transit to foreign country and to explain their relations to shipment at international boundary where they are charged with having taken unlawful possession; and error in excluding such evidence held not to have been shown harmless by proof that more of drug of unproven origin was added at boundary, where whole prosecution based upon original shipment and such proof involved only one of defendants and cross-examination upon it was not allowed. *McGinis* v. *California* 95

6. Evidence must be clear and satisfactory to justify reformation of contract on ground of mutual mistake. *Philippine Sugar &c. Co.* v. *Philippine Islands* 385

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FRAUD:

1. Statutes of limitation upon suits to set aside fraudulent transactions do not begin to run until discovery of the fraud. *Exploration Co.* v. *United States* 435

2. Amendment of bill for annulment of contract for fraud, transferred by order of District Court, under Equity Rule 22, to law side as action for damages for deceit, whereby no substantial change was made in allegations of fraud, *held* not to change cause of action nor constitute beginning of new case. *Friederichsen* v. *Renard*..... 207

3. Proviso of Act of March 2, 1896, prohibiting suits for recovery of land, is not a protection for patent procured afterwards by fraud. *United States* v. *St. Paul, M. & M. Ry.* 310

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HOURS OF LABOR. See **Child Labor Law; Hours of Service Act.**

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Switch tender *held* within class described in proviso of § 2 of Act, whose service is thereby limited to 9 hours in 24. *Chicago & Alton R. R.* v. *United States*..... 197

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2. *Id.* In determining quantum of Indian blood possessed by members of Five Civilized Tribes, and therein capacity to alienate allotted lands, approved rolls of citizenship are conclusive. *Id.*

3. *Allotments. Descent. Law Governing.* In respect of descent of allotments Oklahoma Enabling Act substituted law of State for law of Arkansas adopted provisionally in Supplemental Creek Agreement and prior acts. *Jefferson* v. *Fink* 288

4. *Id.* In designating Arkansas law as rule of descent, Supplemental Agreement was not intended and did not operate to confer any vested right of inheritance in respect of allotments made and deeded while such designation remained in force. *Id.*

5. *Id.* Allotment made under Supplemental Creek Agreement, before admission of Oklahoma, to Creek Freedman who died after admission, descends according to law of State. *Id.*

6. *Id.* Policy and legislation of Congress respecting descent of allotments, particularly in Five Civilized Tribes, reviewed. *Id.*

7. *Marriage.* Evidence of custom among Chickasaw Indians to disregard tribal ceremonies and that two Indians held themselves out as man and wife and were reputed married, held to warrant finding of marriage within meaning of Act of 1890. *Carney* v. *Chapman* 102

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1. In absence of special provision of law or rule of association to contrary, naming of person as beneficiary in benefit certificate of fraternal benefit association confers expectancy merely, which may be defeated by act of insured member in taking out substitute certificate changing beneficiary. *Royal Arcanum* v. *Behrend* 394

2. That first-named beneficiary had paid assessments before change raises no legal claim upon the insurance. *Id.*

3. Benefit certificate expressed promise to pay beneficiary therein named, upon insured member's death, provided " certificate shall not have been surrendered by said member and another certificate issued at his request," and bore printed form providing for " surrender and return " of certificate by member in changing beneficiary. *Held,* that requirement of surrender did not necessarily imply return of original paper. *Id.*

4. Requirement that such certificate shall be surrendered before new one issued is for protection of association and, if waived by it or complied with to its satisfaction during member's lifetime, it cannot be availed of by former beneficiary. *Id.*

5. Tax on life insurance business is not tax on interstate commerce. *Northwestern Life Ins. Co.* v. *Wisconsin* 132

6. State may impose license or privilege tax upon domestic old-line, level-premium life insurance companies, while exempting fraternal societies having lodge organizations and insuring only lives of members. *Id.*

7. State may tax domestic life insurance companies by taking percentage of gross receipts, although it exacts a fixed and comparatively slight fee from similar foreign corporations for privilege of doing local business of same kind. *Id.*

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3. Transmission of stock quotations by wire from one State to another remains interstate commerce until completed in subscriber's office. *Western Union Tel. Co.* v. *Foster* 105

4. Tax on life insurance business is not tax on interstate commerce. *Northwestern Life Ins. Co.* v. *Wisconsin* 132

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2. Order of District Court restraining attorney general of State from prosecuting in state court suit against carrier for damages and penalties for complying with rate order of Interstate Commerce Commission held proper exercise of power. *Looney* v. *Eastern Texas R. R.* 214

3. A suit by carrier against consignee of interstate shipment of live stock to collect charge for disinfecting cars,

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alleged to be due under tariffs approved and published as required by act, wherein consignee, admitting interstate character of shipment and propriety of charges under act, defends on ground that carrier by its acts is estopped from holding him responsible, is one "arising under any law regulating commerce," within meaning of Jud. Code, § 24. *Louisville & Nashville R. R.* v. *Rice* 201

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1. While *res judicata* is ordinarily matter of state law, a decision of state court which denies asserted federal rights through application of former judgment will not conclude this court, if such application clearly inconsistent with right to due process of law. *Postal Telegraph Cable Co.* v. *Newport* 464

2. It is violative of due process of law for State to give conclusive effect to prior judgment against one neither a party, nor in privity with a party, therein. *Id.*

3. Sole ground upon which judgment against prior owner is conclusive against successor in interest is that estoppel runs with the property, that grantor can convey no better right or title than he had himself, and that grantee takes *cum onere.* Hence judgment holding telegraph company bound by license agreement with city touching use of streets, but rendered in suit begun after company had conveyed to another, does not estop its remote successor in interest from claiming against city that agreement was never accepted. *Id.*

4. Decree held to control two causes decided by Circuit Court of Appeals at same time. *Shepard* v. *Barkley* 1

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II. Jurisdiction of this Court.

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I. Jurisdiction of Federal Courts, in Contempt Cases.

1. Judicial Code, § 268, is merely declaratory of the inherent power of the federal courts to punish for contempt, and, in providing that the power " shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice," does no more than express a limitation imposed by the Constitution. The power is essentially one of self-preservation. *Toledo Newspaper Co.* v. *United States* 402

2. Test of the power to punish for contempt is in character of acts in question; when their direct tendency is to prevent or obstruct the free and unprejudiced exercise of the judicial power they are subject to be restrained through summary contempt proceedings. *Id.*

II. Jurisdiction of this Court.

When judgment final, see *Infra*, 2, 7, 9.

(1) *Over Circuit Court of Appeals.*

1. Certiorari may issue under Jud. Code, § 262, to review interlocutory judgment which is not subject to certiorari under § 240. *Union Pacific R. R.* v. *Weld County* 282

2. Appeal does not lie from order which merely affirms, on interlocutory appeal, order of District Court refusing preliminary injunction, even where decision below rested on

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ground of adequate legal remedy which might have been made basis for final dismissal of bill. *Id.*

3. Judgment not reviewable by writ of error under Jud. Code, § 241, where amount in dispute less than $1,000. *San Pedro &c. R. R.* v. *United States* 307

4. A summary conviction for criminal contempt is not within jurisdiction of this court by writ of error but is reviewable by certiorari. *Toledo Newspaper Co.* v. *United States* 402

5. In case ultimately within reviewing power court may require by mandamus filing of record in Circuit Court of Appeals. *Ex parte Abdu.* 27

6. Appeal held to bring up for review two cases decided by court below at same time; and that both were controlled by decree rendered. *Shepard* v. *Barkley* 1

(2) *Over District Courts.* See III, 1, *Infra.*

7. Order allowing District Attorney custody of exhibits to be used in criminal proceedings against witness in private suit in which they were used and impounded, and overruling witness ' objection thereto based on constitutional grounds, is a final order; and right of objecting party to appeal therefrom is unaffected by his lack of interest in such private suit. *Perlman* v. *United States* 7

8. Prohibition will not issue to control District Court upon questions which it is competent to decide or questions dependent on facts not presented to this court. *Ex parte Southwestern Surety Ins. Co.* 19

(3) *Over Court of Appeals of District of Columbia.*

9. Supreme Court of District, having by certiorari removed case from police court upon allegations of want of jurisdiction and insufficiency of information, entered judgment that writ be quashed, petition dismissed, and record " remanded " to police court, " whence it came," which judgment was affirmed by Court of Appeals; *held,* that judgment was in case arising under criminal laws, was not final, and that writ of error would not lie under Jud. Code, § 250. *Hartranft* v. *Mullowny* 295

10. Under Jud. Code, § 250, judgment of Court of Appeals in criminal cases, and judgments not final, are not reviewable

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by writ of error upon ground that jurisdiction of trial court in issue or upon ground that construction of law of United States in issue. *Id.*

(4) *Over Supreme Court of Philippine Islands.*

11. Where, in action at law on contract, answer set up was in effect bill in equity seeking reformation and incidentally to enjoin action at law, proceeding held converted into equitable one, reviewable only by appeal. *Philippine Sugar &c. Co.* v. *Philippine Islands* 385

12. Upon appeal from decree erroneously reversing trial court solely on question of law, this court may decide facts when all evidence proffered admitted and in record and where appellant in court below sought to review trial court's findings under § 497, par. 2, Code Civ. Proc. *Id.*

(5) *Over State Courts.*

13. Construction of act of Congress may be involved by implication so as to present federal question. *Carney* v. *Chapman* 102

14. Refusal of state court to respect sister state judgment upon ground that court rendering it exceeded jurisdiction under its own constitution and laws, presents federal question. *Marin* v. *Augedahl* 142

15. No federal question raised by claim that attorney's lien statute cannot apply in favor of plaintiff's first attorney against defendant, after latter has satisfied judgment secured by plaintiff's second attorney in federal court. *Union Pacific R. R.* v. *Laughlin* 204

16. Decision which denies asserted federal rights through application of former judgment will not conclude this court, if application is inconsistent with due process of law. *Postal Telegraph Cable Co.* v. *Newport* 464

III. **Jurisdiction of District Courts.** See **Equity.**

1. In suit by carriers to restrain attorney general of State from instituting suits against them for damages and penalties for complying with rate order of Interstate Commerce Commission, District Court issued preliminary injunction pending further proceedings by Commission and until final

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hearing by court. *Held*, that a further order restraining defendant from prosecuting suit of character complained of which he subsequently began in state court was in exercise of power of District Court to protect existing jurisdiction and was not appealable under Jud. Code, § 266. *Looney* v. *Eastern Texas R. R.* 214

2. A suit arises "under law regulating commerce" within meaning of Jud. Code, § 24, where carrier sues consignee of interstate shipment of live stock to collect charge for disinfecting cars, alleged to be due under approved and published tariffs, and where consignee, admitting interstate character of shipment and propriety of charge, defends on ground that carrier is estopped from holding him responsible. *Louisville & Nashville R. R.* v. *Rice* 201

3. In action under Act of 1894, as amended, court may decide whether claims of materialmen were filed within year, and upon effect of filing later. *Ex parte Southwestern Surety Ins. Co.* 19

4. District Court in State where estate being administered can not dispense with proceedings in local probate court required by law of State. *Gasquet* v. *Fenner* 16

IV. **Jurisdiction of State Courts.**

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Jurisdiction to supervise criminal proceedings of inferior tribunals through certiorari is analogous to that of Court of King's Bench; and nature and functions of writ in such cases are to be tested by common-law principles. *Hartranft* v. *Mullowny* 295

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LIMITATIONS:

1. Statutes of limitation upon suits to set aside fraudulent transactions do not begin to run until discovery of the fraud; and this applies to provision of Act of 1891 limiting suits to vacate land patents. *Exploration Co.* v. *United States* 435

2. Where money relief prayed in amended petition in case transferred to law side of court, under Equity Rule 22, could properly have been sought as alternative relief in original bill in equity, and transfer was made upon order of court in exercise of discretion, plaintiff not to be held to have made an election of inconsistent remedies letting in defense of limitations against amended demand. *Friederichsen* v. *Renard*..... 207

3. District Court has jurisdiction to decide whether claims of materialmen were filed within year, and upon effect of filing later, under Act of Congress governing actions against public contractors and their bondsmen. *Ex parte Southwestern Surety Ins. Co.*..... 19

4. Proviso of Act of Mar. 2, 1896, barring certain suits to vacate land patents, held a curative measure referring only to lands patented before enactment; and no protection for patent afterwards procured by fraud. *United States* v. *St. Paul, M. & M. Ry*..... 310

5. Principle of strict construction of statutes of limitation as applied to Government, applies with peculiar force in construction of provision which operates to bar absolutely recovery of value of land as well as land itself, in favor of the immediate recipient of fraudulent patent no less than a bona fide purchaser. *Id.*

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LUMBER COMPANIES:

Principle upon which removal of minerals by mining companies held not to produce depreciation held inapplicable in case of company engaged in business of manufacturing and selling lumber and which sells lands incidentally after timber removed. *Doyle* v. *Mitchell Brothers Co.* 179

MANDAMUS:

1. Writ may issue from this court to compel filing of record in Circuit Court of Appeals. *Ex parte Abdu* 27

2. Where refusal to file was in accordance with orders of court, irregularity in directing writ to clerk may be treated as formal and authority to make the orders determined with clerk alone as technical respondent. *Id.*

3. Writ will lie to rectify error of District Court in transferring to equity docket one of two counts in action for damages upon ground that under law of State it could not be entertained at law, by which action plaintiff was deprived of right of trial by jury. *Ex parte Simons* 231

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MATERIALMEN'S ACTS:

District Court has jurisdiction to decide whether claims of materialmen were filed within year, and upon effect of filing later, under Act of Aug. 13, 1894, as amended. *Ex parte Southwestern Surety Ins. Co.* 19

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1. Militia clause of Constitution not a limitation upon war power. *Cox* v. *Wood* 3

2. Congress may conscript for military duty in foreign country. *Id.*

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1. End lines of lode claim are those laid across vein to show how much of it in length is appropriated and claimed by miner. All other lines are side lines. *Jim Butler Mining Co.* v. *West End Co.* 450

2. To sustain extralateral right, end lines must be parallel and straight, but this is not required of side lines. *Id.*

3. Mining claim was laid out as a parallelogram 1500 by 600 feet, but with two diagonally opposite angles truncated so that what would have been end lines in absence of truncation were thereby shortened substantially, but less than one-half. *Held*, that shortened lines, which were straight and parallel, were end lines, and that truncating lines were part of side lines. *Id.*

4. Extralateral right is creation of federal mining laws and they alone must be looked to in defining it. *Id.*

5. Where single vein, whose apex within boundaries of claim, in its descent separates into two limbs—one being the discovery vein—which dip downward through the vertical planes of the side lines, the extralateral right, its other elements being present, applies to each. *Id.*

6. Findings showed fissure with two dipping limbs whose course downward was substantial, regular and practically free from undulation. For 750 out of a total length of 1150 feet within claim each was practically a separate vein with a distinct summit or terminal edge. For remaining 400 feet the two were united and from place of union mineralized rock continued upward for from 20 or 30 to 100 feet. There was no contention that a top or apex had been found elsewhere. *Held*, that it could not be said as matter of law that there was no top or apex within claim. *Id.*

7. Lease under which mining company operating, terminable at option in any year and granting privilege of entering, and of exploring for, mining and removing ores, in return for royalty of so much per ton removed, *held* not to be construed as a conveyance of the ore in place, although latter could be measured with substantial accuracy. *United States* v. *Biwabik Mining Co.* 116

8. In computing excise under Federal Corporation Tax Act of 1909, that part of value of ore disposed of during tax year

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which represents its value as ore in place when law took effect should not be deducted as depreciation of capital assets. *Id.*

9. In computing excise under Federal Corporation Tax Act of 1909, mining company is not entitled to deduct from gross income any amount whatever on account of depletion or exhaustion of ore bodies, caused by its operations for year for which tax assessed; nor can it deduct cost value of ore in ground before it was mined. *Goldfield Consol. Mines Co.* v. *Scott* 126

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1. Essential to recovery under Employers' Liability Act. *New Orleans & N.E. R. R.* v. *Harris* 367

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State law barring recovery by persons injured by cars while walking, standing or playing on railroad, held to apply to boy less than 7 years old. *Erie R. R.* v. *Hilt* 97

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1. In suit to set aside leases of patented machines upon ground that they exceed rights of lessor as patent-owner and operate to produce results obnoxious to Anti-Trust Act, *semble,* that lessees may be necessary parties. *United States* v. *United Shoe Mach. Co.* 32

2. Making the clerk sole respondent in a mandamus proceeding to compel filing of record by Circuit Court of Appeals, *held* harmless irregularity. *Ex parte Abdu* 27

3. Order allowing amendment as to form of appeal and parties, previously made without prejudice to right of appellees to object at hearing on merits, held rightfully granted. *Shepard* v. *Barkley* 1

PATENTS FOR INVENTIONS:

1. Combination of old elements, evolving no new coöperative function and producing no new result, other than convenience and economy, held not patentable. *Grinnell Washing Mach. Co.* v. *Johnson Co.* 426

2. Patent No. 950,402, for gearing device applied to a washing machine, held void for want of invention. *Id.*

3. Patent law gives patentee right to exclude others from use of his invention, absolutely or upon terms. *United States* v. *United Shoe Mach. Co.* 32

4. Principle that when patented article is sold it passes beyond patent monopoly has no application where there is no conveyance of title but a *bona fide* lease of article. *Id.*

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5. Generally, one has right to purchase patents for protection or improvement of own inventions and business, and for prevention of patent litigation, and such purchases should not be adjudged to have stifled competition unduly upon speculative estimates of potential competitive power of new and untried inventions. *Id.*

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1. Amendment of bill for annulment of contract for fraud, transferred by order of District Court, under Equity Rule 22, to law side as action for damages for deceit, whereby no substantial change was made in allegations of fraud, *held* not to change cause of action nor constitute beginning of new case. *Friederichsen* v. *Renard* 207

2. Order allowing amendment as to form of appeal and parties, previously made without prejudice to right of appellees to object at hearing on merits, held rightfully granted. *Shepard* v. *Barkley* 1

3. When case disposed of on pleadings, every uncontradicted allegation by unsuccessful party taken as true, including denials of material facts previously averred by opponent. *Postal Telegraph Cable Co.* v. *Newport* 464

POLICE POWER:

1. Does not sanction interference with interstate commerce arising from order of state commission requiring telegraph

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companies to cease discriminating against a would-be subscriber to stock quotations sent by wire from New York to Boston under arrangement with New York Stock Exchange, and of whom Exchange disapproved. *Western Union Tel. Co.* v. *Foster* 105

2. Power of Congress to regulate interstate commerce not intended as authority to control States in exercise of police power over local trade and manufacture which was expressly reserved to them by Tenth Amendment. *Hammer* v. *Dagenhart* 251

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I. **Error, Appeal or Certiorari.**

1. Where petition for certiorari postponed to hearing of appeal and latter found without jurisdiction, certiorari granted and record on appeal treated as return to writ. *Union Pacific R. R.* v. *Weld County* 282

2. Order allowing amendment as to form of appeal and the parties, previously made without prejudice to right of appellees to object at hearing on merits, held rightfully granted; and that objection so made was without merit. *Shepard* v. *Barkley* 1

II. **Scope of Review.**

1. In proceedings for criminal contempt, this court, in determining whether there was any evidence to justify attributing

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to newspaper publications a tendency to prevent or obstruct the free and unprejudiced exercise of judicial power, considers the evidentiary facts found by the District Court only so far as to determine whether they have any reasonable tendency to sustain the general conclusions of fact based upon them by that court and the Circuit Court of Appeals. *Toledo Newspaper Co.* v. *United States* 402

2. Where in proceeding for criminal contempt, Circuit Court of Appeals, upon concluding that conviction was justified under one count and facts relative thereto, affirmed District Court without considering other counts upon which punishment was also based, this court examined findings as to all the counts, and, holding them sufficient, affirmed judgment. *Id.*

3. Court will review and correct error of state supreme court in assuming state of facts without support in record as basis for denying asserted federal rights. *Postal Telegraph Cable Co.* v. *Newport* 464

4. When case disposed of on pleadings, every uncontradicted allegation by unsuccessful party taken as true, including denials of material facts previously averred by opponent. *Id.*

5. In absence of decision of highest court of State, construction of state statute by intermediate appellate tribunal followed. *Erie R. R.* v. *Hilt* 97

6. Court cannot accept construction placed upon Philippine statute by supreme court of Islands, when it is clearly erroneous. *Philippine Sugar &c. Co.* v. *Philippine Islands* ... 385

7. Upon review by certiorari court confines its discussion to matter relied on in procuring writ. *Alice State Bank* v. *Houston Pasture Co.* 240

III. **Scope and Form of Decree.**

Appeal held to bring up for review two causes decided by court below at same time; and that both controlled by decree rendered. *Shepard* v. *Barkley* 1

IV. **Parties.**

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V. **Scandalous Matter.**

Striking from files of scandalous and impertinent matter in brief deemed unnecessary. *Cox* v. *Wood* 3

VI. **Costs.**

Provision of Act 1917, dispensing with bonds or deposit to secure costs, in actions by seamen, does not apply to appellate proceedings. *Ex parte Abdu* 27

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PUBLIC LANDS. See **Mines and Mining.**

1. Limitation upon suits to vacate land patents under Act of 1891 does not begin to run until discovery of the fraud. *Exploration Co.* v. *United States* 435

2. Proviso in Act of Mar. 2, 1896, relative to suits for recovery of lands, or value thereof, certified or patented in lieu of other lands covered by grant lost or relinquished in consequence of failure of Government to withdraw same from entry or sale, *held* curative measure referring only to lands patented before enactment and not a protection for patent procured afterwards by fraud. *United States* v. *St. Paul, M. & M. Ry.* 310

3. Act of Congress granted " undisposed of " lands in certain sections to State, saving vested rights of others existing at its date. Part of tracts in question, within indemnity limits of Northern Pacific, had previously been selected by railroad and sold by it to purchasers in good faith. After date of act selections were canceled as being founded on improper bases, but Land Department, upon fully hearing State, allowed application of purchasers ' assignee, made meanwhile, to purchase lands in question from United States, and secure patents therefor, under Adjustment Act. *Held,* that decision was not arbitrary, and that suit by

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State against Secretary of Interior and Commissioner of Land Office, to enjoin patents and quiet title, would not lie. *Minnesota* v. *Lane* 243

4. *State Lands.* One whose contract for purchase of state lands had been for many years in default for nonpayment of interest both before and after passage of act forfeiting such contracts of interest not paid within time stated, held not in position to object that law lacked due process in failing to allow time and opportunity for testing liability to forfeiture in court proceeding. *Aikins* v. *Kingsbury* 484

5. *Id.* Law declaring forfeiture, where default continued 5 years and where State prior to passage of law issued another certificate for same land to subsequent purchaser, unless all arrears of interest paid within 6 months of its passage, does not impair contract of purchase. *Id.*

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Right of State to maintain suit against Secretary of Interior and Commissioner of Land Office. See **Actions and Defenses,** 9.

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SCANDALOUS AND IMPERTINENT MATTER:

Striking from files of scandalous and impertinent matter in brief of counsel deemed unnecessary. *Cox* v. *Wood* 3

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2. Power to regulate interstate commerce not intended as means of enabling Congress to equalize economic conditions in States for prevention of unfair competition among them, nor was it intended as authority to control States in exercise of their police power over local trade and manufacture. *Hammer* v. *Dagenhart* 251

3. Police power over local trade and manufacture was expressly reserved to States. *Id.*

4. Police power does not sanction interference with interstate commerce arising from order of state commission requiring telegraph companies to cease discriminating against a would-be subscriber to stock quotations sent by wire from one State to another. *Western Union Tel. Co.* v. *Foster* 105

5. Child Labor Law held to invade powers reserved to States. *Hammer* v. *Dagenhart* 251

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2. Court cannot accept construction placed upon Philippine statute by supreme court of Islands, when it is clearly erroneous. *Philippine Sugar &c. Co.* v. *Philippine Islands* 385

3. Equity of statute barring equitable relief for fraud and mistake is on side of strict construction. *United States* v. *St. Paul, M. & M. Ry.* 310

4. General principle underlying strict construction of statutes of limitation as applied to Government, that public interests should not be prejudiced by negligence or default of public officials, applies with peculiar force in construction of provision which operates to bar absolutely recovery of value of land as well as land itself, in favor of immediate recipient of fraudulent patent no less than *bona fide* purchaser. *Id.*

5. Resort to this principle and legislative history of proviso to Act of Mar. 2, 1896, added to its apparent independence and extraordinary and unreasonable effects of applying it to future cases, overweigh general rule of prospective construction and fact of immediate association with prospective provisions. *Id.*

6. Remarks of chairman of congressional committee, referring to matters of common knowledge in his explanation of amendment offered by him to bill which he has previously

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2. *Seamen's Act of 1915, § 20,* held not to intend to substitute common-law measure of liability for maritime rule. *Chelentis* v. *Luckenbach S. S. Co.* 372

3. *New Jersey Railroad Negligence Law* held to apply to boy less than seven years old. *Erie R. R.* v. *Hilt* 97

4. *Philippine Code of Civ. Proc., § 285.* Relief in case of contract failing through mutual mistake to express intention of parties may be had in pending suit. *Philippine Sugar &c. Co.* v. *Philippine Islands* 385

5. *Wisconsin Income Tax Law (1911, c. 658)* not unconstitutional under commerce clause. *United States Glue Co.* v. *Oak Creek* 321

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I. Income Tax of 1913.

1. *Sixteenth Amendment; Scope.* Amendment does not extend power of taxation to new or excepted subjects, but merely removes occasion for apportioning taxes on incomes among the States. *Peck & Co.* v. *Lowe* 165

2. *Id.; Dividends.* Under Sixteenth Amendment Congress may tax without apportionment dividends received in ordinary course by shareholder from corporation, even though extraordinary in amount and derived from surplus of corporate assets existing before Amendment. *Lynch* v. *Hornby* 339

3. *Income from Exports.* Net income of a corporation derived from exporting goods from States and selling them abroad is subject to be taxed under § II, Act of 1913, as part of "entire net income arising or accruing from all sources." *Peck & Co.* v. *Lowe* 165

4. *Id.; Validity of Tax.* Such tax held not contrary to Art. I, § 9, cl. 5, of Constitution. *Id.*

5. *Converted Capital not Income.* Accumulations that accrued to corporation through surplus earnings or appreciation in property value, before adoption of Sixteenth Amendment and effective date of Act of 1913, regarded as capital and not income. *Southern Pacific Co.* v. *Lowe* 330

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6. *Corporate Earnings Undivided not Taxable to Shareholder.* Act of 1913 treats corporate earnings as not accruing to shareholders until time when dividend paid. *Id.*

7. *Id.* Act of 1913 drew distinction between shareholder's undivided interest in gains and profits of corporation prior to declaration of dividend and his participation in dividends declared and paid, treating latter, in ordinary circumstances, as part of income for purpose of surtax, and not regarding former as taxable to him unless fraudulently accumulated to evade tax. *Lynch* v. *Hornby* 339

8. *Dividends from Non-Taxable Surplus; When not Taxable.* Where shares of corporation all owned, and property and funds possessed, and its operations and affairs completely dominated, by another corporation, so that two were in substance but one, and where dividends from one to other were consummated, after Act of 1913 effective, by mere paper transaction, and represented merely what second company entitled to have as shareholder before January 1, 1913, from surplus theretofore accumulated, held, such dividends not taxable as income of shareholding company. *Southern Pacific Co.* v. *Lowe*..... 330

9. *Id.* On liquidation of company after effective date of Act of 1913, shareholders received in excess of par of their shares, which excess represented increase in value of property accruing prior to such effective date. *Held*, that such excess was not "income, gains, or profits," or shareholder subject to tax. *Lynch* v. *Turrish* 221

10. *Id.*; *When Taxable.* Under Act of 1913, dividends declared and paid in ordinary course after March 1, 1913, whether from current earnings or from surplus accumulated before that date, held taxable to individual shareholders as income, under " surtax " provision. *Lynch* v. *Hornby* 339
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11. *Dividend of Shares.* A dividend by a corporation of shares owned by it in another corporation is not a stock dividend and is subject to tax. *Peabody* v. *Eisner* 347

II. **Corporation Tax of 1909.**

1. *Income; How Proved; Corporate Books.* Income deter-

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mined from actual facts, as to which corporate books are only evidential. *Doyle* v. *Mitchell Brothers Co.* 179

2. *Income Defined.* "Income" employed in natural and obvious sense, as importing something distinct from principal or capital, and conveying idea of gain or increase from corporate activities. *Id.*

3. *Id.; Measured by Business Returns after Act took Effect.* Purpose of Act not to tax property as such, or mere conversion of property, but to tax conduct of business of corporations organized for profit by measure based upon gainful returns from business operations and property from time Act took effect. *Id.*

4. *Conversion of Preëxisting Capital not Income.* While conversion of capital may result in income, in sense of Act, where proceeds include increment of value, such is not case where increment existed when Act took effect. *Id.*

5. *Id.* Before Act, lumber company bought timber land to supply its mills, and after Act manufactured part of timber into lumber which it sold. *Held*, that amount by which timber so used had increased in value between date of purchase and effective date of Act was not element of income to be considered in computing tax. *Id.*

6. *Id.; Subsequent Increment Taxable.* Railroad company bought shares of another such company before, and sold them after, Dec. 31, 1908. *Held*, that only so much of profit as accrued after such date was "income." *United States* v. *Cleveland &c. Ry.* 195

7. *Id.; Interest on Cost of Investment not Deductible.* Coal company bought shares of another coal company before, and sold them at advance after, Act became effective. *Held*, that interest should not be added to investment as part of cost; and that only so much of advance as could be deemed to have accrued since Dec. 31, 1908, was part of company's "gross income" within Act. *Hays* v. *Gauley Mt. Coal Co.* 189

8. *Preëxisting Capital; How Deducted.* In distinguishing preexisting capital from income, it is mere question of method whether deduction be made from gross receipts in ascertain-

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ing gross income, or from gross income, by way of depreciation, in ascertaining net income. *Doyle* v. *Mitchell Brothers Co.* 179

9. *Income and Tax Year.* Act measures tax by income received during tax year without reference to when it accrued, provided it accrued after Act became effective. *Hays* v. *Gauley Mountain Coal Co.* 189

10. *Id.; Deductions; Mining Companies.* In computing excise, mining corporation is not entitled to deduct from gross income any amount whatever on account of depletion or exhaustion of ore bodies, caused by its operations for year for which tax assessed; nor can it deduct cost value of ore in ground before it was mined, ascertained in compliance with Treasury Regulations. *Goldfield Consol. Mines Co.* v. *Scott* 126

11. *Id.* In computing excise of mining company operating under lease terminable at option and which grants it privilege of entering, and of exploring for, mining and removing ores in return for royalty of so much per ton removed, but which does not convey the ore *in situ*, that part of value of ore disposed of during tax year which represents its value as ore in place when law took effect should not be deducted as depreciation of capital assets. *United States* v. *Biwabik Mining Co.* 116

12. *Id.; Lumber Company.* Principle upon which removal of minerals by mining companies held not to produce depreciation, held inapplicable in case of company engaged in business of manufacturing and selling lumber and which sells lands incidentally after timber removed. *Doyle* v. *Mitchell Brothers Co.* 179

III. **State Taxation.**

1. *Income Tax—Gains from Interstate Commerce.* State in laying general income tax upon gains and profits of a domestic corporation may include in computation net income derived from transactions in interstate commerce. So held as to Wisconsin law (1911, c. 658) as applied to income from sales outside of State of goods delivered from factory within it, and sales from company's branches in other

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States of goods previously made within State. *United States Glue Co.* v. *Oak Creek* 321

2. *Life Insurance; not Interstate Commerce.* Tax on life insurance business is not tax on interstate commerce. *Northwestern Life Ins. Co.* v. *Wisconsin* 132

3. *Id.; Permissible Discrimination.* State may impose license or privilege tax upon domestic old-line, level-premium life insurance companies, while exempting fraternal societies having lodge organizations and insuring only lives of members. *Id.*

4. *Id.* State may tax domestic life insurance companies by taking percentage of gross receipts, although it exacts a fixed and comparatively slight fee from similar foreign corporations for privilege of doing local business of same kind. *Id.*

5. *Id.; Wisconsin Tax.* "License fee" laid by Wisconsin on domestic "level premium" life insurance companies, as construed by supreme court of State, is a commutation tax in lieu of all other taxes on personal property of companies taxable in State. *Id.*

6. *Id.; Investment Business, if Interstate Commerce, not Burdened.* Assuming that foreign investment business of domestic life insurance company amounts to interstate commerce, a state tax of 3% of gross income from all sources during year, except rents from real estate and premiums collected outside of State on policies of non-residents, casts no burden upon such commerce, where gross receipts are in effect used as fair measure of value of property and franchise taxable, but not otherwise taxed, within State. *Id.*

7. *Unequal Assessment; When not Unconstitutional.* Unequal assessment not violative of equal protection clause where purpose to discriminate not clearly established and discrimination attributable to honest mistake of judgment and lack of time and evidence for making general revaluations when objection made. *Sunday Lake Iron Co.* v. *Wakefield* 350

8. *Presumption and Burden of Proof.* Good faith of tax assessors and validity of acts presumed; burden of proof is on party assailing them. *Id.*

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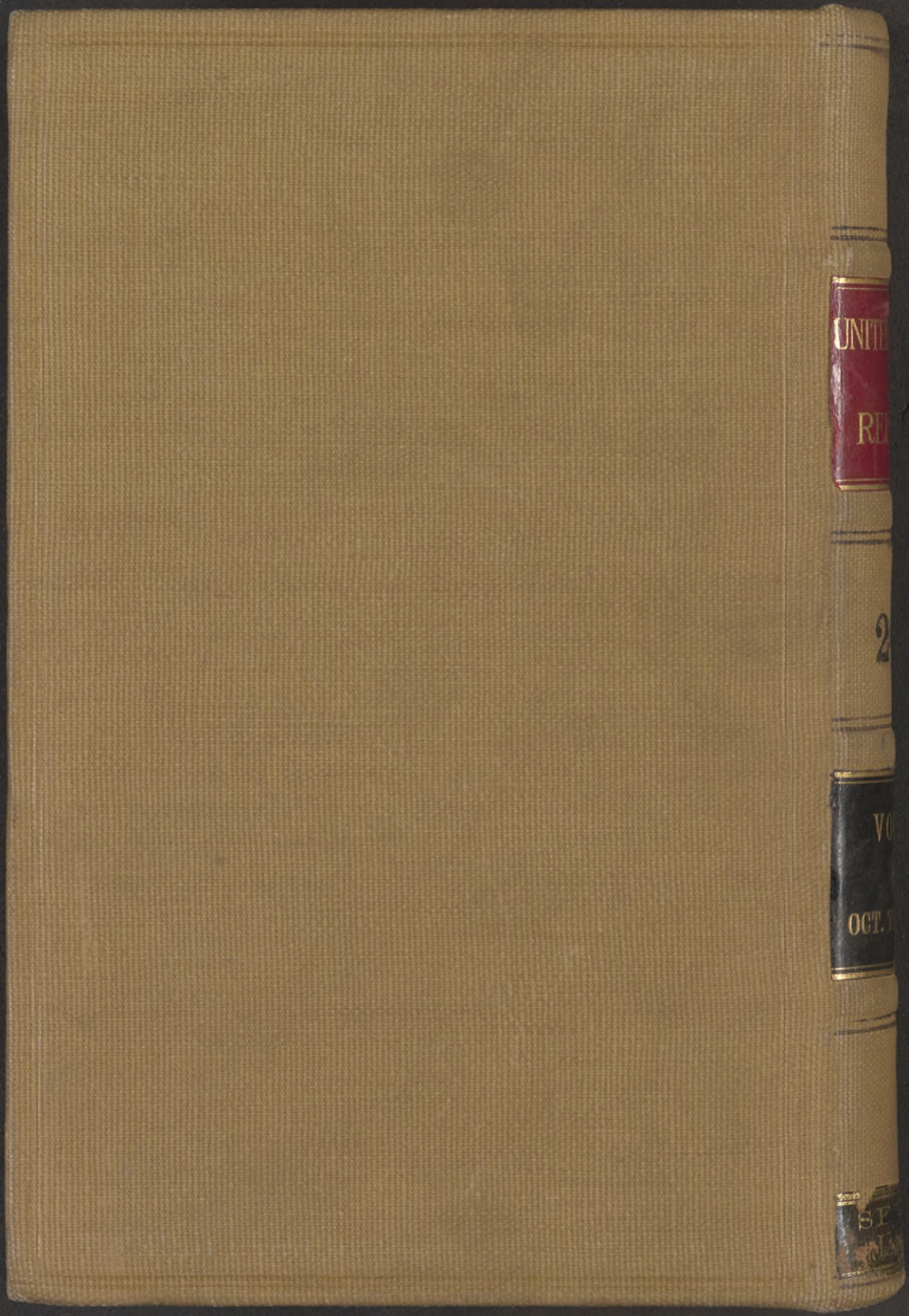
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